No. 20-276

In the Supreme Court of the United States

CHRISTOPHER M. GIBSON,
Petitioner,
v.
SECURITIES AND EXCHANGE COMMISSION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The administrative state can be ruthless in its ability to destroy the lives of those swept up in its machinery—before any wrongdoing is ever established. At issue here is whether Congress has eliminated a crucial safeguard for everyday citizens who become targets of administrative action: the general jurisdiction of federal district courts to adjudicate structural constitutional challenges to the legitimacy of the ALJs presiding over their cases. Under the decision below and others like it, these individuals must endure an administrative gauntlet before the very official they claim is constitutionally defective before they may ever see a federal court—and they might be denied a federal forum for these claims altogether. That stunning result is not based on the text of any statute divesting jurisdiction granted by Congress, but on an *implication* drawn from the mere existence of an administrative scheme. In any other area of statutory interpretation today, that atextual analysis would be intolerable.

As the numerous amici have explained, this issue urgently requires this Court's review. It directly implicates hundreds of SEC enforcement actions brought each year. Those proceedings invariably impose crushing burdens on their targets, who often are forced to "throw in the towel" before they can ever present their structural constitutional claims to a federal court. The most notable aspect of the SEC's response is that it completely ignores the real-world importance of this question—and the lives forever altered by the current regime. Instead, the SEC argues (at 11) that it is "entirely natural" for Congress to preclude district court jurisdiction over this special

class of constitutional claims. But, with respect, the SEC has a blind spot when it comes to the dangers posed by the administrative state.

The same goes for this Court's decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010). While the SEC argues here that Congress impliedly stripped district courts of jurisdiction to hear structural constitutional challenges to the authority of ALJs, this Court in *Free Enterprise Fund* squarely held that the text of the very same provision at issue here (28 U.S.C. § 78y) does *not* "expressly" or even "implicitly" divest district courts of their jurisdiction over such claims. 561 U.S. at 489. The SEC's position here, like the Eleventh Circuit decision below, cannot be reconciled with *Free Enterprise Fund*. No doubt, that explains why the SEC does not even acknowledge *Free Enterprise Fund* until page 10 of its 13-page brief. The SEC's attempt to bury *Free Enterprise Fund* says it all.

In the end, the SEC's position is that certiorari is not warranted—"[f]or now." BIO 12. But here again, the SEC ignores the practical consequences of the current regime for the Americans living this administrative nightmare. Lives and livelihoods are being destroyed as individuals are forced to endure endless, costly proceedings before unaccountable agency officers whose very legitimacy is constitutionally suspect. Waiting to address this patently unconstitutional situation is entirely unnecessary. The square conflict with *Free Enterprise Fund*, along with the compelling practical implications of the question presented, warrant review now. This case presents a perfectly suitable vehicle to decide this crucial jurisdictional issue.

ARGUMENT

A. The Decision Below Is Profoundly Wrong

The SEC claims (at 6-11) that the Eleventh Circuit's decision is "correct[]" and in line with this Court's precedent. To paraphrase, "nothing to see here." The SEC could not be more wrong.

1. In *Free Enterprise Fund*, this Court reiterated that "[p]rovisions for agency review do not restrict judicial review unless the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" 561 U.S. at 489 (second alteration in original) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212 (1994)). The Court then held that the same agency-review provision at issue here (15 U.S.C. § 78y) does *not* demonstrate any "fairly discernible" intent to restrict jurisdiction over the same kind of structural separation-of-powers challenge to an administrative body at issue here. *Id.* at 489-91 & n.2. Thus, as numerous judges have concluded—in opinions that the SEC ignores—*Free Enterprise Fund* "controls here." *Tilton v. SEC*, 824 F.3d 276, 292 (2d Cir. 2016) (Droney, J., dissenting); *see Cochran v. SEC*, 969 F.3d 507, 519-21 (5th Cir.) (Haynes, J., dissenting), *vacated*, *reh'g en banc granted*, 978 F.3d 975 (5th Cir. 2020); Pet. 16-17 (citing decisions).

Remarkably, the SEC essentially ghosts *Free Enterprise Fund*, relegating it to a single paragraph near the end of its brief. Instead, the SEC focuses (at 6-9) on *Elgin v. Department of the Treasury*, 567 U.S. 1 (2012). But *Elgin* involved a different administrative review scheme and fundamentally different claims: the *Elgin* petitioners challenged the

constitutionality of the military-draft laws underlying their discharge from federal employment. 567 U.S. at 6-7. Although constitutional, those claims challenged the substantive basis for the petitioners' specific discharges—"precisely the type of personnel action regularly adjudicated by the [agency] . . . within the [statutory] scheme." *Id.* at 22. By contrast, the constitutional claim here—like the one in *Free Enterprise Fund*—is not case-specific. Gibson is not challenging any substantive statute or the specific charges against him; he is raising a "fundamental structural" challenge to the constitutional legitimacy of the administrative body itself. *Cochran*, 969 F.3d at 519 (Haynes, J., dissenting). Accordingly, "this case is not analogous to . . . *Elgin*." *Id.*

The SEC claims (at 10) that *Free Enterprise Fund* is distinguishable because, there, the plaintiff filed suit *before* the agency proceeding formally commenced. But nothing in the text of Section 78y turns on *when* a structural constitutional claim is brought, or whether an agency action is pending. None of the various statutory provisions cited by the SEC (at 3, 7)—which the government also cited in *Free Enterprise Fund*—evinces any intent to divest district courts of jurisdiction over structural constitutional claims, much less justifies disregarding this Court's holding in *Free Enterprise Fund* that the exact same statutory scheme does *not* divest district courts of their jurisdiction over such claims.

The SEC argues that, unlike the situation in *Free Enterprise Fund*, a plaintiff who is already subject to an enforcement action need not "bet the farm" to secure judicial review of his constitutional challenge. BIO 10. But the burdens of fighting the agency in its home court—where it enjoys a heavy advantage—are

so great that most respondents have little choice but to settle on whatever terms they can get, even when they strongly deny the charges against them. Pet. 32; *see* Jarkesy Amicus Br. 12-19; Cato et al. Amici Br. 13-15. Thus, individuals in Gibson's shoes effectively *are* required to "bet the farm"—often, their livelihoods—just to get their structural constitutional claim to a federal court. *Tilton*, 824 F.3d at 298 & n.5 (Droney, J., dissenting) (citation omitted). Gibson has been battling the SEC for nearly seven years, during which time he has been stripped of his professional license, incurred crippling expenses, and been forced to leave the country to find work. Pet. 9-10, 24.

The stark conflict between the decision below and *Free Enterprise Fund* warrants certiorari.

2. The SEC's attempt to defend the decision below under its own application of *Thunder Basin*—as if *Free Enterprise Fund* did not exist—also fails. The SEC not only disregards ordinary principles of statutory interpretation, *see* Pet. 29-30, and what this Court has called the "virtually unflagging" obligation of courts to exercise jurisdiction granted them, *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (citation omitted), but also distorts the *Thunder Basin* factors beyond recognition.

a. As to the first factor, the SEC claims that there is "'meaningful judicial review'" because Gibson could raise his structural constitutional challenge "in a court of appeals *after* the proceedings conclude." BIO 8 (emphasis added) (citation omitted). But this just substitutes the *possibility* of eventual judicial review for the requirement of *meaningful* judicial review. Pet. 21-22. As the SEC concedes (at 8), Gibson will never be allowed to present his structural constitutional claim to a court if the Commission rules

in his favor. Thus, Gibson faces a "lose-lose situation": he loses his case if the Commission rules against him, and he loses his constitutional claim if the Commission rules for him, even though he was subjected to an unconstitutional process. *Cochran*, 969 F.3d at 519-20 (Haynes, J., dissenting).

Moreover, judicial review is not "meaningful" if a plaintiff must suffer the very constitutional harm he alleges to reach a federal court. *See Tilton*, 824 F.3d at 298 (Droney, J., dissenting). As this Court recently recognized, being forced to submit to a structurally unconstitutional "exercise of executive power" is a "'here-and-now' injury." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2196 (2020). The only way for Gibson to avoid this harm would be to "'violat[e]'" the agency's insistence on his participation and default his case, which does *not* provide "a 'meaningful' avenue of relief." *Free Enter. Fund*, 561 U.S. at 490-91 (citations omitted); *see* Cato et al. Amici Br. 9, 15-16.

The SEC also brushes aside the degree of this here-and-now injury. Constitutionally unaccountable ALJs wield extensive powers over respondents—deciding motions, overseeing discovery, and making findings—in administrative proceedings that often drag on for years. Pet. 5-6, 24. Simply pressing one's case before an ALJ can be financially ruinous. Meanwhile, an ALJ's rulings can deeply color a case, no matter whether they are valid or not. *See id.* at 5-6. The possibility of judicial review in a court of appeals only after the constitutional injury is inflicted is not "meaningful." *Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) (opinion of Alito, J.); *see* Pet. 21-22.

Relying on *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980), the SEC suggests these harms are merely part of "the 'expense and annoyance

of litigation.'" BIO 11. But *Standard Oil* says nothing about the meaningfulness of judicial review or *Thunder Basin*. Moreover, "far 'more is at stake'" for individuals like Gibson than mere legal fees—respondents in SEC proceedings are often stripped of their professional licenses, deprived of their livelihoods, and unable to secure loans or other credit, while suffering irreversible damage to their personal and professional reputations. Pet. 24 (quoting *Cochran*, 969 F.3d at 519 (Haynes, J., dissenting)); *see* Jarkesy Amicus Br. 16-17. The SEC ignores the devastating toll on individuals of delaying review.[1]

b. The SEC's treatment of the remaining two *Thunder Basin* factors just underscores its refusal to respect *Free Enterprise Fund*. Pet. 25-29.

The SEC asserts that Gibson's structural separation-of-powers challenge is "not 'wholly collateral'" on the ground that his claim is "'inextricably intertwined'" with the agency proceedings. BIO 8 (citations omitted). But Gibson's constitutional challenge is completely independent of the specific charges against him, and this Court has consistently held that, unlike a case-specific challenge, a "general challenge" to an agency's constitutional legitimacy "is 'collateral.'" *Free Enter. Fund*, 561 U.S. at 490 (citing *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491-92 (1991)). The SEC's counterargument is directly "inconsistent with *Thunder Basin* and *Free Enterprise* [*Fund*]." *Tilton*,

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[1] The SEC also ignores that, unlike the regimes in *Standard Oil* and *Thunder Basin*, judicial review is unavailable here unless a respondent pays any penalty assessed by the SEC—for Gibson, potentially $184,000 or more. Pet. 12, 24-25.

824 F.3d at 295 (Droney, J., dissenting); *see Cochran*, 969 F.3d at 519-20 (Haynes, J., dissenting).

The SEC also asserts that Gibson's structural constitutional claim is within the "'agency's expertise'" by pointing to other, unrelated "issues." BIO 9 (citation omitted). But as *Free Enterprise Fund* recognized, the same type of "separation-of-powers claim" raised here falls "outside the [SEC's] competence and expertise." 561 U.S. at 491 & n.2. There is "no difference in the application of this factor here to the SEC and its application to the SEC in *Free Enterprise* [*Fund*]." *Tilton*, 824 F.3d at 297 (Droney, J., dissenting); *see Cochran*, 969 F.3d at 520-21 (Haynes, J., dissenting). The SEC makes no attempt to square its arguments with *Free Enterprise Fund*.

B. Review Is Warranted Now

1. That numerous circuits have improperly stripped the district courts of jurisdiction over a recurring class of structural constitutional challenges to agency decisionmakers warrants review.

Notably, the SEC does not dispute the enormous practical importance of the question presented—it just ignores it. In 2019 alone, the SEC brought 862 enforcement actions, the vast majority of which before ALJs. Atlantic Legal Found. Amicus Br. 17-19; *see* Pet. 32-33. The structural "constitutional flaw[]" infecting those proceedings directly threatens "individual liberty." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 687-88 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *rev'd in part*, 561 U.S. 477 (2010). But under the current regime, Article III courts—the traditional forum for "preventing [governmental] entities from acting unconstitutionally," *Free Enter. Fund*, 561 U.S. at 491

n.2 (citation omitted)—are closed to these claims, leaving individuals to endure an administrative nightmare before there is any possibility of presenting their constitutional challenge to a federal court. Pet. 4-5, 32; *see* Jarkesy Amicus Br. 13-17. Perversely, this regime reinforces the separation-of-powers violation while making it virtually impossible to challenge it. Pacific Legal Found. Amicus Br. 22. Most Americans would think that "this kind of thing can't happen in the United States." Oral Arg. Tr. 37, *Sackett v. EPA*, No. 10-1062 (Jan. 9, 2012) (Alito, J.).

2. Perhaps seeing the writing on the wall, the SEC ultimately argues (at 11-12) that review is not warranted—"[f]or now." According to the SEC, the Court should wait until a conflict develops in the courts of appeals, which now seems inevitable given the Fifth Circuit's grant of rehearing en banc. *Cochran v. SEC*, 978 F.3d 975 (5th Cir. 2020). But this Court frequently grants review to correct a conflict with this Court's precedent on an important question of law (*see* Sup. Ct. R. 10(c)), despite "uniform[ity]" on the issue "among the courts of appeals." BIO 8-9, *Liu v. SEC*, 140 S. Ct. 1936 (2020) (No. 18-1501), 2019 WL 4235504; *see, e.g.*, *Tanzin v. Tanvir*, No. 19-71, 2020 WL 7250100 (U.S. Dec. 10, 2020); *Azar v. Gresham*, No. 20-37, 2020 WL 7086046 (U.S. Dec. 4, 2020). Moreover, the question presented is already fully ventilated: there are more than a dozen opinions from both appellate and district court judges fully airing both sides of the question presented in significant detail. Pet. 16-17.[2]

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[2] A decision in *Cochran* would be likely before the Court were to decide this case, anyway. The Fifth Circuit has expedited *Cochran* and set en banc argument for January 20, 2021. And

At the same time, there are compelling reasons for granting review *now*. Five circuits from across the country—including the Eleventh Circuit below—have held that district courts lack jurisdiction over a critical class of structural constitutional claims, eliminating a vital check on unconstitutional administrative action. As explained, that jurisdiction-stripping rule has great consequences for the hundreds of individuals subject to SEC enforcement proceedings each year. Even if the Fifth Circuit reaches the correct result en banc in *Cochran*, it will not eliminate the position in the several circuits going the other way. Only this Court can do that—and it need not await a circuit conflict to correct an obvious injustice at odds with this Court's precedent.

Waiting another year or two or more before intervening—the time it would take to brief, argue, and decide a later case—to resolve the jurisdictional issue presented here would needlessly prolong the significant constitutional injury that hundreds of individuals like Gibson face each year. Most of these individuals are forced to capitulate by settling, and thus forced to forgo their structural constitutional challenge. This Court's intervention is needed now.

3. This case provides a perfectly suitable vehicle to resolve this issue. The SEC suggests (at 12) that it is "suboptimal" because Gibson's case is currently pending before the Commission. But, tellingly, the SEC does not assert any actual impediment to deciding the question presented. There is none. The status of the proceedings before the agency—which

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Axon Enterprise, Inc. v. FTC, No. 20-15662 (9th Cir.), also cited by the SEC (at 12), was argued in July and thus is ripe for decision any day.

remain ongoing—has no bearing on whether the district court had jurisdiction to hear Gibson's complaint, especially since the relevant time frame for assessing jurisdiction is when a complaint is filed (at which point, here, Gibson was before an ALJ).

Notably, the SEC ignores the reasons that Gibson gave for why the status of his agency proceedings is a red herring. Pet. 32 n.10. It also ignores that, because Gibson's case remains pending before the agency (and he may prevail), Gibson still faces a risk that he will be denied any federal court review of his constitutional claim if this action is dismissed, even though he has been forced to endure years of proceedings before a structurally unconstitutional process. *See Cochran*, 969 F.3d at 519 (Haynes, J., dissenting). This Court need only hold that the district court has jurisdiction over this case. The district court can decide how to proceed on remand.[3]

"Learned Hand once remarked that agencies tend to 'fall into grooves, . . . and when they get into grooves, then God save you to get them out.'" *Ramaprakash v. FAA*, 346 F.3d 1121, 1122 (D.C. Cir. 2003) (Roberts, J.) (alteration in original) (quoting Henry J. Friendly, *Benchmarks* 106 (1967)). Here, both an agency and the lower courts are stuck in a groove. Only this Court can get them out.

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[3] The SEC suggests (at 12) that Gibson's request for injunctive relief is "moot," but Gibson sought declaratory relief, too. Compl. ¶ 112, D. Ct. Doc. 1 (Mar. 4, 2019). Moreover, he may well end up back before an ALJ, as he did on the prior remand. Pet. 11-12, 32 n.10. His claim is not moot.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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