No. 21-1239

In the Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION, ET AL.,
Petitioners,

v.

MICHELLE COCHRAN,
Respondent.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Securities Exchange Act of 1934 implicitly strips federal district courts of jurisdiction to adjudicate structural constitutional claims challenging Securities and Exchange Commission administrative proceedings.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF AUTHORITIES iii
INTRODUCTION 1
STATEMENT OF THE CASE 3
A. Legal Background 3
B. Factual Background 6
C. Proceedings Below 7
ARGUMENT 11
I. THE QUESTION PRESENTED IS UNDENIABLY CERTWORTHY 12
II. THE COURT SHOULD GRANT REVIEW AND CONSIDER THIS CASE ALONGSIDE *AXON* 15
CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

Axon Enterprise, Inc. v. FTC,
986 F.3d 1173 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 895 (2022) 13

Axon Enterprise, Inc. v. FTC,
142 S. Ct. 895 (2022) 10, 11

Babb v. Secretary, Department of Veterans Affairs,
802 F. App'x 548 (11th Cir. 2020) 22

Babb v. Secretary, Department of Veterans Affairs,
992 F.3d 1193 (11th Cir. 2021) 22

Babb v. Wilkie,
140 S. Ct. 1168 (2020) 22

Bebo v. SEC,
799 F.3d 765 (7th Cir. 2015), *cert. denied*, 577 U.S. 1236 (2016) 12, 16

Bennett v. SEC,
844 F.3d 174 (4th Cir. 2016) 12, 16

Crawford v. Martinez,
540 U.S. 1217 (2004) 15

Duka v. SEC,
103 F. Supp. 3d 382 (S.D.N.Y. 2015) 13

TABLE OF AUTHORITIES—Continued

Page(s)

Elgin v. Department of the Treasury,
567 U.S. 1 (2012)..... 17

Free Enterprise Fund v. Public Co. Accounting Oversight Board,
561 U.S. 477 (2010)..... 4, 6, 17

Gray Financial Group, Inc. v. SEC,
166 F. Supp. 3d 1335 (N.D. Ga. 2015), *vacated sub nom. Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016)..... 13

Gupta v. SEC,
796 F. Supp. 2d 503 (S.D.N.Y. 2011) 13

Hill v. SEC,
114 F. Supp. 3d 1297 (N.D. Ga. 2015), *vacated*, 825 F.3d 1236 (11th Cir. 2016)..... 13

Hill v. SEC,
825 F.3d 1236 (11th Cir. 2016)..... 12, 16

Ironridge Global IV, Ltd. v. SEC,
146 F. Supp. 3d 1294 (N.D. Ga. 2015) 13

Jarkesy v. SEC,
803 F.3d 9 (D.C. Cir. 2015)..... 12, 16

Lucia v. SEC,
138 S. Ct. 2044 (2018)..... 3, 4, 5, 7

Miller v. Gammie,
335 F.3d 889 (9th Cir. 2003)..... 21

TABLE OF AUTHORITIES—Continued

Page(s)

Taylor v. Grubbs,
930 F.3d 611 (4th Cir. 2019)..... 21

Technical Automation Services Corp. v. Liberty Surplus Insurance Corp.,
673 F.3d 399 (5th Cir. 2012)..... 21

Thunder Basin Coal Co. v. Reich,
510 U.S. 200 (1994)..... 2, 6, 17

Tilton v. SEC,
824 F.3d 276 (2d Cir. 2016), *cert. denied*,
137 S. Ct. 2187 (2017).....3, 12, 13, 14, 16

Yee v. City of Escondido,
503 U.S. 519 (1992)..... 16

STATUTES

5 U.S.C. § 1202(d)..... 4

5 U.S.C. § 7521(a)..... 4

15 U.S.C. § 45(d)..... 19

15 U.S.C. § 78d-1(b) 4

15 U.S.C. § 78y 1

15 U.S.C. § 78y(a)(1) 5

15 U.S.C. § 78y(a)(3) 5, 18

15 U.S.C. § 78y(c)(2)..... 5

TABLE OF AUTHORITIES—Continued

Page(s)

15 U.S.C. § 78bb(a)(2) 19

OTHER AUTHORITIES

Jean Eaglesham, *SEC Wins with In-House Judges*, Wall St. J. (May 6, 2015), https://on.wsj.com/3L4cPUN 3, 5

In re David S. Hall, P.C., Exchange Act Release No. 77718, 2016 WL 1665164 (Apr. 26, 2016)..... 7

Press Release, SEC, *SEC Announces Enforcement Results for FY 2021* (Nov. 18, 2021), https://www.sec.gov/news/press-release/2021-238 3

In re Southeast Investments, N.C., Inc., Exchange Act Release No. 86097, 2019 WL 2448245 (June 12, 2019)..... 5

SEC Rule of Practice 102(e)(1) 5

Stephen M. Shapiro et al., *Supreme Court Practice* (11th ed. 2019) 12, 15

Sup. Ct. R. 14.1(a) 16

Sup. Ct. R. 27.3 15

INTRODUCTION

The petition for certiorari presents a question that has divided the circuits and warrants this Court's review. The government asks this Court to hold the petition pending the Court's decision in *Axon Enterprise, Inc. v. FTC*, No. 21-86 (cert. granted Jan. 24, 2022), which will be argued next Term, and dispose of it in light of *Axon*. For several reasons, however, it is imperative that the Court grant the petition now and consider this case alongside *Axon*.

As the petition observes (at 6), the circuits are openly split on the precise question presented in this case: Whether the scheme of administrative and judicial review in the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78y, implicitly strips federal district courts of jurisdiction to hear structural constitutional claims challenging Securities and Exchange Commission (SEC) administrative proceedings. Indeed, the Fifth Circuit's en banc decision in this case created the circuit conflict. This question is enormously important for the hundreds of individuals, like respondent Michelle Cochran, embroiled in financially, professionally, reputationally, and personally ruinous SEC administrative proceedings superintended by Executive-branch officers acting without legitimate, constitutional authority.

In *Axon,* this Court will consider the same jurisdiction-stripping question—in the context of the Federal Trade Commission (FTC) Act. The Court's resolution of that question, however, will not necessarily resolve the circuit split, which has arisen in the SEC context. As the government's petition in this case indicates, the jurisdiction-stripping analysis

is grounded in the specific "statutory review scheme" at issue. Pet. 6; *see Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212 (1994) ("[T]he question [is] whether petitioner's claims are of the type Congress intended to be reviewed within *this* statutory structure." (emphasis added)). The question presented in *Axon*, however, is expressly tied to the statutory review scheme in the FTC Act. *See* Pet. i, *Axon*, *supra* (No. 21-86) (*Axon* Pet.). Although the government currently represents that the FTC Act and the Exchange Act are "materially identical," Pet. 6, in fact there are differences between the statutes, as Axon itself and the Fifth Circuit's decision below highlight. Hence, the government's assurances today cannot prevent it—or lower courts—from seeking to distinguish the SEC context from the FTC context based on the Court's decision in *Axon*. Indeed, the government recently tried this tack in analogous circumstances.

Granting plenary review in this case and hearing it alongside *Axon* is the only way to ensure that the Court can fully resolve the circuit split and eliminate the otherwise inevitable and unnecessary spin-off litigation that would accompany an FTC-specific decision in *Axon*—litigation that would add insult to injury to litigants, like Cochran, who already have been fighting for *years* for their day to present their structural constitutional claims to a federal court. Thus, as the Court has done in prior instances in which the government has asked for a hold, the Court should instead grant the government's petition in this case and set it for plenary review alongside *Axon*.

STATEMENT OF THE CASE

A. Legal Background

1. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 "dramatically expanded" the authority of the SEC to impose penalties administratively, making administrative proceedings "essentially 'coextensive with [the SEC's] authority to seek penalties in Federal court.'" *Tilton v. SEC*, 824 F.3d 276, 279 (2d Cir. 2016) (alteration in original) (citation omitted), *cert. denied*, 137 S. Ct. 2187 (2017). After Dodd-Frank, the SEC shifted its enforcement efforts to its home court, where the SEC's own ALJs preside over cases. *See Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018); Press Release, SEC, *SEC Announces Enforcement Results for FY 2021* (Nov. 18, 2021), https://www.sec.gov/news/press-release/2021-238 (addendum reporting that in fiscal year 2021, the SEC brought nearly half of its enforcement proceedings in its in-house tribunal before its own ALJs).

This is hardly a coincidence. "[T]he SEC wins the 'vast majority' of the cases it brings through administrative proceedings." Pet. App. 28a n.15 (citation omitted). Indeed, the SEC fares far better before its own ALJs than it does before Article III judges. One study found that, between October 2010 and March 2015, the Commission won more than 90% of cases it brought before its own ALJs, a rate markedly higher than its 69% success rate in federal court over the same period. Jean Eaglesham, *SEC Wins with In-House Judges*, Wall St. J. (May 6, 2015), https://on.wsj.com/3L4cPUN.

In presiding over these in-house proceedings, SEC ALJs wield "extensive powers" nearly coextensive

with those possessed by "federal trial judges." *Lucia*, 138 S. Ct. at 2049, 2053. Once the proceedings conclude, ALJs issue publicly available "decisions containing factual findings, legal conclusions, and appropriate remedies." *Id.* at 2053. As a result of their expansive powers, this Court has held that SEC ALJs "are 'Officers of the United States,' subject to the Appointments Clause." *Id.* at 2053-55.

Nevertheless, SEC ALJs are separated from the oversight and removal of the Chief Executive by multiple "layers of good-cause tenure" protection. *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 496-97 (2010). At a minimum, there are two layers of protection from removal: ALJs can be removed "only for good cause established and determined by the Merit Systems Protection Board [(MSPB)]," 5 U.S.C. § 7521(a), and MSPB officials are removable by the President "only for inefficiency, neglect of duty, or malfeasance in office," *id.* § 1202(d). This scheme thus establishes at least "dual for-cause limitations" on ALJs' removal. *Free Enter. Fund*, 561 U.S. at 492.

2. The Exchange Act prescribes a process for administrative review that, for most, is "difficult" to "navigat[e]." Pet. App. 28a n.15. Parties can petition the Commission for "discretionary" review of adverse ALJ decisions. 15 U.S.C. § 78d-1(b). If the Commission declines review, "the ALJ's decision itself 'becomes final' and is 'deemed the action of the Commission.'" *Lucia*, 138 S. Ct. at 2054 (citations omitted). But even when the Commission grants review, it typically defers to the ALJ's "'findings of fact,'" and when the "factfinding derives from credibility judgments, as it frequently does, acceptance [by the Commission] is near-automatic."

Id. at 2054-55 (citation omitted); *see also* Eaglesham, *supra* (noting that the Commission adopted the ALJ's factual findings 95% of the time).

A party "aggrieved by a final order of the Commission" "may" seek judicial review of that order in a federal court of appeals by filing a petition for review. 15 U.S.C. § 78y(a)(1). "On the filing of the petition," the court of appeals "has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part." *Id.* § 78y(a)(3). But the sanctions imposed by the SEC do not await judicial review. Absent a stay—which typically is difficult to obtain—the SEC can collect any monetary penalties as well as suspend an individual's professional licenses and, accordingly, upend his or her livelihood, all before the individual ever sees the inside of an Article III court. *See id.* § 78y(c)(2); SEC Rule of Practice 102(e)(1); *see also, e.g.*, *In re Southeast Invs., N.C., Inc.*, Exchange Act Release No. 86097, 2019 WL 2448245, at *2 (June 12, 2019) (describing a stay as an "extraordinary remedy" (citation omitted)).

Because it can take years to get to this point, at enormous financial cost and personal burden, many individuals—despite vigorously contesting their guilt—face "tremendous pressure to settle with the SEC" and try to rebuild their lives before they get to a federal court. Pet. App. 68a-70a (Oldham, J., concurring). As a result, most individuals never have an opportunity to present their claims to an Article III court, even when they dispute the authority of the decisionmaker. *See id.* at 28a n.15 (majority opinion).

In *Free Enterprise Fund*, this Court concluded that this same administrative review scheme did not "strip" federal district courts of their jurisdiction over

"an Appointments Clause or separation-of-powers claim" challenging the authority of the Public Company Accounting Oversight Board, another body of inferior officers exercising authority under the SEC. 561 U.S. at 487-91 & n.2. As the Court explained, this review scheme "does not expressly limit the jurisdiction that other statutes confer on district courts." *Id.* at 489. Likewise, the Court held, it does not do so "implicitly" under *Thunder Basin*—the "'statutory scheme'" does not "display[] a 'fairly discernible' intent to limit jurisdiction," and claims challenging the constitutional authority of decisionmakers are not "'of the type Congress intended to be reviewed within th[e] statutory structure.'" *Id.* at 489-91 (second alteration in original) (quoting *Thunder Basin*, 510 U.S. at 207, 212).

B. Factual Background

Michelle Cochran is a CPA licensed in Texas. From 2007 to 2013, Cochran worked for a small accounting firm called The Hall Group, which performed auditing work for non-profits, privately held companies and a few small, publicly traded companies. Initially hired as an hourly employee, Cochran became a non-equity partner in 2012 when the firm's principal, David Hall, made it a condition of her continued employment. The atmosphere at the firm was unpleasant and stressful, exacerbated by Hall's difficult and unprofessional demeanor. Cochran resigned from the firm in July 2013. Compl. ¶¶ 16-23, D. Ct. Doc. 1 (Jan. 18, 2019).

In April 2016, almost three years after Cochran left the Hall Group, the SEC filed an Order Instituting Proceedings against David Hall, his firm,

Cochran, and another accountant. The SEC claimed that Cochran violated the Exchange Act by failing to comply with certain auditing documentation requirements, e.g., the failure to sufficiently complete various auditing checklists. *Id.* ¶¶ 24-27; *see In re David S. Hall, P.C.*, Exchange Act Release No. 77718, 2016 WL 1665164 (Apr. 26, 2016).

Consistent with its preference to litigate before its in-house tribunal, the SEC elected to proceed administratively rather than in federal court. The case was assigned to an ALJ who, like other SEC ALJs, had not been properly appointed for purposes of the Appointments Clause. The ALJ issued multiple orders and presided over a hearing at which Cochran appeared pro se. Compl. ¶¶ 32-40. Following the hearing, the ALJ issued a decision ruling against Cochran, imposing a $22,500 penalty and a five-year ban from practicing before the SEC. Pet. App. 2a-3a.

Cochran petitioned the Commission for review. The Commission, however, vacated the ALJ's decision, and all of the proceedings before it, in light of this Court's decision in *Lucia*, which held that the remedy for an "adjudication tainted with an appointments violation" is a new proceeding before a different and properly appointed official. 138 S. Ct. at 2055; *see* Pet. App. 3a. More than two years after the SEC first instituted proceedings, Cochran was assigned to undergo additional administrative proceedings before a new ALJ, which are still pending. Pet. App. 3a; Compl. ¶ 51.

C. Proceedings Below

1. In January 2019, Cochran filed suit against the SEC in the Northern District of Texas. Pet. App. 140a. Cochran sought declaratory and injunctive

relief based on constitutional deficiencies in the SEC's administrative proceedings. *Id.* Relevant here, Cochran claimed that SEC ALJs cannot preside over the proceedings because they are unconstitutionally insulated from removal by a multilayer for-cause structure, analogous to the structure this Court held unconstitutional in *Free Enterprise Fund*. *Id.* at 3a.

The district court dismissed the case for lack of jurisdiction. *Id.* at 139a-44a. The court concluded that the Exchange Act's administrative review scheme implicitly strips district courts of jurisdiction to hear challenges to ongoing SEC enforcement proceedings. *Id.* at 142a-44a. But in reaching that conclusion, the court found it "deeply concern[ing]" that Cochran, having endured one full proceeding "before an ALJ who was not constitutionally appointed," would have to endure yet another round of proceedings, "undoubtedly at considerable expense and stress, before another unconstitutionally appointed administrative law judge." *Id.* at 143a.

2. Cochran appealed, and a divided panel of the Fifth Circuit affirmed. *Id.* at 114a-38a.[1] The panel majority held that, in enacting the Exchange Act's scheme for administrative review of final SEC orders contained in 15 U.S.C. § 78y, Congress "implicitly" stripped federal district courts of jurisdiction over structural constitutional challenges. *Id.* at 114a-15a, 117a. The majority reasoned that Section 78y "exhibits a general intent to deprive district courts of subject matter jurisdiction," *id.* at 118a-19a; and that, based on the "*Thunder Basin* factors," "Congress

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[1] A motions panel of the Fifth Circuit enjoined the SEC administrative proceedings pending Cochran's appeal. *See* Pet. App. 4a.

intended to funnel the kind of claim Cochran asserts through the statutory review scheme," *id.* at 119a-31a.

Judge Haynes dissented in relevant part, concluding that, "like the [claim] in *Free Enterprise Fund*," Cochran's "structural removal claim is not the type [of claim] over which Congress intended to limit jurisdiction" of federal district courts. *Id.* at 132a-38a.

3. The Fifth Circuit granted rehearing en banc and reversed in relevant part. *Id.* at 1a-111a.

The en banc court held that Congress did not "implicitly strip[] district courts of jurisdiction to hear structural constructional claims under § 78y." *Id.* at 5a-32a. First, the court held that "the text of § 78y" does "not explicitly or implicitly strip the district court of jurisdiction over Cochran's claim." *Id.* at 5a-10a. Second, the court held that this Court's decision in *Free Enterprise Fund* is "enough to decide this case," as that decision "rejected the precise argument the SEC makes here—that the Exchange Act divests district courts of jurisdiction over removal power challenges." *Id.* at 10a-16a. Because "*Free Enterprise Fund* is squarely on point," that decision "foreclos[es] any possibility that § 78y strips district courts of jurisdiction over structural constitutional challenges." *Id.* at 10a.

The court also held that it would reach the same result under a fresh application of "the so-called '*Thunder Basin* factors.'" *Id.* at 16a-32a. As the Court explained, (1) "Cochran's removal power claim is wholly collateral to the Exchange Act's statutory-review scheme," *id.* at 21a-22a; (2) "Cochran's removal power claim is outside the SEC's expertise," *id.* at 22a-23a; and (3) "the Exchange Act's statutory-

review scheme threatens to deprive Cochran of the opportunity for meaningful judicial review," *id.* at 23a-31a. "Therefore," the court concluded, "the *Thunder Basin* inquiry simply reaffirms that *Free Enterprise Fund* controls this case and that Cochran's removal power claim is within the district court's jurisdiction." *Id.* at 31a-32a.[2]

Judge Oldham, joined by five other judges, issued a concurring opinion detailing the relevant history of the SEC and its scheme for administrative review, describing the tremendous burdens imposed by that scheme on SEC targets, and responding to several points raised by the dissent. *Id.* at 35a-81a.

Judge Costa, joined by six other judges, dissented. *Id.* at 82a-111a. He reasoned that Congress intended to create "an exclusive review scheme" in Section 78y that implicitly strips district courts of jurisdiction, *id.* at 85a-94a; and that "the separation-of-powers claim Cochran asserts is of the type that Congress meant to exclude from district court jurisdiction when it created the SEC-specific scheme," *id.* at 94a-111a. In an effort to reconcile his conclusions with *Free Enterprise Fund*, Judge Costa drew an "investigation/enforcement distinction" under which district courts have jurisdiction during "an [SEC] investigation" but lose jurisdiction once the SEC has decided to pursue an "enforcement proceeding." *Id.* at 99a-104a.

4. On January 24, 2022—three weeks after the Fifth Circuit's decision in this case—this Court granted certiorari in *Axon Enterprise, Inc. v. FTC*, 142

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[2] The court also rejected the SEC's ripeness argument, Pet. App. 32a-34a, which the government has abandoned in its petition for certiorari.

S. Ct. 895 (2022) (No. 21-86), which presents the essentially same question in the context of the administrative review scheme under the FTC Act. On March 11, 2022, the government filed the petition for certiorari in this case asking the Court to hold this case pending this Court's decision in *Axon* and dispose of it as appropriate in light of that decision.

ARGUMENT

The petition should be granted and the case set for plenary review by this Court. The circuits are split on the precise question presented by the petition: whether the Exchange Act's administrative review scheme implicitly strips district courts of jurisdiction over structural constitutional claims. That question is important to the hundreds of litigants ensnared in SEC administrative proceedings before unconstitutionally insulated ALJs. And this Court has already granted review in *Axon Enterprise, Inc. v. FTC*, 142 S. Ct. 895 (2022) (No. 21-86), which presents the same question in the context of the FTC Act's less frequently used administrative review scheme.

The government's request that the Court hold the petition pending a decision in *Axon* should be denied. The Court should instead grant plenary review in this case and consolidate it with *Axon* for argument next fall. Doing so is the only way for the Court to fully resolve the circuit split, which arises in the context of the Exchange Act's statutory scheme; ensure that the precedent in circuits across the country currently barring federal district court review in the SEC context is conclusively overturned by the Court's decision; and guarantee that individuals like Cochran are not forced to engage in protracted collateral litigation in the lower courts over the reach of *Axon* to

the Exchange Act. Thus, the petition should be granted, and the case should be considered alongside *Axon*.[3]

I. THE QUESTION PRESENTED IS UNDENIABLY CERTWORTHY

In the decision below, the Fifth Circuit, sitting en banc, correctly held that the Exchange Act does not implicitly strip federal district courts of jurisdiction over structural constitutional challenges to the authority of SEC ALJs. Pet. App. 2a. By filing a petition for certiorari in this case, the government necessarily maintains that this question merits this Court's review. And Cochran agrees.

First, as the government observes, the circuits are split on the precise question presented here. Pet. 6. Several circuits have held that the Exchange Act implicitly strips federal courts of their jurisdiction to hear structural constitutional claims. *See Bennett v. SEC*, 844 F.3d 174, 188 (4th Cir. 2016); *Hill v. SEC*, 825 F.3d 1236, 1241 (11th Cir. 2016); *Tilton v. SEC*, 824 F.3d 276, 291 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2187 (2017); *Bebo v. SEC*, 799 F.3d 765, 767 (7th Cir. 2015), *cert. denied*, 577 U.S. 1236 (2016); *see also Jarkesy v. SEC*, 803 F.3d 9, 17-18 (D.C. Cir. 2015) (reaching same conclusion in a case raising a constitutional "non-delegation challenge"). The Fifth Circuit openly disagreed with those circuits in the en banc decision below, joining numerous other judges who have done so. Pet. App. 13a-15a; *see* Pet. App.

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[3] If the Court grants certiorari, the Court could order that this case be consolidated for oral argument with *Axon* next fall, or treat the cases as separate companion cases and consider them "in tandem." *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 14.6, at 14-21 (11th ed. 2019).

132a (panel opinion) (Haynes, J., dissenting in part); *Tilton*, 824 F.3d at 292 (Droney, J., dissenting).[4] The Fifth Circuit also noted that its view aligned with Judge Bumatay's dissent from the Ninth Circuit's panel decision in *Axon*, a case "addressing a different statute" (the FTC Act) in which he concluded that it did not strip federal courts of jurisdiction over "the plaintiff's removal power claim." Pet. App. 15a (citing *Axon Enter., Inc. v. FTC*, 986 F.3d 1173, 1196 (9th Cir. 2021) (Bumatay, J., concurring in the judgment in part and dissenting in part), *cert. granted*, 142 S. Ct. 895 (2022)).

Second, this is an undeniably "important jurisdictional issue." *Id.* at 111a (Costa, J., dissenting). Indeed, the fact that so many circuits—including those hearing the lion's share of securities enforcement actions—have already weighed in on this issue underscores its national significance. That will not subside. Since Dodd-Frank expanded the SEC's ability to try cases before its in-house administrative tribunal, the SEC has increasingly brought enforcement actions before its own ALJs, where it enjoys a home-court advantage. *See supra* at 3-5. As a result, individuals are currently forced to litigate in a distinctly hostile forum, at great expense, before they can challenge the constitutional legitimacy of the decisionmaker presiding over their agency proceedings. And this administrative process can

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[4] *See also Duka v. SEC*, 103 F. Supp. 3d 382, 390 (S.D.N.Y. 2015); *Gray Fin. Grp., Inc. v. SEC*, 166 F. Supp. 3d 1335, 1343-44 (N.D. Ga. 2015), *vacated sub nom. Hill*, 825 F.3d 1236 (11th Cir. 2016); *Ironridge Glob. IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294, 1303-04 (N.D. Ga. 2015); *Hill v. SEC*, 114 F. Supp. 3d 1297, 1306 (N.D. Ga. 2015), *vacated*, 825 F.3d 1236 (11th Cir. 2016); *Gupta v. SEC*, 796 F. Supp. 2d 503, 512-13 (S.D.N.Y. 2011).

often drag on for many years—far longer than average for district court proceedings. For instance, the administrative proceedings against the plaintiff in the Seventh Circuit's *Bebo* decision—which is the oldest case in the circuit split—have lasted for more than seven years and are *still* ongoing. *See In re Bebo*, Admin. Proc. No. 3-16293 (S.E.C.) (instituted Dec. 3, 2014). Other SEC targets have similarly found their administrative proceedings languishing on the SEC's docket. *See, e.g.*, *In re John Thomas Cap. Mgmt. Grp. LLC*, Admin. Proc. No. 3-15255 (S.E.C.) (seven years and six months); *In re Gibson*, Admin. Proc. No. 3-17184 (S.E.C.) (six years; still ongoing).

This regime exacts an enormous personal, reputational, and financial toll on respondents before they can ever present their constitutional claim to a federal court. *See Tilton*, 824 F.3d at 298 n.5 (Droney, J., dissenting). And the SEC has exploited this vulnerability in "a number of cases" by "threaten[ing] administrative proceedings" before its ALJs in a calculated effort to compel a settlement. *Id.* (citation omitted); *see* Pet. App. 69a (Oldham, J., concurring). That is, the agency has appeared to wield the process as a punishment. The enormous burdens that Cochran has faced in attempting to secure federal court review of her constitutional claim epitomize the hardships that individuals face in these proceedings.

As the district court explained, this state of affairs is "deeply concern[ing]" to say the least. Pet. App. 143a. It is thus not surprising that the Fifth Circuit convened en banc to address this important and frequently recurring issue. And, of course, the significance of the question presented is further underscored by this Court's grant of certiorari in

Axon, which presents the same jurisdictional issue in the context of proceedings under the FTC Act.

II. THE COURT SHOULD GRANT REVIEW AND CONSIDER THIS CASE ALONGSIDE *AXON*

The government asks the Court to hold the petition in this case for *Axon*. Pet. 7. For several reasons, however, that proposal is unsound. While the questions presented in *Axon* and this case unquestionably overlap, it is critical for this Court to grant plenary review in this case and consolidate it with *Axon* for disposition on the merits. *See* Sup. Ct. R. 27.3; Stephen M. Shapiro et al., *Supreme Court Practice* § 14.6, at 14-19 to -21 & n.33 (11th ed. 2019).

A. Although this Court frequently holds certiorari petitions pending a decision in a case presenting a substantially identical issue, it also has recognized that there are instances where, as here, granting plenary review and consolidating the case with an already-granted case pending on the merits docket is appropriate. *See, e.g.*, *Crawford v. Martinez*, 540 U.S. 1217 (2004) (No. 03-878) (granting the government's petition for certiorari, despite the government's request only for a hold, and consolidating with previously granted case). That treatment is warranted here for several reasons.

1. First, the question presented in *Axon* is by its terms confined to the FTC context: "Whether Congress impliedly stripped federal district courts of jurisdiction over constitutional challenges to the Federal Trade Commission's structure, procedures, and existence by granting the courts of appeals jurisdiction to 'affirm, enforce, modify, or set aside' the Commission's cease-and-desist orders." *Axon* Pet. i. To be sure, the resolution of that question may bear

on the availability of federal judicial review in similar circumstances in the SEC context. But the Court's decision in *Axon* will necessarily be constrained by the actual question presented. *See* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *cf. Yee v. City of Escondido*, 503 U.S. 519, 535-37 (1992) (explaining that "[t]he framing of the question presented has significant consequences" and refusing to consider "a question *related* to the one petitioners presented, and perhaps *complementary* to the one petitioners presented, [because] it [was] not 'fairly included therein'").[5] The Court's decision in *Axon,* in other words, will not actually resolve the question presented by this case, which is explicitly framed in the specific context of the "Securities and Exchange Commission." Pet. i. Granting review in this case and consolidating it with *Axon* will ensure that the Court's decision directly addresses the jurisdictional question in the SEC context.

Doing so is critical because the jurisdictional issue has arisen most frequently in the SEC context, and the circuit split arose in that context. *See* Pet. 6. Other than the Ninth Circuit's decision in *Axon*, each of the cases in the circuit split—including this case—has arisen in the SEC context. *See* Pet. App. 2a (5th Cir.); *Bennett*, 844 F.3d 174 (4th Cir.); *Hill*, 825 F.3d 1236 (11th Cir.); *Tilton*, 824 F.3d 276 (2d Cir.); *Bebo*, 799 F.3d 765 (7th Cir.); *Jarkesy*, 803 F.3d 9 (D.C.

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[5] The question whether the Exchange Act strips federal courts of jurisdiction to hear structural constitutional claims is *related* to the question in *Axon*, but it is not *fairly included within* that question because, as explained, the cases involve different statutes. *See Yee*, 503 U.S. at 535-37.

Cir.). The only way to ensure that the Court's decision resolves that conflict in all of those circuits is to grant plenary review and decide this case alongside *Axon*.

Moreover, as the government itself has argued, the "framework" driving the analysis in these cases is tethered to the specific "'statutory scheme of administrative and judicial review'" at issue. Br. in Opp. 7-8, *Axon*, *supra* (No. 21-86) (*Axon* Br. in Opp.) (citation omitted). This Court's cases have also grounded their analyses of the question in the specific statutory scheme at issue, explaining 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*.'" *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 489 (2010) (emphases added) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212 (1994)); *see Elgin v. Department of the Treasury*, 567 U.S. 1, 10 (2012) ("To determine whether it is 'fairly discernible' that Congress precluded district court jurisdiction over petitioners' claims, we examine *the CSRA's text, structure, and purpose*." (emphasis added)). Consistent with that directive, the Fifth Circuit in this case "start[ed]" its analysis "with the statutory text" contained in the Exchange Act, the specific statutory scheme at issue here. Pet. App. 7a (citation omitted); *see also id.* at 35a (Oldham, J., concurring) ("'[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous.' Here, the text is as unambiguous as can be." (citation omitted)).

The FTC Act and the Exchange Act are obviously "different statute[s]," *id.* at 15a (majority opinion),

with different histories and purposes enforced by different agencies. *See id.* at 47a-73a (Oldham, J., concurring) (recounting the unique history and nuances of the SEC's administrative regime). Even though many of the key provisions are, as the government asserts, "materially identical," Pet. 6, there are some distinctions that could affect the analysis. For example, Axon observes that the FTC Act "specifically addresses only FTC 'cease and desist' orders, 15 U.S.C. § 45(c)-(d), whereas the SEC Act governs judicial review of any 'final order of the' SEC, *id.* § 78y." *Axon* Pet. 21. In Axon's view, this distinction "cuts in favor of reading the FTC Act *more* narrowly when it comes to jurisdiction-stripping." *Id.* And, indeed, this statutory difference is baked into the question presented in *Axon*, which refers to the grant of jurisdiction to overturn the FTC's "cease-and-desist orders." *Id.* at i. The government disagrees with this argument. *See Axon* Br. in Opp. 9 n.*. But in the event the Court agrees with Axon, the government or lower courts could seize on that distinction (or any other) in attempting to bar federal court jurisdiction in the SEC context. To eliminate the concern, the Court should simply resolve the question in the SEC context now.

There are also statutory distinctions that arguably cut in favor of reading the Exchange Act more narrowly for purposes of jurisdiction-stripping. For example, the Fifth Circuit explained that the verb "becomes" in the Exchange Act's judicial-review provision—which specifies when jurisdiction in the court of appeals "'becomes exclusive'"—"necessarily implies a transformation," such that the court of appeals' jurisdiction becomes "exclusive" only "*after* a petition is filed." Pet. App. 9a & n.6 (quoting 15

U.S.C. § 78y(a)(3)). The court "contrast[ed]" that language with other formulations that do not use "becomes," such as a statute providing "that jurisdiction 'is exclusive,' or that the court of appeals 'has exclusive jurisdiction.'" *Id.* at 9a n.6. Like those other formulations, the analogous provision in the FTC Act does not use the word "becomes." *See* 15 U.S.C. § 45(d) ("[T]he jurisdiction of the court of appeals . . . *shall be exclusive*." (emphasis added)). The SEC scheme also explicitly preserves "any and all" other avenues of relief. *Id.* § 78bb(a)(2) ("Except as provided in subsection (f) [concerning class actions], the rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity."). The point here is not that one case—*Axon* or *Cochran*—is necessarily stronger (in Cochran's view, the plaintiffs should prevail in both cases), but that there *are* statutory differences that could bear on the Court's resolution of the issue in *Axon*—and the government's response to an adverse decision in *Axon* in the SEC context.

The differences between the statutory schemes also bear on the force of this Court's precedent in resolving the questions presented. As the Fifth Circuit explained, this Court "already rejected the SEC's *precise* jurisdictional argument under § 78y" in *Free Enterprise Fund*. Pet. App. 5a, 10a-13a. "Just like *Free Enterprise Fund*, this case concerns the question of whether the Exchange Act divests district courts of jurisdiction to consider removal power challenges; every material aspect of the Supreme Court's reasoning in *Free Enterprise Fund* would seem to apply with equal force here." *Id.* at 12a. And because "*Free Enterprise Fund* is squarely on point,"

it "foreclos[es] any possibility that § 78y strips district courts of jurisdiction over structural constitutional challenges." *Id.* at 10a; *see also id.* at 2a n.2 ("Judge Willett concurs in the judgment because he believes this case is controlled by *Free Enterprise Fund* . . . .").

To be sure, Axon makes a compelling argument that *Free Enterprise Fund*'s reasoning is equally applicable to the FTC Act's statutory regime. *See Axon* Pet. 20-28. But the precedential force of *Free Enterprise Fund* is plainly different (and stronger) in the SEC context—because *Free Enterprise Fund* itself arose in the SEC context. Indeed, the Fifth Circuit held that *Free Enterprise Fund* "is enough to decide this case" as a matter of "control[ling]" precedent, regardless of the *Thunder Basin* factors. Pet. App. 13a-16a. This distinction provides yet another reason for the Court to grant review in this case and directly answer the question in the SEC context.

2. There also is an imperative practical reason for granting plenary review in this case. Holding this case pending *Axon*—rather than granting review and consolidating the cases—would unnecessarily deprive the many litigants currently ensnared in SEC proceedings of a much-needed ruling by this Court squarely addressing the question presented in the SEC context. Granting review would eliminate any need for further rounds of litigation in the lower courts sorting out the application of the Court's decision in *Axon* to the SEC context.

As noted, the circuit split arises in the context of the Exchange Act, and several circuits have decided the issue in the SEC's favor. *See supra* at 12-13. A decision by this Court addressing solely the FTC Act, however, will not automatically negate adverse circuit precedent concerning the Exchange Act.

Rather, plaintiffs in those circuits will have to litigate the issue on a circuit-by-circuit basis, battling with the government and lower-court judges over the frequently "difficult question of when a three-judge panel may reexamine normally controlling circuit precedent in the face of an intervening United States Supreme Court decision." *Miller v. Gammie*, 335 F.3d 889, 892-93 (9th Cir. 2003) (en banc); *see, e.g.*, *Taylor v. Grubbs*, 930 F.3d 611, 619 (4th Cir. 2019) ("'We do not lightly presume that the law of the circuit has been overturned,' . . . [and] circuit precedent 'controls' where [the] Supreme Court did not *directly* contradict our prior holding[]." (citation omitted) (emphasis added)); *Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399, 405 (5th Cir. 2012) ("[F]or a Supreme Court decision to change our Circuit's law, it 'must be more than merely illuminating with respect to the case before [the court]' and must '*unequivocally*' overrule prior precedent." (alteration in original) (emphasis added)). Thus, even if, as the government now asserts, the statutory schemes are "materially identical," Pet. 6, such that a decision from this Court in favor of Axon *should* call for the precedent in those circuits to be overturned, a decision limited to the FTC Act will only delay the actual resolution of the circuit split while needlessly increasing the litigation costs for plaintiffs, the government, and the lower courts.

Assurances today—in advance of a decision by this Court—cannot prevent the instinct to litigate over any arguable nuances or distinctions based on the reasoning of the decision. Such pie-crust promises are easily made—and easily broken. And recent experience involving a similar instance of "materially identical" statutes underscores that this concern is

real. In *Babb v. Wilkie*, 140 S. Ct. 1168 (2020), this Court addressed the causation standard for federal-sector claims under the Age Discrimination in Employment Act (ADEA). In this Court, the government asserted—repeatedly—that the federal-sector provision in the ADEA is "materially identical" to the federal-sector provision in Title VII. Gov't Cert. Resp. 12, 22, 24, *Babb*, *supra* (No. 18-882). After the government lost in *Babb*, however, it argued on remand that this Court's decision in *Babb* was "limited to ADEA claims," and that pre-*Babb* circuit precedent construing the admittedly "materially identical" Title VII provision was still "binding" on the panel, even though it flatly conflicted with *Babb*. Gov't Suppl. Br. 8-11, *Babb v. Secretary, Dep't of Veterans Affairs*, No. 16-16492 (11th Cir. Oct. 22, 2020).

Indeed, the government specifically pointed to the fact that the question presented in *Babb* was framed in terms of the ADEA, just as the question in *Axon* is framed in terms of the FTC Act. *See id.* at 1 ("Because the Supreme Court granted certiorari in this case limited to plaintiff's [ADEA] claim, the panel remains bound by circuit precedent . . . governing the causation standard for Title VII retaliation claims."). The government further argued that the pre-*Babb* circuit precedent would "remain[] binding" as to Title VII "absent en banc or Supreme Court" correction. *Id.* at 10. The court of appeals initially took a similar view by limiting the reach of this Court's decision to the ADEA, *Babb v. Secretary, Dep't of Veterans Affairs*, 802 F. App'x 548, 548 (11th Cir. 2020), and only reversed itself after soliciting additional briefing and conducting an extended analysis of the circuit's "prior-panel-precedent rule," *Babb v. Secretary, Dep't*

of Veterans Affairs, 992 F.3d 1193, 1198-1204 (11th Cir. 2021). That burdensome scenario could play out in *multiple* circuits across the country if the Court does not grant plenary review in this case.

Thus, while the government maintains in its certiorari petition that the statutory review schemes under the FTC Act and the Exchange Act are "materially identical," Pet. 6, that assertion will not prevent the government from urging lower courts to ignore an FTC-specific decision from this Court in *Axon* in favor of pre-*Axon*, SEC-specific circuit precedent. Indeed, for decades, the government has demonstrated nothing but resolve and tenacity in seeking to prevent individuals like Cochran from getting a hearing in federal court on their structural constitutional claims while their administrative proceedings inch forward at a glacial pace. Granting review in this case alongside *Axon* will eliminate that risk and curtail needless litigation over the scope of this Court's decision.

3. Granting review in this case also will give the Court the full benefit of the Fifth Circuit's considered views on the issues at stake. Judge Haynes' opinion for the en banc court carefully explains why its reasoning better adheres to the statutory text and this Court's precedent. Pet. App. 1a-34a. Judge Costa's dissenting opinion ventilates the opposing position. *Id.* at 82a-111a. And Judge Oldham's compelling concurrence describing the origins of the administrative state, and the SEC in particular, develops several historical and practical points further supporting the existence of federal court jurisdiction in this context. *Id.* at 35a-81a.

In addition, hearing both this case and *Axon* together would give the Court a more complete

understanding of the circumstances in which this question has arisen and the practical impact of the jurisdiction-stripping rule on plaintiffs seeking their day in federal court. That additional background may be particularly salient in that the plaintiff in this case is an individual, rather than a corporation, which puts this case on the same footing as the vast majority of cases that have arisen presenting this issue.

B. For these reasons, there is a compelling need for this Court to grant plenary review in this case and decide it alongside *Axon*. And because the *Axon* case will not be argued until next Term, this case can be briefed and considered with *Axon* without delaying the Court's resolution of the cases.

The Court will not hear argument in *Axon* until October 2022 at the earliest—more than six months from now. This case easily can be briefed during that period and readied for argument in October 2022. Under the current schedule, Axon's opening brief is due on May 9, and the FTC's response brief is due on August 8. The Court could simply allow this case to be briefed on a separate track according to the customary deadlines. But as in prior consolidated cases, the Court also could (1) coordinate the briefing schedules in this case and *Axon* so that the government files its opening brief in this case at the same time it files its respondent's brief in *Axon*,[6] or (2) realign the parties in this case so that respondent Cochran would file an opening brief in time for the government to file a single response brief addressing

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[6] *See, e.g.*, *Benitez v. Rozos*, No. 03-7434 (May 7, 2004), and *Clark v. Martinez*, No. 03-878 (May 7, 2004) (government filing its brief as respondent in No. 03-7434 and its opening brief as petitioner in No. 03-878 on the same day).

both statutory schemes, if it wishes to do so.[7] But under any of these alternatives, this case could be briefed and set for argument alongside *Axon* during the October sitting.

The bottom line is that there is simply no reason to hold this case for *Axon*, but there are numerous compelling reasons to grant plenary review in this case and consider it alongside *Axon* next fall.

* * * * *

Michelle Cochran has already endured six years waiting for review of her constitutional claim in federal district court. Holding the government's petition in this case pending the Court's consideration of this issue in *Axon* under a different statute would unnecessarily prolong Cochran's time in the SEC administrative holding cell and possibly force plaintiffs in her position to have to litigate the *impact* of *Axon* as to the Exchange Act, even if Axon prevails. That situation is untenable and unnecessary. The Court should grant certiorari in this case and decide it alongside *Axon* to ensure that this important jurisdictional question is resolved by this Court in the most common context in which it arises—in the SEC context—as soon as possible.

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[7] *See, e.g.*, *AMG Capital Mgmt., LLC v. FTC*, No. 19-508 (Aug. 12, 2020) (order realigning parties to allow the government to file a single brief as respondent).

CONCLUSION

The petition for a writ of certiorari should be granted, and the case should be considered alongside *Axon Enterprise, Inc. v. FTC*, No. 21-86.

Respectfully submitted,

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