No. 21-1239

In the Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION, ET AL.,
PETITIONERS,

v.

MICHELLE COCHRAN, RESPONDENT.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[*]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more

[*] The parties have filed blanket letters of consent to the filing of *amicus* briefs with the Clerk's office. No counsel for any party authored this brief in whole or in part and no counsel or party—other than *amicus*, its members, or its counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

Here, many businesses face the prospect of unconstitutional proceedings before the Securities and Exchange Commission (SEC). Those costly proceedings can pose an existential threat to business operations. The Chamber has a significant stake in ensuring that those businesses can challenge unconstitutional proceedings in federal district courts before the constitutional injury occurs.

INTRODUCTION AND SUMMARY OF ARGUMENT

The SEC's structure and proceedings are riddled with constitutional problems. Congress did not force private parties to challenge those defects in agency proceedings first, and thereby suffer all the associated harms of unconstitutional agency proceedings. Because Congress has not clearly provided otherwise, federal courts can police the separation of powers and correct pervasive constitutional flaws in the first instance. Thus, as with the FTC review scheme in *Axon Enterprise, Inc. v. FTC*, No. 21-86, parties haled before the SEC can bring their constitutional challenges to federal district courts first. If anything, additional textual clues in the Securities Exchange Act make the availability of immediate judicial review extra clear.

Delay also renders judicial review meaningless. Forcing private parties to suffer through unconstitutional agency proceedings just to challenge those proceedings

later inflicts irreparable constitutional harm. SEC adjudications take years, can cost millions of dollars to litigate, and put ruinous penalties on the line. Few private parties can afford those bet-the-farm stakes. And, for those who persist, victory before an Article III tribunal often rings hollow. Courts decide whether to sever unconstitutional provisions and give the agency a mulligan. This Court has long emphasized the need to encourage separation-of-powers challenges. But if the price of raising them is years of agency proceedings and the reward is years more, the game will rarely be worth the candle.

Delayed judicial review also perversely rewards the worst constitutional offenders. The SEC's particular constitutional flaws—which overlap with and may even exceed the FTC's flaws—underscore the imperative of pre-enforcement review. The Constitution requires political accountability to guard against arbitrary, unchecked agency power. The SEC's structure violates this command. As with the FTC's administrative law judge (ALJ), the President cannot meaningfully supervise the SEC's ALJs, who are unconstitutionally insulated from removal despite exercising significant executive powers.

The Constitution empowers Article III courts to adjudicate disputes arising under federal law as a backstop to agency excesses. And when common-law rights are at stake, the Seventh Amendment requires a jury trial. The SEC tramples those rights too, adjudicating traditional common-law actions in jury-less agency proceedings.

Further, the Constitution requires agencies to respect due-process and equal-protection principles and to avoid resolving significant legal questions through arbitrary or biased decision-making. On that score, the SEC deploys its own set of arbitrary and unfair procedures to give the agency an unfair leg up while hobbling its opponents' chances.

By depriving parties of neutral arbiters and adjudicating these disputes in-house as the one-stop prosecutor, judge, jury, and executioner, the SEC exploits its home-field advantage to such a degree that most parties quit the game early. The statistics speak for themselves: The Commission and its ALJs side with agency lawyers nearly 100% of the time—odds that prompt 98% of public-company respondents to settle the day the SEC announces charges.

Meanwhile, letting agencies decide constitutional challenges to their structure or adjudicatory setup is pointless. Such challenges have nothing to do with the merits of any case, instead implicating the agency's basic functions in *every* case. Delayed adjudication of these challenges thus wastes time and resources while giving the SEC yet another unneeded and unfair edge. Parties haled before the SEC need judicial review now—before proceedings begin—or they are unlikely to ever reach the courthouse doors.

ARGUMENT

I. District Courts Have Jurisdiction Over Constitutional Challenges to the SEC's Structure and Procedures

Congress has granted federal district courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. That jurisdictional grant encompasses constitutional challenges to the SEC's structure and adjudicatory setup. No statute retracts that jurisdiction. Nor is this an exceptional case where the comprehensiveness of Congress' administrative-review scheme implies that Congress intended to channel structural challenges to the SEC first and courts later. Rather, this Court has repeatedly allowed litigants to go straight to court to bring analogous, cross-cutting challenges.

1. No SEC-specific statute expressly curbs federal courts' jurisdiction over federal questions. The only judicial-review provision the government points to here, 15 U.S.C. § 78y(a), merely authorizes courts of appeals to review "final order[s]" after the SEC issues them. *Id.* § 78y(a)(1); Pet. 2. That provision does not mention district courts, constitutional challenges, or pre-enforcement challenges that by definition precede a final order. *See* Resp. Br. 28-29.

Other textual clues reinforce that section 78y does not strip federal courts of jurisdiction to entertain structural constitutional challenges in the first instance. Resp. Br. 29-31. First, section 78y provides that the court of appeals' jurisdiction only "*becomes* exclusive on the filing of the record." 15 U.S.C. § 78y(a)(3) (emphasis added). Thus, until the filing of the record triggers exclusive appellate jurisdiction, parties are free to go to district court. *See* Pet.App.9a n.6 (majority opinion). Second, the Securities Exchange Act contains a broad savings clause providing that "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." 15 U.S.C. § 78bb(a)(2). That clause reinforces that the Act does not implicitly curtail litigants' ordinary right to litigate federal questions in federal district courts.

The government portrays section 78y(a) as "materially identical" to the FTC's administrative-review scheme. Pet. 6. And, in *Axon*, the government contends that the FTC's scheme implicitly requires anyone subject to an agency enforcement action to reach the end of agency proceedings before heading to court. *Axon* Br. in Opp. 11.

But administrative-review statutes "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. PCAOB*, 561 U.S. 477, 489 (2010) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212 (1994)). That inquiry focuses on the so-called *Thunder Basin* factors, i.e., (1) whether "a finding of preclusion could foreclose all meaningful judicial review"; (2) whether the suit is "wholly collateral to a statute's review provisions"; and (3) whether the claims fall "outside the agency's expertise." *Id.* (quoting *Thunder Basin*, 510 U.S. at 212-13).

Applying that framework here yields a simple conclusion: If parties challenge an agency's structure or foundational procedures, and the administrative-review scheme does not expressly bar initial judicial review, parties can go straight to court.

That rule follows from *Free Enterprise Fund*, which allowed judicial review on materially identical facts involving the same SEC judicial-review provision. The petitioners there sought to bring the same type of constitutional challenge to multi-layer tenure protections that respondent presses here. There, petitioners challenged removal restrictions on the SEC-supervised Public Company Accounting Oversight Board (PCAOB); here, the challenged restrictions apply to SEC ALJs. 561 U.S. at 487. As in this case, the government in *Free Enterprise Fund* responded that 15 U.S.C. § 78y foreclosed judicial review. *Id.* at 489. This Court disagreed, holding that section 78y does not "expressly" divest district courts of federal-question jurisdiction; section 78y merely authorizes review of some agency decisions in appellate courts. *Id.* Nor did Congress implicitly require parties to bring constitutional challenges to the PCAOB's structure to the agency first. Instead, the Court held, all three *Thunder Basin* factors favored immediate judicial review. *Id.* at 490-91.

First, as to meaningful judicial review, the Court held that section 78y does not offer an avenue to "meaningfully pursue . . . constitutional claims." *Id.* at 490. Section 78y only authorizes judicial review of certain final orders or rules. Were that provision exclusive, some harmful PCAOB actions could escape review. *Id.* Because the challengers objected to the PCAOB's *structure*, not a specific agency action, the only way to guarantee judicial review was to challenge a rule or to incur sanctions that could be reviewed. *Id.* The Court doubted that Congress intended such perverse procedures. *Id.* at 490-91.

Second, *Free Enterprise Fund* held that challenges to the PCAOB's tenure protections were plainly "collateral." *Id.* at 490. Structural constitutional challenges impugn "the Board's existence," not any specific action. *Id.*

Finally, the Court explained that the agency had no relevant experience to offer. Structural challenges present "standard questions of administrative law, which the courts are at no disadvantage in answering." *Id.* at 491. Unlike technical questions, agencies have no special insight into the separation of powers.

2. *Free Enterprise Fund* was no outlier. The notion that claimants need not subject themselves to unconstitutional agency proceedings just to challenge those proceedings in court runs through multiple cases.

Take *Mathews v. Eldridge*, 424 U.S. 319 (1976), a social security case. The Social Security Act authorizes judicial review of only "final decision[s] of the Commissioner of Social Security made after a hearing." 42 U.S.C. § 405(g). The claimant in *Eldridge* never raised his "constitutional claim to a pretermination hearing" to the agency, much less after a hearing. 424 U.S. at 328-29. Yet the Court allowed the claimant to proceed directly to district court, reasoning that the claimant's "constitutional

challenge is entirely collateral to his substantive claim of entitlement." *Id.* at 330. The claimant did not have to face the burdens of lengthy agency proceedings just to challenge the constitutionality of those proceedings in court. *Id.* at 330-31.

Or take *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991). There, the Court held that an administrative-review scheme that preconditioned judicial review on voluntary surrender for deportation did not "as a practical matter" afford "meaningful" judicial review. *Id.* at 496. The Court explained: "[T]hat price is tantamount to a complete denial of judicial review." *Id.* at 496-97.

By contrast, an administrative scheme precludes immediate judicial review only where Congress evinces a clear intent to strip district courts of jurisdiction over the specific claims at issue. *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), demonstrates how high that bar is. Former federal employees challenged their termination on constitutional grounds, seeking reinstatement and back-pay. *Id.* at 6-8. But this Court found it clear that the Civil Service Reform Act channeled all challenges to federal terminations first to the Merit Systems Protection Board (MSPB), and then to the Federal Circuit. *Id.* at 11-12. Most importantly, the Act's text clearly encompassed challenges to the injury the petitioners had already suffered—termination—and directed such challenges to the MSPB, no matter their nature. *Id.* at 12. Allowing constitutional challenges to terminations to proceed in district court, while relegating other challenges to the MSPB, risked incoherent parallel litigation. *Id.* at 14.

Given the clarity of the statutory text, *Elgin* treated the *Thunder Basin* factors as ancillary points. *See id.* at 15-16. Nonetheless, the Court concluded, all three factors disfavored immediate review. First, petitioners could still

obtain meaningful judicial review: Even though the MSPB only addresses non-constitutional objections to terminations, the Federal Circuit could later address constitutional objections. *Id.* at 21. Second, petitioners' constitutional objections were the vehicle for challenging their terminations, and thus were not "wholly collateral" to the agency proceeding. *Id.* at 21-22. Finally, because petitioners at heart challenged their terminations, the MSPB could potentially adjudicate those terminations on other grounds and thereby cure petitioners' injury without addressing the constitutional issue. *Id.* at 23. In sum, *Elgin* illustrates when parties have to go to the agency first: where the relevant statute unambiguously channels all challenges to the agency and the constitutional challenge is wholly wrapped up with the merits.

3. Those precedents make this an easy case. *Free Enterprise Fund* alone should resolve the question presented. "[L]ike cases should generally be treated alike." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018). Nothing about Cochran's multi-layer removal challenge to the SEC's ALJs justifies a different result from the *Free Enterprise Fund* petitioners' multi-layer removal challenge to the SEC-supervised PCAOB.

Applying the *Thunder Basin* framework anew produces the same result. Section 78y does not expressly bar jurisdiction. *Free Enter. Fund*, 561 U.S. at 489. And all three *Thunder Basin* factors point one way: Congress did not implicitly channel constitutional challenges to the SEC's structure and procedures to the agency itself.

a. **Meaningful Judicial Review.** Forcing parties before the SEC to litigate all the way to a final order just to obtain judicial review of the SEC's unconstitutional structure and procedures would produce too little review, too late. Judicial review is, by definition, not "meaningful" if

it comes only after the allegedly unconstitutional act "would have already taken place." *See Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) (plurality opinion). Parties incur irreparable harm when an unconstitutionally structured agency subjects them to unconstitutional procedures. No matter the outcome of the particular proceeding, parties have been deprived of their right to have their cases heard by constitutionally accountable decision-makers employing constitutionally adequate procedures. Only pre-enforcement review can avert those injuries. Resp. Br. 37-41.

The government is incorrect that *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980), treated enduring an unconstitutional process as a non-cognizable harm. *Axon* Br. in Opp. 12-13. The Court's analysis there turned on the lack of final agency action, not the lack of injury. 449 U.S. at 238. Anyway, the injury here far exceeds the "expense and annoyance of litigation." *See id.* at 244 (citation omitted). Being subjected to unconstitutional proceedings before an unconstitutionally structured agency is a classic "'here-and-now' injury" for courts to adjudicate. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2196 (2020) (citation omitted).

Further, back-end judicial review is an illusory promise when the price of getting to court is to risk an SEC order imposing a career-destroying penalty. The SEC can bar private parties from their chosen profession and collect monetary penalties long before a federal court ever decides parties' structural constitutional claims. *See* 15 U.S.C. § 78y(c)(2). Even a pending SEC enforcement action operates as a scarlet letter in financial industries, while charges can take years to resolve. *See* Andrew N. Vollmer, *Submission of Comments on Improving and Reforming Regulatory Enforcement and Adjudication at the Securities and Exchange Commission* 4 (Mar. 9,

2020), https://bit.ly/3Oqisyz; Lucia Cert. Amicus Br. 12-13.

Faced with crushing litigation costs, long odds, and severe penalties for losing, the vast majority of defendants choose to settle, even if the SEC's case is baseless. Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. Pa. J. Const. L. 45, 57 (2016). As the SEC's former head of the Division of Enforcement has acknowledged, the SEC will even "threaten[] administrative proceedings" to cajole settlements. Brian Mahoney, *SEC Could Bring More Insider Trading Cases In-House*, Law360 (June 11, 2014), https://bit.ly/3MYoKUM. Parties haled before the SEC should not have to "bet the farm" just to argue that those SEC proceedings are inherently unconstitutional. *See Free Enter. Fund*, 561 U.S. at 490.

In short, this case shares the hallmarks of *Free Enterprise Fund*. Here as there, respondent challenges the multi-layered removal protections that insulate SEC inferior officers. Respondent cannot appear before the agency without "already hav[ing] suffered the injury that [she is] attempting to prevent." *See Tilton v. SEC*, 824 F.3d 276, 298 (2d Cir. 2016) (Droney, J., dissenting). And here, as there, parties subjected to agency proceedings risk unacceptably high sanctions just to get to court.

Judge Costa's dissent below dismissed those parallels only by cabining *Free Enterprise Fund* as a one-off. On Judge Costa's read, regulated parties may only challenge the constitutionality of an agency's basic setup *before* the agency takes an enforcement action. *See* Pet.App.99a-101a (Costa, J., dissenting). Once the agency raises the stakes by doing something concrete, parties apparently must see that process through to obtain judicial review of those same cross-cutting challenges. *See id.*

That is pre-enforcement review in name only. The SEC assigns an ALJ only *after* the agency commences an enforcement action. A challenge to ALJ tenure protections may ripen only when an ALJ with tenure protections is assigned to the case. Pet.App.70a-71a (Oldham, J., concurring). The dissent's approach thus amounts to a catch-22: A party can have a claim with jurisdiction, or a ripe claim, but not both.

The "implicit dotted line precariously positioned between investigation and enforcement" also "makes little practical sense." Pet.App.64a-65a (Oldham, J., concurring). SEC investigation and enforcement blend together in practice. Investigation may "look[] a lot like litigation," with investigators empowered to administer oaths, subpoena witnesses, and take evidence. Pet.App.66a-67a (Oldham, J., concurring). And investigations may continue even after official enforcement proceedings have begun. 17 C.F.R. § 201.230(g). Nothing in section 78y indicates that Congress wanted to abruptly close the window for pre-enforcement review the moment the SEC initiates formal charges. Resp. Br. 41-43.

b. **Collateral Challenges.** When Congress prescribes a judicial-review scheme for specific agency actions, such language does not implicitly preclude immediate judicial review of structural constitutional challenges. After all, challenges to an agency's structure and foundational procedures have nothing to do with any particular agency action or case. Thus, *Free Enterprise Fund* deemed a structural constitutional objection to the PCAOB's multi-layered tenure protections collateral to review of any particular agency action because petitioners "object[ed] to the Board's existence," not to "any Commission orders or rules." 561 U.S. at 490. Challenges to the SEC ALJs' multi-layered tenure protections are equally

collateral. Respondent's challenge impugns *every* adjudication, independent of the merits. Resp. Br. 34-36.

The dissent below countered that structural challenges are not wholly collateral when they "arise[] as a result of the actions the agency took during the challenged proceedings." Pet.App.104a (Costa, J., dissenting). Because respondent would not have a constitutional objection if the SEC had not targeted her, the dissent deemed her claim "inextricably intertwined" with the enforcement proceeding. *Id.* (citation omitted). Were that view correct, *Free Enterprise Fund* would have been wrong. There, too, petitioners were injured only because an unconstitutional body acted against them. *See* 561 U.S. at 487. Yet this Court had little doubt that a "general challenge" to an agency's structure is collateral to specific orders "from which review might be sought." *Id.* at 490. Because structural challenges always arise from some action the agency took against a party, the dissent's view would render wholly collateral challenges a nullity.

c. **Lack of Agency Expertise.** Finally, this Court routinely declines to infer that Congress implicitly designated agencies as the threshold arbiters of challenges they lack the competence or jurisdiction to resolve. *E.g.*, *Carr v. Saul*, 141 S. Ct. 1352, 1360-61 (2021); *Free Enter. Fund*, 561 U.S. at 491; *Califano v. Sanders*, 430 U.S. 99, 109 (1977). The point of administrative review is ordinarily for the agency to bring its specialized expertise to bear on substantive matters within its bailiwick. *See Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

Constitutional challenges to the agency's structure and foundational procedures fall at the opposite end of the spectrum. Agencies lack "competence and expertise" on structural constitutional law. *Free Enter. Fund*, 561 U.S. at 491. "[S]tructural constitutional challenges" are matters which "agency adjudications are generally ill suited

to address." *Carr*, 141 S. Ct. at 1360. Even the dissent below recognized that "[p]urely legal questions . . . like issues of constitutional law . . . do not generally benefit from agency expertise." Pet.App.106a (Costa, J., dissenting). Requiring parties to first raise challenges before an agency that is ill-equipped—or even incapable—of resolving them would be illogical and futile.

The dissent below sidestepped that conclusion by looking at the SEC's expertise on "the overall case." *Id.* Because the SEC could "obviate the need" for judicial review by ruling for respondent on the merits, the dissent thought that the agency had relevant expertise. *Id.* (quoting *Elgin*, 567 U.S. at 22). But the question is whether the agency has "competence and expertise" as to the "claims" at issue—not whether the agency could somehow bypass those claims through other rulings in the case. *Free Enter. Fund*, 561 U.S. at 491. Otherwise, courts would never get first crack at *any* challenge to an agency's existence. Pet.App.77a-78a (Oldham, J., concurring). Agencies could always trot out the wait-and-see-the-merits refrain, even as they decline to engage with the underlying constitutional problems. And regulated parties would be forced to endure the unconstitutional proceedings unless and until the agencies called them to a halt. Congress did not implicitly subject parties seeking judicial review to that cat-and-mouse game.

II. The SEC's Constitutional Flaws Make Pre-enforcement Review Critical

The SEC's pervasive, fundamental flaws make pre-enforcement judicial review all the more critical. SEC proceedings often take years and impose enormous expenses, while depriving private parties of bedrock constitutional protections. The SEC's decision-makers wield an array of executive powers, but are insulated from

meaningful accountability to the President. The SEC adjudicates important private rights, arrogating power reserved to Article III courts and juries. And the SEC's operating procedures tilt the scales overwhelmingly in its favor. Parties know going in that the SEC and its ALJs side with agency lawyers the vast majority of the time. Given the SEC's immense powers to levy penalties, bar individuals from their chosen professions, and inflict business-destroying reputational harm, most parties haled before the SEC settle. Forcing parties to go to the SEC first thus rewards the agency for its prolific constitutional flaws. Precisely because the agency enjoys enormous, unchecked authority, the SEC can effectively frustrate back-end judicial review.

1. **Unaccountable Decision-Makers.** The Constitution vests the whole "executive Power" in the President, U.S. Const. art. II, § 1, cl. 1, and charges the President with "tak[ing] Care that the Laws be faithfully executed," *id.* § 3. Thus, the President must be able to exercise the "power to remove—and thus supervise—those who wield executive power on his behalf." *Seila Law*, 140 S. Ct. at 2191; *accord Free Enter. Fund*, 561 U.S. at 513-14.

SEC adjudications thwart that chain of command. Like the FTC ALJ, the SEC's five ALJs—the frontline agency decision-makers—are unconstitutionally insulated from presidential control. Because all executive power flows from the President, Article II requires that the President have some means to remove all subordinate officers who exercise part of the executive power. *Free Enter. Fund*, 561 U.S. at 513-14. In particular, the President cannot constitutionally "be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer." *Id.* at 484.

SEC ALJs' tenure protections are thus plainly unconstitutional, as the Fifth Circuit recently held. *Jarkesy v.*

SEC, 34 F.4th 446, 463-65 (5th Cir. 2022). SEC ALJs are inferior officers who wield significant executive authority in enforcement proceedings. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018). Yet, to remove an ALJ, the SEC itself must initiate removal proceedings and a separate agency, the Merit Systems Protection Board, must find "good cause" for the ALJ's removal. 5 U.S.C. § 7521(a). But by statute, the President is constrained in removing members of the MSPB. *Id.* § 1202(d) (removal "only for inefficiency, neglect of duty, or malfeasance in office"). SEC ALJs therefore enjoy at least two layers of tenure protection.

That structure is unconstitutional, as "the President can neither oversee [those officers] himself nor attribute [their] failings to those whom he *can* oversee." *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1982 (2021) (internal quotation marks omitted). Indeed, the government has acknowledged that SEC ALJ tenure protections raise serious constitutional concerns since 2017. Gov't Cert. Resp. 20-21, *Lucia*, 138 S. Ct. 2044 (No. 17-130); Gov't Br. 47-48, *Lucia*, 138 S. Ct. 2044 (No. 17-130). Today, insulating ALJs from presidential control is plainly unconstitutional.

2. **Non-Article III Adjudication of Private Rights.** It is bad enough to force private parties to make their case to constitutionally unaccountable SEC decision-makers as a prerequisite to judicial review. Worse, shunting challenges to the agency first and courts later inflicts additional constitutional harm by allowing the SEC to adjudicate classic private rights that can be abridged by the federal government only through Article III courts and Seventh Amendment juries.

Administrative agencies might have a proper role in adjudicating public rights, i.e., "matters arising between the government and others, which from their nature do

not require judicial determination." *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) (internal quotation marks omitted). Thus, agency adjudications of mine safety regulations or public-employment protections raise no Article III concerns. *See Thunder Basin*, 510 U.S. at 202-04; *Elgin*, 567 U.S. at 5. Those schemes exist by legislative "grace" and any relief "flow[s] from a federal statutory scheme." *Cf. Stern v. Marshall*, 564 U.S. 462, 493 (2011).

But, "in general, Congress may not withdraw from judicial cognizance" the adjudication of private rights, including "any matter which, from its nature, is the subject of a suit at the common law." *Id.* at 484 (internal quotation marks omitted). The adjudication of private rights is at the heart of the "judicial Power," which the Constitution assigns to "Article III judges in Article III courts." *Id.* Similarly, the Seventh Amendment protects the right to a jury trial for all actions "analogous to 'Suits at common law.'" *Tull v. United States*, 481 U.S. 412, 417 (1987) (quoting U.S. Const. amend. VII). That includes actions for civil penalties, which were historically tried by English law courts. *Id.* at 418.

Like FTC actions, many SEC enforcement actions derive from common-law causes of action, and thus adjudicate private rights. Securities fraud, for example, has "common-law roots." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 344 (2005). "Common-law courts have heard fraud actions for centuries." *Jarkesy*, 34 F.4th at 455. And courts today still look to the common law to define the elements of fraud. *E.g.*, *Field v. Mans*, 516 U.S. 59, 69 (1995). Likewise, the SEC's authority over insider trading rests on breaches of fiduciary duty, another common-law tort. *See Salman v. United States*, 137 S. Ct. 420, 427 (2016); David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 B.U. L. Rev. 1011, 1034-36 (2011).

SEC actions like these adjudicate quintessential private rights. *Jarkesy*, 34 F.4th at 459. Such actions belong in Article III courts. And, when civil penalties are at stake, these actions belong before a Seventh Amendment jury. *Tull*, 481 U.S. at 422-25; *Jarkesy*, 34 F.4th at 457.

Compounding the problem, the SEC's statutory scheme deprives courts of de novo review at the back end. Federal courts must treat SEC factual findings as "conclusive" "if supported by substantial evidence." 15 U.S.C. § 78y(a)(4). Thus, federal courts cannot truly render "the ultimate decision" on private rights as required by Article III. *See United States v. Raddatz*, 447 U.S. 667, 683 (1980); *see also B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 173 (2015) (Thomas, J., dissenting).

3. **Due-Process and Equal-Protection Violations.** SEC adjudications also involve inherently arbitrary and unfair procedures.

a. Start with the SEC's power to choose its preferred forum. Like the FTC, the SEC can unilaterally decide whether to bring enforcement actions seeking monetary penalties in federal court or in agency adjudications. *Jarkesy*, 34 F.4th at 461; *see* 15 U.S.C. §§ 78u(d)(1), 78u-2(a). That threshold decision carries critical consequences for the rest of the proceedings. If the case proceeds in federal court, the Federal Rules of Evidence and Civil Procedure apply; private parties enjoy full cross-examination rights; Article III judges develop the record; and courts of appeals review fact-findings for clear error.

But if the SEC opts for agency proceedings, an SEC ALJ presides over hearings that need not comply with the Federal Rules of Evidence. *See* 17 C.F.R. § 201.320. That ALJ, not a court, makes initial factual and legal findings. *Id.* §§ 201.110, .360. SEC Commissioners then review

ALJ findings without taking new evidence. *Id.* § 201.411(a). And federal courts review that decision only with deference to agency findings. 15 U.S.C. § 78y(a)(4).

The SEC's failure to account for *why* it sends some cases to adjudication and others to federal court flouts basic equal-protection principles, which require the government to have a "rational basis" for treating similarly situated parties differently. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1543 (2022). The SEC's formal rules obscure how the agency makes this decision, stating only that the SEC enjoys "discretion." 17 C.F.R. § 202.5(b). The SEC's website adds only that the decision "may depend upon various [unspecified] factors." SEC, *How Investigations Work* (Jan. 27, 2017), https://bit.ly/3O8Hgv8. The SEC once disclosed a list of nonexhaustive considerations, then rescinded even that barebones guidance. Alexander I. Platt, *"Gatekeeping" in the Dark*, 72 Admin. L. Rev. 27, 46 n.98 (2020). In short, the SEC has failed to afford any rational basis for how it makes a critical jurisdictional decision.

And, in practice, the SEC's decision-making on this score looks even more indefensibly arbitrary. In one case, the SEC pursued 28 defendants from the same insider-trading scheme in federal court, but singled out one defendant for administrative proceedings "with not even a hint . . . as to why." *Gupta v. SEC*, 796 F. Supp. 2d 503, 514 (S.D.N.Y. 2011). Pressed for a reason, the SEC pointed to only its plenary authority, a justification the court found "bizarre." Patricia Hurtado, *Gupta Administrative Action by SEC Is 'Bizarre,' Judge Says*, Bloomberg (Mar. 16, 2011), https://bloom.bg/3aDy8jd.

b. When the SEC hales parties before the agency, its procedures inflict additional constitutional harms. "[A] fair trial in a fair tribunal is a basic requirement of due process." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868,

876 (2009) (citation omitted). Yet at the SEC, the playing field is tilted from kickoff to the final whistle. A single agency serves as investigator, grand jury, prosecutor, judge, and jury. Agency staff investigate potential violations. 15 U.S.C. § 78u(a)(1); 17 C.F.R. § 203.4(b). The Commission begins adjudicative proceedings by voting to issue a complaint. 17 C.F.R. § 201.200. An SEC ALJ adjudicates the complaint in an adversarial proceeding between SEC prosecutors and the private party. *See id.* § 201.360. The Commission then circles back and acts as the final judge of whether the party has violated any laws. *See id.* § 201.411.

At that stage, the Commission empowers itself to "make any findings or conclusions that in its judgment are proper and on the basis of the record." *Id.* § 201.411(a). This includes the power to revisit factual findings and inferences de novo. *See, e.g.*, Francis V. Lorenzo, Exchange Act Release No. 74836, 2015 WL 1927763, at *10 n.32, *11 (Apr. 29, 2015), *vacated in part by Lorenzo v. SEC*, 872 F.3d 578 (D.C. Cir. 2017). That ability to rewrite credibility and factual determinations without hearing testimony raises serious due-process questions. As then-Judge Kavanaugh put it, "[s]o much for a fair trial." *Lorenzo*, 872 F.3d at 599 (Kavanaugh, J., dissenting).

Parties shunted into SEC administrative proceedings face a stacked deck. Private parties have at most ten months to review and prepare a defense in complex securities litigation. 17 C.F.R. § 201.360(a)(ii). Discovery is severely limited. Private parties receive at most seven depositions, including fact and expert witnesses. *Id.* § 201.233(a). In cases the Commission deems simple, parties receive no depositions at all. *Id.* By contrast, the SEC deems its investigations "private[]" and "informal," giving the agency unlimited time before initiating proceedings to

gather evidence and build its case. *See How Investigations Work*, *supra*.

Administrative proceedings also let the SEC shift the law in its favor for the next go-round. By making decisions itself, the SEC can win *Chevron* deference and play legislator, prosecutor, and judge all at once. *See* Jed S. Rakoff, *Is the S.E.C. Becoming a Law unto Itself?* 7-11 (Nov. 5, 2014), https://bit.ly/3Q7Wgux. That exercise in "administrative fiat," *id.* at 12, further loads the dice.

Given these tremendous structural advantages, it is no surprise that the SEC fares far better in its own administrative proceedings than before Article III courts. Between 2010 and 2015, the SEC won 90% of its cases in administrative proceedings, compared to just 69% in federal court. Jean Eaglesham, *SEC Wins with In-House Judges*, Wall St. J. (May 6, 2015), https://on.wsj.com/3H9IRhB. That stretch includes a 219-case winning streak that puts UConn women's basketball to shame. *See* Ryan Jones, Comment, *The Fight Over Home Court*, 68 S.M.U. L. Rev. 507, 509 (2015). Over the same period, the Commission decided 95% of party appeals from ALJ decisions in its own favor. Eaglesham, *supra*.

On top of all that, the SEC wields press releases as weapons, damning respondents before agency adjudicators have found any wrongdoing. Russell G. Ryan, *Get the SEC Out of the PR Business*, Wall St. J. (Nov. 30, 2014), https://on.wsj.com/3zLUh9D. One case-opening press release, for example, declared that the respondent undertook "a calculated fraud exploiting terminally ill patients" that "stole [patients'] most private information for personal monetary gain." SEC, *SEC Announces Charges Against Brokers, Adviser, and Others Involved in Variable Annuities Scheme to Profit from Terminally Ill* (Mar. 13, 2014), https://bit.ly/3HKsbxq. No surprise, the respondent settled. Michael A. Horowitz, Securities Act

Release No. 3884, 2014 WL 3749703 (July 31, 2014). Such press releases can result "in a substantial tarnishing of the name, reputation, and status of the named respondent." *FTC v. Cinderella Career & Finishing Schs., Inc.*, 404 F.2d 1308, 1313 (D.C. Cir. 1968).

With those odds and reputational risks, parties frequently succumb to intense settlement pressure. In the first half of fiscal year 2016, 98% of public-company respondents settled the day the SEC initiated charges. Mark, *supra*, at 57. In the words of the former SEC Deputy General Counsel, "[m]any SEC cases lack merit, but the defendants settle" anyway. Vollmer, *supra*, at 4. That skewed calculus severely limits the value of post-enforcement judicial review.

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As with the FTC, these harms will only grow as the SEC subjects more parties to its constitutionally defective procedures. Over the last two years, the SEC has dramatically expanded the number and scope of its administrative enforcement actions. *E.g.*, Dave Michaels, *SEC Expands Enforcement Staff's Power to Start New Investigations*, Wall St. J. (Feb. 9, 2021), https://on.wsj.com/3tn2M6Y; Tory Newmyer, *SEC Nearly Doubles Its Crypto Enforcement Team to Police Fraud*, Wash. Post (May 3, 2022), https://wapo.st/3ttHeFY. The SEC has also stepped up enforcement actions in unsettled areas of law, allowing the agency to extract settlements without boxing itself in with clear rules for future cases. Two commissioners recently criticized that practice as "clue-by-enforcement." CoinSchedule (July 14, 2021) (statement of Peirce & Roisman, Comm'rs), https://bit.ly/3tI1tQq.

Like the FTC, the SEC has usurped substantial power—investigating, adjudicating, and operating in unconstitutional ways. Yet, most parties haled before the

SEC have no meaningful prospect of judicial review. Faced with the threat of serious sanctions and odds loaded in the SEC's favor, few private parties persevere through administrative proceedings in hope of vindicating their rights in court down the line. The few that do often end up back in front of the same agency, facing further unconstitutional proceedings. That these constitutional problems recur across multiple agencies only underscores why pre-enforcement judicial review is an indispensable safeguard of constitutional rights. It defies credulity—not to mention this Court's holding in *Free Enterprise Fund*—to say that Congress foreclosed that vital check just by providing for judicial review of final SEC orders in the courts of appeals.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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