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 OF RAYMOND J. LUCIA, SR., GEORGE R. JARKESY, JR., AND CHRISTOPHER M. GIBSON AS *AMICI CURIAE* SUPPORTING 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.

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## INTEREST OF *AMICI CURIAE*

Raymond J. Lucia, Sr. is a former investment professional who had an unblemished career of nearly forty years before he found himself in the crosshairs of the Securities and Exchange Commission's "'bold and unrelenting'" enforcement tactics.[*] Mary Jo White, SEC Chair, *A New Model for SEC Enforcement* (Nov. 18, 2016), tinyurl.com/ul7njec. Mr. Lucia's five-year fight against the SEC's unconstitutional administrative process—culminating in a victory before this Court, *see Lucia* v. *SEC*, 138 S. Ct. 2044 (2018)—almost bankrupted him. On remand, Mr. Lucia continued to fight for two more years, collaterally challenging his unconstitutional remand proceedings before being forced to settle. *See Raymond J. Lucia Cos.* v. *SEC*, 2019 WL 3997332 (S.D. Cal. Aug. 21, 2019), *appeal dismissed sub nom. Lucia* v. *SEC*, 2020 WL 5588651 (9th Cir. June 23, 2020).

George R. Jarkesy, Jr. is an investment professional whose untarnished record spanned nearly two decades. He is not, and for decades has not been, required to register with the SEC. Nevertheless, he too found himself in the SEC's crosshairs in 2013. After the lower courts closed the courthouse doors on his collateral constitutional challenge, *see Jarkesy* v. *SEC*, 48 F. Supp. 3d 32, 38, 40 (D.D.C. 2014), *aff'd*, 803 F.3d 9 (D.C. Cir. 2015), he fought the SEC for five more years before finally being able to obtain judicial review of his constitutional claims. His appeal on direct review remains pending today.

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[*] All parties have consented to the filing of this brief by filing blanket consents with this Court. *Amici* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Christopher M. Gibson is a former investment adviser who has been trapped in a nightmare involving the SEC for much of his professional life. During a two-year investigation and six-year litigation before a biased and unconstitutional adjudicator, Mr. Gibson has vigorously contested the truth of the SEC's allegations against him. It is now four years since *Lucia* required a new hearing in his case; yet the Commission has refused even to schedule oral argument or enter any final decision. Because lower courts have refused to hear his collateral constitutional challenges, *see Gibson* v. *SEC*, 2019 WL 5698679 (N.D. Ga. May 8, 2019), *aff'd*, 795 F. App'x 753 (11th Cir. 2019), the SEC's delays have entirely barred Mr. Gibson's access to an Article III court.

Thus, for *years*—seven years for Mr. Lucia (before he settled), over seven years for Mr. Jarkesy, and six years (and counting) for Mr. Gibson—lower courts refused to decide whether *Amici* were being forced to defend themselves before an unconstitutional tribunal. This is not the outcome Congress intended, nor one the Constitution permits. Federal courts sit to resolve constitutional disputes between citizens and the government—not to avoid them. *Amici* therefore respectfully urge this Court to afford Ms. Cochran (and hundreds like her) the one thing *Amici* sought these many years: their day in court.

## SUMMARY OF ARGUMENT

Each year hundreds of individuals are compelled to defend themselves in the SEC's in-house tribunals. *Amici*'s own experiences attest that collateral litigation in a federal district court is the only way to "afford[ ] meaningful review" of defendants' structural-constitutional challenges to those proceedings. *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994).

Absent the availability of a collateral challenge, there is normally *no* realistic chance of any judicial review. As the then-top enforcement official at the SEC has openly bragged, the mere "'threat[ ] [of] administrative proceedings'" is enough to coerce settlement—without any judicial review—in the "'vast majority of [the SEC's] cases.'" *Tilton* v. *SEC*, 824 F.3d 276, 298 n.5 (2d Cir. 2016) (Droney, J., dissenting) (quoting SEC's then-Director of Enforcement). *Amici* know first-hand how the procedural unfairness built into the SEC's proceedings imposes a crushing burden, making defendants generally unemployable during the proceedings and forcing them to exhaust all their resources as they wait years to have their day in court.

Even in the rare case where a defendant fights long enough to obtain direct judicial review, that review is not meaningful. *Amici* learned the hard way that judicial review only *after* being subjected to a biased SEC proceeding for years remedies nothing. Indeed, after such review, the SEC has both refused to provide the required remedy and prevented Article III courts from reviewing the sufficiency of its "remedy."

## ARGUMENT

For years, the SEC subjected *Amici* to the "'here-and-now' injury" of being forced to defend themselves against an unconstitutional administrative tribunal. *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2196 (2020) (citation omitted). And thus, for years, *Amici* have suffered. They have been unemployable in their chosen profession and unable to obtain a license in other professions; their bank and brokerage accounts have been closed; interest rates on their loans have skyrocketed; and their assets have been decimated—all while the SEC (through biased press releases ghostwritten by the Enforcement Division) has dragged

their reputation through the mud, and left it there, *see* Russell G. Ryan, *Get the SEC out of the PR Business*, Wall St. J. (Nov. 30, 2014), tinyurl.com/582w4c5f.

For *years*.

As *Amici* know too well, the crushing process of litigating against the SEC—at the SEC—makes "meaningful review" of their structural-constitutional challenges practically impossible. *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994). This Court therefore should ensure that nobody has to wait for nearly a decade before a court can adjudicate her structural-constitutional dispute with the government. The decision below should be affirmed.

## I. AFTER-THE-FACT JUDICIAL REVIEW USUALLY IS NOT AVAILABLE AS A PRACTICAL MATTER.

By design, "the vast majority" of SEC proceedings have no realistic opportunity for judicial review because they "end in settlements." *Tilton* v. *SEC*, 824 F.3d 276, 298 n.5 (2d Cir. 2016) (Droney, J., dissenting). That is because, as two current administrative law judges (ALJs) put it, the SEC's proceedings are so "slanted against defendants" that almost no one has the time, resources, and energy needed to fight it out to the end. Office of Inspector General, Report of Investigation, Case No. 15-ALJ-0482-1, at 20 (2016), tinyurl.com/y9xjr7fr.

Mr. Lucia knows this unjust reality all too well. It took three years for the SEC to issue a final decision in his case, and three more years for a federal court to uphold his Appointments Clause challenge and vacate that decision. *See In re Raymond J. Lucia Cos.*, 2015 WL 5172953, at *2 (SEC Sept. 3, 2015), *vacated sub nom. Raymond J. Lucia Cos.* v. *SEC*, 736 F. App'x 2 (D.C. Cir. 2018). Even then, however, no federal court

ever heard his remaining constitutional challenges. Nearly bankrupted by his first enforcement proceeding and facing *another* trip through the SEC's administrative gauntlet, Mr. Lucia was finally forced to settle two years later. *See In re Raymond J. Lucia Cos.*, 2020 WL 3264213 (SEC June 16, 2020).

Other *Amici* have had it even worse. Mr. Gibson still has not obtained any judicial review after *eight years*, including a two-year investigation. *See In re Gibson,* 2016 WL 1213259 (SEC Mar. 29, 2016) (order instituting proceedings). Even though this Court's *Lucia* decision required a "new hearing" in his case four years ago, *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 (2018), the SEC has prevented his constitutional challenges from reaching an Article III court by refusing to enter any final decision. And Mr. Jarkesy had to fight for *nine years*, including a two-year investigation, before only recently having his day in court, *see Jarkesy* v. *SEC*, 34 F.4th 446 (5th Cir. 2022)—and that was an "expedited" process, *In re John Thomas Capital Mgmt. Grp. LLC*, 2015 WL 728006, at *2 (SEC Feb. 20, 2015).

While Mr. Jarkesy and Mr. Gibson so far have been able to withstand the intense pressure to settle, despite great personal cost, they are the exception, not the norm. As a practical matter, judicial review normally is not attainable in SEC administrative actions. Because SEC proceedings take years, defendants usually "settle because their business, job, or personal relationships will not survive sustained adverse publicity repeating the SEC's allegations over and over during the long life of litigation." Comments of Andrew N. Vollmer on Office of Mgmt. & Budget Request for Information, OMB-2019-0006, at 4 (Mar. 9, 2020), tinyurl.com/y5qcknzx.

Far too often, defendants like Mr. Lucia face financial ruin before they can obtain judicial review. In addition to incurring steep legal fees, defendants are generally unemployable while their administrative action is pending (and long after that as well). Their chosen profession is out of the question. *See*, *e.g.*, FINRA R. 1014(a)(3)(C) (judging membership based in part on whether applicant "is the subject of a pending . . . regulatory action or investigation by the SEC"). So is obtaining a license in another profession. Starting their own firm usually is not possible, as the pending action makes lenders disinclined to lend, especially at a reasonable cost. Nor is self-funding an option—as Mr. Gibson, Mr. Jarkesy, and Mr. Lucia all learned—because banks and brokerage firms close the accounts of anyone on the wrong side of the "v." in an SEC proceeding.

The downside risk of losing to the SEC compounds the pressure to throw in the towel and forego any constitutional challenge to the SEC's home-court process. The SEC slapped Mr. Jarkesy, for example, with civil penalties of $300,000, disgorgement of $684,935, and various lifetime bans, *In re John Thomas Capital Mgmt. Grp. LLC*, 2020 WL 5291417, at *2 (SEC Sept. 4, 2020)—the "'securities industry equivalent of capital punishment,'" *Saad* v. *SEC*, 873 F.3d 297, 306 (D.C. Cir. 2017) (Kavanaugh, J., concurring) (citation omitted). Mr. Lucia similarly faced civil penalties totaling $300,000 and assorted lifetime bans. *See Raymond J. Lucia Cos.*, 2015 WL 5172953, at *2. These immense downside risks, coupled with the crushing costs and delays of litigating at the SEC, mean that—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.

The unsparing reality is that, normally, the only real choice defendants in SEC administrative actions have is to settle. Unless they have "plentiful liquid assets" or "an impressive insurance policy, targets of [SEC] actions have no [other] viable recourse but to settle." Marc I. Steinberg, *The SEC v. Mark Cuban*, Harv. L. Sch. Forum on Corp. Gov. (Apr. 11, 2019), tinyurl.com/skb2bxkn. That leaves their constitutional challenges to the SEC's one-sided process unheard and the constitutional infirmities in that process unaddressed even when the SEC brings bogus claims.

Far from allowing meaningful review, in short, this settlement-driven regime works to shield unconstitutional SEC proceedings from judicial scrutiny.

## II. AFTER-THE-FACT JUDICIAL REVIEW IS NOT MEANINGFUL.

Even in the rare case where defendants fight until the very end, it can take years of additional litigation to obtain complete judicial review—and that review hardly provides meaningful relief. As *Amici* have learned the hard way, after-the-fact judicial review fails to remedy the SEC's inherently biased in-house process; and after such review, the SEC itself refuses to provide any judicially promised remedy.

**A.** When forced to defend themselves against an unconstitutional SEC proceeding, defendants suffer a "'here-and-now' injury." *Seila Law*, 140 S. Ct. at 2196 (citation omitted). After-the-fact judicial review does not truly remedy that injury because it cannot remove the profound "tension" between the SEC's own "agency-centric process" and deeply rooted constitutional safeguards. *Lorenzo* v. *SEC*, 872 F.3d 578, 602 (D.C. Cir. 2017) (Kavanaugh, J., dissenting), *aff'd*, 139 S. Ct. 1094 (2019).

Indeed, the SEC enjoys far more than a "home-court advantage" in its own proceedings. Jean Eaglesham, *SEC Wins with In-House Judges*, Wall St. J. (May 6, 2015), tinyurl.com/y44yqfwm. In sports, a neutral arbiter applies neutral rules to the home and road team alike; at the SEC, by contrast, the home team runs the show. The government handpicks its own referees and then exerts substantial institutional pressure on those referees to (in the words of a former ALJ) place the "'burden'" on the "'accused'" to "'show that they didn't do what the agency said they did.'" Jean Eaglesham, *SEC Is Steering More Trials to Judges It Appoints*, Wall St. J. (Oct. 21, 2014), tinyurl.com/yb6dgtzb.

At the SEC's home court, moreover, the rules change depending on whether the SEC or the defendant has the ball. Time limits, for example, are rigid and rapid, *see* 17 C.F.R. § 201.360(a)(2)(ii)—until they are not. When the *defendant* asks for a continuance because, say, he was in a traffic accident, *In re J.S. Oliver Capital Mgmt., LP*, 2014 WL 10937777, at *1 (SEC Jan. 3, 2014), or just was served with a document dump "larger than the entire printed Library of Congress," *In re Harding Advisory LLC*, 2014 WL 10937716, at *2 (SEC Jan. 24, 2014), the SEC invariably denies the motion. But when the *Commission's* ALJ seeks an extension of time merely because he is busy, for example, the SEC invariably grants the motion. *See*, *e.g.*, *In re Harding Advisory LLC*, 2014 WL 4160053 (SEC Aug. 21, 2014); *In re J.S. Oliver Capital Mgmt., LP*, 2014 WL 2965407 (SEC July 2, 2014).

According to one former SEC chairman, the "protections that our civil justice system affords litigants" to "protect [their] reputation[s], livelihood[s], and property" are likewise "denied to *every* litigant in an

[SEC] administrative proceeding." Chris Cox, *The Growing Use of SEC Administrative Proceedings* 3–4 (May 13, 2015), tinyurl.com/yyusqwh2. The Commission sits as both prosecutor and judge and is unable to maintain any actual separation of these functions. *See* Dave Michaels, *SEC Says Employees Improperly Accessed Privileged Legal Records*, Wall St. J. (Apr. 6, 2022), tinyurl.com/mr6r5mmt (enforcement employees "improperly accessed documents prepared for cases being litigated in the agency's administrative court system"). Hearsay evidence is freely admitted, even when such evidence would never "be allowed into evidence in federal district court." *In re Melton*, 2000 WL 898566, at *5 (SEC July 7, 2000). And defendants are limited to just three or five depositions, *see* 17 C.F.R. § 201.233(a)—far below the ten depositions minimum allowed in federal court, *see* Fed. R. Civ. P. 30(a)(2)(A)(i), and the virtually limitless depositions and subpoenas the Commission can use to develop its own evidentiary record during its multi-year investigations, *see*, *e.g.*, 15 U.S.C. § 78u(b).

Put together, these imbalances frequently are outcome determinative. Mr. Gibson, for example, was found liable even though "[t]he record d[id] not support" the SEC's core allegations. *In re Gibson*, 2020 WL 1610855, at *30 (SEC Mar. 24, 2020). The ALJ rejected the SEC's allegations that Mr. Gibson "engaged in an improper transaction in TRX shares," *Gibson,* 2016 WL 1213259, at *2, explaining that "[t]he problem is not that Gibson caused the Fund to buy [those] shares," *Gibson*, 2020 WL 1610855, at *25. The ALJ also rejected the SEC's allegations that Mr. Gibson had fraudulently taken a "highly profitable" "short position," *Gibson,* 2016 WL 1213259, at *2, *7, explaining he "was not taking a short position contrary to the Fund's long one," and indeed "thought the

purchase of [those] shares would improve the Fund's chances of selling its remaining shares," *Gibson*, 2020 WL 1610855, at *30. Even so, the SEC judge found a novel way to rule for its home agency based on an *un-alleged* theory that Mr. Gibson had purportedly "failed to take measures to remedy or eliminate [a supposed] conflict" of interest. *Id.* at *25.

Mr. Gibson's experience with biased ALJs is far from unique. In one twelve-month period, the SEC won "all" contested cases before its ALJs, despite winning only 61 percent of cases before federal district courts. *See* Eaglesham, *SEC is Steering More Trials to Judges It Appoints*, *supra*. It is one thing to litigate on a tight deadline, or to lose a motion here and there, or even to lose one's employment, especially if judicial review is right around the corner. But it is "something else" entirely "to be subjected to this combination over a period of . . . years," by public officials who seem "bent on making life difficult." *Wilkie* v. *Robbins*, 551 U.S. 537, 555 (2007). Judicial review only after being subjected to a biased and unconstitutionally structured SEC proceeding for years is hardly meaningful.

**B.** In *Lucia*, this Court held that, "[t]o cure" a structural-constitutional defect, Mr. Lucia and other similarly situated defendants were "entitled" to a "new hearing" before a constitutionally permissible adjudicator. 138 S. Ct. at 2055. That promised remedy has been illusory.

Consider Mr. Gibson. *Lucia* required a new hearing in his case more than four years ago—yet the Commission has refused to hold oral argument or enter any final decision on whether the "hearing" it provided was constitutionally sufficient. Instead, the SEC has delayed the case indefinitely by repeatedly extending the deadline for any decision. *See*, *e.g.*, *In*

*re Gibson*, 2021 WL 1966353 (SEC May 17, 2021) (ordering extension after one year); *In re Gibson*, 2021 WL 3627089 (SEC Aug. 16, 2021) (ordering extension); *In re Gibson*, 2021 WL 5311649 (SEC Nov. 15, 2021) (same); *In re Gibson*, 2022 WL 462463 (SEC Feb. 14, 2022) (same); *In re Gibson*, 2022 WL 1539287 (SEC May 16, 2022) (same). The SEC thus has deprived Mr. Gibson of the remedy to which this Court said he "is entitled," *Lucia*, 138 S. Ct. at 2055, while preventing any federal court from reviewing that deprivation.

The SEC's playbook with Mr. Gibson and other defendants subjected to unconstitutional administrative proceedings is clear: Forestall judicial review until the defendant throws in the towel. That is precisely what the SEC did with Mr. Lucia himself. On remand in *Lucia*, the SEC transferred his administrative action to a different ALJ, but refused to remedy the structural-constitutional defects he identified in that adjudicator. Mr. Lucia collaterally fought his unconstitutional remand proceedings as long as he could—for two more years—before he was finally forced to settle in the early months of the pandemic. *See Raymond J. Lucia Cos.* v. *SEC*, 2019 WL 3997332 (S.D. Cal. Aug. 21, 2019), *appeal dismissed sub nom. Lucia* v. *SEC*, 2020 WL 5588651 (9th Cir. June 23, 2020).

* * *

"The SEC should not be the decider of its own constitutionality. But that is what is happening." Linda D. Jellum, *The SEC's Fight to Stop District Courts from Declaring Its Hearings Unconstitutional*, 101 Tex. L. R. (forthcoming 2022), tinyurl.com/ykxydwe7. This Court should make clear that the doors of federal courthouses remain open for those who find themselves before the SEC's in-house tribunals, being

squeezed to settle. There is no basis—in policy, logic, or equity—to keep those courthouse doors closed and to force defendants to suffer immense financial harm and the "'here-and-now' injury" of defending themselves against an unconstitutional tribunal. *Seila Law*, 140 S. Ct. at 2196 (citation omitted).

## CONCLUSION

The decision below should be affirmed.

Respectfully submitted.

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