No. _____

In the
Supreme Court of the United States

EGAE, LLC, ET AL.,
Petitioners,
v.

UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. In 12 U.S.C. § 1735f-15(e), Congress authorized federal Courts of Appeals to take direct review of the Secretary of Housing and Urban Development's imposition of civil monetary penalties along with "such ancillary issues" as may be raised at the administrative level. Given that scope of review, may the Court of Appeals nonetheless refuse to consider constitutional issues that were raised at the administrative level?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

EGAE, LLC, a limited liability company formed in the State of Alaska, and its managing member (the Marlow Family Exempt Perpetual Trust) are the petitioners here (and in the Ninth Circuit Court of Appeals), and were the respondents in the administrative proceedings below. No publicly owned corporation owns 10 percent or more of EGAE's membership shares, or of the Marlow Family Exempt Perpetual Trust.

The United States Department of Housing and Urban Development ("HUD") was the petitioner in the administrative proceedings below, and respondent on appeal. Benjamin Carson was, at the time this action was started, the Secretary of the Department of Housing and Urban Development ("HUD"). As of March 10, 2021, Marcia Fudge has replaced Mr. Carson as the Secretary of HUD.

STATEMENT OF RELATED PROCEEDINGS

- *EGAE, LLC et al. v. United States Department of Housing and Urban Development*, No. 20-21187 (9th Cir.) (memorandum decision affirming the order of the Secretary of HUD affirming the Administrative Law Judge's ("ALJ) order imposing civil monetary penalties on Petitioner pursuant to 12 U.S.C. § 1735f-15(e), issued on April 21, 2021; petition for rehearing and/or rehearing *en banc* denied July 1, 2021).

- *In the Matter of EGAE, LLC, and Marlow Family Exempt Perpetual Trust*, HUDOHA 18-AF-0227-CM-002 (United States of America Department of Housing and Urban Development Office of the Secretary) (order on secretarial review affirming the Initial Decision and Order issued by Administrative Law Judge Alexander Fernandez; order issued on April 7, 2020).

- *In the Matter of EGAE, LLC, and Marlow Family Exempt Perpetual Trust*, HUDOHA 18-AF-0227-CM-002 (Initial Decision and Order of United States Administrative Law Judge Alexander Fernandez imposing civil monetary penalties in the amount of $222,954; order issued on January 23, 2020).

- *In the Matter of EGAE, LLC, and Marlow Family Exempt Perpetual Trust*, HUDOHA 18-AF-0227-CM-002 (Order of United States Administrative Law Judge Alexander Fernandez granting HUD's motion for partial summary judgment regarding liability).

- *EGAE, LLC v. Marcia Fudge, in her official capacity as Secretary of the United States Department of Housing & Urban Development*, Case No.. 3:21-cv-00238-JMK (D. Alaska)(petition for judicial review and civil action for injunction and related relief to pertaining to HUD's proposed sale of mortgage).

There are no additional proceedings in any court that are directly related to this case.

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INTRODUCTION

Courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821). This Court has reversed the Ninth Circuit previously when it improperly refused to exercise jurisdiction to consider constitutional claims raised in an administrative proceeding as an affirmative defense to an agency's proposed penalties. *Horne v. Department of Agriculture*, 569 U.S. 513, 133 S.Ct. 2053, 186 L.Ed.2d 69 (2013). This case asks the Court to do so once again.

Petitioner EGAE[1] is a family business in Alaska that closed on a loan to rehabilitate a decrepit apartment building in downtown Anchorage in 2005. Shortly before the purchase, the State of Alaska declared the building to be of historical significance. However, EGAE was assured that designation meant it could qualify for valuable historic tax credits that would partially offset the costs of rehabilitating the building. Based on those assurances, EGAE proceeded to close on a HUD-insured loan for slightly over $8 million, and entered into a Regulatory Agreement for Multifamily Housing Projects ("Regulatory Agreement") with HUD.

But after closing, HUD refused to approve EGAE's master lease structure that was designed to maximize the value of those historic tax credits. HUD claimed it

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[1] Petitioner Marlow Family Exempt Perpetual Trust is the managing member of petitioner EGAE, LLC. Both petitioners shall be referred to collectively hereafter as "EGAE."

could not approve that structure because it had not yet finalized its policy on utilizing such structures, even though such historic tax credits had been available for decades. HUD's denial caused approximately $2.5 million in damage to EGAE, which losses EGAE argued eventually caused it to default on certain terms of its Regulatory Agreement.

In 2018, HUD filed an administrative complaint against Petitioners, seeking civil money penalties in the amount of $222,954 because of those defaults. EGAE's managing member Marc Marlow (who has only a high school education) represented Petitioners during the administrative hearings, and repeatedly raised as a defense the harm caused by HUD's initial decision to deny EGAE the full benefit of the tax credits. Mr. Marlow specifically argued that HUD's denial had violated Petitioners' Due Process and Equal Protection rights and constituted a Takings under the Constitution. Administrative Law Judge Fernandez ("ALJ") acknowledged EGAE's constitutional arguments, but did not engage with them and granted HUD the full amount of penalties sought. The Secretary affirmed.

In the National Housing Act (12 U.S.C. § 1701 *et seq*.), Congress created an administrative review process that allows parties such as EGAE to seek direct review in the appropriate Courts of Appeals "of the penalty and such ancillary issues" as may have been raised in the hearing. 12 U.S.C. § 1735f-15(e)(1). Despite an unambiguous record showing EGAE repeatedly raised its constitutional issues to the ALJ and to the Secretary, the Ninth Circuit (in an

unpublished decision) erroneously held that (1) it could not consider EGAE's constitutional arguments because they were allegedly raised for the first time on appeal and (2) that EGAE's constitutional defenses were not properly before the Ninth Circuit on review of a penalty decision.

This Court has repeatedly stated that administrative review regimes that foreclose consideration by courts of constitutional questions would themselves raise "a serious constitutional question of the validity of the statute as so construed." *Weinberger v. Salfi*, 422 U.S. 749, 762, 95 S.Ct. 2457, 2465, 45 L.Ed.2d 522 (1975); *see also Elgin v. Department of Treasury*, 567 U.S. 1, 9, 132 S.Ct. 2126, 2132, 183 L.Ed.2d 1 (2012) (same); *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 n.12, 106 S.Ct. 2133, 2141 n.12, 90 L.Ed.2d 623 (1986)(citing cases). By claiming it could not consider EGAE's constitutional challenges, the Ninth Circuit has now exposed the HUD review statute to such potential constitutional infirmity.

The questions of both where constitutional challenges to agency action should be considered, and the proper scope of judicial review of such challenges, are important questions for which there is an overriding need for uniform guidance. This Court already has under consideration another petition for a writ of certiorari that raises similar issues with respect to where such constitutional challenges should be raised and decided. *Axon Enterprise, Inc. v. Federal Trade Commission*, Supreme Court Case No. 21-86 (2021) (petition for writ of certiorari pending).

Congress authorized a similar scope of review for actions of the Occupational Health and Safety Administration ("OSHA"), which is why the Fifth Circuit decided in the first instance constitutional challenges to OSHA's recent vaccine mandate for employers, which issue is also likely to come before this Court. *BST Holdings, LLC, et al v. Occupational Safety and Health Adm*., Fifth Circuit Case No. 21-60845, 2021 WL 5279381 (November 12, 2021). The issue of the proper scope of review of administrative action when Congress authorizes direct review in the Courts of Appeals is one that will likely arise again and again until this Court makes a binding pronouncement.

OPINIONS BELOW

The ALJ's decision granting HUD's summary judgment motion in part (Pet. App. 27-40) is unpublished. The ALJ's decision imposing penalties (Pet. App. 9-25) is unpublished. The Secretary's decision affirming the ALJ (Pet. App. 5-8) is unpublished. The Ninth Circuit's decision affirming the Secretary's decision (Pet. App. 1-4) is unpublished (845 Fed. Appx. 616) and available at 2021 WL 1564344.

JURISDICTION

The Ninth Circuit denied EGAE's petition for reconsideration or rehearing en banc on July 1, 2021. Pursuant to this Court's COVID-19 orders, and specifically the order of Monday, July 19, 2021, EGAE timely filed this petition within 150 days of that denial. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit had jurisdiction pursuant to 12 U.S.C. § 1735f-15(e). The Secretary had jurisdiction

pursuant to 12 U.S.C. § 1735f-15(d)(1). The ALJ had jurisdiction pursuant to the same statute, and 24 CFR Part 30.

STATUTORY AND OTHER PROVISIONS INVOLVED

1. 12 U.S.C. § 1735f-15(d) provides:

(d) Agency procedures

(1) Establishment

The Secretary shall establish standards and procedures governing the imposition of civil money penalties under subsections (b) and (c). These standards and procedures—

(A) shall provide for the Secretary or other department official (such as the Assistant Secretary for Housing) to make the determination to impose a penalty;

(B) shall provide for the imposition of a penalty only after the mortgagor, general partner of a partnership mortgagor, officer or director of a corporate mortgagor, or identity of interest agent employed to manage the property has been given an opportunity for a hearing on the record; and

(C) may provide for review by the Secretary of any determination or order, or interlocutory ruling, arising from a hearing.

(2) Final orders

If no hearing is requested within 15 days of receipt of the notice of opportunity for hearing, the imposition of the penalty shall constitute a final and unappealable determination. If the Secretary reviews the determination or order, the Secretary may affirm, modify, or reverse that determination or order. If the Secretary does not review the determination or order within 90 days of the issuance of the determination or order, the determination or order shall be final.

(3) Factors in determining amount of penalty

In determining the amount of a penalty under subsection (b) or (c), consideration shall be given to such factors as the gravity of the offense, any history of prior offenses (including offenses occurring before December 15, 1989), ability to pay the penalty, injury to the tenants, injury to the public, benefits received, deterrence of future violations, and such other factors as the Secretary may determine in regulations to be appropriate.

(4) Reviewability of imposition of penalty

The Secretary's determination or order imposing a penalty under subsection (b) or (c) shall not be subject to review, except as provided in subsection (e).

(5) Payment of penalty

No payment of a civil money penalty levied under this section shall be payable out of project income.

2. 12 U.S.C. § 1735f-15(e) provides:

(e) Judicial review of agency determination

(1) In general

After exhausting all administrative remedies established by the Secretary under subsection (d)(1), an entity or person against whom the Secretary has imposed a civil money penalty under subsection (b) or (c) may obtain a review of the penalty and such ancillary issues as may be addressed in the notice of determination to impose a penalty under subsection (d)(1)(A) in the appropriate court of appeals of the United States by filing in such court, within 20 days after the entry of such order or determination, a written petition praying that the Secretary's order or determination be modified or be set aside in whole or in part.

(2) Objections not raised in hearing

The court shall not consider any objection that was not raised in the hearing conducted pursuant to subsection (d)(1) unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection. If any party demonstrates to the satisfaction of the court that additional evidence

not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at the hearing, the court shall remand the matter to the Secretary for consideration of such additional evidence.

(3) Scope of review

The decisions, findings, and determinations of the Secretary shall be reviewed pursuant to Section 706 of Title 5.

3. 5 U.S.C. § 706 provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

> **(D)** without observance of procedure required by law;
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> **(E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
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> **(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
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> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

STATEMENT

As this Court observed earlier this year, agency adjudications are ill-suited forums for constitutional challenges, as administrative law judges are usually powerless to grant any relief for such violations, and such challenges fall outside of the ALJ's technical expertise. *Carr v. Saul*, ___ U.S. ____, 141 S.Ct. 1352, 1360-1361, 209 L.Ed.2d 376 (2021). "As such, it is sometimes appropriate for courts to entertain constitutional challenges to statutes or other agency-wide policies even when those challenges were not raised in administrative proceedings." *Carr*, 141 S.Ct. at 1360. When the petitioner challenges the constitutionality of agency action, which issue may be beyond the jurisdiction of the agency itself to determine, exhaustion doctrines are applied sparingly if at all. *Weinberger v. Salfi*, 422 U.S. 749, 766, 95 S.Ct. 2457, 2467, 45 L.Ed.2d 522 (1975).

Here, Congress recognized that federal appellate courts are the more appropriate forum for considering such constitutional challenges by requiring that such courts review the "penalty and such ancillary issues" as may have been raised in the administrative proceedings. 12 U.S.C. § 1735f-15(e)(1). The APA requires such federal courts to set aside agency action that is found to be "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(b). Thus Congress, like this Court, anticipated that federal courts ultimately would be the proper forum for deciding constitutional challenges to HUD's action. Unfortunately, that did not occur here.

A. Factual Background.

In the fall of 2003, Petitioners were in the process of rehabilitating the McKinley Tower building on the east edge of Anchorage, Alaska (the "Project"), which building was described by HUD officials as an "eyesore." Pet. App. 111. The Petitioners began the process of applying for a HUD-backed mortgage loan around 2004, during which they were advised that they would need a "no-action" letter from Alaska's State Historic Preservation Office ("SHPO") to ensure that the development of the Project would not affect the preservation of historic property. Pet. App. 112. After review, the SHPO informed Petitioners' representative, Mr. Marc Marlow, that historic preservation criteria would require Petitioners to change the redevelopment plan to preserve the original look of the building but that the Project would earn Historic Tax Credit incentives that would help offset these extensive rehabilitation costs. Pet. App. 118-119.

So assured, the Petitioners then invested significant resources to change their plans, but expected to be able to recoup some of that investment by using a master lease structure to maximize the value of the Historic Tax Credits. Pet. App. 118-119. As HUD has acknowledged, "[m]aster leases are used to maximize the benefits" of Historic Tax Credits, and "are advantageous to investors and developers participating in these programs by providing maximum leverage for project financing and premium pricing for equity, while reducing the need for additional debt." Pet. App. 121.

HUD agreed to insure the development loan for the Project pursuant to Section 221d4 of the National Housing Act, 12 U.S.C. § 1701, *et seq*. Pet. App. 134. On March 8, 2005, the Petitioners executed a Regulatory Agreement (Pet. App. 76, 134) with HUD, reflecting the agency's agreement to insure Petitioner's approximately $8 million loan.[2] Pet App. 134. Thereafter, Petitioners set to work rehabilitating the property as necessary to accrue Historic Tax Credits in the project. Pet. App. 118-119. Ultimately, Petitioners expended over $12,000,000 rehabilitating the Property in reasonable reliance on recouping some of that investment by selling the accrued Historic Tax Credits

[2] The loan itself was issued by a private lender, CW Capital, LLC. Pet. App. 134. The loan was later sold to Walker Dunlop, LLC. Pet. App. 30, 51-52.

worth approximately $2,451,779.[3] Pet. App. 43, 119-120.

In March, 2006, Petitioners' representative, Mr. Marc Marlow, approached HUD's legal counsel in Anchorage with a draft proposal for a master lease to affiliate Bank of America as an investor with the Project, which would allow Bank of America to purchase the Historic Tax Credits at the then-prevailing market rate. Pet. App. 120, 135. But HUD bureaucrats in Washington, D.C. had a "policy" of rejecting all such master lease proposals because HUD had not come up yet with an official policy regarding such master lease structures, and rejected EGAE's proposed structure. Pet. App. 125, 135.

Although the Historic Tax Credit program had been part of federal law for decades already, HUD apparently did not complete its review and come up with a policy until late 2009, when it issued Mortgagee Letter 2009-40. Pet. App. 114-116, 123-124. Realistically, the Petitioners could not challenge HUD's denial in 2006 because the Historic Tax Credits could not be sold before construction was complete and a cost certification audit performed, but the Historic Tax Credits were required to be sold before tenants moved into the Project. Pet. App. 105-106, 119-120, 122.

As a result of HUD's arbitrary denial of Petitioners' proposed structure, Petitioners were forced to convey

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[3] General background information concerning the tax incentives offered for rehabilitation of historic buildings to the standards of NPS is available at https://www.nps.gov/tps/tax-incentives.htm (last visited November 20, 2021).

an ownership interest in the Project to Bank of America to recoup any value from the Historic Tax Credits. Pet. App. 114-116, 119-121. HUD has never disputed that, because of its decision to reject Petitioners' proposed master lease structure, HUD reduced the value of Petitioners' Historic Tax Credits by over $400,000.00. Pet. App. 114-116, 119-121. That loss compounded over time.

Subsequently, Petitioners discovered that HUD allowed a similarly-situated developer (Marcel Wisznia) to utilize the same master-lease structure as was proposed by Petitioners in 2006 (and denied by HUD). Pet. App. 43-44, 120-121. Mr. Wisznia was required to engage in discussions with HUD for "well over a year" before they permitted him to use the master lease structure that the Petitioners had sought to utilize. Pet. App. 119-121. It is undisputed that HUD did not have any Historic Tax Credit policy in place when it allowed Mr. Wisznia to so proceed.

Since at least 2011 and thereafter, EGAE raised with HUD numerous times the impact of HUD's arbitrary rejection of the proposed master lease arrangement, and sought relief for that impact. *E.g.*, Pet. App. 47-48, 51-52, 143. But the impact of HUD's decision only became fully apparent when a local property tax exemption that the Petitioners had negotiated for the Project expired. Pet. App. 106, 126-127. Because HUD initially failed to include a property tax reserve as one of the underwriting requirements for the loan, Petitioners' lender used their 2017 mortgage payments as payments towards the 2017 tax bill from the Municipality of Anchorage. Pet. App. 126-127.

Because the devaluation of Petitioners' Historic Tax Credits had cost Petitioners over $400,000.00 in liquid capital at the beginning of the Project, the use of the mortgage payments toward payment of the tax bill resulted in Petitioners defaulting on the mortgage as of August 1, 2018. Pet. App. 127. Following the default, HUD reacquired the loan as part of its loan guarantee obligation.

B. Procedural Background.

1. HUD initiated enforcement proceedings on August 22, 2018, despite apparently having identified problems with the Project going back to 2011. Pet. App. 6, 146 - 148. HUD alleged that Petitioners had failed to file audited financial statements for 2013-2017, and sought the maximum penalty. Pet. App. 6.

Petitioners appeared *pro se* through their representative, Mr. Marlow. Pet. App. 113 - 115. In their Answer, Petitioners admitted their failure to file audited financial statements, but denied liability for any penalty, specifically raising HUD's arbitrary treatment of its Historic Tax Credits as one of the "financial stresses on the project [that was] directly related to the audits being late." Pet. App. 143.

HUD moved for summary judgment, and Petitioner opposed the motion in part because HUD erred in the handling of the Project by not allowing a Historic Tax Credit Investor to affiliate with the project, resulting in over $400,000 loss to [Petitioners]." Pet. App. 27 - 40. The ALJ found there was no genuine issue of material fact that the Petitioners had both "knowingly" and "materially" violated Section 1735f-15(c)(1)(B)(x), but

reserved for trial the amount of the Civil Money Penalty to be awarded. Pet. App. 27 - 40.

After the ALJ's denial in part of HUD's summary judgment motion, HUD decided to schedule a "management review" of EGAE's books, records, and operations to coincide approximately with the start of the penalty phase of the trial. Pet. App. 137 – 138. EGAE asked HUD to reschedule that review, and when HUD refused, EGAE filed a motion to require HUD to reschedule that management review to a later time. Pet. App. 137. The ALJ was not amused that "somebody [at HUD] thought that scheduling a Management Review for July 29th [approximately the start of the hearing] was a good idea," granted EGAE's motion in part, and ordered:

> 1. HUD will provide sworn affidavits by the HUD officials involved explaining, in detail: 1) why no other dates are available; 2) how the July 29 date came to be chosen; 3) who was involved in the choosing of the date; and, 4) what efforts, if any at all were made to accommodate Respondents' May 10, 2019, request.
> 2. HUD will provide an accounting of how often in the last 5 years Management Review dates are changed either for HUD's convenience or for the convenience of any other impacted person.

Pet. App. 138. The ALJ allowed HUD to avoid the ALJ's review so long as it agreed to postpone the "management review" to a "mutually convenient date after Respondents' hearing." Pet. App. 138. HUD then decided to postpone the "management review" to a later time.

At the two-day penalty phase of the trial, Petitioners (again represented pro se by Mr. Marc Marlow) argued that HUD's arbitrary decision to deny Petitioners' proposed master lease structure had violated Petitioners' constitutional rights. EGAE argued that HUD's actions in denying EGAE use of the proposed master lease structure (while allowing it for others) denied Petitioners' due process and equal protection rights under the law. Pet. App. 122 - 124. EGAE also argued that HUD's decision constituted an unlawful taking of Petitioners' property (i.e., their reasonable investment-backed expectation that they would be able to maximize the value of their Historic Tax Credits as required by other federal laws to which HUD must adhere). Pet. App. 116, 124. EGAE argued that HUD's denial and continued refusal to recognize that injury breached HUD's duty of good faith. Pet. App. 124-125. Petitioners argued that constitutional violations rendered the penalty unlawful and that the damage from the constitutional violations should more than offset the proposed penalty.

In his Initial Decision and Order, the ALJ granted HUD's request for the maximum penalty allowed under the statute, holding Petitioners jointly and severally liable for the amount of $222,954. Pet. App. 9-25. The ALJ never directly addressed Petitioners' constitutional arguments, but did acknowledge that Petitioners had consistently defended on the basis that HUD had treated them unfairly:

> Respondents claim HUD's denial of their master lease was an error that resulted in $2,466,416.80 in damages. Respondent EGAE

> claims it was unfairly treated, because there is no evidence that HUD had ever denied a master lease proposal other than Respondents'. . . . HUD acknowledges that Respondent EGAE was denied the use of a master lease structure. And, HUD does not dispute Respondents' claim that the denial resulted in the diminishment of the value of the historic tax credits Respondents expected. . . . Respondents' evidence demonstrates unfortunate circumstances that may have resulted in financial losses to Respondent EGAE.

Pet. App. 23-24.

Petitioners timely sought secretarial review. As the Secretary recognized, "Respondents' Appeal claimed that HUD violated Respondent's constitutional rights and requested that the Decision be set aside." Pet. App. 6. Nonetheless, the Secretary ". . . affirm[ed] the ALJ's decision and adopt[ed] the findings and legal decisions therein" (Pet. App. 7), without addressing Petitioners' constitutional claims.

2. Pursuant to 12 U.S.C. § 1735f-15(e), Petitioners timely filed a notice of appeal from the Secretary's decision with the Ninth Circuit Court of Appeals on April 24, 2020. Now represented by counsel, Petitioners specifically briefed and more thoroughly fleshed out the same due process, equal protection and regulatory takings claims that Mr. Marlow had argued before the ALJ and the Secretary. Petitioners' Initial Brief, Case No. 20-71187, 2020 WL 5351407, *39 - 47 (9th Cir. Aug. 27, 2020). In response, HUD agreed that Petitioners had properly raised their constitutional

issues, though HUD disputed that those issues had any validity. Respondent's Answering Brief, Case No. 20-71187, 2020 WL 6366871, *25 - 29 (9th Cir. Oct. 20, 2020).

On April 21, 2021, a panel of the Ninth Circuit issued its unpublished memorandum decision affirming the Secretary. Pet. App. 1-4. The Ninth Circuit erroneously held that "Petitioners' argument that the ALJ should have considered whether HUD's denial of Petitioners' request to use a master lease precluded the award of civil money penalties pursuant to § 1735f-15(a) is forfeited because it is raised for the first time on appeal." Pet. App. 2. As explained above, Petitioners' Mr. Marlow made that argument throughout the administrative proceedings.

The Ninth Circuit also determined that it was not the proper forum for considering the constitutional claims:

> Nor is there a basis for Petitioners' argument that their rights under the Equal Protection Clause and the Takings Clause were violated. Since this is an appeal of the ALJ's decision to grant HUD civil money penalties against Petitioners, any issues stemming solely from HUD's denial of Petitioners' request to use a master lease are not properly before us. As Petitioners' constitutional arguments solely relate to the denial of the master lease, they cannot form the basis for reversal of the ALJ's ruling.

Pet. App. 4.

Petitioners filed a subsequent request for publication, which was denied. Petitioners also timely filed a petition for rehearing and/or rehearing en banc on June 4, 2021. On July 1, 2021, the Ninth Circuit denied that petition. Pet. App. 41 - 42. Petitioners now timely petition this Court.

REASONS FOR GRANTING THE WRIT

Over a dozen provisions of the United States Code currently mandate direct circuit court review of the actions of at least 20 administrative agencies and their officials.[4] *See generally* Joseph Mead and Nicholas A. Fromherz, "Choosing a Court to Review the Executive,"

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[4] *See, e.g.,* 7 U.S.C. §§ 8(a), 9, 21(i)(4), 194(h), 1600, 2714(b)(2) (Department of Agriculture); 12 U.S.C. § 2266(b) (Farm Credit Administration); 15 U.S.C. § 45(c) (1988) (Federal Trade Commission); 15 U.S.C. §§ 77i, 78y(a)(1), 79x, 80a-42, 80b-13 (Securities and Exchange Commission); 15 U.S.C. § 717r(b) (Department of Energy); 15 U.S.C. § 1710 (Department of Housing and Urban Development on interstate land sales); 15 U.S.C. § 3416(a)(4) (Federal Energy Regulatory Commission); 19 U.S.C. § 81r(c) (1988) (Foreign Trade Zones Board); 20 U.S.C. §§ 1234g, 2464(b), 2834 (Department of Education); 21 U.S.C. § 371(f) (Food and Drug Administration); 28 U.S.C. § 2342 (Federal Communications Commission, Secretary of Agriculture, Secretary of Transportation, Federal Maritime Commission, Atomic Energy Commission, Surface Transportation Board, Department of Housing and Urban Development, Railroad Safety Enforcement); 29 U.S.C. § 160(f) (National Labor Relations Board); 33 U.S.C. § 1516 (Secretary of Transportation); 42 U.S.C. § 300j-7(a) (Environmental Protection Agency); 42 U.S.C. § 2022(c)(2) (Environmental Protection Agency); 42 U.S.C. § 10139 (Department of Energy); 42 U.S.C. § 6306(b)(1) (Energy Policy and Conservation Act); 49 U.S.C. § 1133 (National Transportation and Safety Board); 33 U.S.C. § 921 (Department of Labor).

67 Admin. Law Rev. 1, 11 – 18 (2015) (describing the history and development of various statutes allowing direct circuit court review of agency action). However, only six provisions contain the expansive statutory review language at issue in this case that require the Courts of Appeals to review "the penalty and such ancillary issues"[5] – and all of them involve review of HUD's imposition of civil penalties.

HUD was established by the Housing and Urban Development Act (Public Law 89–174), effective November 9, 1965. However, Congressional concern with the mismanagement of HUD had reached a peak by 1989, which resulted in the enactment of the "Department of Housing and Urban Development Reform Act of 1989." Pub.L. 101-235, December 15, 1989, 103 Stat. 1987. It was this reform package that first gave HUD the authority to impose civil monetary penalties. But with that authority, Congress insisted on a unique provision ensuring expansive Court of Appeals' review of HUD's decisions to impose such penalties. There is little case law to guide circuit courts regarding the scope and nature of their review

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[5] 12 U.S.C. § 1701q-1(e)(1)(review of civil penalties imposed by Secretary of HUD against mortgagor); 12 U.S.C. § 1723i(d)(1)(review of civil penalties imposed by Secretary of HUD against issuers and custodians); 12 U.S.C. § 1735f-14(d)(1)(review of penalties imposed by Secretary of HUD against mortgagee or lender or others); 12 U.S.C. § 1735f-15(e)(1) (review of penalties imposed by Secretary of HUD against mortgagor or others); 42 U.S.C. § 3537a(c)(4)(A) (review of civil penalties imposed by Secretary of HUD against employees); 42 U.S.C. § 3545(h)(1)(review of penalties imposed by Secretary of HUD against applicants for assistance).

of HUD-issued penalties "and such ancillary issues."[6] This case provides an ideal vehicle to provide that guidance, and to reaffirm once again that circuit courts should exercise the jurisdiction Congress gave them to review and decide all issues raised in defense to an administrative penalty – especially allegations (such as were made here) of unconstitutional agency action.

I. The Ninth Circuit's Conclusion That It Could Not Consider Petitioners' Constitutional Arguments Contradicts Congress' Mandate, This Court's Precedent, And Is Wrong.

This Court has long applied a "strong presumption" in favor of judicial review of agency action. *Mach Mining, LLC v. Equal Employment Opportunity Commission*, 135 S.Ct. 1645, 1651 (2015). That is so because agencies are more likely to violate citizens' rights if those violations have no consequences because they are not subject to judicial review. *Mach Mining*, 135 S.Ct. at 1653. That "strong presumption" can only be overcome by "clear and convincing" indications from statutory sources that Congress intended to bar review. *Block v. Community Nutrition Institute*, 467 U.S. 340, 349-350 (1984). But foreclosing such federal court review raises "serious constitutional questions." *Elgin*, 567 U.S. at 9, 132 S.Ct. at 2132; *accord Weinberger*, 422 U.S. at 762, 95 S.Ct. at 2465; *Bowen*,

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[6] Indeed, there are only two previous circuit court decisions interpreting this statute, and neither involved review of constitutional claims. *Grier v. United States Dept. of Housing and Urban Development*, 797 F.3d 1049 (D.C. Cir. 2015); *Yetiv v. United States Dept. of Housing and Urban Development*, 503 F.3d 1087 (9th Cir. 2007).

476 U.S. at 681 n.12, 106 S.Ct. at 2141 n.12 (citing cases). The Ninth Circuit's conclusion that it could not consider Petitioner's constitutional challenges is contrary to the statutory scheme and this Court's precedents, and if allowed to stand, could foreclose any venue for raising such challenges in the future.

A. Congress Mandated That Circuit Courts Review The "Penalty And Such Ancillary Issues."

When Congress gave HUD the power to impose Civil Money Penalties in 1989, it also created a right of direct review of such penalties in the circuit courts of appeals. In doing so, Congress authorized the circuit courts to review "the penalty and such ancillary issues" as may have been raised in the hearing. 12 U.S.C. § 1735f-15(e)(1).

Congress could not have been much clearer. Had Congress meant for the circuit courts to review only the "penalty" (as concluded by the Ninth Circuit here), it would have said so. Instead, Congress added the phrase "such ancillary issues." Congress has only included the expansive phrase "and such ancillary issues" with respect to circuit court review of HUD's penalty decisions, despite otherwise providing circuit court review for the decisions of at least 20 other federal agencies. *See* fn. 6, *supra*. "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000).

The term "ancillary" mean "providing something additional to the main part or function." Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/ancillary (last accessed November 21, 2021). HUD desired to make its penalty hearing only about the missing audits; in defense, EGAE raised ancillary issues regarding HUD's original decision to deny its master-lease structure, thereby impairing the value of those credits and putting the project in financial jeopardy from the beginning. The Ninth Circuit was wrong to refuse to consider those issues.

B. The Ninth Circuit Contradicted This Court's Precedent By Refusing to Consider EGAE's Constitutional Claims.

As explained above, the review statute here (12 U.S.C. § 1735f-15(e)(1)) required the Ninth Circuit to consider EGAE's constitutional claims raised in defense to the proposed penalties, even if those claims appeared "ancillary." The statute's plain meaning is congruent with this Court's repeated admonition that federal court review must remain available to those adversely affected by agency action to avoid substantial constitutional problems.

Although this Court has long held that Congress may require citizens to raise their Constitutional challenges to agency action through an agency's administrative process in the first instance, that restriction is permissible largely because federal courts will then review such claims even when they are

"wholly collateral"[7] to the agency proceeding. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-213, 114 S.Ct. 771, 779, 127 L.Ed.2d 29 (1994); *accord Cuozzo Speed Techs, LLC v. Lee*, 136 S.Ct. 2131, 2140 (2016) (recognizing the strong presumption in favor of judicial review); *Elgin v. Department of Treasury*, 567 U.S. 1, 132 S.Ct. 2126, 183 L.Ed.2d 1 (2012)(dismissing district court challenge to constitutionality of agency action because such claims were required to go through the administrative process); *see also FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980) (affirming that a party must raise issues in the administrative review process rather than directly in a district court). Otherwise, there might be no meaningful avenue for judicial review, which lack of meaningful court review would create "serious constitutional questions." *Elgin*, 567 U.S. at 9, 132 S.Ct. at 2132. But according to the Ninth Circuit's decision here, there may be no forum where EGAE's constitutional claims can now be heard.

This Court previously reversed the Ninth Circuit when it refused to exercise jurisdiction to review and decide constitutional claims raised by a business in an administrative proceeding where the agency was seeking to impose civil penalties. *Horne*, 569 U.S. at

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[7] A "claim is not wholly collateral if it has been raised in response to, and so is procedurally intertwined with, an administrative proceeding—regardless of the claim's substantive connection to the initial merits dispute in the proceeding." *Tilton v. Sec. & Exch. Comm'n*, 824 F.3d 276, 287 (2d Cir. 2016). Here, EGAE raised its constitutional challenges as a defense to HUD's imposition of civil money penalties (*see*, *e.g.*, App. 139-140), so they should not be considered "collateral" at all.

529, 133 S.Ct. at 2064. There, the Department of Agriculture began administrative proceedings to levy fines and civil penalties against raisin growers. The raisin growers defended in part by arguing that the Department had "violated the Fifth Amendment's prohibition on taking property without just compensation." *Horne*, 569 U.S. at 521, 133 S.Ct. at 2059. After the growers' takings claims were rejected at the administrative level, the growers sought federal court review; the Ninth Circuit eventually reviewed the propriety of the penalties, but refused to consider the takings claim as it believed it had no jurisdiction to do so. *Horne*, 569 U.S. at 522, 133 S.Ct. at 2060. This Court reversed: "The grant of jurisdiction necessarily includes the power to review any constitutional challenges properly presented to and rejected by the agency." *Horne*, 569 U.S. at 528-529, 133 S.Ct. at 2063 – 2064.[8] The same should be the case here.

In *Thunder Basin*, this Court considered whether a mine operator who was faced with potential civil penalties for failing to comply with what it regarded as unconstitutional agency directives could challenge those directives in the District Court rather than go through the agency's administrative process. As noted there, adjudication of constitutional challenges to agency action is often beyond the jurisdiction of

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[8] After this Court reversed and remanded to the Ninth Circuit, the Ninth Circuit ruled that there was no taking. This Court also reviewed that decision, and again reversed the Ninth Circuit, finding that the raisin growers had proven a taking had occurred. *Horne v. Department of Agriculture*, 576 U.S. 350, 135 S.Ct. 2419, 192 L.Ed.2d 388 (2015).

administrative agencies. *Thunder Basin*, 510 U.S. at 215, 114 S.Ct. at 780; *accord Carr*, 141 S.Ct. at 1360 – 1361 (agencies are ill-suited to consider constitutional claims). This Court found that the parties challenging agency action were nonetheless required to pursue those constitutional challenges through the administrative process, rather than sue initially in District Court. But the Court so held because the legislation at issue also provided a right of direct review of the agency action by the federal Courts of Appeals, who were competent and capable of considering the constitutional challenges.

This Court had the opportunity to revisit that issue in *Elgin*, and once again reaffirmed the principle that even constitutional challenges need to be pursued first through the agency process. *Elgin*, 132 S.Ct. at 2132 – 33. But the Court there emphasized that to satisfy constitutional requirements, review by the circuit court (there the Federal Circuit) had to be plenary, and not limited by the alleged jurisdiction of the agency. *Elgin*, 132 S.Ct. at 2137. Although the parties stipulated that the agency there could not and would not decide the petitioner's constitutional challenges, "the Federal Circuit has authority to consider and decide petitioners' constitutional claims," so the petitioner's constitutional claims would receive meaningful review in the Federal Circuit, saving the statutory scheme from constitutional infirmity. Indeed, the Court noted that it "is not unusual for an appellate court reviewing the decision of an administrative agency to consider" constitutional challenges that the agency may lack authority or competence to decide. *Elgin*, 132 S.Ct. at 2137 n. 8.

Here, the Ninth Circuit disregarded this Court's teachings in *Horne*, *Thunder Basin* and *Elgin*, as well as the plain language of the review statute: "Since this is an appeal of the ALJ's decision to grant HUD civil money penalties against Petitioners, any issues stemming solely from HUD's denial of Petitioners' request to use a master lease are not properly before us. As Petitioners' constitutional arguments solely relate to the denial of the master lease, they cannot form the basis for reversal of the ALJ's ruling." Pet. App. 4. Thus, according to the Ninth Circuit, there is no court that can review Petitioners' constitutional claims, which were properly raised at the agency level. That conclusion is contrary to this Court's holdings as described above.

C. The Ninth Circuit Contradicted This Court's Precedents By Refusing To Exercise The Jurisdiction Granted by Congress.

Courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens*, 6 Wheat. at 404 (1821). As Justice Marshall explained then, when Congress provides courts with jurisdiction to hear a controversy, declining such jurisdiction "would be treason to the constitution." *Id.* Indeed, this Court has instructed that a federal court's obligation to hear and decide cases within its Congressional grant of jurisdiction is "virtually unflagging." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); *see also Union Pacific R. Co. v. Brotherhood of Locomotive Eng.*, 558

U.S. 67, 71-72, 130 S.Ct. 584, 590-591, 175 L.Ed.2d 428 (2009) (applying the same rule to administrative agency jurisdiction). Within our constitutional structure, it is Congress, not the courts, that decides what claims should be heard by federal courts (at least within constitutionally permissible bounds). *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 359, 109 S.Ct. 2506, 2513, 105 L.Ed.2d 298 (1989).

In granting HUD the power to impose Civil Money Penalties, Congress also mandated that circuit courts review the penalties "and such ancillary issues" as might be raised at the administrative level. 12 U.S.C. § 1735f-15(e)(1). Congress also mandated that circuit courts conduct such review pursuant to the APA. 12 U.S.C. § 1735f-15(e)(3). The APA specifically provides that the reviewing court (i.e., the circuit courts of appeals here) "shall decide all relevant questions of law" and "interpret constitutional and statutory provisions." 5 U.S.C. § 706. Moreover, the reviewing court "shall" compel the agency to act or not act as required, and "shall" set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or that is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706.

Here, the Ninth Circuit refused to consider the central issue raised by Petitioner below; to wit, whether HUD violated Petitioners' rights by refusing to allow use of a master lease structure simply because HUD had not yet come up with any policy on using such leases. Petitioner raised this issue over and over

again at the administrative level in defense to the penalties.

Congress plainly gave the Ninth Circuit jurisdiction to consider those issues; the Ninth Circuit nonetheless refused to exercise that jurisdiction. And given this Court's pronouncements in *Horne*, *Thunder Basin* and *Elgin*, the Ninth Circuit was the proper forum for considering those issues.[9] Essentially, the Ninth Circuit has rendered HUD's actions unreviewable. Such refusal to exercise the jurisdiction granted by Congress defies two centuries of this Court's holdings admonishing federal courts to do otherwise.

D. The Ninth Circuit's Decision Was Wrong.

The Ninth Circuit's analysis is internally incoherent, and mistaken about both the facts below and the available scope of its appellate review. The Ninth Circuit stated (incorrectly) that EGAE had raised the issue of whether HUD's denial of Petitioners' request to use a master lease structure violated EGAE's rights for the first time on appeal. Pet. App. 2.

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[9] Other Circuits have also properly recognized in other contexts when considering similar statutory regimes that the unconstitutionality of agency action may be raised upon review to the Circuit Courts of Appeal, either as a defense to the agency action or otherwise. *See, e.g., Security People, Inc. v. Iancu*, 971 F.3d 1355, 1361 (Fed. Cir. 2020), *cert. denied sub nom Security People, Inc. v. Hirschfeld*, 141 S.Ct. 2701 (2021) ("Nor did the doctrine of administrative exhaustion prevent Security People from raising its constitutional claims on direct appeal to the Federal Circuit."); *Jones Bros. v. Sec. of Labor*, 898 F.3d 669, 676 (6th Cir. 2018) (constitutional challenge can provide defense to imposition of civil penalties, if raised before the agency).

But EGAE raised that issue repeatedly during the proceedings below.

In EGAE's answer to HUD's complaint, EGAE contended that HUD's earlier denial of EGAE's request to use the master lease structure caused EGAE to default on its obligations. Pet. App. 139-140. HUD initially tried to exclude EGAE's arguments that HUD's actions caused Petitioners' default, but the ALJ agreed that information was relevant. Pet. App. 104-107.

EGAE opened its case in chief by arguing that its defaults were caused by HUD's refusal to allow use of the master lease structure:

> MR. MARLOW: Good morning, Your Honor, and may it please the court. The uncompleted, extensive, and time-consuming audits are not completed because of HUD's continual denial from and improper taking of $400,000 of property -- of my property ultimately resulting in my inability to afford to complete the audits. HUD erred in 2006 by denying me the use of a master lease to close my historic tax credits and forcing me against my will into a tier one closing, resulting in losses in excess of $400,000 to my property and person. HUD admitted their error in a 2009 letter entitled Mortgage Letter 2009-40 where they stated that master leases are what HUD should be allowing to every developer using historic tax credits.

Pet. App. 115. EGAE went on to argue that HUD's denial constituted an unconstitutional taking (Pet.

App. 116, 124) and violated Petitioners' equal protection and due process rights. Pet. App. 122, 124, 126. EGAE also argued that HUD's denial was arbitrary and capricious under the APA, and showed a lack of good faith and fair dealing under the parties' Regulatory Agreement. Pet. App. 124-125, 130. EGAE did not raise these issues for the first time on appeal as contended by the Ninth Circuit; rather, EGAE raised these issues in its answer to HUD's complaint and at every opportunity thereafter during the administrative proceedings.

Despite claiming that EGAE failed to raise these issues below, the Ninth Circuit confusingly ends its opinion by stating that it could not consider those issues anyway:

> Since this is an appeal of the ALJ's decision to grant HUD civil money penalties against Petitioners, any issues stemming solely from HUD's denial of Petitioners' request to use a master lease are not properly before us. As Petitioners' constitutional arguments solely relate to the denial of the master lease, they cannot form the basis for reversal of the ALJ's ruling.

App. 4. As explained above, both the applicable review statute and this Court's precedent make clear that the Ninth Circuit had a duty to consider those constitutional issues on the merits. And again, if those claims cannot be considered by the Ninth Circuit, they may essentially become unreviewable.

II. The Question Presented Is Important and Recurring.

The Ninth Circuit's position that it can never consider "ancillary issues" (such as HUD's initial denial of EGAE's right to use a master lease) in assessing the propriety of HUD penalties is one that is likely to reoccur again and again. This is especially so now that HUD has an appellate decision saying it can ignore such past mistakes with impunity.

This Court has stepped in numerous times to affirm that when Congress creates an administrative review process that requires circuit court review, circuit courts are empowered to review constitutional issues properly raised in the administrative proceeding, even if the administrative body could not decide those issues. *E.g.*, *Thunder Basin*, 510 U.S. at 215, 114 S.Ct. at 780; *Elgin*, 132 S.Ct. at 2137 n. 8. Indeed, this Court already has under consideration another petition for a writ of certiorari that raises similar issues with respect to review of challenges to actions by the Federal Trade Commission. *Axon Enterprise, Inc. v. Federal Trade Commission*, Supreme Court Case No. 21-86 (2021) (petition for writ of certiorari pending). Especially if this Court takes review of *Axon*, it should also take review of this case so as to clarify the scope of judicial review available to petitioners such as EGAE.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court grant the petition for a writ of certiorari.

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Respectfully submitted,

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