

No. 22-991

In the Supreme Court of the United States

GEORGE R. JARKESY, JR., ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

*ON CONDITIONAL CROSS-PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF FOR THE CROSS-RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals, on a petition for review of an order of the Securities and Exchange Commission, may remand the case to the agency after setting aside the order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-62a) is reported at 34 F.4th 446.* The order of the court of appeals denying rehearing en banc (Pet. App. 63a-70a) is reported at 51 F.4th 644. The opinion and order of the Securities and Exchange Commission (Pet. App. 71a-154a) is available at 2020 WL 5291417. The initial decision of the administrative law judge (Pet. App. 155a-225a) is available at 2014 WL 5304908.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 2022. A petition for rehearing was denied on

* This brief uses “Pet.” and “Pet. App.” to refer to the petition for a writ of certiorari and appendix in No. 22-859, and “Cross-Pet.” to refer to the conditional cross-petition for a writ of certiorari.

October 21, 2022. On January 6, 2023, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including February 17, 2023. On January 30, 2023, Justice Alito further extended the time to and including March 20, 2023. The petition in No. 22-859 was filed on March 8, 2023, and placed on the docket on March 9, 2023. The conditional cross-petition for a writ of certiorari in No. 22-991 was filed on April 10, 2023 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The background of this case is described in the petition for a writ of certiorari in No. 22-859. See Pet. 2-9. This statement summarizes the aspects of that background that relate to the question presented in the cross-petition for a writ of certiorari.

1. Cross-petitioner George Jarkesy launched two hedge funds with his advisory firm, cross-petitioner Patriot28, L.L.C., serving as the funds' investment adviser. Pet. App. 2a. Cross-petitioners violated federal securities laws by making various false representations to brokers and investors. See *id.* at 80a-84a, 96a, 101a.

The Securities and Exchange Commission (SEC or Commission) brought an administrative proceeding against cross-petitioners, alleging that they had violated the Securities Act of 1933 (Securities Act), 15 U.S.C. 77a *et seq.*; the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*; and the Investment Advisers Act of 1940 (Advisers Act), 15 U.S.C. 80b-1 *et seq.* See Pet. App. 2a. An administrative law judge (ALJ) issued an initial decision finding that cross-petitioners had violated those laws. See *id.* at 155a-225a. The Commission reviewed that decision and like-

wise found that cross-petitioners had violated the securities laws. *Id.* at 71a-152a. It ordered cross-petitioners to pay a civil penalty of \$300,000 and to cease and desist from their violations of the securities laws. *Id.* at 152a-154a. It also barred Jarkesy from various activities in the securities industry and directed Patriot28 to disgorge nearly \$685,000 in illicit gains. *Id.* at 153a-154a.

2. In accordance with the judicial-review provisions of the relevant statutes, cross-petitioners filed a petition for review in the Fifth Circuit. Pet. App. 4a; see 15 U.S.C. 77i (Securities Act); 15 U.S.C. 78y (Exchange Act); 15 U.S.C. 80b-13 (Advisers Act). A divided panel granted the petition, vacated the SEC's decision, and remanded the matter to the Commission for further proceedings. *Id.* at 1a-62a.

The court of appeals issued three holdings. The court first held that Congress had violated the Seventh Amendment by empowering the SEC to bring certain administrative proceedings seeking civil penalties. Pet. App. 5a-20a. The court also held that Congress had improperly delegated legislative power to the Commission by giving the agency unconstrained authority to choose in particular cases to seek civil remedies by instituting administrative proceedings rather than by filing suit in district court. *Id.* at 21a-28a. The court finally held that Congress had violated Article II by making the Commission's ALJs removable only for cause. *Id.* at 28a-34a.

The court of appeals concluded that its Seventh Amendment and nondelegation holdings each justified vacatur of the SEC's order. Pet. App. 20a-21a & n.9. The court found it unnecessary to decide whether "vacating would be the appropriate remedy based on [the

removal issue] alone.” *Id.* at 29a n.17. The court accordingly “grant[ed] the petition for review, vacate[d] the decision of the SEC, and remand[ed] for further proceedings consistent with this opinion.” *Id.* at 35a (capitalization altered).

Judge Davis dissented. Pet. App. 36a-62a. Judge Davis first concluded that SEC adjudications comply with the Seventh Amendment. *Id.* at 36a-50a. He also concluded that the SEC’s ability to choose between judicial and administrative enforcement in particular cases does not violate the nondelegation doctrine. *Id.* at 50a-54a. And he concluded that the statutory restrictions on the removal of the Commission’s ALJs comply with Article II. *Id.* at 54a-56a.

3. The court of appeals denied the SEC’s petition for rehearing en banc by a vote of 10-6. Pet. App. 63a-64a.

Judge Haynes, joined by four other judges, dissented from the denial of rehearing en banc. Pet. App. 65a-70a. She expressed the view that the panel’s Seventh Amendment holding was “in conflict with Supreme Court * * * precedent”; that its nondelegation holding had wrongly treated an agency’s exercise of enforcement discretion “as an exercise of legislative power”; and that its Article II holding would improperly “threaten the independence” of ALJs. *Id.* at 66a, 68a-69a (brackets and citation omitted).

ARGUMENT

Cross-petitioners contend (Cross-Pet. 8-30) that the court of appeals lacked power to remand the case to the SEC after finding the agency’s decision unlawful and setting it aside. That argument lacks merit. This Court has previously directed the SEC to conduct additional proceedings “on remand,” *Lucia v. SEC*, 138 S. Ct.

2044, 2055 n.5 (2018), and the courts of appeals likewise routinely remand proceedings to the Commission. Cross-petitioners cite no decision in which a court of appeals has held that it lacked power to remand a case to the SEC. This case would in any event be a poor vehicle for addressing the argument, which was neither raised nor addressed in the court below. And the Court need not decide the remedial question presented in the cross-petition in order to resolve the logically antecedent merits questions presented by the Commission's petition for a writ of certiorari. The Court should therefore deny the cross-petition.

1. Each of the statutes at issue here authorizes aggrieved persons to seek judicial review of SEC orders by filing petitions for review in the courts of appeals. See 15 U.S.C. 77i (Securities Act); 15 U.S.C. 78y (Exchange Act); 15 U.S.C. 80b-13 (Advisers Act). Cross-petitioners discuss (Cross-Pet. 4) only the Exchange Act's review provision, which states that, upon "the filing of the petition, the court has jurisdiction * * * to affirm or modify and enforce or to set aside the order in whole or in part." 15 U.S.C. 78y(a)(3).

A court should interpret the Exchange Act's review provision against the backdrop of traditional principles of administrative law and judicial review. See, e.g., *Axon Enterprise, Inc. v. FTC*, 143 S. Ct. 890, 900-902 (2023). Under one such background principle, a court of appeals that grants a petition for review and vacates an agency order should generally remand the case to the agency for any proceedings that may be appropriate in light of the court's decision. See, e.g., *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (per curiam) ("Generally speaking, a court of appeals should remand a case to an

agency for decision of a matter that statutes place primarily in agency hands.”); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (“[T]he proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”).

Cross-petitioners acknowledge (Cross-Pet. 12) the administrative-law principle that generally *requires* remands, but argue that the Exchange Act inverts that background rule and *forbids* remands to the SEC. That argument conflicts with this Court’s decisions in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), and in *Lucia*.

In *Chenery*, private parties sought review of an SEC order under the Public Utility Holding Company Act of 1935 (Holding Company Act), ch. 687, Tit. I, 49 Stat. 803. This Court found the SEC’s rationale for the challenged order defective and set the order aside. See *Chenery*, 318 U.S. at 84-95. The Court then held that the court of appeals was not simply allowed, but required, “to remand [the matter] to the Commission for such further proceedings * * * as may be appropriate.” *Id.* at 95.

Similarly in *Lucia*, private parties sought judicial review of an SEC order under the Advisers Act. See 138 S. Ct. at 2049-2050. This Court set the order aside on the ground that the ALJ who had conducted the SEC adjudication had been improperly appointed. See *id.* at 2055. The Court remedied that violation by granting the private parties a “new hearing” before a properly appointed ALJ. *Ibid.* That remedy necessarily entailed a remand to the SEC. See *id.* at 2055 n.5 (“[W]e can give that remedy here because other ALJs (and the Commission) are available to hear this case on remand.”); *id.* at 2055 n.6 (“The Commission has not suggested that it intends to assign Lucia’s case on remand

to an ALJ whose claim to authority rests on the ratification order.”).

Although cross-petitioners focus (Cross-Pet. 4) on the review provision of the Exchange Act, this case also involves review under the Advisers Act. See p. 2, *supra*. And as explained above, *Lucia* indicates that courts hearing petitions for review under the Advisers Act may remand cases to the SEC when appropriate.

In any event, the Holding Company Act and Advisers Act review provisions that governed the proceedings in *Chenery* and *Lucia* are materially identical to the Exchange Act review provision on which cross-petitioners focus here. For example, cross-petitioners emphasize that the Exchange Act grants courts of appeals jurisdiction “to affirm or modify and enforce or to set aside the order in whole or in part.” Cross-Pet. 12 (quoting 15 U.S.C. 78y(a)(3)). But the other statutes contain essentially the same language. See Holding Company Act § 24(a), 49 Stat. 835 (jurisdiction “to affirm, modify, or set aside such order, in whole or in part”); 15 U.S.C. 80b-13(a) (same). Cross-petitioners also draw a negative inference from the Exchange Act’s provision authorizing a court to remand a case to the agency so that the agency can “adduce additional evidence.” Cross-Pet. 23 (quoting 15 U.S.C. 78y(a)(5)). But the Holding Company Act and Advisers Act contain similar provisions. See Holding Company Act § 24(a), 49 Stat. 835 (“If application is made to the court for leave to adduce additional evidence, * * * the court may order such additional evidence to be taken before the Commission.”); 15 U.S.C. 80b-13(a) (same). If the review provisions in *Chenery* and *Lucia* did not displace the “ordinary remand requirement,” *Orlando Ventura*,

537 U.S. at 17, then the Exchange Act review provision does not do so either.

Cross-petitioners argue (Cross-Pet. 12, 14 n.29) that *Chenery* and *Lucia* rested on the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.* They read *Chenery* (Cross-Pet. 12) as holding only that “judicial review * * * under the APA pursuant to 5 U.S.C. § 706 includes implicit authority to remand,” and they argue (Cross-Pet. 26) that “the traditional *Chenery* * * * remedy can[not] be ‘imported’ from the APA into § 78y review of SEC adjudications.” Cross-petitioners similarly argue (Cross-Pet. 14 n.29) that “the [*Lucia*] Court’s detailed prescription for a new hearing before a different ALJ * * * [is] unremarkable in an APA review, but falls outside the permissible remedies available under § 78y.”

Those arguments lack merit. *Chenery* (which was decided in 1943) did not involve the APA (which was enacted in 1946). And *Lucia* arose out of a petition for review in a court of appeals under the Advisers Act, not out of a civil action in a district court under the APA. See 138 S. Ct. at 2050.

Even if cross-petitioners’ characterization of *Chenery* and *Lucia* were accepted, their argument would still fail. The APA’s review provisions “constitute a general restatement of the principles of judicial review.” U.S. Dep’t of Justice, *Attorney General’s Manual on the Administrative Procedure Act* 93 (1947). The APA states that “[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action.” 5 U.S.C. 703. That lan-

guage makes clear that a “special statutory review proceeding,” such as court-of-appeals review of final SEC orders pursuant to the Exchange Act, is subject (except to the extent a particular review statute provides otherwise) to the APA’s provisions. See *ICC v. Brotherhood of Locomotive Eng’rs*, 482 U.S. 270, 282 (1987) (noting that the APA “codifies the nature and attributes of judicial review” even for review proceedings conducted under other statutes). So even on cross-petitioners’ view (Cross-Pet. 12) that a court’s “authority to remand” derives from “the APA,” a court of appeals may properly invoke that authority in adjudicating petitions for review under the Exchange Act.

Cross-petitioners separately observe (Cross-Pet. 20) that ordinary principles of administrative law do not require futile remands. But a remand here would not be futile. The court of appeals held that the Seventh Amendment and nondelegation doctrine precluded the Commission from bringing administrative proceedings seeking civil penalties. Those holdings do not prevent the Commission from seeking other types of remedies through administrative proceedings. See Pet. App. 152a-154a (granting various remedies, including civil penalties, disgorgement, cease-and-desist orders, and orders barring Jarkesy from various activities in the securities industry). The court also held that Congress had violated Article II by granting tenure protection to the Commission’s ALJs, but that holding does not prevent the Commission from conducting adjudications without ALJs. See 5 U.S.C. 556(b) (authorizing an agency to assign the initial stages of an adjudication to itself or to one or more of its members rather than to an ALJ). Far from being futile, a remand would give the

Commission an opportunity to conduct an adjudication in a manner consistent with the Fifth Circuit's decision.

Cross-petitioners also criticize (Cross-Pet. 19-20) decisions in which courts of appeals have remanded cases to agencies without vacating the challenged agency orders. But the court of appeals in this case vacated the SEC's order as well as remanding the case to the agency. See Pet. App. 35a. This case accordingly presents no occasion to address cross-petitioners' objections (Cross-Pet. 17) to the "remand-without-vacatur disposition."

2. Cross-petitioners do not allege any circuit conflict over the question presented in the cross-petition. Courts of appeals have long exercised the authority, on petitions for review of SEC orders, to remand cases to the Commission. See, e.g., *New England Elec. Sys. v. SEC*, 376 F.2d 107, 116 (1st Cir. 1967), rev'd on other grounds, 390 U.S. 207 (1968); *Berko v. SEC*, 297 F.2d 116, 118-119 (2d Cir. 1961); *Todd & Co. v. SEC*, 557 F.2d 1008, 1015 (3d Cir. 1977); Pet. App. 35a (5th Cir.); *Beck v. SEC*, 413 F.2d 832, 834 (6th Cir. 1969); *Board of Trade v. SEC*, 883 F.2d 525, 536-537 (7th Cir. 1989); *Sharemaster v. U.S. SEC*, 847 F.3d 1059, 1071 (9th Cir. 2017); *Bloomberg L.P. v. SEC*, 45 F.4th 462, 477-478 (D.C. Cir. 2022).

Cross-petitioners suggest (Cross-Pet. 29 n.49) that the Ninth Circuit adopted their interpretation of the Exchange Act in *Sacks v. SEC*, 648 F.3d 945 (2011). That is incorrect. In *Sacks*, the Ninth Circuit held, on a petition for review of an SEC order approving a rule proposal filed by the Financial Industry Regulatory Authority, that the rule that the SEC had approved could not "retroactively apply" to the petitioner in that case.

Id. at 952. Although the court did not remand the case to the agency, it did not discuss the propriety of remand in Exchange Act review proceedings generally, let alone suggest that any categorical bar to such remands exists. Rather, given the court’s resolution of the retroactivity issue, it appears that a remand would have served no useful purpose. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion) (explaining that a remand is not appropriate if it would be “meaningless” or “an idle and useless formality” because no “uncertainty” exists about the “outcome of [the] proceeding” on remand). And in other cases, the Ninth Circuit has exercised its power to remand to the SEC when adjudicating petitions for review. See, e.g., *Sharemaster*, 847 F.3d at 1071.

3. This case would in all events be a poor vehicle for addressing cross-petitioners’ question presented. This Court’s ordinary practice “precludes a grant of certiorari * * * when ‘the question presented was not pressed or passed upon below.’” *United States v. Williams*, 504 U.S. 36, 41 (1992) (citation omitted). Cross-petitioners did not argue in the court of appeals that the court lacked authority to remand the case to the Commission. See Cross-Pet. C.A. Br. 1 (issues presented); *id.* at 7-56 (argument). And the court did not address the issue; rather, it simply remanded the case to the SEC without further analysis. See Pet. App. 35a.

Cross-petitioners seek (Cross-Pet. 8) to overcome that problem by arguing that the court of appeals lacked “jurisdiction” to remand the case to the agency. But “jurisdiction is a word of many, too many meanings.” *Biden v. Texas*, 142 S. Ct. 2528, 2540 (2022) (brackets, citation, and ellipsis omitted). The term can refer not

only to a court's subject-matter jurisdiction over a case (its "power to hear [a] claim"), but also to its remedial jurisdiction (its "power to issue a specific category of remedies"). *Id.* at 2539. "[T]he question whether a court has jurisdiction to grant a particular remedy is different from the question whether it has subject matter jurisdiction over a particular class of claims." *Id.* at 2540.

Cross-petitioners accept that the court of appeals had subject-matter jurisdiction over their petition for review. They argue (Cross-Pet. 10) only that the court lacked "remedial jurisdiction to order further proceedings to take place in the agency." Although "[l]imits on subject-matter jurisdiction * * * 'may be raised at any time,'" *Wilkins v. United States*, 143 S. Ct. 870, 876 (2023) (citation omitted), this Court recently left open the question whether limits on remedial jurisdiction are subject to waiver and forfeiture, see *Biden*, 142 S. Ct. at 2540 n.4. The government's view is that such limits are not subject to waiver or forfeiture, see, *e.g.*, Gov't Supp. Br. at 19-20, *Biden, supra* (No. 21-954), but this Court would need to resolve that issue before entertaining cross-petitioners' contention.

Even if cross-petitioners' contention is not subject to forfeiture, this Court should not review it here. The Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Consistent with that principle, the Court often declines to resolve jurisdictional issues that have not been addressed in the lower courts. See, *e.g.*, *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (per curiam); *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 441 n.4 (2017). Cross-petitioners identify no sound reason for the Court to depart from

its ordinary practice and to consider their contention in the first instance.

4. The question presented by the cross-petition does not affect this Court's ability to resolve the questions presented by the SEC's petition for a writ of certiorari. The questions presented by the Commission's petition concern the merits: whether the administrative adjudication and order in this case conflicted with the Seventh Amendment, the nondelegation doctrine, or Article II. The question presented by the cross-petition, in contrast, concerns the remedy: whether it would be appropriate to remand the case to the Commission for further proceedings if cross-petitioners are correct on the merits. Because the merits questions presented by the Commission's petition are logically antecedent to the remedial issue raised by the cross-petition, the Court can resolve the former without addressing the latter.

Cross-petitioners' invocation (Cross-Pet. 8) of the word "jurisdiction" does not change that analysis. As discussed above, a court's subject-matter jurisdiction to hear a case differs from its jurisdiction to grant particular remedies. See p. 12, *supra*. Because the court of appeals indisputably had subject-matter jurisdiction over this case, it had indisputable authority to decide the merits issues on which the SEC has sought review. This Court accordingly can decide the merits without addressing cross-petitioners' contention that the court lacked "jurisdiction" to remand the case to the SEC. See *Biden*, 142 S. Ct. at 2539 (explaining that the Court could reach the merits without deciding whether a district court had jurisdiction "to grant a particular form of relief," as long as the lower court had "subject matter jurisdiction" over the case).

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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