ORIGINAL

24-1233

NO. _____

In the Supreme Court of the United States

JOHN M. BARR AND JOHN MCPHERSON,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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March 28, 2025

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QUESTION PRESENTED

Whether an agency can deny a whistleblower award by applying a new regulatory standard retroactively, after the whistleblower's claim has fully matured.

PARTIES TO THE PROCEEDINGS

Petitioners and Appellants below

- John M. Barr
- John McPherson

There are no corporate petitioners

Respondent and Appellee below

- Securities and Exchange Commission

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit

No. 23-60216

Barr et al., Appellants *v. Securities and Exchange Commission*, Respondent

Final Opinion: August 30, 2024

Rehearing Denials: October 29, 2024

U.S. Securities and Exchange Commission

Whistleblower Award Proceeding No. 2023-42

In the Matter of the Claims for an Award in Connection with SEC v. Life Partners, Inc. et al.

Final Order: March 27, 2023

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OPINIONS BELOW

The order of the court of appeals denying review is reported at 114 F.4th 441. App.1a. The determination and order of the Securities and Exchange Commission is available at 2023 WL 2660927 and included at App.22a. Note: The SEC provided the order to the Petitioners in the redacted form. Petitioners have no access to a fully unredacted version of this order.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2024. App.1a. Petitions for rehearing were denied on October 29, 2024. App.43a, 44a. On Jan. 24, 2025, Justice Alito extended the time within which to file a petition for writ of certiorari to and including Mar. 13, 2025. No. 24A727. On March 3, 2025, Justice Alito further extended the time to and including March 28, 2025. The Clerk of Court then provided until May 29, 2025 to perfect a booklet filing under Rule 33.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the appendix. App.45a-62a.

STATEMENT OF THE CASE

A. Legal Background.

In December of 2008, the Securities and Exchange Commission (the "Commission") revealed the Bernard L. Madoff scandal when it filed a complaint in the United States District Court for the Southern District of New York against Madoff and Bernard L. Madoff Investment Securities LLC ("BMIS")[1]. Four days later, the BMIS action was moved to the bankruptcy court for the Southern District of New York.[2] The subsequent liquidation of BMIS was carried out in the bankruptcy court.

Then-Commission Chairman Mary Shapiro later testified before Congress that upon being sworn in as Chairman in January 2009, her "highest priority at that time was to make whatever changes were needed to ensure that another Madoff could never happen again" and "was equally concerned about how to get the most effective relief to the Madoff victims" in the bankruptcy court liquidation.[3]

The Commission's steps to reduce the chances that such frauds would occur in the future included "advocating for a whistleblower program" to "reward

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[1] https://www.sec.gov/files/litigation/complaints/2008/comp-madoff121108.pdf

[2] https://casetext.com/case/sipc-v-bernard-l-madoff-investment-securities-llc

[3] https://www.sec.gov/news/testimony/2011/ts092211mls.htm

those who bring forward substantial evidence about significant federal securities violations."[4]

In the wake of the 2008 financial crisis, the Madoff scandal and other highly-publicized frauds perpetrated against investors, Congress enacted the Dodd Frank Wall Street Reform and Consumer Protection Act (Dodd Frank) in 2010. To help the Commission both in "identifying securities law violations" and obtaining the *"recover[y] [of] money for victims of financial fraud,"* (emphasis added) Congress "establish[ed] a new, robust whistleblower program designed to motivate people who know of securities law violations to tell the SEC." S. Rep. No. 111–176, at 38, 110 (2010).

Dodd Frank provides:

> In general, in any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action. 15 U.S.C. § 78u-6(b)(1).[5]

The monetary sanctions of a qualifying action(s) must be at least $1 million for an award to be paid. 15 U.S.C. § 78u-6(a)(1). Further, Congress gave the Com-

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[4] https://www.sec.gov/spotlight/secpostmadoffreforms.htm

[5] Section 922 of Dodd-Frank amended the Exchange Act to add a new section—Section 21F—entitled "Securities Whistleblower Incentives and Protection." Section 21F of the Exchange Act is codified in its entirety at 15 U.S.C. § 78u-6.

mission rulemaking authority to "issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section." 15 U.S.C. § 78u-6(j).

On November 3, 2010, the Commission "voted unanimously to propose a whistleblower program to reward individuals who provide the agency with high-quality tips that lead to successful enforcement actions." Chairman Schapiro stated,

> We get thousands of tips every year, yet very few of these tips come from those closest to an ongoing fraud. Whistleblowers can be a source of valuable firsthand information that may otherwise not come to light. These high-quality leads can be crucial to protecting investors and recovering ill-gotten gains from wrongdoers.[6]

On May 25, 2011, the Commission adopted rules to establish its whistleblower program. The Commission's rules adopted a transactional test to determine when two or more proceedings that involve "the same nucleus of operative facts" are treated as one "action" for award purposes. ROA.1492 (relying upon Securities Whistleblower Incentives and Protections, Rel. No. 34-64545, 76 Fed. Reg. 34,300, 34,327 & n.239 (June 13, 2011); *see also McPherson Br., Barr v. SEC*, Case No. 23-60216 (5th Cir.) Dkt. 58 at 41 & n.16. The Commission looks to *In re Iannochino*, 242 F.3d 36, 46 (1st Cir. 2001), which in turn relies upon *In the Matter of Intelogic Trace, Inc.*, 200 F.3d 382, 386 (5th Cir. 2000). Both of those cases considered whether a

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[6] https://www.sec.gov/news/press/2010/2010-213.htm

district court case and a bankruptcy case were the same, and each court found that they were. *Id.* at 388 (holding "the two actions are the same under the transactional test").[7]

The Commission promulgated and published a rule in the Federal Register in 2011 that set the standard against which the percentage recoveries set out in the Securities Whistleblower Incentives Act were to be measured. 17 C.F.R. 240.21F-5(b) ("§ 5(b)"). The standard set by the Commission was a percentage of the amount the Commission would be "able to recover" upon obtaining a judgment.[8] Later, on September 23, 2020, the Commission amended § 5(b) to narrow its reach only to a statutory percentage of monies actually "collected" by the Commission and other entities ("the 2020 Amendment"). *Id.*

B. Factual and Procedural Background.

1. SEC Enforcement Proceeding in District Court.

In early 2012, the Commission initiated an enforcement action against Life Partners Holdings Inc. (Life Partners) and others, alleging that the defendants perpetrated a sweeping disclosure and accounting fraud, and targeted tens of thousands of unsophisticated retail investors. ROA.28. Life Partners principally derived its income from commission fees it collected on "viatical" and "life settlement" products, including from the sale of fractional interests to individual and institutional investors. *Life Partners*, 854

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[7] https://www.sec.gov/files/rules/final/2011/34-64545fr.pdf

[8] https://www.sec.goc/files/rules/final/2020/34-89963.pdf

F.3d at 772 n.2 (defining each product). Life Partners acted as both the broker and the seller for these viatical/life settlement policies—yielding exorbitant profits on both ends. ROA.1471.

Both McPherson and Barr timely filed forms with the Commission to notify it of a possible securities law violation. ROA.1501, 1524.

On February 3, 2014, a jury returned a verdict finding that Life Partners and its officers had violated multiple securities laws. The district court's final judgment order concluded that Life Partners and its wholly-owned subsidiary Life Partners Inc. "effectively operate as a single entity." ROA.1103. The district court ordered Life Partners to pay disgorgement of $15 million and a civil penalty of $23.7 million, and certain officers to pay millions in civil penalties. *Id.*

Following entry of the Final Judgment, the Commission sought appointment of a court-appointed receiver or, if appropriate, a bankruptcy trustee. ROA. 1697. The Commission's motion requested a receiver to manage Life Partners and *all* its subsidiaries. ROA.1698 ("the Commission asks the Court to appoint a Receiver over LPHI and its affiliates, including Life Partners, Inc.").

The same day the district court was scheduled to hear the Commission's motion for appointment of a receiver—January 20, 2015—Life Partners filed a voluntary petition under Chapter 11 and immediately moved the bankruptcy court for appointment of an examiner of its choice. ROA.1786. The district court then denied the motion for appointment of a receiver without prejudice, agreeing with the Commission that it "will be able to effectively seek from the Bankruptcy

Court the relief sought from this Court in the receivership motion." ROA.1465.

2. The Bankruptcy Proceeding.

The Commission was actively involved in the bankruptcy proceeding.[9] After consulting with the Commission, the U.S. Trustee selected and appointed a trustee, which the court approved. *See* Order Approving Appointment of Chapter 11 Trustee, *Life Partners Bankr.*, Dkt. No. 229 (filed Mar. 19, 2015). The Commission filed a proof of claim in the bankruptcy proceeding for the nearly $39 million judgment entered by the district court. Dkt. 12-1.

Petitioners both filed applications with the Commission for a whistleblower award in 2015. ROA. 33, 83.

The Bankruptcy Court created a liquidating trust, which made distributions to investors starting in December of 2016 and continuing through September 2022, when there was a sale of its "non-cash, policy related, assets." Position Holder Trust's (PHT) Final Report, *Life Partners Bankr.*, Dkt. No. 4626 at 5 (¶ 17) (filed Nov. 22, 2022). The PHT's Final Report stated that "since its inception to present," the PHT has paid

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[9] The Commission's decision to take advantage of all available enforcement methods—including receiverships or bankruptcy proceedings—is neither novel nor surprising. *See* Alistaire Bambach & Samuel R. Maizel, *The SEC's Role in Public Company Bankruptcy Cases Where There Is a Significant Enforcement Interest*, 2006 ANN. SURVEY OF BANKRUPTCY LAW 99 (2006 ed.); *see also In re Commonwealth Oil Refining Co., Inc.*, 461 F. Supp. 284, 286 (W.D. Tex. 1978) (discussing Commission's important interest in bankruptcy proceedings through its role as protector of public investor interests).

over $736,500,000 in distributions to investors—"[a] successful outcome for all involved." *Id.* at 6 (¶ 20). When added to pre-Plan distributions, the investor recoveries approached $900 million. The bankruptcy case closed in December 2022. *Life Partners Bankr.*, Dkt. No. 4681 (filed Dec. 16, 2022).

3. The 2020 Amendments.

Years after filing its proof of claim in the bankruptcy proceeding, the Commission issued Final Rules on September 23, 2020, updating its whistleblower program regulations. In addition to abandoning its longstanding "able to collect" standard, the Commission issued a press release accompanying issuance of the amended rules and asserted, for the first time, that "our statutory authority does not extend to paying whistleblower awards for recoveries in bankruptcy proceedings or other proceedings that may in some way 'result from' the Commission's enforcement action and the activities of the whistleblower."[10]. According to the Commission's new rule, "[b]ankruptcy proceedings are not brought by either the Commission acting under the securities laws or by one of the designated related-action authorities, and orders to pay money that result from bankruptcy proceedings are not imposed 'in' Commission covered actions or related actions." *Id.*

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10 https://www.sec.goc/files/rules/final/2020/34-89963.pdf

4. Five Days After Issuing the New Final Rules, the Commission Issued Its Preliminary Determination to Whistleblowers.

Less than a week later, on September 28, 2020, the SEC's Claims Review Staff ("CRS") issued a Preliminary Determination in Petitioner McPherson's case. It recommended a 23% award to McPherson (Claimant #1). ROA.1559. In a footnote, it recounted his "extraordinary and continuing assistance spanning several years." ROA.1559 (n.2). In another footnote, CRS concluded that the bankruptcy proceeding "initiated by a voluntary petition under Chapter 11 filed by [LPHI]" did not qualify under the award provisions. ROA.1559 (n.1).

CRS next concluded that: "the only bankruptcy [sic] collections that can be counted in an award calculation are those *collected* in satisfaction of the SEC's judgment in the covered action. To date, there have been no collections or distributions under the SEC's Creditors' Trust Interest." *Id.* (emphasis added). CRS calculated McPherson's payment to be $18,224, which McPherson learned through an email from staff. ROA.1730. McPherson timely contested the preliminary determination on February 1, 2021. ROA.1723. The Preliminary Determination recommended that Barr be denied an award entirely.

5. The Final Order Denied Petitioners a Meaningful Award.

Both Petitioners Barr and McPherson timely contested the preliminary determination on February 1, 2021. ROA.1723. More than two years later, on March 27, 2023, the Commission issued the Final Order, revising the ultimate recommendations in the

Preliminary Determinations and granting Barr 5% and McPherson 20% of "the amounts collected or to be collected in connection with" the SEC's enforcement action. This meant that McPherson was entitled to an award of 20% of the qualifying monetary sanctions, which the Commission calculated to be an amount "equal to over $21,000" and (b) Barr was entitled to an award of 5% of the collected monetary sanctions, or $5,000.

In its Final Order the SEC also determined that (1) it did not "walk away from a collection of $38.7 million" by voluntarily subordinating its interest in the Creditors' Trust "because it would only have been able to collect a de minimis amount, and any such collections would have been dependent upon the [SEC] winning on appeal"; (2) the whistleblower-award calculation cannot be based on what the SEC "may have been able to but did not collect" because "the statutory maximum whistleblower award is based on the amount actually collected" (pursuant to the 2020 Amendment); and (3) calculating the award "based on what the [SEC] hypothetically 'was able to collect,' but did not, would introduce uncertainty, inconsistency, and could delay the processing of award claims," even though this was the SEC's own published standard for 10 years preceding the 2020 Amendment.

With respect to the Commission's nearly $39 million in disgorgement and civil penalties, the Final Order stated that it would have only been able to recover a "fraction," and concluded that awards must be based on amounts "actually collected." ROA.1791. Last, the Final Order found that the Commission's exemptive authority did not extend to requirements set by "[t]he text of the statute," and claimed the

agency has "never used our discretion under Section 36(a)(1) of the Exchange Act to exempt a whistleblower from a statutory requirement." ROA.1792.

Neither the record previously supplied by the Commission, nor the Final Order itself, provided any basis for the Commission's calculation beyond its single conclusory sentence. ROA.1785.

REASONS FOR GRANTING THE PETITION

AGENCIES MAY NOT DISREGARD OR RETROACTIVELY APPLY THEIR OWN REGULATIONS TO EXTINGUISH A WHISTLEBLOWER CLAIM THAT HAD ALREADY LEGALLY MATURED.

It is now axiomatic that agencies must follow their own published regulations. This is frequently called "the *Accardi* principle," after the decision cited most frequently for it, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). Grounded primarily in the mandates of due process, the doctrine is often enforced through the review standards embodied in Chapter Seven of the Administrative Procedure Act.

In this case the SEC received whistleblower reports from the two Petitioners which directly led to a successful and substantial monetary judgment, at a time when the agency's own published regulations required the payment of whistleblower awards upon its securing of a collectible judgment. The SEC then effectively transferred its judgment to a bankruptcy trustee, who in turn compensated all of the victimized investors. The Commission then stalled for five years in granting the whistleblower awards, then changed

the operative regulation to only allow for awards upon its own completed *collection* on a monetary judgment. The Commission then retroactively rejected its own regulatory standard—the one applicable when the claim had matured—to deny the awards, adopting the more limiting standard set out in the 2020 amendment. This is a textbook example of arbitrary and capricious conduct.

While Congress commits whistleblower-award determinations to the SEC's discretion, 15 U.S.C. § 78u-6(f), the agency's determinations are cabined by the applicable statutory and regulatory standards and are reviewed "in accordance with section 706 of Title 5," *id.*, so they may be set aside if "found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Healthy Gulf v. U.S. Army Corps of Eng'rs*, 81 F.4th 510, 520 (5th Cir. 2023) (quoting 5 U.S.C. § 706(2)(A)). An agency order is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The statute outlines the circumstances in which the SEC must pay out whistleblower awards:

> In any covered judicial or administrative action, or related action, the [SEC], under regulations prescribed by the [SEC] and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who

> voluntarily provided original information to the [SEC] that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—
>
> (A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and
>
> (B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

15 U.S.C. § 78u-6(b)(1)(A)–(B).

The SEC had promulgated a regulation at the time Petitioners submitted their whistleblower complaints, providing that the SEC was obligated to pay a whistleblower "at least 10 percent and no more than 30 percent of the monetary sanctions that the Commission and the other authorities are *able to collect*." 17 C.F.R. 240.21F-5(b) (emphasis added). In this respect the regulation was somewhat more generous to whistleblowers—the statute requiring at least the payment of a percentage of the amount "collected" by the SEC or others. But the statutory scheme provides the SEC with substantial discretion in formulating and approving awards, allowing the agency to issue an award that § 78u-6(b)(1) does not require, vesting the Commission with authority to "issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section." 15 U.S.C. § 78u-6(j). *See also,* 15 U.S.C. § 78mm(a)(1).[11] Under the published

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[11] § 78mm(a)(1) provides that:

regulatory standard in place when the Petitioners came forward, and all the way through the final judgment, the SEC was capable of collecting the judgment amount: even if the SEC did not directly "collect" the funds from its judgment, it was obviously "able" to collect them, as the successful bankruptcy trustee soon proved. *See Regnante v. SEC Officials*, Civil Act. No. 1:14-cv-04880, Dkt. 28, n.4 (2015) (App.63a, n.4).

The controlling "able to collect" standard was dispositive of Petitioners claims both before the Commission and in the Fifth Circuit. But in denying an award for the judgment amount, the Commission had to resort to eschewing its own regulation, and in denying the petitions for review below, the Fifth Circuit ignored it entirely. Remarkably, the Commission evaded its own longstanding "able to collect" measure by claiming, without explanation, that § 240.21F-5(b) "is at odds with the statute that it is designed to implement."[12] To avoid Petitioners' claims, the Commission for the first time repudiated its own published standard that it had followed for many years.

The plain and ordinary meaning of the phrase "able to collect" is *capable of being collected*—"having the means, capacity, or qualifications to do something; having sufficient power; in such a position that

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> [t]he Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person . . . from any provision or provisions of [the Exchange Act] or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

[12] Order Determining Whistleblower Award Claims, Release No 97202 (Mar. 27, 2023), at 7.

a particular action is possible." OXFORD ENGLISH DICTIONARY. In promulgating § 240.21F-5(b), the SEC could have said that only the consummated collection itself established the right to an award. But it elected instead to publish governing rules that require payouts when the agency *could* collect—a principle that advances Congress's statutory objective (encouraging whistleblowers to come forward) and that is easy to administer—as it is the unusual case where it is not apparent whether collection is possible. The Commission certainly appears to agree, having seen it necessary to take the extraordinary step of repudiating its own regulatory language and applying a new regulation retroactively in order to justify the rejection of Petitioners' claims. *Id.*

That the SEC *could* have collected on its judgment, but chose instead the expedient of routing the collection for investors to a bankruptcy trustee, both demonstrates the collectability of the judgment and the fundamental flaw in the Commission's and Fifth Circuit's analyses. It also runs counter to the legislative purpose underlying § 21F of the Securities and Exchange Act and this Court's precedents disallowing the retroactive application of statutory and regulatory standards which would dilute matured claims.

This Court has long held that statutes or regulations which affect substantive rights may not be applied retroactively. *See Landgraf v. USI Film Products,* 511 U.S. 244, 280 (1994) (where a law "takes away or impairs vested rights acquired under existing laws, or creates new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past," there is true "retroactive effect" and the presumption against retroactivity applies");

Bennett v. New Jersey, 470 U.S. 632 (1985) (laws "affecting substantive rights and liabilities are presumed to have only prospective effect"); *Greene v. United States*, 376 U.S. 149 (1964) ("retrospective operation will not be given to a statute which interferes with antecedent rights").

The Commission's retroactive application of its 2020 amendment to § 240.21F-5(b)—after the Petitioners' claims had long since matured—cannot be reconciled with this long line of cases. The Commission abused its discretion in extinguishing Petitioners' claims through retroactive application of its regulatory amendment, and the Fifth Circuit grievously erred in ratifying the Commission's action. This Petition provides the Court with the opportunity to reinvigorate its retroactivity jurisprudence and promote Congress' intent in fostering a robust system for reporting of securities law violations for the protection of the investing public.

CONCLUSION

For these reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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March 28, 2025