No. 20-276

In the Supreme Court of the United States

CHRISTOPHER M. GIBSON, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a federal district court has jurisdiction to hear a suit in which a respondent in an ongoing Securities and Exchange Commission proceeding seeks to enjoin that proceeding on account of an alleged constitutional defect in the proceeding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes, and regulations: Page

Regulations—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter, but is reprinted at 795 Fed. Appx. 753. The order of the district court (Pet. App. 7a-10a) is not published in the Federal Supplement, but is available at 2019 WL 5698679. The initial decision of the administrative law judge (Pet. App. 12a-112a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2019. A petition for rehearing en banc was denied on April 1, 2020 (Pet. App. 11a). The petition for a writ of certiorari was filed on August 31, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has created a comprehensive scheme for the commencement and review of civil enforcement actions by the Securities and Exchange Commission (SEC or Commission). In the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*, the Investment Company Act of 1940 (Company Act), 15 U.S.C. 80a-1 *et seq.*, and the Investment Advisers Act of 1940 (Advisers Act), 15 U.S.C. 80b-1 *et seq.*, Congress authorized the Commission to initiate administrative proceedings to determine whether a person has violated those statutes and whether to award equitable relief or impose civil monetary penalties. See, *e.g.*, 15 U.S.C. 78u-1, 78u-2, 78u-3, 80a-9(b) and (d)-(f), 80b-3(f) and (i)-(k).

When the Commission initiates an administrative proceeding, it may assign the initial stages of the proceeding to itself, a single Commissioner, or an administrative law judge (ALJ). See 15 U.S.C. 78d-1(a); 17 C.F.R. 200.30-9. If the Commission assigns the proceeding to an ALJ, the ALJ will receive evidence, hold a hearing, hear argument, and issue an initial decision. See 17 C.F.R. 201.221-201.360. A respondent or the Commission's Division of Enforcement may appeal the decision to the Commission, and the Commission may also review the decision on its own initiative. See 17 C.F.R. 201.410(a), 201.411(c). If the ALJ's decision is not reviewed, the Commission issues an order stating that the ALJ's decision has become final. See 17 C.F.R. 201.360(d)(2). If it is reviewed, the Commission considers the case de novo and issues a final decision. See 17 C.F.R. 201.411(a).

If the Commission issues an adverse decision, the respondent "may obtain review of the order in the United

States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit." 15 U.S.C. 78y(a)(1); see 15 U.S.C. 80a-42(a), 80b-13(a). Once the respondent files the petition for review in one of those courts of appeals, that court "has jurisdiction, which becomes exclusive on the filing of the record." 15 U.S.C. 78y(a)(3); see 15 U.S.C. 80a-42(a), 80b-13(a).

The review statutes set forth the contents of the agency record, see 15 U.S.C. 78y(a)(2), 80a-42(a), 80b-13(a); the standard of review of the Commission's factual findings, see 15 U.S.C. 78y(a)(4), 80a-42(a), 80b-13(a); and the process for seeking a stay of the Commission order, 15 U.S.C. 78y(c)(2), 80a-42(b), 80b-13(b). Each party may seek the court of appeals' leave to "adduce additional evidence," and the court "may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers appropriate." 15 U.S.C. 78y(a)(5); see 15 U.S.C. 80a-42(a), 80b-13(a) (similar). The court may not consider any objection to the Commission's order that was not raised before the Commission, "unless" there was a "reasonable ground for failure to do so." 15 U.S.C. 78y(c)(1); see 15 U.S.C. 80a-42(a), 80b-13(a).

2. In 2016, the Commission instituted an administrative enforcement proceeding against petitioner to determine whether he had violated the Exchange Act, Company Act, and Advisers Act. Pet. App. 2a. The Commission's Division of Enforcement alleged that petitioner, as an investment adviser to a private investment fund, had "engaged in a deceptive scheme" to "benefit himself and those close to him at the expense of the Fund and his other clients by exploiting the in-

vestment advice he provided to the Fund." *Ibid.* (citation omitted). The Commission assigned the initial stages of the proceeding to an ALJ, who issued an initial decision adverse to petitioner. *Ibid.* The Commission then granted petitioner's request to review that decision. *Ibid.*

While petitioner's case was pending before the Commission, this Court held in *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), that the Commission's ALJs are officers of the United States and thus must be appointed in a manner consistent with the Appointments Clause of the Constitution. *Id.* at 2049. After that decision, the Commission remanded petitioner's case for a fresh hearing before a different, properly appointed ALJ. Pet. App. 3a.

Before the new ALJ, petitioner raised several constitutional, statutory, and equitable objections to the administrative proceedings. Pet. App. 3a. In particular, he claimed that "(1) the proceedings violated the separation of powers, (2) the statutory restrictions on removing the SEC's ALJs violated Article II, (3) the SEC's ALJs had not been properly appointed, (4) the proceedings were based on an impermissible delegation of legislative authority, (5) the proceedings violated his due process rights, (6) the proceedings violated his equal protection rights, (7) the proceedings violated his right to a jury trial, (8) the statute of limitations had run, and (9) the proceedings were barred by laches." *Ibid.* He later agreed to a stipulation under which the ALJ would not need to rule on his constitutional objections, but which allowed him to renew those objections before the Commission. *Id.* at 105a. The ALJ ultimately issued an initial decision adverse to petitioner, concluding that he had violated various provisions of the

securities laws. *Id.* at 12a-112a. Petitioner sought review of the ALJ's decision before the Commission, and that administrative proceeding remains pending.

3. While petitioner's administrative proceeding was pending before the (second, properly appointed) ALJ, petitioner brought this suit in the Northern District of Georgia to have the proceeding enjoined. Pet. App. 3a. He raised many of the same claims he had raised in the administrative proceeding, alleging that (1) the administrative proceeding denied him due process, (2) the statutory restrictions on the ALJ's removal violated Article II, (3) the administrative proceedings violated the Seventh Amendment, and (4) the statute of limitations barred the proceeding. *Id.* at 7a-8a.

The district court denied the motion for a preliminary injunction and dismissed the complaint for lack of subject-matter jurisdiction. Pet. App. 7a-10a. The court observed that, in *Hill* v. *SEC*, 825 F.3d 1236 (2016), the Eleventh Circuit had held that the statutory review scheme of the Exchange Act was exclusive and that a litigant could not "bypass the administrative scheme * * * by filing a district-court lawsuit raising constitutional challenges to the administrative proceeding." Pet. App. 8a-9a. The court concluded that "*Hill* governs here." *Id.* at 9a.

The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-6a. Like the district court, the court of appeals "conclude[d] that *Hill* controls in this case." *Id.* at 6a. The court of appeals observed that petitioner "can receive meaningful judicial review of his claims in a court of appeals" after the end of the administrative proceedings, and that "if the appellate court finds merit in any of his claims, it may vacate or set aside any adverse SEC order." *Ibid.* The court stated

that, in the meantime, petitioner "cannot bypass the SEC statutory scheme by filing a collateral action in federal district court." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 14-34) that he may bypass the statutory scheme for reviewing the Commission's proceedings by filing an action in district court to have those proceedings enjoined on constitutional grounds. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. This Court has previously denied petitions for writs of certiorari raising similar questions. See *Tilton* v. *SEC*, 137 S. Ct. 2187 (2017); *Bebo* v. *SEC*, 136 S. Ct. 1500 (2016). The same course is warranted here.

1. This Court's cases set out a framework "for determining whether a statutory scheme of administrative and judicial review provides the exclusive means of review for constitutional claims." *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 8 (2012). Under that framework, the Court first asks whether "Congress' intent to preclude district court jurisdiction is 'fairly discernible in the statutory scheme.'" *Id.* at 9-10 (citation omitted). As a general matter, a court may fairly discern from Congress's enactment of an elaborate and comprehensive scheme for reviewing agency action that Congress did not mean to allow litigants to challenge such action outside that scheme. For example, in *Elgin*, the Court held that the civil-service laws' "'elaborate' framework" for reviewing federal employees' challenges to employment decisions "demonstrates Congress' intent" to foreclose review of constitutional claims outside that framework. *Id.* at 11 (citation omitted). Similarly, in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994),

the Court held that the enactment of a "comprehensive enforcement structure" for mine-safety laws "establishes a 'fairly discernible' intent to preclude district court review" of constitutional challenges to those laws. *Id.* at 216 (citation omitted).

Even where exclusivity is fairly discernable from the statutory scheme, this Court has held that claims may proceed outside that scheme if they are not "of the type Congress intended to be reviewed within th[e] statutory structure." *Thunder Basin*, 510 U.S. at 212. The Court "presum[es] that Congress does not intend to limit * * * jurisdiction" if (1) "'a finding of preclusion could foreclose all meaningful judicial review,'" (2) the suit is "'wholly collateral to a statute's review provisions,'" and (3) the claims lie "'outside the agency's expertise.'" *Elgin*, 567 U.S. at 15 (citation omitted).

In this case, exclusivity is fairly discernible from the statutory scheme. Congress has provided for a person aggrieved by a final order of the Commission to seek review in either the circuit where he resides or has his principal place of business or the D.C. Circuit. See 15 U.S.C. 78y(a)(1), 80a-42(a), 80b-13(a). It has prescribed the contents of the agency record in that review proceeding, the standard of review of the Commission's factual findings, the process for seeking a stay, the rules governing the introduction of additional evidence, the rules governing remands to the Commission, and the scope of the court's authority to consider objections not raised before the Commission. See p. 3, *supra*. "Given the painstaking detail with which the [law] sets out the method for [respondents in Commission enforcement proceedings] to obtain review of adverse [decisions], it is fairly discernible that Congress intended to deny

such [persons] an additional avenue of review in district court." *Elgin*, 567 U.S. at 11-12.

In addition, there is no sound basis for concluding that petitioner's claims are "of the type Congress intended to be reviewed [outside] th[e] statutory structure." *Thunder Basin*, 510 U.S. at 212. First, "a finding of preclusion" would not "foreclose all meaningful judicial review." *Elgin*, 567 U.S. at 15 (citation omitted). To the contrary, it would simply mean that, instead of filing suit in district court while the Commission proceedings remain ongoing, petitioner would seek review in a court of appeals after the proceedings conclude if the Commission concludes in its final decision that he violated the securities laws. At that point, the court of appeals will have the opportunity to consider petitioner's claims and, if appropriate, to vacate the Commission's order and award other suitable relief. See, *e.g.*, *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 (2018) (considering an Appointments Clause challenge to a Commission ALJ after the completion of the administrative proceeding and ordering a new hearing before a different, properly appointed ALJ).

Second, petitioner's claims are not "wholly collateral to a statute's review provisions." *Elgin*, 567 U.S. at 15 (citation omitted). Quite the contrary, his claims are "inextricably intertwined with the conduct of the very enforcement proceeding the statute grants the [Commission] the power to institute and resolve." Pet. App. 6a (citation omitted). Put another way, petitioner's claims "do not arise 'outside' the SEC administrative enforcement scheme"; rather, "they arise from actions the Commission took in the course of that scheme." *Jarkesy* v. *SEC*, 803 F.3d 9, 23 (D.C. Cir. 2015).

Third, petitioner's claims do not lie "outside the agency's expertise." *Elgin*, 567 U.S. at 15 (citation omitted). In *Elgin*, this Court explained that, although an agency may lack expertise on matters of constitutional interpretation, it can still "apply its expertise" to the "many threshold questions that may accompany a constitutional claim," potentially "obviat[ing] the need to address the constitutional challenge." *Id.* at 22-23. Here, for example, the Commission could bring its expertise to bear on issues "such as whether [petitioner] has violated the securities laws or whether the statute of limitations has expired." Pet. App. 6a. In such circumstances, there is "no reason to conclude that Congress * * * exempt[ed] such claims from exclusive review" through the channels specified in the statute. *Elgin*, 567 U.S. at 23.

2. Petitioner's contrary arguments lack merit. Petitioner characterizes the court of appeals' decision as a "jurisdiction-stripping" rule and argues that Congress may adopt such a rule only if it does so "'expressly.'" Pet. 14-15 (citation omitted). In *Elgin*, however, this Court distinguished between (1) "a statute that purports to 'deny any judicial forum for a colorable constitutional claim'" and (2) a statute that "simply channels judicial review of a constitutional claim to a particular court." 567 U.S. at 9 (citation omitted). The Court explained that its precedents require a clear statement to "foreclose all judicial review" of a constitutional claim, but that no such clear statement is needed when Congress "merely directs that judicial review shall occur in [a particular court]." *Id.* at 10. Here, Congress has not deprived petitioner of all judicial review of his constitutional claims; rather, it has required the claims to be

brought in the court of appeals rather than the district court. No clear-statement requirement applies.

Petitioner also argues (Pet. 19-29) that the decision below conflicts with this Court's decision in *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010). That is incorrect. In *Free Enterprise Fund*, an accounting firm that was not subject to any ongoing administrative proceeding argued that the "existence" of the Public Company Accounting Oversight Board violated the Appointments Clause and the separation of powers. *Id.* at 490, 508. The Court explained that such a "general challenge to the Board" was collateral to "any [particular] orders or rules from which review might be sought," and that "[r]equiring [the firm] to select and challenge a Board rule at random" would have been "an odd procedure for Congress to choose." *Id.* at 490. The Court further rejected the suggestion that the firm could secure judicial review by refusing to comply with a Board request for documents or testimony and then "rais[ing] [its] claims by appealing a Board sanction." *Ibid.* The Court refused to "require plaintiffs to bet the farm by taking the violative action before testing the validity of the law." *Ibid.* (citation, ellipsis, and internal quotation marks omitted). In contrast to the accounting firm in *Free Enterprise Fund*, petitioner need not "select and challenge a [Commission action] at random." *Ibid.* Nor is he required to "bet the farm by taking the violative action before testing the validity of the law." *Ibid.* (citation, ellipsis, and internal quotation marks omitted). Rather, he is already subject to a pending Commission proceeding, and his constitutional claims arise out of that very proceeding. It is not "odd" for Congress to have insisted that petitioner pursue those constitutional claims—along

with any other claims he may have—through the scheme it established for reviewing that proceeding, *ibid.*; quite the contrary, it is entirely natural.

Finally, petitioner asserts (Pet. 24) that he will suffer irreparable harm simply from "having to appear before an unconstitutionally insulated ALJ." In *FTC* v. *Standard Oil Co. of California*, 449 U.S. 232 (1980), however, this Court rejected a similar effort to enjoin an ongoing administrative proceeding, explaining that a court could consider the lawfulness of the proceeding after it ended and that, in the meantime, the "expense and annoyance of litigation is 'part of the social burden of living under government.'" *Id.* at 244-245 (citation omitted). Petitioner distinguishes that case (Pet. 23) on the ground that it involved a statutory rather than constitutional challenge, but nothing in the Court's reasoning turned on that point. Petitioner also argues (Pet. 24) that an ALJ order can impose consequences even before the Commission issues a final order. The Commission's regulations make clear, however, that an ALJ's order has no legal effect until the Commission issues a final order. See 17 C.F.R. 201.360(d)(1). And if the Commission does issue a final order adverse to petitioner, he may seek review in accordance with the scheme established by Congress.

3. As petitioner concedes (Pet. 18), the decision below does not conflict with the decision of any other court of appeals. Every court of appeals to consider the issue agrees that parties in petitioner's position may not bypass the review scheme established by Congress by challenging an ongoing administrative action in district court. See *Tilton* v. *SEC*, 824 F.3d 276 (2d Cir. 2016), cert. denied, 137 S. Ct. 2187 (2017); *Bennett* v. *U.S. SEC*, 844 F.3d 174 (4th Cir. 2016); *Bebo* v. *SEC*, 799 F.3d 765

(7th Cir. 2015), cert. denied, 136 S. Ct. 1500 (2016); *Hill* v. *SEC*, 825 F.3d 1236 (11th Cir. 2016); *Jarkesy*, *supra* (D.C. Cir.).

Two courts of appeals are still considering the question presented here or a close variant of it. In *Cochran* v. *SEC*, No. 19-10396 (docketed Apr. 9, 2019), the Fifth Circuit has granted rehearing en banc to determine whether a party in petitioner's position may challenge the constitutionality of restrictions on the removal of Commission ALJs by filing an action in district court. See *Cochran* v. *SEC*, 978 F.3d 975 (2020). And in *Axon Enterprise, Inc.* v. *FTC*, appeal pending, No. 20-15662 (docketed Apr. 14, 2020), the Ninth Circuit is considering a similar issue in the context of the Federal Trade Commission, whose statutory review scheme is materially identical to the statutory review scheme at issue here. If a circuit conflict emerges as a result of the Fifth and Ninth Circuits' decisions, this Court's review may be warranted at that time. For now, however, the uniformity of the courts of appeals' decisions makes this Court's intervention unnecessary.

4. In all events, this case would be a suboptimal vehicle for considering the question presented. In district court, petitioner sought to enjoin an evidentiary hearing before a Commission ALJ, principally on the ground that the restrictions on the ALJ's removal violate the Constitution. Compl. ¶ 110; see, *e.g.*, Pet. 24. Now, however, the proceedings before the ALJ have already occurred, and petitioner's case is before the Commission. See pp. 4-5, *supra*. At this point, petitioner's request to enjoin the ALJ proceedings is moot, and it is unclear what alternative relief a district court could properly grant petitioner even if it did exercise subject-matter jurisdiction.

Unlike petitioner here, the plaintiffs in *Cochran* and *Axon Enterprises* have not yet had their evidentiary hearings; rather, the courts of appeals in those cases have enjoined or stayed those hearings pending appeal. See Order, *Axon Enterprise, Inc.*, *supra* (No. 20-15662) (Oct. 2, 2020); Order, *Cochran*, *supra* (No. 19-10396) (Sept. 24, 2019). Those cases thus would present better vehicles than the present petition for resolving the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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