No. 21-1239

In the Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION, ET AL.,
Petitioners,

v.

MICHELLE COCHRAN,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPENING BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Securities Exchange Act of 1934 strips federal district courts of jurisdiction to adjudicate structural constitutional claims challenging Securities and Exchange Commission administrative proceedings.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellees below) are the Securities and Exchange Commission; Gary Gensler, in his official capacity as Chairman of the Securities and Exchange Commission; and Merrick B. Garland, in his official capacity as Attorney General of the United States.

Respondent (plaintiff-appellant below) is Michelle Cochran.

RELATED PROCEEDINGS

United States Court of Appeals (5th Cir.):

Cochran v. U.S. Securities & Exchange Comm'n, No. 19-10396 (Dec. 13, 2021)

United States District Court (N.D. Tex.):

Cochran v. U.S. Securities & Exchange Comm'n, No. 19-cv-66 (Mar. 25, 2019)

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-111a) is reported at 20 F.4th 194. The opinion of the court of appeals panel (Pet. App. 114a-38a) is reported at 969 F.3d 507. The opinion of the district court (Pet. App. 139a-44a) is available at 2019 WL 1359252.

JURISDICTION

The en banc court of appeals entered its judgment on December 13, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the addendum to this brief.

INTRODUCTION

The administrative state can be ruthless in its ability to destroy the lives of those caught up in its machinery—before any wrongdoing is established. When individuals like Michelle Cochran are accused by the Securities and Exchange Commission (SEC or Commission) of violating an SEC-created and SEC-enforced securities regulation, they frequently find themselves in SEC administrative proceedings in which the SEC enjoys a home-court record that would make most college teams blush. Superintended by the SEC's own administrative law judges (ALJs), these drawn out proceedings can take such a crushing personal, financial, and reputational toll on their targets that most—even those who vigorously maintain their innocence—are forced to settle to avoid complete destruction. To make matters worse, ALJs are executive officers insulated from

accountability by a regime of multiple layers of protection from removal by the President—a regime that this Court deemed structurally unconstitutional in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010).

Faced with the prospect of ruinous proceedings helmed by an executive officer acting without the constitutionally required degree of accountability, private citizens like Cochran turn to one of the most important bastions against unconstitutional government action—federal district courts. For nearly a century and a half, district courts have exercised general federal-question jurisdiction under 28 U.S.C. § 1331 to "prevent[] [governmental] entities from acting unconstitutionally." *Free Enter. Fund*, 561 U.S. at 491 n.2 (citation omitted). But in this case and others like it, the SEC has tried to block that essential avenue for vindicating constitutional safeguards, insisting that Congress has insulated the SEC's administrative proceedings from any judicial scrutiny until the SEC has decided to conclude them. In the SEC's view, those enmeshed in the agency's machinery must endure years of proceedings—superintended by the very official they claim is unconstitutionally unaccountable—before they may set foot inside a federal courthouse.

That would be a drastic step for Congress to take. But the SEC does not rest its position on the text of any congressionally enacted statute expressly stripping district courts of their longstanding grant of federal-question jurisdiction. Everyone agrees there is no such statute. Instead, the SEC advances the atextual theory that Congress *implicitly* stripped that jurisdiction in 15 U.S.C. § 78y—a provision of the Securities Exchange Act of 1934 that says nothing

about district court jurisdiction and merely grants the courts of appeals jurisdiction to provide appellate review of "final order[s] of the Commission."

The en banc Fifth Circuit below correctly rejected the SEC's position and held that Section 78y does not strip federal district courts of their jurisdiction to hear structural constitutional claims. Most fundamentally, the SEC's position has zero basis in the text of Section 78y. Moreover, its position flouts this Court's decision in *Free Enterprise Fund*. There, the government argued that the same statute at issue here (Section 78y) implicitly stripped district court jurisdiction over the same kind of structural constitutional claims, based on the same line of precedent—grounded in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994)—that the SEC relies on here. Yet, this Court firmly rejected that argument, concluding that "§ 78y did not"—either "expressly" or "implicitly"—"strip the District Court of jurisdiction over these claims." *Free Enter. Fund*, 561 U.S. at 489-91. That holding alone ends this case. And, in any event, a proper application of *Thunder Basin* supports the conclusion that district courts have jurisdiction over structural constitutional claims.

As the administrative state has exploded, the general jurisdiction that Congress long ago granted district courts in 28 U.S.C. § 1331 is an increasingly important safeguard for individuals seeking to enforce their constitutional rights against a government that has grown not just in sheer size, but raw power. This Court should affirm the en banc Fifth Circuit's ruling that district courts retain jurisdiction to hear structural constitutional challenges to SEC administrative proceedings.

STATEMENT OF THE CASE

A. Legal Background

The Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881, was enacted by Congress on the heels of the 1929 stock market crash and resulting depression in an effort—by the incoming Roosevelt Administration—to unleash "regulation to the full extent of federal power" over "exchanges in securities and commodities." Pet. App. 47a (Oldham, J., concurring) (citation omitted). The judicial review provision at issue in this case—15 U.S.C. § 78y—was drafted by James Landis, a law professor, who "hoped that the SEC could set upon Americans without interference from courts—unless and until the SEC gave courts permission to review its work." Pet. App. 36a (Oldham, J., concurring). To this day, the SEC has vigorously defended that inglorious objective.

1. Broadly speaking, the Exchange Act established the SEC to enforce an array of federal laws that, over time, have grown to regulate virtually "every facet of the securities industry." *Kokesh v. SEC*, 137 S. Ct. 1635, 1639-40 (2017) (citation omitted). The SEC is composed of five Commissioners, each of whom "shall hold office for a term of five years." 15 U.S.C. § 78d(a). The Commissioners are appointed by the President and confirmed by the Senate, and no more than three may be "members of the same political party." *Id.*

The SEC is an "independent agency whose Commissioners are considered removable by the President only for cause," and as such, is "'specifically designed *not* to have the quality . . . of being subject to the exercise of political oversight and sharing the President's accountability to the people.'" *Free Enter.*

Fund v. Public Co. Acct. Oversight Bd., 537 F.3d 667, 697 n.7 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (alteration in original) (quoting *Freytag v. Commissioner*, 501 U.S. 868, 916 (1991) (Scalia, J., concurring in part and concurring in the judgment)), *aff'd in part, rev'd in part*, 561 U.S. 477 (2010). The SEC has taken its "independent [a]gency" status to heart, explicitly instructing its members to "exhibit a spirit of firm independence and reject any effort by representatives of the executive or legislative branches of the government to affect their independent determination of any matter being considered by th[e] Commission." 17 C.F.R. § 200.58. Free from "partisan demands" and "public clamor," the SEC openly declares the agency to "be above fear of unjust criticism by anyone." *Id.*

The Exchange Act vested the SEC with vast regulatory powers that have only grown in the decades since the agency's inception. In addition to possessing extensive authority to promulgate rules and regulations governing the securities markets, the SEC has broad authority to enforce those rules. *See Kokesh*, 137 S. Ct. at 1640. The SEC's enforcement powers include the power to conduct intrusive investigations in which the SEC may compel production of documents and witness testimony through subpoenas. *See* 15 U.S.C. §§ 77s(c), 78u(b). SEC investigations are extensive, and "often" drag on for "months or even years." Pet. App. 66a (Oldham, J., concurring) (citation omitted).

The SEC also possesses significant adjudicatory authority. Although the SEC may initiate enforcement actions in federal district court, *see, e.g.*, 15 U.S.C. § 78u(d), the SEC may also prosecute alleged violations of the securities laws through in-

house administrative proceedings, *see id.* § 78u-3(a); *see also, e.g.*, *id.* §§ 80a-9, 80b-3. If, after those administrative proceedings, the SEC decides that the respondent committed the alleged violations, the SEC has the power to impose sanctions. *See id.* § 78u-2.

Originally, the Exchange Act allowed the SEC to impose only a limited range of administrative sanctions without going to court, such as expelling or suspending registered individuals from the national securities exchanges. *See* Exchange Act § 19(a), 48 Stat. at 898. Even this authority was met with "grave concern" at the time, as it allowed the SEC to make the rules, "act as a public prosecutor" in enforcing the rules, and "determine the guilt or innocence of the person it has accused." Roland L. Redmond, *The Securities Exchange Act of 1934: An Experiment in Administrative Law*, 47 Yale L.J. 622, 636-37 (1938).

Over time, however, this authority has only grown. The SEC gained the authority to impose additional forms of administrative sanctions, including cease-and-desist orders, industry bar orders, disgorgement, and even monetary penalties. *See* 6 Thomas L. Hazen, *Law of Securities Regulation* §§ 16:29-16:30, at 53-59 (7th ed. rev. 2016) (Hazen). Today, the SEC prosecutes nearly half of its enforcement cases administratively. *See* Press Release, SEC, *SEC Announces Enforcement Results for FY 2021* (Nov. 18, 2021) (addendum), https://www.sec.gov/news/press-release/2021-238.

2. For the targets of SEC's enforcement power, the SEC's administrative adjudication regime is onerous, to say the least. SEC-initiated proceedings frequently drag on for several years and take such an enormous personal, financial, and reputational toll on their targets that most—despite vigorously asserting

their innocence—are forced to capitulate. *See* Pet. App. 68a-70a (Oldham, J., concurring).

a. Formal enforcement proceedings begin when the Commission votes to issue an order instituting proceedings. 17 C.F.R. § 201.200(a). At that point, the SEC typically assigns the case to one of its own ALJs. *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018); *see* 15 U.S.C. § 78d-1(a); 17 C.F.R. § 200.30-9.

The SEC's ALJs wield "extensive powers" over "'the course of' the proceeding and the 'conduct of the parties and their counsel.'" *Lucia*, 138 S. Ct. at 2049 (citation omitted). Those powers "'include, but are not limited to,' supervising discovery; issuing, revoking, or modifying subpoenas; deciding motions; ruling on the admissibility of evidence; administering oaths; hearing and examining witnesses"; and "'do[ing] all things'" that they deem "'necessary and appropriate to discharge [their] duties.'" *Id.* (quoting 17 C.F.R. § 201.111); *see* 17 C.F.R. § 200.14(a). ALJs may also "impos[e] sanctions"—which can be "severe"—for "violations of [their] orders," "violations of procedural requirements," or any "other contemptuous conduct." *Lucia*, 138 S. Ct. at 2049, 2053-54 (citing 17 C.F.R. § 201.180(a)). Once the proceedings conclude, ALJs issue "decisions containing factual findings, legal conclusions, and appropriate remedies." *Id.* at 2053 (citing 17 C.F.R. § 201.360(b)).

The respondents in these proceedings stand on far worse footing than individuals who are lucky enough to face the SEC based on the same sort of regulatory charges in a federal court. For example, the "targets of [SEC] administrative enforcement proceedings do not have the extensive rights available to defendants in civil court proceedings, including rights to pretrial discovery, protections of evidentiary rules, access to a

jury trial, or a lesser standard for review upon appeal than applies to appeals from administrative orders." 5 Hazen § 16:3, at 742.

Worse, SEC ALJs are insulated by multiple layers of removal from Executive Branch oversight. Like other executive officers, the power exercised by SEC ALJs reflects an exercise of the "executive Power" that Article II of the Constitution vests in the "President." *Free Enter. Fund*, 561 U.S. at 492 (quoting U.S. Const. art. II, § 1, cl. 1); *see Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197-98 & n.2 (2020); *see also Lucia*, 138 S. Ct. at 2049 (classifying SEC ALJs as "Officers of the United States" (quoting U.S. Const. art. II, § 2, cl. 2)). Yet, the SEC's ALJs enjoy significant insulation from the President's ability to hold executive officers "accountable for their conduct" through "oversight" and "removal." *Free Enter. Fund*, 561 U.S. at 495-97.

As the government itself has previously acknowledged, "the statutory scheme provides [SEC ALJs with] at least two, and potentially three, levels of protection against presidential removal authority." Gov't Cert. Resp. 20, *Lucia*, *supra* (No. 17-130). ALJs can be removed "only for good cause established and determined by the Merit Systems Protection Board [(MSPB)]," 5 U.S.C. § 7521(a), and MSPB officials are removable by the President "only for inefficiency, neglect of duty, or malfeasance in office," *id.* § 1202(d). And, on top of that, the SEC Commissioners themselves have traditionally enjoyed for-cause removal protection. *See supra* at 4-5. This is an "arrangement" that this Court in *Free Enterprise Fund* declared to be "contrary to" Article II's Vesting and Take Care Clauses. 561 U.S. at 492, 496.

b. A losing party may seek discretionary review of an ALJ's decision before the Commission itself—the same body that instituted the administrative proceedings in the first place. 15 U.S.C. § 78d-1(b). But this review is not available until the ALJ issues its "initial decision." 17 C.F.R. § 201.410(a). If the Commission declines review, "the ALJ's decision itself 'becomes final' and is 'deemed the action of the Commission.'" *Lucia*, 138 S. Ct. at 2054 (quoting 17 C.F.R. § 201.360(d)(2); 15 U.S.C. § 78d-1(c)). But even when the Commission grants review, it typically defers to the ALJ's "'findings of fact,'" and when the "factfinding derives from credibility judgments, as it frequently does, acceptance [by the Commission] is near-automatic." *Id.* at 2054-55 (citation omitted).

Given that SEC employees play judge, jury, and prosecutor, it is hardly surprising that "the SEC wins the 'vast majority' of the cases it brings through administrative proceedings." Pet. App. 28a n.15 (citation omitted). One study found that, between October 2010 and March 2015, the Commission won more than 90% of cases it brought before its own ALJs—a rate markedly higher than its 69% success rate in federal court over the same period, Jean Eaglesham, *SEC Wins with In-House Judges*, Wall St. J. (May 6, 2015), https://on.wsj.com/3L4cPUN, and one that would rank with or exceed the very best home-court advantages in sports, *see* Brian Rauf, *NCAA Basketball: Ranking the Nation's 25 Best Home-Court Advantages*, Busting Brackets (Aug. 15, 2019) (Kansas-Allen Fieldhouse).[1]

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[1] https://bustingbrackets.com/2019/08/15/ncaa-basketball-ranking-nations-25-best-home-court-advantages/26/.

Faced with years of ruinous proceedings in front of decisionmakers who are perceptibly "'less fair,'" SEC respondents face "tremendous pressure" to throw in the towel and settle. Pet. App. 68a-70a (Oldham, J., concurring) (citation omitted). And the SEC has capitalized on this, actually "threatening" respondents in "a number of cases" with ALJ proceedings as a means of compelling settlement. *Tilton v. SEC*, 824 F.3d 276, 298 n.5 (2d Cir. 2016) (Droney, J., dissenting) (citation omitted), *cert. denied*, 137 S. Ct. 2187 (2017); *see* Pet. App. 69a (Oldham, J., concurring).

c. For the unbroken few who emerge from the SEC's administrative regime, the Exchange Act provides that a party "aggrieved by a final order of the Commission" "may" seek judicial review of that order in a federal court of appeals by filing a petition for review. 15 U.S.C. § 78y(a)(1). "On the filing of the petition," the court of appeals "has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part." *Id.* § 78y(a)(3).

But even then, the appellate review provided by Section 78y is strictly confined to the administrative record assembled in the agency proceedings, *see id.* § 78y(a)(5), and constrained by "very deferential" standards of review, *Lorenzo v. SEC*, 872 F.3d 578, 583 (D.C. Cir. 2017) (citation omitted) (discussing the "substantial evidence" standard in 15 U.S.C. § 78y(a)(4)), *aff'd*, 139 S. Ct. 1094 (2019); *see also id.* at 602 (Kavanaugh, J., dissenting) ("Administrative adjudication of individual disputes is usually accompanied by deferential review from the Article III Judiciary.").

Moreover, the sanctions imposed by the SEC do not await judicial review. Absent a discretionary stay, the SEC can collect any monetary penalties as well as suspend an individual's professional licenses and, accordingly, upend his or her livelihood—all before the individual ever sees the inside of a court of appeals. *See* 15 U.S.C. § 78y(c)(2); 17 C.F.R. §§ 201.360(d)(2), 201.601(a); *see also, e.g.*, *In re Southeast Invs., N.C., Inc.*, No. 3-19185, 2019 WL 2448245, at *2 (SEC June 12, 2019) (describing a discretionary SEC stay as an "extraordinary remedy" (citation omitted)).

Most respondents, however, never "make it to federal court." Pet. App. 68a (Oldham, J., concurring).

B. Factual Background

Michelle Cochran is a CPA licensed in Texas. JA42. After having two children, Cochran rejoined the workforce in 2007 to work for a small accounting firm called the Hall Group, which performed auditing work for non-profits, privately held companies, and a few small, publicly traded companies. *Id.* Cochran was initially hired as an hourly employee, working ten to fifteen hours per week as an auditor. *Id.*

The working environment at the Hall Group, however, was toxic. The firm's principal, David Hall, frequently berated his employees while taking on more work than the small firm could handle, leaving his few employees scrambling to try to complete auditing engagements on unachievable deadlines. JA42-43. Every time Cochran tried to speak up to raise the alarm, Hall threatened to fire her. *See In re David S. Hall, P.C.*, No. 3-17228, 2017 WL 894965, at *10 (SEC Mar. 7, 2017) (*ALJ Initial Decision*).

Things took a turn for the worse in 2012, when Hall demanded that Cochran become a non-equity partner as a condition of her continued employment. JA43. This was hardly a welcome advancement. The non-equity position entailed no increase in pay, and, instead, merely added more stress and more hours to an already unpleasant environment. *Id.* Yet, elevating Cochran to non-equity partner allowed Hall—the sole equity partner—to brand his firm "The Hall Group *CPAs*" and take on even more engagements. *Id.* After multiple disagreements with Hall, Cochran decided enough was enough and resigned from the firm in July 2013. JA42-44.

She thought the trauma was over. But in April 2016, almost three years after Cochran left the firm, Cochran was blindsided when the SEC filed an Order Instituting Proceedings against not only David Hall and his firm, but also Cochran and another accountant. JA44. The SEC claimed that Cochran violated the Exchange Act by failing to comply with certain auditing documentation requirements, e.g., the alleged failure to sufficiently complete various auditing checklists. JA44-45; *see* Order Instituting Public Administrative & Cease-and-Desist Proceedings, *In re David S. Hall, P.C.*, No. 3-17228, 2016 WL 1665164 (SEC Apr. 26, 2016). The SEC did not allege that anyone suffered any losses or was misled by this allegedly incomplete paperwork.

As it often does, the SEC elected to proceed against Cochran within its own administrative regime rather than in federal court. JA45-46. The case was assigned to an ALJ who, like other SEC ALJs, had not been properly appointed for purposes of the

Appointments Clause. *Id.*[2] The ALJ issued multiple orders and presided over a hearing at which Cochran appeared pro se. JA47-49. After the hearing, the ALJ issued a decision against Cochran and imposed a $22,500 penalty and a ban from practicing before the SEC that would last a minimum of five years—a devastating penalty for a single mother of two. JA49; *see ALJ Initial Decision*, 2017 WL 894965, at *26-33.

Cochran petitioned the Commission for review. The Commission, however, vacated the ALJ's decision, and all of the proceedings before it, in light of this Court's decision in *Lucia*, which held that the remedy for an "adjudication tainted with an appointments violation" is a new proceeding before a different and properly appointed official. 138 S. Ct. at 2055; *see* JA51. That was the good news. The bad news: More than two years after the SEC first instituted proceedings, Cochran was assigned to undergo a new round of administrative proceedings before a new ALJ. Pet. App. 3a; JA51-52.

Her nightmare, in other words, continued.

C. Proceedings Below

1. In January 2019, Cochran filed suit against the SEC in the Northern District of Texas. JA38-65. Cochran sought declaratory and injunctive relief based on constitutional deficiencies in the SEC's administrative proceedings. JA64. Relevant here, Cochran claimed that SEC ALJs cannot preside over the proceedings because they are unconstitutionally

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[2] As fate would have it, Cochran's case was assigned to ALJ Cameron Elliott—the same ALJ who presided over the proceedings at issue in *Lucia*, 138 S. Ct. at 2049-50.

insulated from removal by a multilayer for-cause structure. JA60-62; *see supra* at 8.

The district court dismissed the case for lack of jurisdiction. Pet. App. 139a-44a. The court concluded that Section 78y of the Exchange Act implicitly strips district courts of jurisdiction to hear challenges to ongoing SEC enforcement proceedings. *Id.* at 141a-44a. But in reaching that conclusion, the court found it "deeply concern[ing]" that Cochran, having endured one full proceeding "before an ALJ who was not constitutionally appointed," would have to endure yet another round of proceedings, "undoubtedly at considerable expense and stress," before another constitutionally illegitimate ALJ. *Id.* at 143a.

2. Cochran appealed, and a divided panel of the Fifth Circuit affirmed. *Id.* at 114a-38a.[3] The panel majority held that, in enacting Section 78y's scheme for review of final SEC orders, Congress "implicitly" stripped federal district courts of jurisdiction over structural constitutional challenges as well. *Id.* at 114a-15a, 117a. In so holding, the majority reasoned that Section 78y "exhibits a general intent to deprive district courts of subject matter jurisdiction," *id.* at 118a-19a; and that "Congress intended to funnel the kind of claim Cochran asserts through the statutory review scheme," *id.* at 119a-31a. The majority arrived at the latter conclusion after "marching through" a set of "factors" derived from this Court's decision in *Thunder Basin*—whether "(1) administrative

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[3] A motions panel of the Fifth Circuit had previously enjoined the SEC administrative proceedings pending Cochran's appeal, and the proceedings have been stayed since. *See* Pet. App. 4a; Order Granting Joint Motion, *In re David S. Hall, P.C.*, No. 3-17228 (SEC Mar. 24, 2022).

proceedings would 'foreclose all meaningful judicial review'; (2) 'the suit is wholly collateral to a statute's review provisions'; and (3) 'the claim[] [is] outside the agency's expertise.'" *Id.* at 120a (alteration in original) (citation omitted); *see id.* at 123a-28a.

Judge Haynes dissented in relevant part, concluding that, "like the [claim] in *Free Enterprise Fund*," Cochran's "structural removal claim is not the type [of claim] over which Congress intended to limit jurisdiction" of federal district courts. *Id.* at 132a-38a.

3. The Fifth Circuit granted rehearing en banc and reversed in relevant part. *Id.* at 1a-111a.

The en banc court held that district courts have federal-question jurisdiction under 28 U.S.C. § 1331 to hear structural constitutional claims challenging SEC proceedings. *Id.* at 5a-32a. First, the court held that "the text of § 78y" does "not explicitly or implicitly strip the district court of jurisdiction over Cochran's claim." *Id.* at 5a-10a. Second, the court held that this Court's decision in *Free Enterprise Fund* is "enough to decide this case," as that decision "rejected the precise argument the SEC makes here—that the Exchange Act divests district courts of jurisdiction over removal power challenges." *Id.* at 10a-16a. Because "*Free Enterprise Fund* is squarely on point," that decision "foreclos[es] any possibility that § 78y strips district courts of jurisdiction over structural constitutional challenges." *Id.* at 10a.

The court further held that it would reach the same conclusion under a fresh application of "the so-called '*Thunder Basin* factors.'" *Id.* at 16a-32a. As the Court explained, (1) "Cochran's removal power claim is wholly collateral to the Exchange Act's statutory-review scheme," *id.* at 21a-22a;

(2) "Cochran's removal power claim is outside the SEC's expertise," *id.* at 22a-23a; and (3) "the Exchange Act's statutory-review scheme threatens to deprive Cochran of the opportunity for meaningful judicial review," *id.* at 23a-31a. "Therefore," the court concluded, "the *Thunder Basin* inquiry simply reaffirms that *Free Enterprise Fund* controls this case and that Cochran's removal power claim is within the district court's jurisdiction." *Id.* at 31a-32a.[4]

Judge Oldham, joined by five other judges, issued a concurring opinion. *Id.* at 35a-81a. He agreed with the majority's textual analysis and conclusion, explaining that "the text is as unambiguous as can be. Section 1331 creates jurisdiction, and § 78y strips only part of it"—a part that "undisputedly does not apply to Cochran." *Id.* at 35a. In his view, "[t]hat should end this case." *Id.* But to respond to points made by the dissent, he went on to detail the relevant history of the SEC and its scheme for administrative review, describing the tremendous burdens imposed by that scheme on SEC targets. *Id.* at 36a-81a.

Judge Costa, joined by six judges, dissented. *Id.* at 82a-111a. After rejecting the majority's position that Section 78y's text resolves this case, he concluded that application of the *Thunder Basin* factors leads to the conclusion that Congress intended to create "an exclusive review scheme" in Section 78y that implicitly strips district courts of jurisdiction, *id.* at 85a-94a, including jurisdiction over structural constitutional claims like Cochran's here, *id.* at 94a-111a. In an effort to reconcile that result with *Free*

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[4] The Fifth Circuit also rejected the SEC's ripeness argument, Pet. App. 32a-34a, which the government abandoned in its petition for certiorari, Cert. Resp. 10 n.2.

Enterprise Fund, he drew an "investigation/enforcement distinction" under which district courts have jurisdiction during "an [SEC] investigation" but lose jurisdiction once the SEC has decided to initiate an "enforcement proceeding." *Id.* at 99a-104a.

4. The government filed the petition for certiorari, which the Court granted on May 16, 2022.[5]

SUMMARY OF ARGUMENT

The Fifth Circuit correctly held that federal district courts have jurisdiction to hear structural constitutional challenges to SEC proceedings.

A plain reading of the relevant statutory provisions commands this result. In 28 U.S.C. § 1331, Congress granted federal district courts jurisdiction over all cases arising under the Constitution. This jurisdictional grant has long served as a vital safeguard in preventing or halting unconstitutional governmental action. That includes jurisdiction over structural constitutional claims by individuals, like Cochran, who seek to halt the SEC's administrative proceedings against them because they are helmed by unconstitutionally insulated officials.

Section 78y of the Exchange Act does not strip district courts of that longstanding jurisdiction. All agree that, in enacting Section 78y, Congress did not *expressly* strip district courts of their jurisdiction to review structural constitutional claims. The only point of dispute is whether Section 78y strips that

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[5] On April 8, 2022, the SEC filed a letter notifying the Court of a "control deficiency" in its administrative proceedings: Agency personnel acting in a prosecutorial capacity in Cochran's case accessed and shared documents prepared by agency personnel acting in an adjudicatory capacity.

jurisdiction *implicitly*. Given the paramount importance of statutory text, stripping jurisdiction based on mere implications is at best a shaky enterprise. But this Court already considered this exact question in *Free Enterprise Fund* and concluded that the answer is no. There is no reason to reach any different conclusion here. As the en banc Fifth Circuit explained below, the statutory text and structure, as well as the nature of the structural constitutional claim at issue, all *support* district court jurisdiction here.

Indeed, Section 78y does not say a word about divesting district courts of jurisdiction over structural constitutional challenges to administrative proceedings. Instead, it grants courts of appeals jurisdiction over challenges to certain agency actions—namely, a "final order of the Commission." Even assuming this limited grant of jurisdiction implicitly strips district courts of jurisdiction to review final orders of the Commission, Cochran is not challenging a final order of the Commission. Thus, the district court retains jurisdiction over Cochran's claim.

The judicial review scheme established by Section 78y is particularly inhospitable to structural constitutional claims like Cochran's. Section 78y does not give the courts of appeals (or the agency itself) the tools to prevent these structural constitutional defects from inflicting irreparable harm. And the record in Section 78y review is limited to an administrative record developed by the SEC in the administrative proceedings—the very proceedings under constitutional attack. In plain terms, Section 78y simply channels challenges to certain agency actions—the kinds of challenges that would benefit

from appellate review—into the courts of appeals. There is no inkling in the text that Congress intended this administrative apparatus to serve as the exclusive means of challenging the apparatus itself.

The SEC's attempt to subvert the text by invoking the "*Thunder Basin* factors" is unavailing. This Court already rejected the conclusion that these factors stripped jurisdiction over structural constitutional claims in *Free Enterprise Fund*, and that decision controls here. Challenges to the ALJs' existence within the administrative proceedings have nothing to do with the substantive securities laws or the merits of the SEC's allegations and are therefore both collateral to any specific SEC order subject to judicial review under Section 78y and outside the agency's expertise. Moreover, forcing these claims to wait until after the SEC issues a final order may foreclose meaningful judicial review of these claims altogether. Not only does this mean that individuals must endure the very injury they are seeking to prevent in order to reach a federal court, but there is no guarantee that the SEC will ever issue such an order.

The availability of federal district court jurisdiction over structural constitutional claims like Cochran's is an increasingly important safeguard of individual liberty. As the administrative state and its ambitions have grown, so has the list of unconstitutional abuses against ordinary Americans. Not only do agencies like the SEC lack the competence and expertise to resolve such constitutional challenges, but they have an institutional interest in barring or at least forestalling their resolution for as long as possible. And they have the tools to do so. Through its internal rules and home-court advantage, the SEC can—and does—tie individuals up in

administrative proceedings for years, exhausting their personal will and financial wherewithal to fight on. Cramming structural constitutional claims into that review scheme will needlessly perpetuate the agency's systematic violation of the Constitution, harming countless Americans in the process.

The Fifth Circuit properly held that Congress did not intend this unjust and illogical result.

ARGUMENT

Federal court jurisdiction has always served as a critical safeguard of individual liberties. That protection is a vital check against the modern administrative state. The "growth of the Executive Branch" over the past century has produced an administrative state that "now wields vast power and touches almost every aspect of daily life." *Free Enter. Fund v. Public Co. Acct. Oversight Bd.,* 561 U.S. 477, 499 (2010). Indeed, "[t]he Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities." *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (citation omitted). But in their wisdom, they recognized the importance of an independent Judiciary to protect constitutional rights and prevent government abuses. The en banc Fifth Circuit properly held that federal district courts retain this jurisdiction over the structural constitutional claim at issue here.

I. DISTRICT COURTS HAVE JURISDICTION OVER STRUCTURAL CONSTITUTIONAL CHALLENGES TO THE SEC'S ADMINISTRATIVE REGIME

A. District Courts Have Broad Jurisdiction Under 28 U.S.C. § 1331 Unless Congress Plainly Specifies Otherwise

1. Since 1875, Congress has granted federal district courts "original jurisdiction of all civil actions arising under the Constitution." 28 U.S.C. § 1331; *see Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 376-77 (2012) (discussing Act of Mar. 3, 1875, ch. 137, 18 Stat. 470). Included within this longstanding grant of jurisdiction is the power "to issue injunctions" against federal officers and agencies "to protect rights safeguarded by the Constitution." *Free Enter. Fund*, 561 U.S. at 491 n.2 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)); *see also Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326-27 (2015). Section 1331 thus serves as "'the proper means for preventing entities from acting unconstitutionally,'" including claims seeking to prevent ongoing or imminent violations of "separation-of-powers principles." *Free Enter. Fund*, 561 U.S. at 491 n.2 (citation omitted). And that is critical. Such structural constitutional violations inflict a "'here-and-now' injury" that "can be remedied by a court." *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2196 (2020) (citation omitted); *see Bond v. United States*, 564 U.S. 211, 222 (2011) (recognizing that "individuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations").

The jurisdiction granted by Section 1331 is mandatory, not optional. Since the days of Chief Justice Marshall, this Court has recognized that the

obligation of federal courts to decide cases "within the scope of a jurisdictional grant" is "'virtually unflagging'"—federal courts "have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72-73, 77 (2013) (citation omitted) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)). This obligation rests on the "constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 359 (1989).

Thus, when a case "falls within 28 U.S.C. § 1331's general grant of jurisdiction," district courts must exercise that jurisdiction unless Congress has enacted a more specific statute that "*divest[s]* the district courts of their authority under 28 U.S.C. § 1331." *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 642-43 (2002); *see Mims*, 565 U.S. at 378-79.

2. Of course, Congress retains the prerogative to divest federal courts of jurisdiction, within certain constitutional constraints. And from time to time, Congress has exercised that authority.

a. When Congress seeks to "restrict[] application of a jurisdiction-conferring statute," it usually does so "expressly." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 n.11 (2006); *see, e.g.*, 12 U.S.C. § 1818(i)(1) ("[N]o court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any [Board] notice or order under this section."); 42 U.S.C. § 405(h) ("[N]o action against the United States, the [Secretary of Health and Human Services], or any

officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.").[6] Given the important consequences of stripping courts of jurisdiction over any claims, the Court should require no less.

b. In a few circumstances, however, this Court has held that it is "'fairly discernible in the statutory scheme'" itself that "Congress intended" to *implicitly* strip district courts of their jurisdiction under Section 1331. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207-08 (1994) (citation omitted); *see Elgin v. Department of the Treasury*, 567 U.S. 1, 9-10 (2012).

This concept of implicit jurisdiction-stripping is questionable, to say the least. As the Court just stressed, arguments about what "Congress implicitly intended" when enacting a statute suffer from a "fundamental problem"—"Congress expresses its intentions through statutory text passed by both Houses and signed by the President (or passed over a Presidential veto)." *Oklahoma v. Castro-Huerta*, No. 21-429 (June 29, 2022), slip op. 11 (emphasis

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[6] *See also, e.g.*, 8 U.S.C. § 1160(e)(1) ("There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection."); *id.* § 1182(d)(3)(B)(i) ("Notwithstanding any other provision of law . . . no court shall have jurisdiction to review such a determination or revocation except in a proceeding for review of a final order of removal pursuant to section 1252 of this title, and review shall be limited to the extent provided in section 1252(a)(2)(D)."); 15 U.S.C. § 717z(g)(1) ("Except as provided in paragraph (2), no court shall have jurisdiction to grant any injunctive relief to stay or defer the implementation of any order issued under this section unless such relief is in connection with a final judgment entered with respect to such order.").

omitted). Stripping federal courts of their statutorily granted jurisdiction based on mere inferences or implications thus fits uncomfortably alongside this Court's usual refusal to engage in "'speculation about what Congress might have' intended." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2073 (2018) (citation omitted); *see Castro-Huerta*, slip op. 11 ("As this Court has repeatedly stated, the text of a law controls over purported legislative intentions unmoored from any statutory text.").

These principles must apply equally to jurisdictional statutes. Indeed, this Court has admonished that the "jurisdiction conferred by 28 U.S.C. § 1331 should hold firm against 'mere implication flowing from subsequent legislation.'" *Mims*, 565 U.S. at 383 (quoting *Colorado River*, 424 U.S. at 808); *see Rosecrans v. United States*, 165 U.S. 257, 262 (1897) ("When there are statutes clearly defining the jurisdiction of the courts, . . . that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation.").

In light of this tension, the circumstances attending implicit jurisdiction-stripping are necessarily limited and have generally rested on the field-preemption-like notion that "when Congress creates procedures 'designed to permit agency expertise to be brought to bear on particular problems,' those procedures 'are to be exclusive.'" *Free Enter. Fund*, 561 U.S. at 489 (quoting *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965)). Thus, when Congress creates a comprehensive statutory scheme for "review of specified [agency] actions," this Court has considered

whether it is "'fairly discernible'" in the statutory "text, structure, and purpose" that "Congress intended" for this scheme to be "exclusive," such that it implicitly "preclude[s] district court jurisdiction" over challenges to the agency actions specified in the statute. *Elgin*, 567 U.S. at 5, 8-10 (quoting *Thunder Basin*, 510 U.S. at 207). But even then, this Court has indicated that implicit jurisdiction-stripping is appropriate only if, and only to the extent that, the "claims [at issue] are of the type Congress intended to be reviewed within this statutory structure." *Thunder Basin*, 510 U.S. at 212. For "claims considered wholly collateral to a statute's review provisions and outside the agency's expertise," this Court will presume that Congress did *not* intend to preclude district court jurisdiction—"particularly where a finding of preclusion could foreclose all meaningful judicial review." *Id.* at 212-13 (internal quotation marks omitted); *see Elgin*, 567 U.S. at 15; *Free Enter. Fund*, 561 U.S. at 489.

c. Applying these principles, the Court has drawn a sharp distinction between cases involving challenges to specific agency action in an individual case and structural constitutional challenges to the agency's authority to act generally.

In *Thunder Basin*, for example, the Court held that the "comprehensive enforcement and administrative-review scheme" prescribed in the Mine Safety and Health Amendments Act of 1977 (Mine Act) implicitly precluded district court jurisdiction over a mining operator's preemptive challenge to an "'anticipated citation'" by the Secretary of Labor for Mine Act violations. 510 U.S. at 206 (citation omitted). The company had attempted to assert discrete, individualized

challenges to the anticipated citation, and the Court held the Mine Act's "review process"—which set forth a "detailed structure for review[]" of "any citation issued under the Act" by an independent commission followed by a court of appeals—"establishe[d]" that "Congress intended" to strip district courts of jurisdiction over such challenges. *Id.* at 207-09. Any doubt on that score was removed by the statutory history, which "confirm[ed]" that Congress plainly "intended to direct ordinary challenges under the Mine Act to a single review process" that deliberately avoided review "in federal district court." *Id.* at 209-11. Moreover, the company's specific "claims"—which primarily involved statutory questions that "at root" arose under the Mine Act—fell "within the Commission's expertise," had been addressed "in previous enforcement proceedings," and could be "meaningfully addressed" in federal court after agency proceedings had concluded. *Id.* at 214-18.

In *Elgin*, the Court likewise held that the administrative review scheme established by the Civil Service Reform Act (CSRA)—which channels review of agency employment actions to the MSPB followed by judicial review in the Federal Circuit—impliedly precluded employees from challenging an agency's "adverse employment action" in federal district court on the ground "that [the applicable] federal statute is unconstitutional." 567 U.S. at 5. The Court reasoned that, because the CSRA was "designed" to "creat[e] an integrated scheme of review" that would avoid "widespread judicial review" by multiple courts of appeals, its "statutory review scheme is exclusive." *Id.* at 13-14. And because the employees in *Elgin* were challenging precisely "the type of . . . adverse employment action" "covered" by

the CSRA's review scheme, the Court held that they could not evade that scheme, regardless of the particular "ground" on which they challenged the covered action. *Id.* at 12-13, 15. Moreover, the constitutional claim could be "fully" "adjudicate[d]" in the Federal Circuit, and the kinds of relief sought by the employees—"reinstatement, backpay, and attorney's fees"—were "precisely the kinds of relief that the CSRA empowers the MSPB and the Federal Circuit to provide." *Id.* at 17-22.

In *Free Enterprise Fund*, by contrast, this Court held that Section 78y of the Exchange Act—the statutory provision at issue here—did *not* strip district courts of jurisdiction over claims that the members of the Public Company Accounting Oversight Board (PCAOB) were unconstitutionally insulated from removal. 561 U.S. at 489-91. In so holding, the Court rejected the government's argument that Section 78y was an "exclusive route" to judicial review over such claims, observing that the "text [of Section 78y] does not expressly limit [district court] jurisdiction," "[n]or does it do so implicitly." *Id.* at 489. To the contrary, the Court reasoned, such "general challenge[s]" to the constitutionality of the PCAOB's structure were "'collateral' to any Commission orders" subject to Section 78y, and the resolution of such claims fell "outside" the agency's "competence and expertise." *Id.* at 490-91. Moreover, stripping district courts of jurisdiction "could foreclose all meaningful judicial review" of the claims at issue because the plaintiffs were "object[ing] to the Board's existence, not to any of its auditing standards" or other actions. *Id.* at 489-90 (citation omitted). And, the Court recognized, requiring the plaintiffs to submit to the very body that they challenged as

unconstitutionally structured merely to "win access to a court of appeals" was not a "'meaningful' avenue of relief." *Id.* at 490-91 (citation omitted).

In short, to the extent this Court has allowed implicit jurisdiction-stripping, the cases establish that the mere existence of a statutory review scheme applicable to certain types of agency actions does not, without more, strip district courts of jurisdiction to hear structural constitutional challenges to the "statutory[] review scheme itself." Pet. App. 24a.

B. Section 78y Of The Exchange Act Does Not Strip District Courts Of Jurisdiction Over Structural Constitutional Claims

Section 78y does not strip district courts of their jurisdiction under 28 U.S.C. § 1331 over the kind of structural constitutional claim at issue here.

1. The pertinent statutory text is clear. Section 78y provides that "person[s] aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order" in the courts of appeals. 15 U.S.C. § 78y(a)(1). All agree that "the text [of Section 78y] does not *expressly* limit the jurisdiction that other statutes confer on district courts." *Free Enter. Fund*, 561 U.S. at 489 (emphasis added). To the contrary, Section 78y is a jurisdiction-*conferring* statute. Nowhere does the statute mention district court jurisdiction, much less expressly strip district courts of jurisdiction—something Congress plainly knows how to accomplish when it actually wants to. *See supra* at 22-23 & n.6.

At the very most, the text of Section 78y might be read to *implicitly* strip district courts of jurisdiction to review a "final order of the Commission," 15 U.S.C. § 78y(a)(1), which is channeled into the courts of

appeals for appellate review instead. But Cochran is not challenging a "final order of the Commission." Nor is she even challenging the type of agency action that might *prompt* a final order of the Commission—such as an "initial decision" by an ALJ. 17 C.F.R. § 201.410(e); *see* 15 U.S.C. § 78d-1(c). She is instead seeking relief from the "'here-and-now' injury" produced by her coerced participation in an administrative proceeding adjudicated by an unconstitutionally insulated agency official. *Seila Law*, 140 S. Ct. at 2196 (citation omitted). Cochran's claim thus "has absolutely nothing whatsoever to do with a final order, and therefore her claim falls outside of § 78y." Pet. App. 7a-8a.

In this respect, "the text is as unambiguous as can be"—Section 78y implicitly "strips only part" of the jurisdiction conferred by Section 1331, and the "part that § 78y strips (as to '[a] person aggrieved by a final order of the [SEC]') undisputedly does not apply to Cochran. So jurisdiction remains." *Id.* at 35a (Oldham, J., concurring) (alterations in original); *cf. Merritt v. Shuttle, Inc.*, 245 F.3d 182, 187-89, 191 n.13 (2d Cir. 2001) (Sotomayor, J.) (stressing that when statutory text "vest[s] judicial review of administrative orders exclusively in the courts of appeals," the statute precludes district court jurisdiction "only if the claim attacks the matters decided by the administrative order," and *not* "claim[s] for injuries suffered as a result of [agency] actions unrelated to [an] order").

2. Statutory context and structure strongly support this conclusion. The provisions alongside Section 78y(a)(1) all demonstrate that this review scheme is limited to review of final SEC orders in

individual cases and is not intended to foreclose jurisdiction over structural constitutional claims.

For example, the statutory scheme does not give the courts of appeals the tools necessary to remedy the here-and-now injuries imposed by structural constitutional violations, such as injunctive or declaratory relief designed to ensure "enforce[ment] only by a constitutional agency." *Free Enter. Fund*, 561 U.S. at 491 n.2, 513. Instead, the only remedies available to the court of appeals under the statute are explicitly tethered to SEC final orders—the court of appeals may only "affirm or modify and enforce or . . . set aside the [SEC's final] order in whole or in part." 15 U.S.C. § 78y(a)(3). And while the statute contemplates a stay in certain circumstances, the statute does not authorize a "stay" by the court of appeals until "[a]fter the filing of a petition under this section," *id.* § 78y(c)(2)—that is, a petition for review of a "final order of the Commission," *id.* § 78y(a)(1).

Moreover, Section 78y presupposes judicial review confined to a "record" developed by the SEC. *Id.* § 78y(a)(2)-(5). This kind of limitation, common in administrative review statutes, tends to "incorporate[] an assumption that the limited review provisions . . . apply only to claims that have been subjected to administrative consideration and that have resulted in the creation of an adequate administrative record." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 493 (1991). It does not manifest any congressional intent to sweep in "structural constitutional challenges," which agencies "are generally ill suited to address." *Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021). And while this provision may not categorically *bar* structural constitutional claims from the post-agency judicial review provided

by Section 78y, *cf. Elgin*, 567 U.S. at 18-19, the question is whether the statute shows that "Congress intended" for such claims to be raised "*exclusively* through the statutory review scheme," *id.* at 10 (emphasis added). A provision limiting judicial review to an agency-created record undermines any such intent.

The Exchange Act also provides that "the rights and remedies" provided by the Act "shall be *in addition to* any and all other rights and remedies that may exist at law or in equity." 15 U.S.C. § 78bb(a)(2) (emphasis added). As this Court explained in considering a similar provision, Congress's inclusion of a "saving clause" "strongly buttresse[s]" the conclusion that the statute's review provisions are "intended to assure adequate judicial review of [certain] agency decisions" *without* "preclud[ing] traditional avenues of judicial relief." *Abbott Labs. v. Gardner*, 387 U.S. 136, 142, 144-45 (1967). Among the traditional avenues of judicial relief relevant here, of course, is an action under 28 U.S.C. § 1331—which has long served as a bulwark for preventing unconstitutional governmental actions. *See Free Enter. Fund*, 561 U.S. at 491 n.2. Thus, far from being stripped, Section 1331 jurisdiction is preserved.

In sum, based on the unambiguously limited text of Section 78y(a)(1) and the surrounding provisions of the Exchange Act, it is not only "fairly discernible"—but quite inescapable—that Section 78y does *not* "preclude[] district court jurisdiction over [the] claims" at issue here. *Elgin*, 567 U.S. at 10.

3. To the extent vague notions of statutory purpose could ever strip jurisdiction, *but see Southwest Airlines Co. v. Saxon*, No. 21-309 (June 6, 2022), slip op. 11 ("[W]e have no warrant to elevate

vague invocations of statutory purpose over the words Congress chose."), this consideration also counsels against stripping jurisdiction here.

Nothing in the statutory history suggests that Congress intended to preclude jurisdiction in the district courts. *See* S. Rep. No. 73-792, at 13 (1934). This stands in stark contrast to the statutory review provisions in cases like *Elgin* and *Thunder Basin*, which were deliberately "designed to replace" prior regimes that permitted challenges to "agency actions in district courts." *Elgin*, 567 U.S. at 13-14; *see Thunder Basin*, 510 U.S. at 210 (noting that "Congress expressed particular concern" with existing review "in federal district court[s]").

The "legal landscape at the time of [Section 78y's] enactment," *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 963 (2017), bolsters this understanding. In 1934, it was well-settled that federal courts had jurisdiction to grant equitable relief against unconstitutional exercises of executive power. *See, e.g.*, *Bell*, 327 U.S. at 684 & nn.3-7 (collecting cases). By contrast, the "scope of judicial review of administrative decisions" was "unclear"—the APA "had not yet been enacted," and some "argued" that "technical agency determinations" were not judicially reviewable absent a "special statutory review procedure." *Abbott Labs.*, 387 U.S. at 142-44. Section 78y dispelled that uncertainty in the SEC context by providing that an aggrieved party "may" seek limited judicial review of SEC orders, 15 U.S.C. § 78y(a)(1)—without "manifest[ing] a congressional purpose" to "cut down more traditional channels of review," *Abbott Labs.*, 387 U.S. at 142-44.

Ultimately, a straightforward statutory analysis compels the conclusion that Section 78y does not strip

district courts of their jurisdiction under 28 U.S.C. § 1331 over structural constitutional challenges to SEC administrative proceedings.[7]

C. The Extra-Textual "*Thunder Basin* Factors" Only Confirm That District Court Jurisdiction Exists

The fact that the statute does not plainly strip district courts of jurisdiction over structural constitutional claims should resolve the question presented. But rather than heed traditional tools of statutory interpretation, the SEC has thus far grounded its position in an extra-textual application of the "*Thunder Basin* factors." Pet. App. 91a (Costa, J., dissenting). Even if, contrary to ordinary rules of statutory interpretation, a handful of "factors" could override congressionally enacted text, this Court already considered those factors in *Free Enterprise Fund* and concluded that they *support* district court jurisdiction in these circumstances. The SEC's efforts to avoid *Free Enterprise Fund*—and thereby distort the *Thunder Basin* factors—are unavailing.

1. In *Thunder Basin*, this Court held that, even when it is "fairly discernible" that Congress intended for the statutory scheme to be the exclusive mechanism for challenging certain agency actions, 510 U.S. at 207, district courts may retain jurisdiction

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[7] The Fifth Circuit limited its decision to the claim "that SEC ALJs are unconstitutionally insulated from the President's removal power." Pet. App. 30a. And this Court need go no further to decide this case. To be clear, however, in Cochran's view, federal district courts have jurisdiction over all structural constitutional challenges to SEC administrative proceedings—i.e., constitutional claims challenging the inherent nature of the proceedings, not limited to the circumstances in any case.

over "claims" that are not "of the type Congress intended to be reviewed within th[e] statutory structure," *id.* at 212. To guide that inquiry, the Court identified prior decisions—all of which involved *express* jurisdiction-stripping statutes—in which the Court "ha[d] *upheld* district court jurisdiction over claims considered wholly collateral to a statute's review provisions and outside the agency's expertise, . . . particularly where a finding of preclusion could foreclose all meaningful judicial review." *Id.* at 212-13 (emphasis added) (internal quotation marks omitted).

Because Cochran indisputably is not challenging "the type of [agency] action" that is "covered" by the text of the Exchange Act's statutory review provision (i.e., a final SEC order), *Elgin*, 567 U.S. at 12, there is simply no reason to consider these "additional factors," *id.* at 15. The text should be the end of any "*Thunder Basin*" inquiry here. *Cf., e.g.*, *American Hosp. Ass'n v. Becerra*, No. 20-1114 (June 15, 2022), slip op. 8 (rejecting jurisdictional "preclusion argument [that] lacks any textual basis").

2. In any event, as *Free Enterprise Fund* holds, the *Thunder Basin* "considerations point against any limitation on [district court] review" of structural constitutional claims like Cochran's. *Free Enter. Fund*, 561 U.S. at 489-90. Indeed, *Free Enterprise Fund* involved "the same statutory-review scheme and the same type of constitutional claim" at issue in this case. Pet. App. 12a. "Hence, *Free Enterprise Fund* is squarely on point, foreclosing any possibility that § 78y strips district courts of jurisdiction over structural constitutional challenges." *Id.* at 10a.

a. First, challenges to the ALJs' insulation from removal are "'wholly collateral'" to the review of

individual agency orders channeled through Section 78y. *Free Enter. Fund*, 561 U.S. at 489-90 (quoting *Thunder Basin*, 510 U.S. at 212). Like the petitioner in *Free Enterprise Fund*, Cochran is challenging the exercise of executive power by an unconstitutionally insulated agency official; she is asserting a "general challenge" to "the [ALJ's] existence, not to any of its" specific decisions or orders. *Id.* at 490. Cochran's claim has nothing to do with the substance of the SEC's allegations against her, nor does it "depend on the validity of any substantive aspect of the Exchange Act, nor of any SEC rule, regulation, or order." Pet. App. 22a. She is contesting the ALJ's constitutional authority to take *any* action against her.

As a result, Cochran's constitutional claim is not merely a "vehicle" to "reverse" the "type of [agency] action" that is "covered" by "the [statutory] scheme," *Elgin*, 567 U.S. at 21-22—i.e., a "final order of the Commission," 15 U.S.C. § 78y(a)(1). Cochran is not challenging any final SEC order at all, and the outcome of her constitutional claim "will have no bearing on her ultimate liability for allegedly violating the securities laws." Pet. App. 22a. Cochran's general challenge to the ALJ's removal protections—and the here-and-now injury she seeks to avoid—exist independent of any order or outcome in her individual proceeding. *See McNary*, 498 U.S. at 492, 498 (observing the "critical difference" between individualized agency determinations and "general collateral challenges to unconstitutional practices and policies used by the agency").

Moreover, Cochran is not "requesting relief that the [SEC] routinely affords" in the administrative review scheme. *Elgin*, 567 U.S. at 22. She filed suit to *prevent* the SEC from forcing her to participate in

administrative proceedings helmed by an unconstitutionally unaccountable ALJ. Nothing in the Exchange Act's review scheme contemplates granting that sort of relief. And more to the point, "disallowing the proceedings before the ALJ is obviously not a *routine* outcome." *Tilton v. SEC*, 824 F.3d 276, 295 (2d Cir. 2016) (Droney, J., dissenting) (emphasis added), *cert. denied*, 137 S. Ct. 2187 (2017). The fact that Cochran "does not seek relief of the sort the Exchange Act's scheme is designed to provide" confirms that her "claim is wholly collateral to [that] scheme." Pet. App. 21a-22a.

b. Second, Cochran's structural constitutional claim falls "outside the Commission's competence and expertise." *Free Enter. Fund*, 561 U.S. at 491.

As this Court has often explained, administrative agencies generally lack the institutional "competence" to review "the constitutionality of [a] statute." *Mathews v. Diaz*, 426 U.S. 67, 76 (1976); *see Thunder Basin*, 510 U.S. at 215 ("[A]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." (citation omitted)). After all, "[a]dministrative agencies are creatures of statute," *National Fed'n of Indep. Bus. v. Department of Labor*, 142 S. Ct. 661, 665 (2022) (per curiam), and as the SEC itself recognized long ago, "[i]t is not the function of the body delegated by Congress to administer the Act to question its constitutionality," *In re Walston & Co.*, 5 S.E.C. 112, 113 (1939).

Moreover, the kind of structural constitutional claim at issue here is not "within the [SEC's] expertise." *Free Enter. Fund*, 561 U.S. at 491 (citation omitted). As this Court recently reiterated, "agency adjudications are generally ill suited to address

structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise." *Carr*, 141 S. Ct. at 1360. Such claims do not "require technical considerations of [SEC] policy" nor any substantive "understanding of the [securities] industry." *Free Enter. Fund*, 561 U.S. at 491 (citations omitted). Nor do they intersect with any "threshold questions" within the SEC's wheelhouse. *Elgin*, 567 U.S. at 22-23. Instead, structural constitutional claims present "standard questions of administrative [and constitutional] law, which the courts are at no disadvantage in answering." *Free Enter. Fund*, 561 U.S. at 491.

c. Finally, it is clear that interpreting the Exchange Act to implicitly strip federal district courts of jurisdiction over structural constitutional challenges to the SEC's administrative-review scheme "could foreclose all meaningful judicial review" of such claims. *Id.* at 489 (citation omitted).

As noted, each "exercise of executive power" taken by an agency official who is unconstitutionally "insulated from removal" inflicts a serious "'here-and-now' injury." *Seila Law*, 140 S. Ct. at 2196 (citation omitted). Thus, SEC respondents like Cochran suffer discrete "harm[] by the very act of having to appear in proceedings before an ALJ who is unconstitutionally insulated from the President's removal power." Pet. App. 23a n.12. Cochran's claim seeks to avert that injury. The only way to guarantee meaningful judicial review of that kind of claim is to file suit in district court to prevent the injury from continuing.

Stripping district courts of jurisdiction over such claims, and instead illogically forcing them into the Exchange Act's administrative review scheme, could foreclose meaningful judicial review. For starters,

review in the courts of appeals is limited to parties "aggrieved" by a "final order of the Commission." 15 U.S.C. § 78y(a)(1). Just as in *Free Enterprise Fund*, there is no guarantee that the administrative proceedings against Cochran will "produce[]" the kind of adverse SEC order "subject to judicial review." 561 U.S. at 490. The Commission could drop its case against Cochran, or, more likely, it could induce Cochran to settle. Neither of those scenarios will produce an appealable final order subject to judicial review.[8] And yet, in both scenarios, Cochran will have suffered the here-and-now injury of having to participate in proceedings before an unaccountable agency official—for years on end.

As a result, stripping district courts of jurisdiction over structural constitutional claims would leave SEC respondents like Cochran with the possibility of *no* judicial review—let alone meaningful judicial review—of those claims. This, in turn, leaves them without a remedy for constitutional injuries suffered as a result of the administrative proceedings, rendering the constitutional injury permanent, irremediable, and unreviewable. That possibility alone is reason "enough to preserve district court jurisdiction." Pet. App. 27a-28a; *see Free Enter. Fund*, 561 U.S. at 489 (looking to whether stripping district courts of jurisdiction "*could* foreclose all meaningful judicial review" of such claims (emphasis added) (citation omitted)); *cf. Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) (plurality opinion) (refusing to

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[8] These scenarios are not mere possibilities—the vast majority of proceedings before ALJs end without an appealable final order. *See* Pet. App. 28a n.15; *id.* at 68a-69a (Oldham, J., concurring).

channel noncitizen detainee's "prolonged detention" claim into review of a final removal order because "it is possible that no such order would ever be entered in a particular case, depriving that detainee of any meaningful chance for judicial review").

Indeed, absent district court jurisdiction, the only way for an SEC respondent like Cochran to guarantee judicial review of her constitutional claim without suffering the constitutional injury she challenges would be to refuse to participate in the ALJ proceedings altogether and simply default her case. *See* 17 C.F.R. § 201.155. But as the Court held in *Free Enterprise Fund*, this course of action—refusing to heed an agency's demands and incurring an adverse order, merely to "win access to a court of appeals" while risking "severe punishment should [the] challenge fail"—is not "a 'meaningful' avenue of relief." 561 U.S. at 490-91 (quoting *Thunder Basin*, 510 U.S. at 212). Plaintiffs need not "bet the farm" as the price of "testing the validity of the law." *Id.* at 490 (citation omitted).

Finally, for the few litigants with the wherewithal to make it to a court of appeals—and even for those who *prevail* in a court of appeals—judicial review of the structural constitutional claim can hardly be considered "meaningful" because it arrives only *after* the plaintiff suffers the very "injury that [she is] attempting to prevent." *Tilton*, 824 F.3d at 298 (Droney, J., dissenting); *cf. Jennings*, 138 S. Ct. at 840 (plurality opinion) ("By the time a final order of removal [is] eventually entered, the allegedly excessive detention would have already taken place."). No amount of post-enforcement review can undo the here-and-now injury inflicted by forcing Cochran's participation in an unconstitutionally

structured administrative proceeding. Thus, unlike a fine or employment termination that can be reversed and redressed on appeal after agency proceedings have concluded, *see Thunder Basin*, 510 U.S. at 218; *Elgin*, 567 U.S. at 21-22, delaying judicial review of Cochran's structural constitutional claim to post-agency review effectively means that "full relief *cannot* be obtained," *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976) (emphasis added).

Rather than meaningfully remedy the here-and-now injury, the retrospective relief could be simply more agency proceedings before a properly removable agency official. And even obtaining *that* after-the-fact remedy may be difficult given this Court's recent decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), which suggests that "retrospective relief" may require proof of "harm" specifically attributable to "the unconstitutional removal restriction"—such as evidence that the President would have removed (or overruled) the agency official absent the removal restriction. *Id.* at 1788-89. This counterfactual analysis will, at a minimum, likely prove to be a "challenging" endeavor. Pet. App. 75a (Oldham, J., concurring); *see Collins*, 141 S. Ct. at 1798-99 (Gorsuch, J., concurring in part).[9]

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[9] The difficulty of satisfying *Collins* may also leave the constitutional question unresolved in post-agency review—perpetuating the agency's unconstitutional structure while leaving litigants without *any* viable mechanism for challenging it. *See, e.g.*, *Calcutt v. FDIC*, — F.4th —, 2022 WL 2081430, at *13-16 (6th Cir. June 10, 2022) (refusing to "delve deeply" into the merits of removal-power challenges because the petitioner could not "concrete[ly]" show how "the removal protections caused [the petitioner] harm" during the agency proceedings).

These concerns are borne out by the protracted journey that George Jarkesy was required to endure leading up to *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022). After the federal courts refused to permit Jarkesy to escape the SEC's administrative regime to assert structural constitutional challenges, *see Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015), Jarkesy was condemned to over seven years of administrative proceedings—during which he suffered tremendous and irreversible professional, personal, and reputational damage, *see* Lucia et al. Cert. Amici Br. 1-2, 12-13—only to have the proceedings ultimately vacated and his case remanded based in part on the same structural constitutional objection Cochran seeks to assert here, *see Jarkesy*, 34 F.4th at 463-65. *Jarkesy* confirms that, when it comes to structural constitutional claims, Section 78y does not provide "a 'meaningful' avenue of relief." *Free Enter. Fund*, 561 U.S. at 490-91 (citation omitted).

3. Faced with *Free Enterprise Fund*'s controlling application of the *Thunder Basin* factors, the SEC has tried to invent a way out. According to the SEC, the district court had jurisdiction in *Free Enterprise Fund* because the plaintiffs filed suit against the agency during the agency's investigation, *before* the agency formally commenced enforcement proceedings. Pet. App. 99a-101a (Costa, J., dissenting). But this supposed "investigation/enforcement distinction"—the "critical" lynchpin of the SEC's position today, *id.* at 99a, 103a—is textually groundless. Nothing in the text of Section 78y turns on whether an enforcement action is pending. To the contrary, the only conceivable dividing line in the statutory text is the entry of a "final order of the Commission." 15 U.S.C. § 78y(a)(1). No such order existed in *Free Enterprise*

Fund, and no such order exists in this case. The text, therefore, is a complete answer to the SEC's new "investigation/enforcement distinction."

This distinction also finds no support in *Free Enterprise Fund*. Nowhere did this Court suggest that district court jurisdiction hinged on the fact that the agency had not commenced formal enforcement proceedings. Rather, consistent with the text of Section 78y, the Court's analysis hinged on the fact that the statute "provides only for judicial review of *Commission* action," and the challenged "Board action" may not result "in a final Commission order or rule." 561 U.S. at 490. And that fact is equally present here: As explained above, SEC respondents in enforcement proceedings before ALJs are not guaranteed an appealable final Commission order. *See supra* at 37-39. Just as the "formal investigation" of the petitioners in *Free Enterprise Fund* "produced no [appealable] sanction," 561 U.S. at 487, 490, the enforcement proceedings against Cochran may produce no appealable order.

Finally, this distinction is completely artificial and prone to manipulation. As Judge Oldham explained, "[i]nvestigation and enforcement are two stages of the same administrative process, conducted by the same division of the SEC," and throughout the entirety of that process the agency may undertake both investigation-like and enforcement-like activities. Pet. App. 65a-69a (concurring opinion). Thus, embracing this distinction would essentially allow the agency to dictate the confines of federal court jurisdiction by deciding—unilaterally—when to commence formal enforcement proceedings. And it produces the "anomalous result" that subjecting a party to *more* "onerous" agency action by an

unconstitutionally insulated officer deprives that party of any recourse to an Article III court. *Id.* at 103a n.15 (Costa, J., dissenting). This is nonsense.

Nothing in the Exchange Act remotely suggests that Congress intended to strip district courts of jurisdiction under Section 1331 in such an atextual, illogical, and easily manipulable way.

4. In actuality, the SEC is seeking a profound expansion of *Thunder Basin*. As explained, the factors identified in *Thunder Basin* were designed to *preserve* district court jurisdiction over certain claims challenging agency action that would otherwise be subject to an exclusive statutory review scheme. *See supra* at 25, 33-34. Nevertheless, before the Fifth Circuit's en banc decision in this case, the SEC had successfully convinced several lower courts to invoke those factors to strip district court jurisdiction over claims not even subject to such a statutory review scheme—even in the face of *Free Enterprise Fund*. *See* Pet. App. 82a (Costa, J., dissenting) (collecting cases). Given how lower courts went astray in addressing the question presented, it is imperative for this Court to make clear that it never intended—in *Thunder Basin* or elsewhere—to sanction such an extreme version of implicit jurisdiction-stripping.

First, these courts have erroneously leapt to the *Thunder Basin* factors after glossing over the text of the statute, claiming that Section 78y broadly precludes district court jurisdiction over "challenges to the Commission's administrative proceedings." *Id.* at 85a (quoting *Jarkesy*, 803 F.3d at 17). But this gloss on the statutory text assumes away the question whether the challenged agency action is subject to the statutory review scheme in the first place. Just as the text of the statutory scheme in *Elgin* "turn[ed] on the

type of civil service employee and adverse employment action at issue," 567 U.S. at 12 (citation omitted), so too Section 78y turns on the type of claimant and agency action at issue—it is limited to a party "aggrieved by a final order of the Commission," 15 U.S.C. § 78y(a)(1). The statutory text at most provides a carve-out from district court jurisdiction for review of those final SEC orders; it does not purport to broadly immunize the SEC from district court jurisdiction anytime a challenge merely implicates an administrative proceeding.

Next, these courts have reengineered the *Thunder Basin* factors themselves. The courts agreeing with the SEC have all but eliminated two of the three *Thunder Basin* factors, concluding that Congress implicitly stripped federal district courts of jurisdiction *even when* the claim is "'wholly collateral' to the statute's review provisions and outside the scope of the agency's expertise." *Bebo v. SEC*, 799 F.3d 765, 767 (7th Cir. 2015), *cert. denied*, 577 U.S. 1236 (2016); *see, e.g.*, *Hill v. SEC*, 825 F.3d 1236, 1245 (11th Cir. 2016) (similar). This reasoning stems from a view that the "meaningful judicial review" factor "is paramount." Pet. App. 105a & n.16 (Costa, J., dissenting). But *Thunder Basin* did not prioritize any single factor. And this approach departs from the supposed justification for implicit jurisdiction-stripping to begin with—that the statutory scheme is "designed to permit agency expertise to be brought to bear on particular problems." *Free Enter. Fund*, 561 U.S. at 489 (citation omitted).

Having improperly zeroed in on the "meaningful judicial review" factor, the lower courts have then diluted it. Although the question is whether "a finding of preclusion could foreclose all *meaningful*

judicial review," *Thunder Basin*, 510 U.S. at 212-13 (emphasis added), this inquiry has been converted into one that merely "turn[s] on the *accessibility* of post-proceeding review by a federal court"—and "not on whether such review, if accessible, could adequately remedy the [agency's] alleged violation," *Tilton*, 824 F.3d at 284 (emphasis added). Setting aside the fact that judicial review is not even accessible to many SEC respondents, a single-minded focus on possible accessibility renders this factor meaningless. Given that *Thunder Basin*'s framework applies *only* to statutory schemes under which "[judicial] review is available" at some point, 510 U.S. at 207 n.8, it makes no sense to ask, as a point of distinction, whether judicial review might be available later—the answer will always be yes. Rather, the correct inquiry must be whether judicial review will be "meaningful." And as explained above, judicial review is not meaningful if it comes only after having suffered the very harm that the claim is seeking to prevent. *See supra* at 39-41.

All this leaves private citizens trapped in the SEC's administrative machinery with no recourse to a federal court until the agency decides to take the type of action that unlocks the courthouse doors, even when that machinery violates critical constitutional rights. "That is obviously not how our government is supposed to work." Pet. App. 36a (Oldham, J., concurring). To the contrary, "[i]n a Nation that values due process," a regime that places fundamental "rights of ordinary Americans entirely at the mercy of [agency] employees," while leaving them "blocked from access to the courts," is "unthinkable." *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring). Denying Americans

enmeshed in agency proceedings a timely avenue for challenging the structural constitutionality of those proceedings is just as unthinkable.

Despite the valiant efforts of a few dissenters, the last decade of appellate decisions addressing the question presented—broken only by the Fifth Circuit en banc below—shows that *Thunder Basin*'s multi-factor framework is susceptible to misuse. As this Court has admonished in other contexts, jurisdictional rules should be clear and come from Congress. *See Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493, 1497 (2022). In deciding this case, the Court should make clear that the lower courts' application of *Thunder Basin* went off the rails or, alternatively, repudiate these atextual factors altogether.

II. DISTRICT COURT JURISDICTION OVER STRUCTURAL CONSTITUTIONAL CLAIMS IS ESSENTIAL TO PRESERVING INDIVIDUAL LIBERTY

Ultimately, there is a more fundamental principle at stake in this case. Preserving district court jurisdiction over structural constitutional claims like Cochran's is necessary to ensure that administrative agencies conform to the Constitution's strictures.

Cochran challenges the multiple ways that SEC ALJs are insulated from removal by the President. The President's removal authority is an "essential" mechanism for "subject[ing] Executive Branch actions to a degree of electoral accountability," thereby providing some assurance that Executive Branch officers "serve the people effectively and in accordance with the policies that the people presumably elected the President to promote." *Collins*, 141 S. Ct. at 1784. Without that structural safeguard in place, the coercive "power to make decisions affecting individual

lives, liberty, and property" is left in the hands of an "unaccountable government agent." *Id.* at 1797 (Gorsuch, J., concurring in part). Here, the agent comes in the form of an unelected ALJ who has extensive power over lives and property of those subjected to SEC administrative proceedings, yet enjoys multiple layers of insulation from presidential (and thus electoral) oversight and removal. This arrangement poses "precisely the fundamental threat to the 'liberty and security of the governed' that separation of powers principles were designed to prevent." *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 537 F.3d 667, 686 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (citation omitted), *aff'd in part, rev'd in part*, 561 U.S. 477 (2010).

It makes no sense to have agencies decide in the first instance whether their own structure violates this fundamental constitutional safeguard. That is like assigning the fox to inspect the fencing that guards the henhouse. Not only do agencies lack the expertise and competence to decide such questions, but given "the tendency of administrative [agencies] to perpetuate and to increase their administrative powers," Redmond, 47 Yale L.J. at 635, agencies have every reason to banish structural constitutional challenges into administrative oblivion as onerous agency proceedings inch along at a glacial pace, leaving private citizens with nowhere to turn.

The particular removal-power claim at issue here proves the point. This Court expressly acknowledged, but declined to resolve, the constitutionality of ALJs' insulation from removal twelve years ago in *Free Enterprise Fund*, 561 U.S. at 507 n.10. And yet, until the Fifth Circuit's en banc decision in this case, circuits across the country had steadfastly refused to

permit district courts to address this issue, consigning individuals to a years-long administrative nightmare before they might ever see a federal court. *See* Cert. Resp. 12 (collecting cases).

These administrative proceedings are a uniquely inhospitable forum for such claims because the agency itself runs the show. *See* Lucia et al. Cert. Amici Br. 14-16 (discussing examples). And the agency has lately displayed a stark inability to maintain even the façade of a fair tribunal, with its recent, disturbing disclosure of internal document-sharing among agency employees performing prosecutorial and adjudicatory functions. *See* April 8, 2022 SEC Letter. Faced with the prospect of ruinous litigation in a distinctly hostile forum, most litigants have no choice but to settle. The SEC has exploited this vulnerability in "a number of cases" by "threaten[ing] administrative proceedings" before its ALJs in a calculated effort to compel a settlement. *Tilton*, 824 F.3d at 298 n.5 (Droney, J., dissenting).

That tactic largely succeeded in enabling the agency to insulate the constitutionality of its ALJs from any Article III scrutiny. In the twelve years since *Free Enterprise Fund*, the removal-power issue has been addressed by only one court of appeals, and that did not happen until the middle of *this year*. *See Jarkesy*, 34 F.4th at 463-65. And in *Jarkesy*, the court *agreed* that the SEC's ALJs are unconstitutionally insulated from removal. Thus, stripping district courts of jurisdiction has enabled the SEC to prolong a structural constitutional infirmity acknowledged by this Court more than a decade ago.[10]

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[10] The decision in *Jarkesy* only underscores the importance of district court jurisdiction here. Without it, SEC respondents like

Moreover, channeling removal-power challenges to the agency will only discourage SEC respondents from raising these challenges. To begin, it would mean that respondents must raise such challenges before the very decisionmaker whom they contend lacks the constitutionally required degree of accountability. That same decisionmaker, however, will "issue an opinion complete with factual findings, legal conclusions, and sanctions"—a dynamic that creates enormous pressure for SEC respondents to "stay in line" and not challenge ALJs' authority or "resist [their] order[s]." *Lucia*, 138 S. Ct. at 2054. And challenging an ALJ's constitutional legitimacy in this setting means that the ALJ essentially becomes "a judge in his own cause." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 428 (1995) (citation omitted).

Worse, the next step in the administrative review scheme would require the respondent to assert the structural challenge on review before the Commission itself. And it is perhaps unsurprising that the Commission has not been receptive to these kinds of claims. Years after this Court flagged the issue in *Free Enterprise Fund*, the SEC continued to criticize "[a] system in which [ALJs] are brought more directly within the President's control" as "radical" and "[un]wise." *In re Timbervest, LLC*, No. 3-15519, 2015 WL 5472520, at *28 (SEC Sept. 17, 2015). Thus, for SEC respondents, challenging ALJs' insulation from removal in a distinctly hostile administrative forum is a futile, if not potentially damaging, endeavor.

Cochran could *still* be forced to endure years of administrative proceedings before they could make a "*Jarkesy* claim" to a federal court.

The upshot is that stripping district courts of jurisdiction in this context would needlessly perpetuate the SEC's systematic violation of a structural safeguard that "[t]he Framers recognized" as "critical to preserving liberty." *Free Enter. Fund*, 561 U.S. at 501 (citation omitted). Nothing in Section 78y remotely suggests that Congress took that draconian step. And there is no basis for a court to do so in its place, through mere inference or implication.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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ADDENDUM

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U.S. Const. art. II, § 1, cl. 1

SECTION 1. The executive Power shall be vested in a President of the United States of America. * * *

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U.S. Const. art. II, § 3

SECTION 3. * * * he shall take Care that the Laws be faithfully executed * * *.

5 U.S.C. § 1202

§ 1202. Term of office; filling vacancies; removal

(a) The term of office of each member of the Merit Systems Protection Board is 7 years.

(b) A member appointed to fill a vacancy occurring before the end of a term of office of the member's predecessor serves for the remainder of that term. Any appointment to fill a vacancy is subject to the requirements of section 1201. Any new member serving only a portion of a seven-year term in office may continue to serve until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire, unless reappointed.

(c) Any member appointed for a 7-year term may not be reappointed to any following term but may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire under this section.

(d) Any member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

5 U.S.C. § 7521

§ 7521. Actions against administrative law judges

(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

(b) The actions covered by this section are—

(1) a removal;

(2) a suspension;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but do not include—

(A) a suspension or removal under section 7532 of this title;

(B) a reduction-in-force action under section 3502 of this title; or

(C) any action initiated under section 1215 of this title.

15 U.S.C. § 78d-1

§ 78d-1. Delegation of functions by Commission

(a) Authorization; functions delegable; eligible persons; application of other laws

In addition to its existing authority, the Securities and Exchange Commission shall have the authority to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter. Nothing in this section shall be deemed to supersede the provisions of section 556(b) of title 5, or to authorize the delegation of the function of rulemaking as defined in subchapter II of chapter 5 of title 5, with reference to general rules as distinguished from rules of particular applicability, or of the making of any rule pursuant to section 78s(c) of this title.

(b) Right of review; procedure

With respect to the delegation of any of its functions, as provided in subsection (a) of this section, the Commission shall retain a discretionary right to review the action of any such division of the Commission, individual Commissioner, administrative law judge, employee, or employee board, upon its own initiative or upon petition of a party to or intervenor in such action, within such time and in such manner as the Commission by rule shall prescribe. The vote of one member of the Commission shall be sufficient to bring any such action before the Commission for review. A person or party shall be entitled to review by the Commission if he or it is

adversely affected by action at a delegated level which (1) denies any request for action pursuant to section 77h(a) or section 77h(c) of this title or the first sentence of section 78*l*(d) of this title; (2) suspends trading in a security pursuant to section 78l(k) of this title; or (3) is pursuant to any provision of this chapter in a case of adjudication, as defined in section 551 of title 5, not required by this chapter to be determined on the record after notice and opportunity for hearing (except to the extent there is involved a matter described in section 554(a)(1) through (6) of such title 5).

(c) Finality of delegated action

If the right to exercise such review is declined, or if no such review is sought within the time stated in the rules promulgated by the Commission, then the action of any such division of the Commission, individual Commissioner, administrative law judge, employee, or employee board, shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission.

15 U.S.C. § 78d-3

§ 78d-3. Appearance and practice before the Commission

(a) Authority to censure

The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found by the Commission, after notice and opportunity for hearing in the matter—

(1) not to possess the requisite qualifications to represent others;

(2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or

(3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder.

(b) Definition

With respect to any registered public accounting firm or associated person, for purposes of this section, the term "improper professional conduct" means—

(1) intentional or knowing conduct, including reckless conduct, that results in a violation of applicable professional standards; and

(2) negligent conduct in the form of—

(A) a single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which the registered public accounting firm or associated person knows, or should know, that heightened scrutiny is warranted; or

(B) repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.

15 U.S.C. § 78u

§ 78u. Investigations and actions

(a) Authority and discretion of Commission to investigate violations

(1) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated, or, as to any act or practice, or omission to act, while associated with a member, formerly associated with a member, the rules of a registered clearing agency in which such person is a participant, or, as to any act or practice, or omission to act, while a participant, was a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm, a person associated with such a firm, or, as to any act, practice, or omission to act, while associated with such firm, a person formerly associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations

under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

(2) On request from a foreign securities authority, the Commission may provide assistance in accordance with this paragraph if the requesting authority states that the requesting authority is conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces. The Commission may, in its discretion, conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance. Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States. In deciding whether to provide such assistance, the Commission shall consider whether (A) the requesting authority has agreed to provide reciprocal assistance in securities matters to the Commission; and (B) compliance with the request would prejudice the public interest of the United States.

(b) Attendance of witnesses; production of records

For the purpose of any such investigation, or any other proceeding under this chapter, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to

the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

(c) Judicial enforcement of investigative power of Commission; refusal to obey subpena; criminal sanctions

In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) Injunction proceedings; authority of court to prohibit persons from serving as officers and directors; money penalties in civil actions; disgorgement

(1) Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

* * *

(e) Mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus, injunctions, and orders commanding (1) any person to comply with the provisions of this chapter, the rules, regulations, and orders thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, the rules of the Municipal Securities Rulemaking Board, or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, (2) any national securities exchange or registered securities association to enforce compliance by its members and persons associated with its members with the provisions of this chapter, the rules, regulations, and orders thereunder, and the rules of such exchange or association, or (3) any registered clearing agency to enforce compliance by its participants with the provisions of the rules of such clearing agency.

* * *

15 U.S.C. § 78u-2

§ 78u-2. Civil remedies in administrative proceedings

(a) Commission authority to assess money penalties

(1) In general

In any proceeding instituted pursuant to sections 78*o*(b)(4), 78*o*(b)(6), 78*o*–6, 78*o*–4, 78*o*–5, 78*o*–7, or 78q–1 of this title against any person, the Commission or the appropriate regulatory agency may impose a civil penalty if it finds, on the record after notice and opportunity for hearing, that such penalty is in the public interest and that such person—

(A) has willfully violated any provision of the Securities Act of 1933 [15 U.S.C. 77a et seq.], the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.], the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 et seq.], or this chapter, or the rules or regulations thereunder, or the rules of the Municipal Securities Rulemaking Board;

(B) has willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person;

(C) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission or with any other appropriate regulatory agency under this chapter, or in any proceeding before the Commission with respect to registration, any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such

application or report any material fact which is required to be stated therein; or

(D) has failed reasonably to supervise, within the meaning of section 78*o*(b)(4)(E) of this title, with a view to preventing violations of the provisions of such statutes, rules and regulations, another person who commits such a violation, if such other person is subject to his supervision;[1]

(2) Cease-and-desist proceedings

In any proceeding instituted under section 78u–3 of this title against any person, the Commission may impose a civil penalty, if the Commission finds, on the record after notice and opportunity for hearing, that such person—

(A) is violating or has violated any provision of this chapter, or any rule or regulation issued under this chapter; or

(B) is or was a cause of the violation of any provision of this chapter, or any rule or regulation issued under this chapter.

(b) Maximum amount of penalty

(1) First tier

The maximum amount of penalty for each act or omission described in subsection (a) shall be $5,000 for a natural person or $50,000 for any other person.

(2) Second tier

Notwithstanding paragraph (1), the maximum amount of penalty for each such act or omission

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[1] So in original. The semicolon probably should be a period.

shall be $50,000 for a natural person or $250,000 for any other person if the act or omission described in subsection (a) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(3) Third tier

Notwithstanding paragraphs (1) and (2), the maximum amount of penalty for each such act or omission shall be $100,000 for a natural person or $500,000 for any other person if—

(A) the act or omission described in subsection (a) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(B) such act or omission directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission.

(c) Determination of public interest

In considering under this section whether a penalty is in the public interest, the Commission or the appropriate regulatory agency may consider—

(1) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;

(2) the harm to other persons resulting either directly or indirectly from such act or omission;

(3) the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior;

(4) whether such person previously has been found by the Commission, another appropriate

regulatory agency, or a self-regulatory organization to have violated the Federal securities laws, State securities laws, or the rules of a self-regulatory organization, has been enjoined by a court of competent jurisdiction from violations of such laws or rules, or has been convicted by a court of competent jurisdiction of violations of such laws or of any felony or misdemeanor described in section 78*o*(b)(4)(B) of this title;

(5) the need to deter such person and other persons from committing such acts or omissions; and

(6) such other matters as justice may require.

(d) Evidence concerning ability to pay

In any proceeding in which the Commission or the appropriate regulatory agency may impose a penalty under this section, a respondent may present evidence of the respondent's ability to pay such penalty. The Commission or the appropriate regulatory agency may, in its discretion, consider such evidence in determining whether such penalty is in the public interest. Such evidence may relate to the extent of such person's ability to continue in business and the collectability of a penalty, taking into account any other claims of the United States or third parties upon such person's assets and the amount of such person's assets.

(e) Authority to enter order requiring accounting and disgorgement

In any proceeding in which the Commission or the appropriate regulatory agency may impose a penalty under this section, the Commission or the appropriate regulatory agency may enter an order requiring

accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.

* * *

15 U.S.C. § 78u-3

§ 78-3. Cease-and-desist proceedings

(a) Authority of Commission

If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this chapter, or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation. Such order may, in addition to requiring a person to cease and desist from committing or causing a violation, require such person to comply, or to take steps to effect compliance, with such provision, rule, or regulation, upon such terms and conditions and within such time as the Commission may specify in such order. Any such order may, as the Commission deems appropriate, require future compliance or steps to effect future compliance, either permanently or for such period of time as the Commission may specify, with such provision, rule, or regulation with respect to any security, any issuer, or any other person.

(b) Hearing

The notice instituting proceedings pursuant to subsection (a) shall fix a hearing date not earlier than 30 days nor later than 60 days after service of the notice unless an earlier or a later date is set by the Commission with the consent of any respondent so served.

(c) Temporary order

(1) In general

Whenever the Commission determines that the alleged violation or threatened violation specified in the notice instituting proceedings pursuant to subsection (a), or the continuation thereof, is likely to result in significant dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest, including, but not limited to, losses to the Securities Investor Protection Corporation, prior to the completion of the proceedings, the Commission may enter a temporary order requiring the respondent to cease and desist from the violation or threatened violation and to take such action to prevent the violation or threatened violation and to prevent dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest as the Commission deems appropriate pending completion of such proceedings. Such an order shall be entered only after notice and opportunity for a hearing, unless the Commission determines that notice and hearing prior to entry would be impracticable or contrary to the public interest. A temporary order shall become effective upon service upon the respondent and, unless set aside, limited, or suspended by the Commission or a court of competent jurisdiction, shall remain effective and enforceable pending the completion of the proceedings.

* * *

(d) Review of temporary orders

(1) Commission review

At any time after the respondent has been served with a temporary cease-and-desist order pursuant to subsection (c), the respondent may apply to the Commission to have the order set aside, limited, or suspended. If the respondent has been served with a temporary cease-and-desist order entered without a prior Commission hearing, the respondent may, within 10 days after the date on which the order was served, request a hearing on such application and the Commission shall hold a hearing and render a decision on such application at the earliest possible time.

(2) Judicial review

Within—

(A) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or

(B) 10 days after the Commission renders a decision on an application and hearing under paragraph (1), with respect to any temporary cease-and-desist order entered without a prior Commission hearing,

the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court

except after hearing and decision by the Commission on the respondent's application under paragraph (1) of this subsection.

(3) No automatic stay of temporary order

The commencement of proceedings under paragraph (2) of this subsection shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(4) Exclusive review

Section 78y of this title shall not apply to a temporary order entered pursuant to this section.

(e) Authority to enter order requiring accounting and disgorgement

In any cease-and-desist proceeding under subsection (a), the Commission may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.

(f) Authority of the Commission to prohibit persons from serving as officers or directors

In any cease-and-desist proceeding under subsection (a), the Commission may issue an order to prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who has violated section 78j(b) of this title or the rules or regulations thereunder, from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 78*l* of this title, or that is required to file reports pursuant to section 78*o*(d) of this title, if the conduct

of that person demonstrates unfitness to serve as an officer or director of any such issuer.

15 U.S.C. § 78y

§ 78y. Court review of orders and rules

(a) Final Commission orders; persons aggrieved; petition; record; findings; affirmance, modification, enforcement, or setting aside of orders; remand to adduce additional evidence

(1) A person aggrieved by a final order of the Commission entered pursuant to this chapter 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, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated by the Commission for that purpose. Thereupon the Commission shall file in the court the record on which the order complained of is entered, as provided in section 2112 of title 28 and the Federal Rules of Appellate Procedure.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.

(4) The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.

(5) If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there was reasonable ground for

failure to adduce it before the Commission, the court may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers appropriate. If the case is remanded to the Commission, it shall file in the court a supplemental record containing any new evidence, any further or modified findings, and any new order.

(b) Commission rules; persons adversely affected; petition; record; affirmance, enforcement, or setting aside of rules; findings; transfer of proceedings

(1) A person adversely affected by a rule of the Commission promulgated pursuant to section 78f, 78i(h)(2), 78k, 78k–1, 78*o*(c)(5) or (6), 78*o*–3, 78q, 78q–1, or 78s of this title may obtain review of this rule 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, by filing in such court, within sixty days after the promulgation of the rule, a written petition requesting that the rule be set aside.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated for that purpose. Thereupon, the Commission shall file in the court the rule under review and any documents referred to therein, the Commission's notice of proposed rulemaking and any documents referred to therein, all written submissions and the transcript of any oral presentations in the rulemaking, factual information not included in the foregoing that was considered by the Commission in the promulgation of the rule or proffered by the Commission as pertinent to the rule, the report of any advisory committee received or

considered by the Commission in the rulemaking, and any other materials prescribed by the court.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the materials set forth in paragraph (2) of this subsection, to affirm and enforce or to set aside the rule.

(4) The findings of the Commission as to the facts identified by the Commission as the basis, in whole or in part, of the rule, if supported by substantial evidence, are conclusive. The court shall affirm and enforce the rule unless the Commission's action in promulgating the rule is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law.

(5) If proceedings have been instituted under this subsection in two or more courts of appeals with respect to the same rule, the Commission shall file the materials set forth in paragraph (2) of this subsection in that court in which a proceeding was first instituted. The other courts shall thereupon transfer all such proceedings to the court in which the materials have been filed. For the convenience of the parties in the interest of justice that court may thereafter transfer all the proceedings to any other court of appeals.

(c) Objections not urged before Commission; stay of orders and rules; transfer of enforcement or review proceedings

(1) No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.

(2) The filing of a petition under this section does not operate as a stay of the Commission's order or rule. Until the court's jurisdiction becomes exclusive, the Commission may stay its order or rule pending judicial review if it finds that justice so requires. After the filing of a petition under this section, the court, on whatever conditions may be required and to the extent necessary to prevent irreparable injury, may issue all necessary and appropriate process to stay the order or rule or to preserve status or rights pending its review; but (notwithstanding section 705 of title 5) no such process may be issued by the court before the filing of the record or the materials set forth in subsection (b)(2) of this section unless: (A) the Commission has denied a stay or failed to grant requested relief, (B) a reasonable period has expired since the filing of an application for a stay without a decision by the Commission, or (C) there was reasonable ground for failure to apply to the Commission.

(3) When the same order or rule is the subject of one or more petitions for review filed under this section and an action for enforcement filed in a district court of the United States under section 78u(d) or (e) of this title, that court in which the petition or the action is first filed has jurisdiction with respect to the order or rule to the exclusion of any other court, and thereupon

all such proceedings shall be transferred to that court; but, for the convenience of the parties in the interest of justice, that court may thereafter transfer all the proceedings to any other court of appeals or district court of the United States, whether or not a petition for review or an action for enforcement was originally filed in the transferee court. The scope of review by a district court under section 78u(d) or (e) of this title is in all cases the same as by a court of appeals under this section.

(d) Other appropriate regulatory agencies

(1) For purposes of the preceding subsections of this section, the term "Commission" includes the agencies enumerated in section 78c(a)(34) of this title insofar as such agencies are acting pursuant to this chapter and the Secretary of the Treasury insofar as he is acting pursuant to section 78*o*–5 of this title.

(2) For purposes of subsection (a)(4) of this section and section 706 of title 5, an order of the Commission pursuant to section 78s(a) of this title denying registration to a clearing agency for which the Commission is not the appropriate regulatory agency or pursuant to section 78s(b) of this title disapproving a proposed rule change by such a clearing agency shall be deemed to be an order of the appropriate regulatory agency for such clearing agency insofar as such order was entered by reason of a determination by such appropriate regulatory agency pursuant to section 78s(a)(2)(C) or 78s(b)(4)(C) of this title that such registration or proposed rule change would be inconsistent with the safeguarding of securities or funds.

15 U.S.C. § 78bb

§ 78bb. Effect on existing law

(a) Limitation on judgments

* * *

(2) Rule of construction

Except as provided in subsection (f), the rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

* * *

(f) Limitations on remedies

(1) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(2) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

(3) Preservation of certain actions

(A) Actions under State law of State of incorporation

(i) Actions preserved

Notwithstanding paragraph (1) or (2), a covered class action described in clause (ii) of this subparagraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

* * *

(B) State actions

(i) In general

Notwithstanding any other provision of this subsection, nothing in this subsection may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

* * *

(C) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding paragraph (1) or (2), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State

or Federal court by a party to the agreement or a successor to such party.

(D) Remand of removed actions

In an action that has been removed from a State court pursuant to paragraph (2), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(4) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

* * *

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.