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

BRIEF OF CITIZENS UNITED AND CITIZENS UNITED FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

Citizens United and Citizens United Foundation are dedicated to restoring government to the people through a commitment to limited government, federalism, individual liberty, and free enterprise. Citizens United and Citizens United Foundation regularly participate as litigants (*e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)) and amici in important cases in which these fundamental principles are at stake (*See, e.g.*, Brief of Citizens United, Citizens United Foundation, and The Presidential Coalition as Amici Curiae in Support of Appellants and Petitioners, *Merrill, et al. v. Milligan, et al.*, Nos. 21-1086, 21-1087, 2022 WL 1432037 (U.S. May 2, 2022)).

Citizens United is a nonprofit social welfare organization exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation is a nonprofit educational and legal organization exempt from federal income tax under IRC section 501(c)(3). These organizations were established to, among other things, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well

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[1] No party's counsel authored this brief in whole or in part. No party's counsel or party contributed money that was intended to fund preparing or submitting this brief. No person other than *amici curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief. The parties have filed blanket consents to the filing of briefs of *amici curiae* in this case.

as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

INTRODUCTION

This case is about whether courts must continue to deny citizens an impartial judicial hearing until after they have endured the very process they believe is unconstitutional.

When it comes to adjudicating before administrative agencies, the process often is the punishment. The mere whiff of an investigation may cause lasting reputational harms. The adjudication process is long, it is expense, the procedural deck is stacked against respondents, and the reward for a successful challenge is often getting to start at square one and begin the whole process over again.

That is what has happened in this case, where it is Groundhog Day at the SEC. The SEC initiated its administrative enforcement proceedings against Respondent six years ago. *See, e.g.*, Petition for a Writ of Certiorari, *Securities and Exchange Commission v. Cochran*, No. 21-1239 (Mar. 11, 2022). Respondent had a complete administrative hearing, only to have her matter remanded by the SEC back to a new administrative law judge to start over in light of the Court's decision in *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018). *Id*. Now, Petitioner is asking Respondent to repeat this process all over again: to have a hearing before an administrative law judge and go before the

Commission, all before going before an Article III court to challenge the constitutional status of the Commission's administrative law judges, where Respondent's reward for a successful case will be starting the whole process over again for a third trip through the SEC. This is clear example of the process being the punishment, and it is not required by 15 U.S.C. § 78y(a)(1).

SUMMARY OF THE ARGUMENT

In 1952, Justice Jackson wrote: "The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart." *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting). He went on to declare that administrative bodies "have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking." *Id.*

Since that time, the problem has only become worse. "Now, in the 21st century, '[t]he administrative state wields vast power and touches almost every aspect of daily life.'" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2446 (2019) (Gorsuch, J., concurring in judgment) (quoting *City of Arlington v. Federal Commc'ns Comm'n*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting)). By some estimates, there are "nearly 120 executive agencies, which does not include the 60

other 'independent' entities . . . ." Kevin Kosar, *How to Strengthen Congress*, Nat'l Affairs (Fall 2015), https://www.nationalaffairs.com/publications/detail/how-to-strengthen-congress. These "[a]gencies issue 4,000 new rules per year . . . 80 to 100 [of which] have economic effects of $100 million or more." *Id.* "Whether you think this administrative fecundity is a good or bad thing, it surely means that the cost of continuing to deny citizens an impartial judicial hearing . . . has increased dramatically since this Court started down this road." *Kisor*, 139 S. Ct. at 2447 (Gorsuch, J., concurring in judgment).

The Respondent should be able to obtain an impartial hearing before an Article III court without having to first endure the administrative process whose constitutionality is at issue for a second time.

Consistent with the canon of constitutional avoidance, findings of implied preclusion should be limited to public rights cases that are outside of the judicial power of the United States. "The Constitution does not vest the Federal Government with an undifferentiated 'governmental power.'" *Dep't of Transp. v. Ass'n of American R.Rs.*, 575 U.S. 43, 67 (2015) (Thomas, J., concurring in judgment). Administrative agencies do not have (and Congress could not give them) authority to exercise the judicial power of the United States. In contrast, adjudicating public rights, such as access to public water ways or disputes over public employment, is historically outside of the judicial power, and may be allocated by Congress to the other branches as Congress sees fit. In order to avoid the constitutional questions

associated with administrative agencies exercising judicial power by adjudicating constitutional rights, the Court should limit claims of implied preclusion to cases involving public rights.

In the alternative, even if the Court's implied preclusion framework identified in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), applies to Respondent, it counsels against finding implied preclusion. Constitutional challenges to an agency's structure are inherently outside of the agency's expertise. A challenge to the structure of an administrative agency is wholly collateral to the agency's enforcement proceedings. And the nature of administrative proceedings deprives respondents of a *meaningful* opportunity for judicial review.

Accordingly, the Court should affirm the Court of Appeals for the Fifth Circuit and find that respondent does not need to exhaust administrative enforcement proceedings before obtaining an impartial hearing before an Article III court.

ARGUMENT

I. The Court Should Avoid the Constitutional Challenges Posed by Adjudicating Constitutional Rights in Administrative Agencies by Limiting Implied Preclusion to Cases Involving Public Rights

This case is a question of statutory interpretation: does 15 U.S.C. § 78y(a)(1) implicitly

strip Article III courts of jurisdiction to hear claims under 28 U.S.C. § 1331 seeking to enjoin an administrative enforcement proceeding before the SEC based on constitutional defects until after the SEC has issued a "final order." It is a longstanding principle of statutory interpretation that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). This rule "militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 247-48 (2012).

Interpreting § 78y(a)(1) to implicitly strip jurisdiction over Respondent's claim raises serious constitutional questions. Such an interpretation effectively places the administrative agency in the shoes of the district court, requiring the agency to either exercise judicial power by ruling on its own constitutionality (which it cannot do) or rending Respondent's claim futile, an outcome that would be absurd.

This serious constitutional challenge can be avoided by limiting claims of implied preclusion to cases involving public rights, which were historically outside of the judicial power of the United States.

Since Respondent's claim does not involve a public right, § 78y(a)(1) should be interpreted to permit Respondent to obtain an impartial hearing before an Article III court without having to first exhaust an unconstitutional or futile administrative process.

a. Executive Branch Agencies Cannot Exercise the Judicial Power of the United States

As Justice Thomas wrote, "[t]he Constitution does not vest the Federal Government with an undifferentiated 'governmental power.' Instead, the Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government." *Assoc. of American R.Rs.*, 575 U.S. at 67 (Thomas, J., concurring in judgment).

Article II, section I, provides "[t]he executive [p]ower shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1. An implicit predicate to the Court's decisions in prior removal cases, such as *Collins v. Yellen*, 141 S. Ct. 1761 (2021), *Seila Law LLC v. Consumer Finance Protection Bureau*, 140 S. Ct. 2183 (2020), *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018), and *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), is that agencies such as the Federal Housing Finance Agency, Consumer Finance Protection Bureau, Public Company Accounting Oversight Board, and SEC are part of the Executive branch and exercise executive

power. After all, if they were not, then the President's authority to supervise the executive branch and duty to ensure that the laws are faithfully executed would not be implicated by their actions, and his inability to appoint or remove their officials would not pose separation of powers concerns. If agencies such as the SEC are part of the executive branch, it follows under our constitutional structure that they may only exercise *executive* power.

Article III, section 1, vests the "judicial [p]ower of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. This judicial power "shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their [a]uthority," among other situations. *Id.* at § 2, cl. 1. Moreover, "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation which shall not be diminished during their Continuance in Office." *Id.* at § 1.

"[T]he separation of powers is designed to preserve the liberty of all the people." *Yellen*, 141 S. Ct. at 1780. "In establishing the system of divided power in the Constitution, the Framers considered it essential that 'the judiciary remain[] truly distinct from both the legislature and the executive.'" *Stern v. Marshall*, 564 U.S. 462, 483 (2011) (quoting Alexander Hamilton, The Federalist No. 78 at 466 (C. Rossiter ed. 1961)). The separation of the judicial power from

the executive was such an important concern that it is specifically cited in the Declaration of Independence as one of the "long [t]rain of [a]buses and [u]surpations" that justify the colonists' break with Britain: "[The King] has made Judges dependent on his Will alone, for the [t]enure of their [o]ffices, and the [a]mount and [p]ayment of their [s]alaries." Thomas Jefferson, Declaration of Independence (1776).

Judicial independence was also a topic of concern when defending the proposed constitution following the revolution. For example, in Federalist 47, Madison, quoting Montesquieu, stated "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor." James Madison, The Federalist No. 47, https://avalon.law.yale.edu/18th_century/fed47.asp.

b. The Judicial Power of the United States Historically Does Not Include the Adjudication of Public Rights

Historically, the law distinguished "public rights," such as property rights held by the government, the right to access commons such as the public waters, or "privileges that the legislature had gratuitously allowed private individuals to enjoy, from private rights citizens could enforce under the common law. As long as no contractual rights or vested interests in property were being abrogated, the

legislature could repeal the statutes creating these privileges, and it could also authorize executive officials to revoke them on a more individualized basis." Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum L. Rev. 559, 571 (2007) (citations omitted); *see also Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855) (concerning the distinction between private and public rights); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67-68 (1982) ("The [public rights] doctrine extends only . . . to matters that historically could have been determined exclusively by [the executive or legislative] departments.").

Because these rights are generally derived from discretionary action, the executive and legislative branches retained some control over how that discretion was exercised. *See, e.g.*, *Northern Pipeline*, 458 U.S. at 83 ("[W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right.").

In general, the Court has upheld administrative adjudication based on the theory of public rights and the notion that agency adjudicators are acting as fact finders subject to judicial oversight. *See id.* ; *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977); *Crowell v. Benson*, 285 U.S. 22 (1932).

However, "[n]o comparable justification exists . . . when the right being adjudicated is not of congressional creation." *Northern Pipeline*, 458 U.S. at 83-84; *see also Jarkesy v. Securities and Exchange Comm'n*, 34 F.4th 446, 455 (5th Cir. 2022) ("[T]he action the SEC brought against Petitioners is not the sort that may be properly assigned to agency adjudication under the public-rights doctrine. Securities fraud actions are not new actions unknown to the common law.").

c. Claims of Implicit Preclusion Should Be Limited to Public Rights Cases

To avoid the serious constitutional issues associated with assigning claims that require the exercise of judicial power to administrative agencies in the first instance or the absurd result of requiring respondents to raise inherently futile claims in administrative proceedings, the Court should limit findings of implied preclusion to public rights cases.

This approach is consistent with the original understanding of the judicial power and conforms to the Court's "special duty to 'jealously guar[d]' the Constitution's promise of judicial independence." *Kisor*, 139 S. Ct. at 2438 (Gorsuch, J., concurring in judgment) (quoting *Northern Pipeline*, 458 U.S. at 60).

In cases that do not concern public rights, adjudication requires the exercise of judicial power which can only be done through the Federal courts. It makes no sense for Congress to *implicitly* remove jurisdiction from the Federal courts in favor of an

agency process that is Constitutionally unable to adjudicate the claim at issue. Where Congress wishes to alter the jurisdiction of the Federal courts to hear cases concerning private rights under 28 U.S.C. § 1331, the least it can do is do so expressly.

This approach is also consistent with the Court's decision in *Elgin v. Department of the Treasury*, 567 U.S. 1 (2012). In *Elgin*, the Court determined that the Civil Service Reform Act was the exclusive avenue for review of adverse federal employment actions. *Id.* at 5. Federal employment is a quintessential example of a public right. Because Congress created rights relating to public employment as an exercise of its discretion, it could choose how to channel adjudication of those rights, and did so through the creation of the Merit Systems Protection Board. Since the right at issue was a public right, the application of the *Thunder Basin* factors was appropriate, which led the Court to conclude that the administrative process was an exclusive avenue for adjudication.

d. Respondent's Claim is Not a Public Rights Claim

"'It is emphatically the province and duty of the judicial department to say what the law is.' *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). "The rise of the modern administrative state has not changed that duty." *City of Arlington v. Federal Commc'ns Comm'n*, 569 U.S. 290, 316 (2013) (Roberts, C.J., dissenting). "The judicial power to interpret the law . . . 'can no more be shared with another branch

than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress can share with the Judiciary the power to override a Presidential veto.'" *Kisor*, 139 S. Ct. at 2438 (Gorsuch, J., concurring in judgment) (quoting *Stern*, 564 U.S. at 483). Accordingly, "when the question arose, this Court did not hesitate to say that judges reviewing administrative action should decide all questions of law." *Id.* at2426 (Gorsuch, J., concurring in judgment).

The right to be free from an unconstitutional administrative process is not a congressional creation, and the "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Elgin*, 567 U.S. at 27-28 (Alito, J., dissenting) (quoting *Thunder Basin*, 510 U.S. 214).

The claim presented by respondent does not relate to a traditional public right. Instead, it requires a classic exercise of judicial power. Accordingly, in the absence of an *express* Congressional command to the contrary, the district court has jurisdiction to hear respondent's claim without requiring respondent to first exhaust the SEC's administrative process.

II. Even if the Court's Implied Preclusion Framework Applies to Respondent's Claim, It Counsels Against Finding Implied Preclusion

Even if the Court applies the *Thunder Basin* factors to claims outside of the public rights context,

Respondent's claims are not implicitly precluded. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), the Court stated "we presume that Congress does not intend to limit jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Id*. at 489 (quoting *Thunder Basin*, 510 U.S. at 212-13 (1994)).

Respondent's claim is outside of the agency's expertise, is wholly collateral to the enforcement proceedings against it, and the denial of jurisdiction to hear a challenge to the very structure of an administrative process until after respondent endured the very process it claims is unconstitutional forecloses the possibility of *meaningful* judicial review.

a. Respondent's Claim is Outside the Agency's Expertise

Respondent raises a constitutional challenge to the SEC's administrative adjudication process based on the removal provisions applicable to administrative law judges. In *Free Enterprise*, a case that was also about a constitutional challenge to officers of the United States supervised by the SEC, the Court found "constitutional claims are also outside the Commission's competence and experience." *Id.* at 491. Even at least one court that ultimately ruled against jurisdictional claims similar to Respondent's conceded that constitutional challenges to an agency's structure are outside of the agency's expertise. *See*, *Axon Enterprise, Inc. v. Federal Trade Comm'n*, 986 F.3d

1173, 1186 (9th Cir. 2021) ("The third *Thunder Basin* factor – whether the claims are outside the agency's expertise – weighs against jurisdiction-stripping.").

Nevertheless, some lower courts have looked to *Elgin* to determine that constitutional challenges to an agency's structure are within the agency's expertise. *See Hill v. Securities and Exchange Comm'n*, 825 F.3d 1236, 1250-51 (11th Cir. 2016) ("As in *Elgin*, here the Commission might decide that the SEC's substantive claims are meritless and would thus have no need to reach the constitutional claims. . . . We are thus satisfied that the Commission's expertise could be brought to bear in this way, even if its expertise could offer no added benefit to the resolution of the constitutional claims themselves." (citations omitted)); *see also Tilton v. Securities and Exchange Comm'n*, 824 F.3d 276, 290 (2d Cir. 2016); *Bennett v. Securities and Exchange Comm'n*, 844 F.3d 174, 187-88 (4th Cir. 2016); *Jarskesy v. Securities and Exchange Comm'n*, 803 F.3d 9, 28-29 (D.C. Cir. 2015). This approach misreads *Elgin* and would effectively read the "agency expertise" prong out of the *Thunder Basin* factors.

First, as noted above, *Elgin* is distinguishable because it concerns public rights – the statutory rights granted by Congress to federal employees. Under the structure of the Constitution, Congress has greater leeway to assign adjudicative responsibilities to executive branch agencies for matters concerning public rights.

Second, the constitutional claims in *Elgin* were raised as substantive defenses to the adverse employment actions taken against petitioners. Resolution of petitioners constitutional claims could substantively resolve petitioner's challenge to their adverse employment action and vice-versa. In the case at hand, resolving Respondent's constitutional challenge does not substantively resolve the agency's enforcement action against her. Moreover, as determined in *Free Enterprise*, resolving structural separation of powers claims is not the type of claim the SEC typically addresses.

Finally, the argument in *Hill* and similar decisions would effectively read the "agency expertise" prong out of the *Thunder Basin* analysis by reducing it to a tautology and/or collapsing it into the "wholly collateral" prong. According to the court, if a constitutional claim is related to an administrative action, it is within the agency's expertise. This is tautological: if every claim associated with an enforcement action is within an agency's expertise, it is hard to see how *any* question could be outside of the agency's expertise. *See Axon Enterprise,* 986 F.3d at 1186 (Noting that "such an interpretation renders this . . . factor virtually meaningless because any challenge to an administrative process can be mooted if a party prevails on the substantive merits.").

It is also hard to see how any claim that is not wholly collateral could be outside of the agency's expertise, effectively collapsing two prongs of the *Thunder Basin* analysis into each other. *See Tilton*824 F.3d at 292 (Droney, J., dissenting) ("The

majority's application of the *Thunder Basin* factors has stripped the 'wholly collateral' and 'outside the agency's expertise' factors of any significance: in its view, as long as administrative proceedings have been initiated, those two factors are always satisfied.").

The SEC has not gained newfound "competence and experience" adjudicating constitutional claims in the intervening years since *Free Enterprise* was decided. Instead, like petitioner's claim in *Free Enterprise*, respondent's claim presents "standard questions of administrative law, which the courts are at no disadvantage in answering." *Free Enterprise*, 561 U.S. at 491.

b. Respondent's Claims Are Wholly Collateral

The SEC initiated enforcement proceedings against Respondent alleging that Respondent violated the Exchange Act by failing to comply with auditing standards issued by the Public Company Accounting Oversight Board ("PCAOB"). *See* Petition for a Writ of Certiorari at ¶ 2, *Securities and Exchange Commission v. Cochran*, No. 21-1239 (Mar. 11, 2022). Respondent seeks to enjoin the administrative proceedings before the SEC on the theory that the applicable statutory removal restrictions of administrative law judges violates Article II of the Constitution. *See, e.g., id.* at ¶ 3. Whether the removal restrictions of SEC administrative law judges violate Article II has no impact on whether or not respondent's conduct violated the Exchange Act. Accordingly, Respondent's claim is wholly collateral to

the substance of the administrative enforcement proceedings against her.

While often acknowledging that this is one plausible reading of the "wholly collateral" standard, several courts of appeals have adopted a different reading: finding that "if the claim is the procedural vehicle that the party is using to reverse the agency action, it is not 'wholly collateral' to the review scheme." *Axon Enterprise*, 986 F.3d 1185; *see also Tilton*, 824 F.3d at 287; *Bennett*, 844 F.3d at 187; *Jarkesy*, 803 F.3d at 22-25. This approach is closely tied to interpretations of *Elgin* discussed above in relation to "agency expertise," and suffers some of the same infirmities. Namely, it would effectively read the "wholly collateral" factor out of the *Thunder Basin* analysis once there is an administrative proceeding.

Elgin does not compel this result. As noted above, the constitutional concerns raised in *Elgin* related to the substance of the administrative proceeding. As the Fifth Circuit noted, "[t]he nature of [Resondent's] challenge is structural – it does not depend on the validity of any substantive aspect of the Exchange Act, nor of any SEC rule, regulation, or order." *Cochran v. Securities and Exchange Comm'n*, 20 F.4th 194, 207 (5th Cir. 2021); *see also Tilton*, 824 F.3d at 297 (Droney, J., dissenting) ("Here . . . the appellants object to the very existence of SEC administrative proceedings conducted by ALJs who are, in their view, not appointed in accordance with the Appointments Clause. . . . I see no difference between the Appointments Clause challenge in *Free Enterprise* and here; it is completely collateral to the

work of the PCAOB as well as to the work of the SEC and its ALJs.").

Since Respondent's claim would not resolve the enforcement action against her, it is wholly collateral to that action.

c. Forcing Respondents to Endure an Administrative Enforcement Process Before Being Able to Raise a Constitutional Challenge to the Proceeding Itself Deprives Respondents of *Meaningful* Judicial Review

Forcing a Respondent to undergo a complete administrative enforcement process before being able to raise a constitutional challenge to the proceeding before an impartial Article III court deprives Respondent of *meaningful* judicial review.

In evaluating whether a finding of preclusion forecloses meaningful judicial review, the lower courts have downplayed the degree to which the process is the penalty in administrative enforcement proceedings.

i. Administrative Processes Produce Lasting Reputational Harm

As former Labor Secretary Raymond Donovan said, "Which office do I go to to get my reputation back?" Joseph P. Fried, *Raymond Donovan, 90, Dies; Labor Secretary Quit Under a Cloud*, N.Y. Times (June 5, 2021),

https://www.nytimes.com/2021/06/05/us/raymond-j-donovan-dead.html. There is a reputational harm associated with being branded a lawbreaker by an administrative agency.

To bring a constitutional challenge under Petitioners' reading of the law, a respondent would have to be accused of misconduct, have that accusation sustained by an administrative law judge, and have the administrative law judge's determination confirmed by the Commission, all before seeing the inside of a courtroom. Even if a respondent succeeds in raising their constitutional challenge before a court of appeals, they will have already endured years of reputational harm.

ii. SEC Administrative Procedures Are Generally Less Favorable to Respondents than Comparable Article III Court Proceedings

SEC administrative procedures place respondents at a significant disadvantage relative to proceedings before an Article III court.

First and foremost, "[u]nlike Article III judges, executive officials are not, nor are they supposed to be, 'wholly impartial.' They have their own interests, their own constituencies, and their own policy goals – and when interpreting a regulation, they may choose to 'press the case for the side [they] represen[t]' instead of adopting the fairest and best reading." *Kisor*, 139 S. Ct. at 2439 (Gorsuch, J., concurring in judgment) (quoting Archibald Cox, *Judge Learned*

Hand and the Interpretation of Statutes, 60 Harv. L. Rev. 370, 390-91, n. 58 (1947)).

Once in front of an agency administrative law judge, agency procedures generally provide significantly less protections for respondents than corresponding district court rules. *But see generally* 17 C.F.R. § 201.230 (concerning the availability of Commission documents for inspection by Respondents).

"The SEC's administrative courts' unrealistic time constraints relating to decision issuances are perhaps the form's most prominent procedural disadvantage." Ryan Jones, *Comment: The Fight Over Home Court: An Analysis of the SEC's Increased Use of Administrative Proceedings*, 68 SMU L. Rev. 507, 524 (2015) (citing Peter J. Henning, *The S.E.C.'s Use of the 'Rocket Docket' is Challenged*, N.Y. Times Dealbook (Aug. 25, 2014), https://archive.nytimes.com/dealbook.nytimes.com/2014/08/25/the-s-e-c-s-use-of-the-rocket-docket-is-challenged/). Under Commission rules, an initial decision must be issued within a timeframe specified based on one of three tracks: a 30-day, a 75-day, or a 120-day track. 17 C.F.R. § 201.360(a)(2)(i). Under the 120-day timeline, a hearing "shall" be scheduled no more than ten months from the date of service of the order instituting the proceeding, while 75-day hearings must begin within six months, and 30-day hearings must begin within four months. 17 C.F.R. § 201.360(a)(2)(ii).

This timeline begins to run "from the date of service of the order instituting the proceeding," an order which is issued by the Commission. *See id.* While there are limited options to request an extension of time, such motions are generally "strongly disfavor[ed]." 17 C.F.R. § 201.161(b)(1). A hearing officer may also "certify" that they are unable to file an initial decision within the prescribed time frame for "case management purposes," however, the Commission – i.e., one of the parties to the proceeding – retains the ability to issue an order denying the certification. 17 C.F.R. § 201.360(a)(3)(i). Respondents do not have a similar veto power.

By comparison, the median time from filing to trial in civil matters as of March 31, 2022, is 32.6 months – more than three times as long as the longest acceptable timeframe for Commission hearings. *U.S. District Courts – Federal Court Management Statistics – Profiles*, U.S. Courts (Mar. 31, 2022), https://www.uscourts.gov/report-name/federal-court-management-statistics. It is even longer – 45.3 months – in the District of Columbia, where the SEC sits, and 39.4 months in the Southern District of New York, where many regulated parties operate. *Id.*

This timeline puts respondents at a serious disadvantage.[2] "Agency investigations deploy immense investigatory power to target individuals

[2] These timelines are actually an improvement over the SEC's prior process, which set stricter timeframes for reaching an initial decision. *See* SEC, *Final Rule: Amendments to the Commission's Rules of Practice*, 81 Fed. Reg. 50211 (Jul. 29, 2016).

and entities with often crippling and voluminous document, inspection, and interview requests." Aram A. Gavoor and Steven A. Platt, *Administrative Investigations*, 97 Ind. L.J. 421, 462 (2022). With respect to the SEC, "[t]ypically, SEC investigations take two to four years to complete." *Frequently Asked Questions*, SEC Whistleblower Advocates PLLC (Accessed Jul. 1, 2022), https://secwhistleblowerадvocate.com/sec-whistleblower-frequently-asked-questions/#:~:text=How%20long%20does%20it%20take,to%20four%20years%20to%20complete. While respondents are generally aware of the subject and overall nature of an SEC investigation, the agency nevertheless has a significant head start in assembling materials and developing its theories of the case. Moreover, with limited exceptions, such as statute of limitations imperiled matters, since the Commission is the initiating party it is able to take as much time as it needs prior to issuing its order initiating proceedings.

At the same time, proceedings before the SEC can also be too long. As one commentator noted, "There is also no procedure available for a respondent to move to dismiss the allegations at the outset of the case; that option is only available to defendants in federal court." Douglas J. Davidson, *Litigating with the SEC* at 709, SEC Compliance and Enforcement AB 2015 (2015), file:///C:/Users/GLawkowski/Downloads/sec-compliance-and-enforcement-answer-book-chapter-20-excerpt.pdf.

Moreover, while there are strict timelines for proceedings before hearing officers, there are no such strict limits on the Commission itself. In the three most recent reporting periods, the median time for the Commission to reach a decision was 167, 334, and 501 days, respectively. *See Report on Administrative Proceedings for the Period October 1, 2021 through March 31, 2022*, Securities and Exchange Commission (Apr. 29, 2022), https://www.sec.gov/files/34-94820_0.pdf. These times are in addition to the time spent before an administrative law judge, meaning that "data suggest that after factoring in delays associated with Commission review, 'the overall period for completion of an administrative proceeding is likely *slower* than the time required to complete a trial in district court.'" Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and the Prospects for Reform Through Removal Legislation*, 85 Fordham L. Rev. 1143, 1164 (2016) (quoting Ctr. For Capital Mkts. Competitiveness, U.S. Chamber of Commerce, Examining U.S. Securities and Exchange Commission Enforcement: Recommendations on Current Process and Practices, at 16 (July 2015), https://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882_SEC_Reform_FIN1.pdf.

The result is the worst of both worlds for respondents: they are hurried through the administrative hearing process with less time to prepare than if the same proceeding were held in district court, then forced to remain in limbo for more time than if the same action was filed in district court

while the Commission considers the matter, all before being able to reach an Article III court.

In addition, the SEC's administrative process stacks the deck against respondents in discovery. *But see* 17 C.F.R. § 201.230 (concerning the availability of Commission documents for inspection by Respondents). Under SEC procedure, the Division of Enforcement and a single respondent may each file notices to depose no more than three persons in connection with a proceeding under the 120-day timeframe, the Commission's longest hearing track. 17 C.F.R. § 201.233(a)(1); *compare with* Fed. R. Civ. P. 30 (allowing up to ten depositions prior to seeking leave of the court).[3] If a matter involves multiple respondents, the respondents jointly may depose up to five persons, as may the Division of Enforcement. 17 C.F.R. § 201.233(a)(2). Any side may file a discretionary motion with the hearing officer to take two additional depositions. 17 C.F.R. § 201.233(a)(3). "No other depositions shall be permitted . . . ." 17 C.F.R. § 201.233(a); *see also* 17 C.F.R. § 201.233(b).

In addition, SEC rules permit the introduction of "investigative testimony, or other sworn statement or declaration made pursuant to 28 U.S.C. 1746," where "[i]n the discretion of the Commission or the hearing officer, it would be desirable, in the interest of justice, to allow the prior sworn statement or declaration to be used." 17 C.F.R. § 201.235(a)(5).

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[3] These procedures are also an improvement over the SEC's prior process, which did not permit respondents to take depositions. *See* SEC, *Final Rule: Amendments to the Commission's Rules of Practice*, 81 Fed. Reg. 50211 (July 29, 2016)

Setting aside the issues with having the Commission – the body that initiated the proceedings – determine which investigative statements are "in the interests of justice," this loophole puts respondents at a severe disadvantage.

As noted above, prior to initiating an administrative proceeding, the SEC conducts an investigation that often spans years and involves taking testimony from multiple witnesses. This gives the SEC an opportunity to supplement its limited number of depositions with a potentially unlimited number of investigative transcripts. Worse, unlike at a deposition, where both parties' counsel may be present and ask relevant questions, investigate transcripts reflect only the questions the SEC wants to ask, without challenge, contradiction, or further exploration by respondents. Given these structural advantages, it is little wonder that "[w]hile the rule governing admissibility of prior sworn statements is party-neutral, in practice, it is a favorite tool of Enforcement Division trial counsel who are not required to call the witness live." Alan M. Lieberman, *Fast-Track Justice: Is the SEC Exercising 'Unchecked and Unbalanced Power'?*, 20 No. 10 Westlaw Journal of Securities Litigation & Regulation 1, at *4 (Sept. 18, 2014).

In addition, the SEC's evidentiary standards fall short of the protections offered by the federal rules. For example, under SEC rules, "evidence that constitutes hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair." 17 C.F.R. § 201.320(b).

Finally, if the SEC opts to pursue an administrative hearing, respondents are deprived of the opportunity for a trial by jury. At least one Court of Appeals has determined that the lack of a jury trial violates the Seventh Amendment, at least for fraud proceedings under the Securities and Exchange Act. *See Jarkesy*, 34 F.4th at 455 (noting "the action the SEC brought against Petitioners is not the sort that may be properly assigned to agency adjudication under the public-rights doctrine. Securities fraud actions are not new actions unknown to the common law.").

SEC administrative procedures are generally less favorable to respondents than corresponding district court proceedings, forcing respondents to hurry up and wait through the enforcement process, all while contending with discovery and admissibility rules that largely tilt the playing field in the government's favor.

iii. Administrative Processes Impose Heavy Financial Expense

"For many it's cost prohibitive" to try to litigate through the entire SEC enforcement process. Stephen Traub, *When The SEC Charges, Should You Fight or Settle?*, Compliance Week (Aug. 8, 2005), https://www.complianceweek.com/when-the-sec-charges-should-you-fight-or-settle/7001.article#:~:text=Most%20cases%20are%20settled%20before,sort%20of%20litigation%20is%20filed. Over fifteen years ago, "it could cost individuals at least $100,000 and as much as $1 million in a major

case to defend themselves against charges." *Id.* That cost has likely gone up in the intervening years. *See generally* Jean Eaglesham, *SEC Wins With In-House Judges*, Wall St. J. (May 6, 2015), https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803(Describing one defendant noting that "he and fellow defendants have spent nearly $6 million on legal fees.").

Moreover, costs are not limited to lawyers' fees. The mere announcement of an administrative investigation can have significant impacts on the value of impacted companies. *See generally* Gavoor and Platt, 97 Ind. L.J. at 462 ("When it was publicly revealed that the Department of Justice and the FTC were launching antitrust investigations into Facebook, Amazon, and Google's parent company, those companies' shares dropped 7.5%, 4.6%, and 6.1%, respectively."). Adverse actions by the SEC, including the initiation and continuation of enforcement proceedings, can also impact the ability of targeted firms to functionally operated and raise money in capital markets. *Id.* at 465 ("If the Securities and Exchange Commission censures a business association, that entity can face additional disclosure requirements, ineligibility to obtain federal contracts, and the possibility of criminal proceedings, civil securities class actions, or shareholder derivative actions."); Jeffery E. McFadden and Samantha Kats, *To Plea or Not to Plea: That is Not the Question*, Stradley Ronon, at 2 (Oct. 13, 2017), https://www.stradley.com/-/media/files/publications/2017/10/securitieslitigationenforcementalertoctober2017.pdf (noting that one of

the biggest drivers of SEC settlements is the threat "Settle, or we won't let you raise money in the capital markets.").

iv. The Result is a Pressure to Settle that Deprives Respondents of a *Meaningful* Opportunity for Judicial Review of Structural Claims

Given these pressures, it is little wonder that "[r]oughly 98 percent of all SEC cases settle." *Id.* at 2. Those that do not first face an administrative hearing process that by some estimates rules in favor of the agency 90 percent of the time, *see, e.g,* Jean Eaglesham, *SEC Wins With In-House Judges*, Wall St. J. (May 6, 2015), https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803, a success rate so high that SEC enforcement officials have candidly admitted using the threat of administrative proceedings to induce settlements. *See Tilton*, 824 F.3d at 298 n. 5 (Droney, J., dissenting) (quoting the Head of the SEC Division of Enforcement as stating "I will tell you that there have been a number of cases in recent months where we have threatened administrative proceedings, it was something we told the other side we were going to do and they settled." (quoting Brian Mahoney, *SEC Could Bring More Insider Trading Cases In-House*, LAW360 (June 11, 2014), http://www.law360.com/articles/547183/sec-could-bring-more-insider-trading-cases-in-house)).

Assuming a respondent does navigate the administrative hearing process, they will then need to

seek Commission review. By one estimate, the Commission decided in the agency's favor concerning 95 percent of respondents on appeal. *See* Jean Eaglesham, *SEC Wins With In-House Judges*, Wall St. J. (May 6, 2015), https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803 ("The commissioners decided in their own agency's favor concerning 53 out of 56 defendants in appeals – or 95% – from January 2010 through this past March . . . . Five other cases were sent back to in-house SEC judges to reconsider."). Moreover, the Commission has the authority to, and does, increase penalties for defendants who choose to appeal, effectively punishing respondents for exercising their procedural rights. *Id.* ("During the same stretch, the SEC commissioners reduced financial sanctions imposed on one defendant but increased the sanctions for seven others.").

Thus, before seeking the inside of a courtroom, respondents must navigate an administrative hearing, that ends in the SEC's favor 90 percent of the time, and an appeal to the Commission, that ends in the SEC's favor 95 percent of the time and where the SEC can choose to effectively punish defendants for availing themselves of their appeal rights by increasing their penalties.

v. Respondents Do Not have the Opportunity for *Meaningful* Review

As Judge Droney of the Second Circuit notes, "[t]he [respondent] seek[s] to enjoin the SEC proceedings, but by the time that they access any

judicial review, the proceedings will be complete, rendering the possibility of obtaining an injunction moot even if the final Commission order is vacated." *Tilton*, 824 F.3d at 298 (Droney, J., dissenting). This is not a *meaningful* opportunity for judicial review.

In response to these concerns, several courts have noted that respondent can eventually obtain judicial review in an Article III court, and pointed to the Court's opinion in *Federal Trade Commission v. Standard Oil Company of California*, 449 U.S. 232 (1980), for the proposition that "the expense and annoyance of litigation is 'part of the social burden of living under government.'" *See*, *e.g.*, *Bennett*, 844 F.3d at 185 (quoting *Standard Oil*, 449 U.S. at 244).

This approach effectively writes the word "meaningful" out of the judicial review factor. Under the approach of the court in *Bennett* and several other circuits, any judicial review satisfies this factor, particularly if respondent is already in enforcement proceedings.

As the Fifth Circuit explains, *Bennett* and other cases relying on *Standard Oil* also take the language regarding litigation costs out of its original context. *See Cochran*, 20 F.4th at 210 ("*Standard Oil* did not concern implied jurisdiction stripping; rather, the issue before the Court was whether the FTC had taken a 'final agency action' within the meaning of the Administrative Procedure Act . . . ." (citations omitted)). The question in *Standard Oil* was whether the issuance of a complaint and accompanying reason to believe finding constituted final agency action. The

Court concluded that it did not, noting that adjudicating the complaint before the agency was part of the administrative process. Unlike in *Standard Oil*, adjudicating whether the very structure of the agency violates the Constitution is not typically part of an agency adjudication.

A better approach is to give the word "meaningful" teeth, which requires some functional analysis of the practicality of obtaining judicial review.

When it comes to adjudicating before administrative agencies, the process is often the punishment. It is long, it is expensive, the procedural deck is stacked against respondents, and the reward for a successful challenge is often getting to start at square one and begin the whole process over again. Given these hurdles, it is little wonder that agencies, including the Securities and Exchange Commission, have used the threat of administrative process to induce parties to settle rather than seek to vindicate their rights in an Article III court.

Particularly where, as here, the challenge raised is one to which the agency has no power to rectify, forcing respondents to endure this punishing process deprives respondents of a meaningful opportunity to obtain judicial review. Thus, this factor counsels against finding implied preclusion.

CONCLUSION

For the foregoing reasons, the judgment in favor of the Respondent should be affirmed.

Respectfully submitted,

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