No. 21-1239

In The Supreme Court of the United States

SECURITIES & 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 FOR THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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The Institute for Justice ("IJ") is a nonprofit, public interest law firm committed to defending the essential foundations of a free society and securing the constitutional protections necessary to ensure individual liberty. Central to that mission is advocating for an engaged judiciary that is willing to exercise its constitutional duty to adjudicate cases and controversies, enjoin constitutional violations, and hold government officials accountable when they violate the Constitution.

This case directly implicates IJ's mission to promote an engaged judiciary capable of securing Americans' essential constitutional rights. Judge-made doctrines that allow courts to abdicate their constitutional duty have the effect of delaying or denying relief in IJ's litigation to protect property rights, free speech, and economic liberty. IJ has several cases against administrative agencies, including a structural challenge to the Department of Labor's administrative proceedings, *Sun Valley Orchards, LLC* v. *DOL*, No. 1:21-cv-16625 (D.N.J.), and pending administrative proceedings before the Federal Communications Commission and United States Department of Agriculture.

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[1] Pursuant to this Court's Rule 37.3(a), all parties consented to the filing of this brief. And pursuant to Rule 37.6, *Amicus* affirms that no party or counsel for a party authored this brief in whole or part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *Amicus*, its members, or counsel made a monetary contribution to its preparation or submission.

IJ is concerned that many lower courts are applying the judge-made doctrine of "implied jurisdiction stripping" to abdicate the duty and role of the judicial branch. In doing so, these courts place unwarranted barriers in the way of individuals who are seeking to vindicate both their constitutional rights and the structural constraints on government that serve to protect those rights. IJ therefore submits this brief to encourage the Court to restrict—if not eliminate—the dangerous, frequently abused, and constitutionally suspect doctrine of implied jurisdiction stripping.

SUMMARY OF ARGUMENT

This case and *Axon Enterprises, Inc.* v. *FTC*, No. 21-86, ask this Court to decide whether Congress can impliedly deprive Article III courts of their inherent and statutory power to decide ripe constitutional challenges to an agency's structure and procedures. The simple answer is no, as this Court recognized in *Free Enterprise Fund* v. *PCAOB*, 561 U.S. 477, 489-91 (2010) (applying *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994)).

Despite this Court's holding in *Free Enterprise Fund,* however, the lower courts overwhelmingly reach the wrong result in cases like this. It seems those courts mistake this Court's decision in *Elgin* v. *Department of Treasury*, 567 U.S. 1 (2012), as an invitation to ignore the clear instruction of *Free Enterprise Fund*. In the decade since *Elgin*, the lower courts have crafted creative ways to disclaim their duty to decide important constitutional claims. This case presents the Court with a chance to reclaim the courts' Article III jurisdiction over such cases.

As *Amicus* will explain, implied jurisdiction stripping is contrary to our constitutional design, violates due process, and—at least in the case of the Securities and Exchange Commission—creates a nondelegation issue. Yet the lower courts consistently invoke *Thunder Basin* to abdicate their jurisdiction over actions to enjoin the unconstitutional actions of federal officials. These cases illustrate that *Thunder Basin*'s implied-jurisdiction-stripping doctrine is unworkable and warrants reconsideration. This Court should restore the proper constitutional balance and rule that Congress never impliedly strips jurisdiction—especially in cases challenging the constitutionality of an agency's structure or procedures.

ARGUMENT

I. IMPLIED JURISDICTION STRIPPING IS UNCONSTITUTIONAL

Article III courts protect individual liberty by providing a forum to vindicate constitutional rights and by enforcing the Constitution's structural constraints on government. When a court infers that Congress impliedly stripped its jurisdiction, it undermines those important judicial functions. This section will explain how the judge-made doctrine of implied jurisdiction stripping leads judges to abdicate their constitutional duty to enjoin unconstitutional acts by federal agencies, violates the due process rights of the litigants whose constitutional cases the courts decline to hear, and (in the case of the SEC)

impermissibly delegates control over the federal courts' jurisdiction to an administrative agency.

A. Article III Imposes a Duty on Courts to Enjoin Unconstitutional Acts by Governmental Officials

To protect individual liberty against intrusion by the political branches, Article III imposes on courts a "*duty* . . . to declare all acts contrary to the manifest tenor of the Constitution void." The Federalist No. 78 (Alexander Hamilton) (emphasis added). The doctrine of implied jurisdiction stripping is at odds with that judicial duty.

The judicial duty imposed by Article III compels courts to enjoin federal officials from carrying out statutory and administrative schemes that violate the Constitution. *Bell* v. *Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution."); see also *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001) ("[I]njunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally."). The courts' authority to stop unlawful conduct by governmental officials is an equitable power that "reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326-37 (2015) (citation omitted). When executive action violates the Constitution, equity requires that courts remain open to vindicate a plaintiff's rights. See *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 (2018) ("'[O]ne who makes a timely challenge to

the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief.") (citation omitted). "Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer[.]" *Am. Sch. of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, 110 (1902).

The Judiciary Act of 1789, which established the lower courts and vested them with jurisdiction over federal questions and diversity suits, "carries out the constitutional right" to a federal forum. *Suydam* v. *Broadnax*, 39 U.S. (14 Pet.) 67, 75 (1840). And with that statutory grant of jurisdiction, *all* federal courts—not just the Supreme Court—are duty-bound to exercise their jurisdiction in such cases. See *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."). The judiciary's obligation to "'decide' cases within its jurisdiction" is "virtually unflagging." *Lexmark Int'l, Inc.* v. *Static Ctrl. Components*, 572 U.S. 118, 126 (2014) (citation omitted). That's why this Court has reiterated, time and again, that federal courts must not "abdicate their authority or duty" and must "proceed to judgment and [] afford redress to suitors before them in every case to which their jurisdiction extends." *New Orleans Pub. Serv., Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 358-59 (1989) (quoting *Chicot County* v. *Sherwood*, 148 U.S. 529, 534 (1893)); *Elgin*, 567 U.S. at 35 (Alito, J., joined by Ginsburg and Kagan, JJ., dissenting) ("The presumptive power of the federal courts to hear constitutional challenges is well established.").

Courts, therefore, presume they retain their authority to decide cases and controversies unless a statute strips that jurisdiction "clearly and directly." *Bd. of Governors, FRS* v. *MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991); see also *Verizon Md., Inc.* v. *Pub. Serv. Comm'n*, 535 U.S. 635, 644 (2002) (holding that the Telecommunications Act of 1996 did not strip federal-question jurisdiction because Congress would "expressly" exclude otherwise applicable jurisdiction if it intended to do so). By requiring a "heightened showing" of congressional intent to strip jurisdiction, courts "avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988); see also *Oestereich* v. *Selective Serv. Bd.*, 393 U.S. 233, 235, 237-38 (1968) (finding jurisdiction over a student's appeal of his Selective Service induction despite an express statutory bar because the bar as written would be "out of harmony . . . with constitutional requirements"); *Noel Canning* v. *NLRB*, 705 F.3d 490, 497-98 (D.C. Cir. 2013) (addressing an unpreserved Appointments Clause challenge despite an express statutory exhaustion requirement because "the Supreme Court ha[s] considered objections to the authority of the decision maker whose decision is under review even when those objections were not raised below"), aff'd 573 U.S. 513 (2014).

Implied jurisdiction stripping reverses the strong presumption of Article III jurisdiction and invites courts to abdicate their judicial duty to provide meaningful review of legitimate constitutional violations.

Additionally, implied jurisdiction stripping imbalances the separation of powers by giving administrative agencies primary jurisdiction over structural issues they are powerless to resolve. See *Califano* v. *Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions."). As this Court has recognized repeatedly, executive officials cannot declare acts unconstitutional or enjoin duly enacted laws. See, *e.g.*, *Carr* v. *Saul*, 141 S. Ct. 1352, 1361 (2021) ("It makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested."). In *Crowell* v. *Benson*, for example, the Court recognized "the utility and convenience of administrative agencies" (albeit in a far narrower sphere than they exist today) but observed that "[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." 285 U.S. 22, 57, 60 (1932). Similarly, in *McNary* v. *Haitian Refugee Center, Inc.*, this Court permitted a constitutional challenge to an immigration proceeding to go forward in court despite a statutory limitation on courts reviewing the denial of an amnesty application. 498 U.S. 479, 497 (1991). Consistent with the presumption of jurisdiction, this Court insisted that Congress would have used "more expansive language" had it intended to preclude the courts' consideration of the constitutionality of the agency's processes. *Id.* at 494.

Decades of this Court's jurisprudence confirm that courts should not abdicate their judicial power in favor of executive officials who lack the "competence and expertise" to resolve a plaintiff's claims—even when Congress has created an administrative framework to enforce a statutory scheme. *Free Enter. Fund*, 561 U.S. at 491; see also *Carr*, 141 S. Ct. at 1360-61 ("[I]t is sometimes appropriate for courts to entertain constitutional challenges to statutes or other agency-wide policies even when those challenges were not raised in administrative proceedings."); *Califano*, 430 U.S. at 109 (requiring exhaustion of constitutional claims would "effectively have closed the federal forum to the adjudication of colorable constitutional claims" and—particularly absent an express statutory command—courts will not "take the 'extraordinary' step of foreclosing jurisdiction"); see also *Leedom* v. *Kyne*, 358 U.S. 184, 190 (1958) ("This Court cannot lightly infer that Congress does not intend the judicial protection of rights it confers against agency action taken in excess of delegated powers."). Implied jurisdiction stripping violates the judicial duty by allowing courts to withhold their Article III jurisdiction in favor of an administrative process that cannot resolve the constitutional controversy.

This abdication does not just affect a single litigant. By dismissing colorable constitutional challenges to an agency's structure and procedures, courts allow the agency to continue violating the Constitution in all its enforcement proceedings until a person aggrieved by a final agency order can eventually petition for review in a circuit court. Cf. *Free Enter. Fund*, 561 U.S. at 498. The entire public

suffers when the judiciary refuses to ensure that the executive follows the law.

This judicial abdication upsets the basic alignment of our constitutional scheme. Federal courts—not administrative tribunals—have the responsibility and duty to adjudicate constitutional disputes. Our system of checks and balances depends on each branch guarding its powers jealously. See *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2438 (2019) (Gorsuch, J., with Thomas, Alito, and Kavanaugh, JJ., concurring in judgment); see also *Free Enter. Fund*, 561 U.S. at 501 (The "dependence on the people . . . is maintained . . . by letting ambition counteract ambition, giving each branch the necessary constitutional means, and personal motives, to resist encroachments of the others.") (cleaned up). When the judiciary refuses to restrain the unconstitutional actions of federal officials, power accumulates in the political branches and puts individual liberty at risk.

B. Implied Jurisdiction Stripping Violates Due Process

Implied jurisdiction stripping also violates a litigant's due-process right to be heard. A core aspect of due process is the right to a hearing at a meaningful time and in a meaningful manner. *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 538, 542 (1985). That opportunity is not meaningful if a litigant must first endure an unnecessary and unconstitutional administrative process that might never lead to judicial review.

When litigants bring a direct action to challenge the constitutionality of an agency's structure or

processes, implied jurisdiction stripping forecloses judicial review until the litigants "already have suffered the injury that they are attempting to prevent." *Tilton* v. *SEC*, 824 F.3d 276, 298 (2d Cir. 2016) (Droney, J., dissenting); see also *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 840 (2018) (holding that channeling a noncitizen's "prolonged detention" claim through an administrative review scheme would "depriv[e] that detainee of any meaningful chance for judicial review" because, "[b]y the time a final order of removal was eventually entered, the allegedly excessive detention would have already taken place").

This deprivation of a meaningful opportunity to be heard would "unquestionably constitute[] irreparable injury" even if it were just for a "minimal period[] of time." *Elrod* v. *Burns*, 427 U.S. 347, 373-74 (1976); see also *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2196 (2020) (structural issues "inflict[] a 'here-and-now' injury on affected third parties that can be remedied by a court." (citation omitted)); *Bond* v. *United States*, 564 U.S. 211, 222 (2011) ("[I]ndividuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations."). In many cases, though, the constitutional deprivation is protracted and comes at great personal cost to the person left to the mercy of the agency. Respondents in SEC enforcement proceedings can face litigation for nearly a decade. See Brief of Raymond J. Lucia, *et al.* as *Amici Curiae* Supporting Respondent, *SEC* v. *Cochran*, No. 21-1239 ("Lucia Cert-Stage *Amicus*"). The cost is so great that nearly everyone settles their case before they ever get their day in court. Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. Pa. J. Const. L. 45, 57 (2016) (noting that between

2002 and 2014, the SEC obtained settlement agreements in about 98% of its cases). In addition to the out-of-pocket costs of a decade-long legal defense, respondents frequently settle their claims "because their business, job, or personal relationships will not survive sustained adverse publicity repeating the SEC's allegations over and over during the long life of litigation." Comments of Andrew N. Vollmer on Office of Mgmt. & Budget Request for Info., OMB-2019-0006, at 4 (Mar. 9, 2020), tinyurl.com/y5qcknzx. Ray Lucia, for instance, finally had enough and settled his case after seven years without *ever* receiving a constitutionally sound hearing before the SEC. Lucia Cert-Stage *Amicus* at 2.

Those SEC respondents who do manage to endure the gauntlet of administrative proceedings are still not guaranteed judicial review. Under the government's theory, the courts are open to only those respondents "aggrieved by a final order of the Commission." 15 U.S.C. § 78y(a). Implied jurisdiction stripping would ensure that those rare respondents who somehow prevail on the merits before the Commission[2] *never* have a court declare that the agency's structure or procedures were unconstitutional. A respondent's successful defense on the merits does not erase the constitutional injury suffered along the way; it just denies any redress.

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[2] The SEC "prevails much more frequently—sometimes 100% of the time in a given year—in its in-house enforcement proceedings than in court." Kent Barnett, *Against Administrative Judges*, 49 U.C. Davis L. Rev. 1643, 1645 (2016) (citing reporting from The New York Times and The Wall Street Journal).

A system that indefinitely delays any opportunity for courts to hear a litigant's constitutional claim—and often denies review altogether—does not provide the *meaningful* opportunity that due process requires. See *Loudermill*, 470 U.S. at 542. Courts violate due process when they infer jurisdiction stripping.

C. When an Agency Can Choose Between District Court and In-House Proceedings, Implied Jurisdiction Creates a Nondelegation Issue

There is yet another constitutional issue lurking in the background if this Court rules in the government's favor. The Dodd-Frank Act authorized the SEC to choose between prosecuting securities violations in a federal district court or before one of its in-house ALJs. See 15 U.S.C. §§ 78d-1, 78u. The district courts, of course, unquestionably have jurisdiction over all related constitutional claims if the SEC chooses to prosecute in an Article III court. But if the agency's choice to burrow its enforcement actions inside its own agency proceedings can divest the district courts of their jurisdiction to consider constitutional claims, it would violate the separation of powers in two ways.

First, as discussed in Part I.A, the federal courts enjoy inherent equitable authority to enjoin unconstitutional acts. See *Webster*, 486 U.S. at 603; *Bell*, 327 U.S. at 684; *Suydam*, 39 U.S. at 75. If Article III courts jealously guard their power from intrusion by Congress—the only branch authorized to limit the lower courts' jurisdiction—then surely they must resist that encroachment even more fiercely

when the executive seeks to limit the judicial power. Cf. *Kisor*, 139 S. Ct. at 2438 (Gorsuch, J., concurring); *Free Enter. Fund*, 561 U.S. at 501.

Second, Congress cannot delegate to an administrative agency "the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 529 (1935). "[T]he mode of determining" which cases are assigned to administrative tribunals is a legislative power "completely within congressional control." *Crowell*, 285 U.S. at 50-51 (citation omitted). But implied jurisdiction stripping in SEC cases permits the Commission to choose which cases remain within the courts' subject-matter jurisdiction based solely on the agency's decision to bring an enforcement action before its ALJ instead of in court. The Constitution does not allow an agency's choice of forum to deprive the courts of jurisdiction. Cf. *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 10 (1941) (an agency's rules cannot "extend or restrict the jurisdiction conferred by statute"); see also *EEOC* v. *Lutheran Soc. Servs.*, 186 F.3d 959, 963 (D.C. Cir. 1999) ("[I]n the absence of a statute clearly depriving courts of jurisdiction to hear issues not first presented to the agency, we know of no principle of administrative law . . . that would permit an agency to do so on its own.").

Jurisdiction stripping is not a delegable power. But even if it were, Congress must—at the very least—provide an intelligible principle to inform when an agency could limit a district court's jurisdiction. See *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). Far from including any intelligible

principle, the Dodd-Frank Act gave the SEC "unfettered discretion" to decide whether to bring securities actions before its own ALJs instead of in federal court. *Jarkesy* v. *SEC*, 34 F.4th 446, 461 (5th Cir. 2022) (citing 15 U.S.C. § 78u-2(a)). The implied stripping of jurisdiction over securities laws would delegate to the SEC the legislative power to choose "which subjects of its enforcement actions" enjoy their full set of constitutional rights—including the right to seek redress of constitutional violations in federal court and the right to a jury trial.[3] See *ibid.* (citing *INS* v. *Chada*, 462 U.S. 919, 952 (1983) (holding that actions are "legislative" when they have "the purpose and effect of altering the legal rights, duties and relations of person . . . outside the legislative branch")). Consequently, by reading jurisdiction stripping into the securities laws where none exists, the Court would be writing a nondelegation issue into that statutory scheme.

A ruling in the SEC's favor would, therefore, empower a single branch—one headed by a unitary executive no less—to accumulate the power of the other branches, completely distorting the constitutional scheme and placing plenary power in the hands of the President. Such a scheme would be

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[3] Indeed, at least one federal judge has recently questioned whether it ever comports with due process and the Constitution's structural safeguards when agencies proceed in-house with prosecutions that deprive a person of his "'property' interest" in the money the government takes as a fine and his "'liberty' interest in continuing in his profession" because such deprivations implicate private rigts. *Calcutt* v. *FDIC*, 2022 WL 2081430, at *39 (6th Cir. June 10, 2022) (Murphy, J., dissenting).

"the very definition of tyranny." The Federalist No. 47 (James Madison).

This case, of course, does not require the Court to reach the nondelegation problem so long as it rules that district courts maintain jurisdiction over constitutional challenges to the SEC's structure and enforcement procedures *regardless* of where the agency chooses to prosecute. But if this Court accedes to the lower courts' abdication of Article III jurisdiction, it should consider the nondelegation issue that ruling would create.

II. *THUNDER BASIN* WAS WRONGLY DECIDED AND HAS PROVED UNWORKABLE

Courts that infer jurisdiction stripping—giving rise to all the constitutional concerns discussed in Part I—root their analysis in *Thunder Basin* and its progeny. As this section will explain, however, *Thunder Basin* announced a standard contrary to traditional modes of statutory interpretation. The lower courts that apply that standard reach the wrong result in most cases, demonstrating that *Thunder Basin*'s three factors for inferring jurisdiction stripping are unworkable. This case presents an opportunity for the Court to replace those factors with a clear constitutional rule.

A. *Thunder Basin* Requires Courts to Speculate About Congressional Intent

Congress granted federal district courts "original jurisdiction of *all* civil actions arising under the Constitution." 28 U.S.C. § 1331 (emphasis added). As

outlined in Part I.A, this jurisdictional grant—along with the constitutional authority inherent in Article III—authorizes district courts to enjoin federal officers who act unconstitutionally. But *Thunder Basin* instructs courts to withhold that jurisdiction without any subsequent express statement by Congress requiring them to do so.

Traditionally, courts disfavor "'speculation about what Congress might have' intended." *Wis. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2073 (2018) (citation omitted). It is particularly inappropriate for courts to speculate that Congress intended to supersede a prior-enacted statute without saying so explicitly. Such an approach ignores the "strong presumption that . . . Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1624 (2018) (cleaned up). Congress knows how to strip federal-question jurisdiction when it intends to. See, *e.g.*, *Shalala* v. *Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 10 (2000) (statute expressly provided that "[n]o action . . . shall be brought under section 1331"). There is simply no need for courts to search for clues beyond a statute's plain text to infer that Congress meant to withdraw § 1331's grant of authority—particularly when there is a ripe constitutional controversy. Congress must speak explicitly if it intends to deprive courts of their jurisdiction over the types of claims most fundamental to the judiciary's constitutional function. Cf. *West Virginia* v. *EPA*, 597 U.S. ___, ___ (2022).

Thunder Basin and its progeny break from this traditional approach to statutory interpretation by instructing courts to go beyond a statute's plain text to weigh three factors in an attempt to discern whether Congress intended for federal courts to withhold their jurisdiction over a plaintiff's claim. 510 U.S. at 212-13. According to *Thunder Basin*, courts can infer jurisdiction stripping from: (1) the availability of meaningful judicial review, and whether the claim (2) implicates the agency's expertise and (3) is wholly collateral to the agency's review. *Ibid.* This approach is counter to traditional modes of statutory interpretation and this Court's precedent requiring a clear and direct statutory statement when Congress seeks to limit the courts' jurisdiction. See, *e.g.*, *MCorp Fin.*, 502 U.S. at 44.

The Court in *Elgin* only exacerbated the problems of *Thunder Basin* by suggesting that courts can infer Congress's intent to strip jurisdiction from how "comprehensive," "elaborate," or "exhaustively detail[ed]" an administrative scheme is. 567 U.S. at 5, 11. While such considerations might well inform whether Congress intended to vest an executive agency with "'the primacy' of review" over the administration of benefits, *ibid.*, a statute's complexity says nothing about the primary jurisdiction that Article III courts retain over constitutional questions. Nor is the elaborate nature of an administrative scheme a measurable factor that courts can consistently apply to determine legislative intent.

If Congress wants to divest courts of their jurisdiction over constitutional questions it must do

so expressly, clearly, and directly in a statute's plain text. *Verizon Md.*, 535 U.S. at 644; *MCorp Fin.*, 502 U.S. at 44. Mere implication can never satisfy *Webster*'s heightened standard for jurisdiction stripping in constitutional cases. 486 U.S. at 603; see also *Mims* v. *Arrow Fin. Servs., LLC*, 565 U.S. 368, 383 (2012) ("[J]urisdiction conferred by 28 U.S.C. § 1331 should hold firm against 'mere implication flowing from subsequent legislation.'") (citation omitted). *Elgin* was wrong to hold otherwise. See 567 U.S. at 9 (relying on the fact that the Merit System Protection Board, for some reason, "routinely adjudicates some constitutional claims"). Implied jurisdiction stripping has no place in constitutional cases.

Thunder Basin and *Elgin* invite courts to ignore the tools of statutory interpretation and to instead infer congressional intent based on pure conjecture. This Court should reconsider its doctrine of implied jurisdiction stripping, at least in cases challenging the constitutionality of an agency's structure and processes.

B. This Case Shows that the *Thunder Basin* Factors Are Unworkable in Practice

Thunder Basin is an unworkable standard, as demonstrated by the circuit split that precipitated review in this case. Most lower courts that have applied the *Thunder Basin* factors to the SEC's administrative scheme reached the opposite result as *Free Enterprise Fund*, which held that the *very same* statute did not implicitly strip the district courts of their jurisdiction over the *very same* type of structural

challenge. 561 U.S. at 489-91. The lower courts' inability to follow this Court's application of *Thunder Basin* shows that we need a clearer, more workable standard. See *Tilton*, 824 F.3d at 287 ("In the absence of more extensive guidance, lower courts have adopted two competing approaches."). The Court should announce a rule that reinforces the important function of Article III courts over constitutional claims.

In a portion of *Free Enterprise Fund* that elicited no dissent, this Court held 15 U.S.C. § 78y did not impliedly strip district courts of their jurisdiction over an Appointments Clause challenge. 561 U.S. at 489-91. To reach that conclusion, the Court walked through the *Thunder Basin* factors and determined that they "point[ed] against any limitation on review": (1) there would be no meaningful judicial review because not every agency action is encapsulated in a final order or rule; (2) the claim was collateral to § 78y's review provisions because the plaintiff objected to the agency's existence, "not to any of its auditing standards"; and (3) the plaintiff's constitutional claims were outside the SEC's expertise because they were "standard questions of administrative law" that did not require any "fact-bound inquiries" or "'technical considerations of [agency] policy.'" *Ibid.* (citation omitted).

That decision was compelled by law. Section 78y contemplates a circuit court's review only when a person aggrieved by a final agency order files a petition. These appeals are limited to the agency record. 15 U.S.C. § 78y(a). And again, the agency's ruling necessarily doesn't include the type of

collateral constitutional challenges to an agency's structure and processes—questions beyond the agency's competency and expertise. See *Free Enter. Fund*, 561 U.S. at 491; see also *Califano*, 430 U.S. at 109.

Despite the many reasons *not* to infer jurisdiction stripping, the first six circuit courts to apply the *Thunder Basin* factors all favored abdication. See *Cochran* v. *SEC*, 969 F.3d 507 (5th Cir. 2020) (panel opinion); *Bennett* v. *SEC*, 844 F.3d 174 (4th Cir. 2016); *Hill* v. *SEC*, 825 F.3d 1236 (11th Cir. 2016); *Tilton*, 824 F.3d 276 (2d Cir. 2016); *Jarkesy* v. *SEC*, 803 F.3d 9 (D.C. Cir. 2015); *Bebo* v. *SEC*, 799 F.3d 765 (7th Cir. 2015). To get around *Free Enterprise Fund*, the lower courts seem to suggest that *Elgin* abrogated the decision from just two years prior. See, *e.g.*, *Cochran*, 969 F.3d at 511-12 (panel opinion); *Bennett*, 844 F.3d at 187.

Applying the "meaningful review" factor, the lower courts have held that SEC respondents have an opportunity for meaningful judicial review because § 78y eventually allows those respondents aggrieved by a final agency order to seek review in a circuit court. *Tilton*, 824 F.3d at 286-87; *Bebo*, 799 F.3d at 774; *Jarkesy*, 803 F.3d at 27. In other words, these cases hold that the mere possibility of eventual judicial review over agency actions, in some cases, at some indeterminate time, indicates that Congress likely intended to strip district courts of federal-question jurisdiction over *all* claims related to the agency's structure and procedures.

Similarly, the lower courts' application of the "wholly collateral" factor would also result in

jurisdiction stripping almost any time there's an ongoing agency-enforcement action. Some courts, for instance, have decided that constitutional claims cannot be collateral to the merits because the only point to challenging an agency's structure and processes is to "prevail in the proceeding." *Tilton*, 824 F.3d at 288; see also *Jarkesy*, 803 F.3d at 23. Although procedural safeguards help ensure the adequate protection of an individual's rights during an agency's merits determination, a litigant's insistence that an agency's proceedings comply with the Constitution is separate from the merits of their administrative case. Ms. Cochran knows this well. After this Court ruled that the ALJ who decided the merits of her case back in 2017 sat in violation of the Appointments Clause, she did not "prevail in the proceeding"—she ended up right back at the start of enforcement proceedings on the merits.

Finally, and perhaps most egregiously, the lower courts have also held that cases satisfy the "agency expertise" factor whenever the Commission may dispose of the case based on a securities-law issue within its purview and "moot the need to resolve" the constitutional claim. *Jarkesy*, 803 F.3d at 29; see also *Tilton*, 824 F.3d at 290; *Bebo*, 799 F.3d at 773 ("*Elgin* explained that the possibility that [the respondent] might prevail in the administrative proceeding (and thereby avoid the need to raise her constitutional claims in an Article III court) does not render the statutory review scheme inadequate."). Such a broad view of when a claim implicates an agency's expertise would lead courts to abdicate their jurisdiction any time an agency's enforcement proceeding "is ongoing, . . . because any time a proceeding has commenced

there is of course some possibility that a plaintiff may prevail on the merits." *Tilton*, 824 F.3d at 296 (Droney, J., dissenting).

If *Thunder Basin* was a workable standard that produced consistent outcomes for constitutional claims, these cases should have been easy. Yet half the circuit courts of appeals have applied the same three factors to § 78y as this Court did in *Free Enterprise Fund* and *every single one* got it wrong until the Fifth Circuit went *en banc* in this case. And that doesn't even account for the Ninth Circuit's denial of jurisdiction based on the similar review scheme at issue in *Axon Enter., Inc.* v. *FTC*, 986 F.3d 1173 (9th Cir. 2021).

To be sure, some judges have applied the rule correctly, but their opinions have not carried the day. See, *e.g.*, *Axon*, 986 F.3d at 1189 (Bumatay, J., dissenting in part); *Cochran*, 969 F.3d at 518 (Haynes, J., dissenting); *Tilton*, 824 F.3d at 292 (Droney, J., dissenting); see also *Gupta* v. *SEC*, 796 F. Supp. 2d 503 (S.D.N.Y. 2011) (Rakoff, J.); *Duka* v. *SEC*, 103 F. Supp. 3d 382 (S.D.N.Y. 2015) (Berman, J.); *Hill* v. *SEC*, 114 F. Supp. 3d 1297 (N.D. Ga. 2015) (May, J.); *Ironridge Glob. IV, Ltd.* v. *SEC*, 146 F. Supp. 3d 1294 (N.D. Ga. 2015) (May, J.). The overwhelming majority of lower court judges who have looked to *Thunder Basin* and *Elgin* for guidance have reached the wrong result.

* * *

It's time for a simplified approach. Courts should never infer that Congress stripped jurisdiction absent an express statutory command. And they certainly do

not need to balance three factors to confirm that they retain their inherent and statutory jurisdiction over constitutional challenges to an agency's structure or procedures.

Even if this Court is not prepared to discard *Thunder Basin* entirely, it should "restate" and "clear up some mixed messages" about when the lower courts should find that Congress impliedly stripped their jurisdiction. *Kisor*, 139 S. Ct. at 2414. Much like the devolution of *Auer* deference before this Court decided *Kisor*, the lower courts have applied *Thunder Basin* in a way that ignores the judiciary's fundamental role and the basic tenets of statutory interpretation. Cf. *Kisor*, 139 S. Ct. at 2425-26 (Gorsuch, J., concurring).

The set of inferences employed in *Thunder Basin* and *Elgin* cannot justify stripping Article III courts of their power to enjoin the political branches from violating the Constitution. See *Webster*, 486 U.S. at 603. Implied jurisdiction stripping over such constitutional claims prevents the judiciary from fulfilling its fundamental role. *Thunder Basin* requires courts to tie their own hands and refuse to decide constitutional issues, based solely on a textually unsupported inference that Congress intended to channel related administrative claims through an executive agency.

When a plaintiff raises a ripe constitutional challenge, courts should never apply judge-made doctrines to abdicate their own jurisdiction. A decision denouncing implied jurisdiction stripping over such claims would ensure that courts remain fully available to vindicate constitutional rights and

would ensure that the political branches adhere to their structural constraints. Such a rule would provide a simple and effective means for Article III courts to preserve their jurisdiction.

The Court should make clear that Congress does not silently strip federal district courts of their jurisdiction to hear direct constitutional challenges to an agency's structure and procedures.

CONCLUSION

While a straightforward application of *Free Enterprise Fund* could resolve this case in Ms. Cochran's favor, the lower courts' persistent misuse of the *Thunder Basin* factors counsels in favor of this Court enunciating that Article III courts retain their jurisdiction over actions to enjoin unconstitutional actions by federal officials—especially when no statute commands differently.

This Court should affirm the Fifth Circuit in *Cochran* and reverse the Ninth Circuit in *Axon*.

Respectfully submitted,

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