No. 26-514

IN THE

Supreme Court of the United States

ERIC S. SMITH,

Petitioner,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE PIONEER NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

PioneerLegal, LLC (PioneerLegal), doing business as Pioneer New England Legal Foundation (the "Legal Foundation"), is a nonprofit, nonpartisan legal research and litigation entity[1]. The Legal Foundation seeks to promote open and accountable government, free enterprise, property rights, and educational opportunities, through legal action and public education.

The Legal Foundation has a longstanding commitment to protecting constitutional rights, such as the Seventh Amendment right to a jury trial before an Article III judge. The Legal Foundation is dedicated to preserving the constitutional separation of powers, and to the adjudication of disputes on their merits wherever possible.

[1] Pursuant to Supreme Court Rule 37.6, the Legal Foundation states that neither parties, nor their counsel, nor any individual or entity other than amicus, has authored this brief in whole or in part, or has made any monetary contribution to its preparation or submission. Counsel for the Legal Foundation notified all counsel of record of its intention to file this brief by email on November 5, 2026.

SUMMARY OF ARGUMENT

Petitioner frames the question presented in this case as whether a statutory issue exhaustion requirement bars a court of appeals from considering a constitutional challenge to the "inherent nature of the agency proceeding itself," which Petitioner describes as a "structural constitutional claim." Petition, pp. i, 3. Petitioner then lays out the 6-2 circuit split that supports the grant of certiorari. Petition, pp. 14-19. The details of this circuit split are addressed in the Petition and need not be repeated here.

This brief will instead focus on the fact that this case was wrongly decided by the Sixth Circuit. The court should have considered Petitioner's jurisdictional challenge to the authority of the Securities and Exchange Commission to adjudicate its claim against Petitioner and should have entered judgment in favor of Petitioner.

This Court has expressly held that the Securities and Exchange Commission ("SEC") does not have the authority to adjudicate the type of claim it brought against Petitioner in this proceeding, which is essentially a common law fraud claim, based on "the close relationship between federal securities fraud and common law fraud." *Sec. & Exch. Comm'n v. Jarkesy*, 603 U.S. 109, 126,144 S. Ct. 2117, 2131, 219 L. Ed. 2d 650 (2024). Because "the Constitution prohibits Congress from withdrawing from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law . . . an Article III

court must decide it, with a jury if the Seventh Amendment applies." *Id.*

Jarkesy and this case are both challenges to the subject matter jurisdiction of the SEC. "[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L. Ed. 2d 860 (2002). A jurisdictional challenge to the authority of a tribunal to adjudicate a particular dispute cannot be waived or forfeited, even in the face of a statutory requirement that the challenge be raised at the SEC. The actions (or omissions) of a litigant cannot confer upon the SEC authority prohibited to it by the Constitution. This Court should grant this Petition for a writ of certiorari, vacate the judgment of the Sixth Circuit, and remand to the Sixth Circuit for further proceedings.

ARGUMENT

I. A *Jarkesy* challenge is a structural jurisdictional challenge because it is a challenge to the authority of the SEC to adjudicate what is essentially a common law fraud claim.

Petitioner describes this case as a structural constitutional challenge, so it is worthwhile to start with a brief exploration of what that means. One commentator has suggested that challenges "related to federalism, separation of powers, and checks and balances—which appear in the first three articles of

the U.S. Constitution—are firmly considered structural." Ozan O. Varol, *Structural Rights*, 105 Geo. L.J. 1001, 1003 (2017). Another has identified as structural a variety of separation-of-powers issues, such as the power of the legislature to delegate its authority to executive branch agencies, the president's power to remove executive officials from office, and, as relevant here, challenges to "agencies' or Article I courts' jurisdiction over certain common law claims." Kent H. Barnett, *Standing For (and Up To) Separation of Powers*, 91 Ind. L.J. 665, 671-672 (2016).

For purposes of the present case, this Court need not define the precise contours of which constitutional challenges are structural and which are not. Similarly, the Court need not decide whether all structural challenges are immune from forfeiture or waiver. Instead, the Court need only address whether the particular jurisdictional issue raised here – the authority of the SEC to adjudicate securities fraud claims – is waived if not raised at the SEC.

In *Jarkesy*, the Court had to "consider whether the Seventh Amendment permits the SEC to compel respondents to defend themselves before the agency rather than before a jury in federal court." 603 U.S. at 115, 144 S. Ct. at 2125. The Court held that agencies were barred from deciding common law causes of action, and such actions fall within the exclusive jurisdiction of the Article III courts:

> The Constitution prohibits Congress from withdrawing from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law. Once such a suit is brought *within the bounds of federal jurisdiction*, an Article III court must decide it, with a jury if the Seventh Amendment applies.

603 U.S. at 127, 144 S. Ct. at 2131 (emphasis added; internal punctuation omitted), *citing Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284, 15 L.Ed. 372 (1856). A determination of whether a cause of action falls "within the bounds of federal jurisdiction" is an issue of subject matter jurisdiction.

In the specific context of fraud claims brought by the SEC, "the action the SEC seeks to pursue is not the stuff of equity or admiralty jurisdiction but the sort of suit historically adjudicated before common-law courts" and "the Seventh Amendment guarantees Mr. Jarkesy the right to have his case decided by a jury of his peers." 603 U.S. at 151, 144 S. Ct. at 2145 (Gorsuch, J., concurring). Distinguishing a fraud action, to be heard by an Article III court, from those cases that fall within equity or admiralty jurisdiction, is surely an inquiry into subject matter jurisdiction.

II. Jurisdictional challenges cannot be waived or forfeited.

Because the actions (or inaction) of Petitioner Smith cannot confer upon the SEC the power to hear

and decide a fraud claim, Smith's constitutional right to have the SEC's claims against him heard by an Article III court is not waivable, and was not waived by his failure to raise it with the SEC.

The term "jurisdiction" is somewhat imprecise, and has been criticized as a "verbal coat of too many colors." *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 39, 73 S. Ct. 67, 70, 97 L. Ed. 54 (1952) (Frankfurter, J., dissenting). However, it is clear that disputes over a "courts' statutory or constitutional *power* to adjudicate the case" fall within the "concept of subject-matter jurisdiction" and "can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781, 1785, 152 L. Ed. 2d 860 (2002) (emphasis in original).

These principles have been applied in the context of agency decision-making as well, when an agency adjudicates cases that are outside of its authority. There are "unwaivable limitations upon the power of these agencies." *L. A. Tucker Truck Lines, Inc.*, supra, 344 U.S. at 39, 73 S. Ct. at 70 (Frankfurter, J., dissenting). A defense cannot be waived if the defense alleges that an administrative agency has "patently traveled outside the orbit of its authority." *N. L. R. B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322, 82 S. Ct. 344, 347, 7 L. Ed. 2d 312 (1961).

On a more theoretical level, a litigant cannot "give power to the government" by failing to raise a constitutional right:

> Either intentionally by waiver or merely by forfeiture, individuals can leave a constitutional right unexercised. But they cannot thereby give power to government, for a constitutional right is a legal limit on government imposed by the people. Thus, even when individuals relinquish the exercise of their freedom, they do not thereby grant government a power denied it by the Constitution.

Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 Va. L. Rev. 479, 484 (2012).

III. The principle that jurisdictional challenges are not waivable has been extended to structural jurisdictional challenges.

In his concurrence in *Freytag v. Comm'r*, 501 U.S. 868, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991) Justice Scalia suggested that the correct test of whether a party has forfeited a constitutional claim is not whether the claim is structural, but whether the claim is jurisdictional:

> Appointments Clause claims, and other structural constitutional claims, have no special entitlement to review. A party forfeits the right to advance on appeal a non-jurisdictional claim, structural or otherwise, that he fails to raise at trial.

Id., 501 U.S. at 893–94, 111 S. Ct. at 2646 (Scalia, J., concurring in part and concurring in the judgment.)

This passage clearly implies that jurisdictional claims, "structural or otherwise", are not waived or forfeited by a failure to raise them below.

Freytag is helpful in distinguishing a jurisdictional challenge from a non-jurisdictional challenge. It was an Appointments Clause challenge to adjudication by the Tax Court. 501 U.S. at 877-888, 111 S. Ct. at 2638. As such, it was not a challenge to the overall authority of the Tax Court to hear the case. Instead, it was a challenge to the authority of a "special trial judge" to hear the case. The Tax Court could have heard the case if it was heard by a judge whose appointment satisfied the Appointments Clause.

This is different from the situation in *Jarkesy*, in which there was nothing the SEC could have done differently that would have allowed it to acquire the authority to hear a security fraud case. *Jarkesy* was a challenge to the authority of the SEC to adjudicate the case at all, while *Freytag* was a challenge to the manner in which the IRS adjudicated the case. For that reason, a *Jarkesy* challenge is jurisdictional and not waivable, while an Appointments Clause challenge is non-jurisdictional, and potentially waivable, even though the Court held that *Freytag* was "one of those rare cases in which we should exercise our discretion to hear petitioners' challenge to the constitutional authority of the Special Trial Judge." 501 U.S. at 879, 111 S. Ct. at 2639.

A number of circuit court decisions, including some which have generated the circuit split discussed

in Petitioner's brief, have followed the logic of Justice Scalia's concurrence in *Freytag*. The Fifth Circuit has held that "challenges under the Appointments Clause are 'nonjurisdictional structural constitutional objections.'" *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 351 (5th Cir. 2013) *citing Freytag*, 501 U.S. at 878–79, 111 S.Ct. at 2639.

Likewise, the Second Circuit held that the plaintiff had forfeited the argument that the SEC "violated the Appointments Clause of Article II of the Constitution when it designated the case to an ALJ" by failing to raise the argument before the S.E.C. *Gonnella v. United States Sec. & Exch. Comm'n*, 954 F.3d 536, 543 (2d Cir. 2020). The Eighth Circuit has also declined to hear an Appointments Clause challenge because it had not been raised below, noting that "The Supreme Court, the D.C. Circuit, and the Sixth Circuit, however, have all characterized appointments clause challenges as nonjurisdictional." *N.L.R.B. v. RELCO Locomotives, Inc.*, 734 F.3d 764, 794 (8th Cir. 2013) (*citing, inter alia*, *Freytag*, *supra*.)

Freytag and the cases relying on Justice Scalia's concurrence therein have all emphasized the difference between jurisdictional and non-jurisdictional constitutional challenges. These cases support the conclusion that structural jurisdictional challenges cannot be waived or forfeited and may be raised for the first time on appeal.

CONCLUSION

Petitioner is entitled to a jury trial under the Seventh Amendment to the U.S. Constitution, before an Article III judge. The SEC has no power or authority to adjudicate such claims. Any failure by Petitioner to raise his constitutional arguments before the SEC cannot endow the agency with the power or authority to adjudicate claims which the Constitution bars the SEC from adjudicating. Pioneer New England Legal Foundation respectfully requests that this Court grant Petitioner Smith's petition for a writ of certiorari, vacate the judgment of the Sixth Circuit, and remand to the Sixth Circuit.

Respectfully submitted,

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