No. 26-514

In the Supreme Court of the United States

ERIC S. SMITH,

Petitioner,

v.

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 THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a statutory issue-exhaustion requirement, 15 U.S.C. § 78y(c)(1), bars a court of appeals from reaching a constitutional claim challenging the inherent nature of the agency proceeding itself.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because it involves questions directly related to the right to a civil jury trial in conflicts between individuals and administrative agencies. Cato has an interest in the judicial enforcement of that right—a right supported by both the Seventh Amendment and *Securities and Exchange Commission v. Jarkesy,* 603 U.S. 109 (2024).

[1] Rule 37 statement: All parties were notified before the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

In *SEC v. Jarkesy*, 603 U.S. 109 (2024), this Court held that "[a] defendant facing a fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator." *Id.* at 140. The contrary position, the Court explained, "would permit Congress to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch. That is the very opposite of the separation of powers that the Constitution demands." *Id.* But if the decision below is not reversed, the practical effect is that many defendants will suffer from the very concentration of prosecutorial and adjudicative power that *Jarkesy* prohibits.

Fifty-three days after *Jarkesy* was issued, the Securities and Exchange Commission ("SEC") sustained the lifetime ban and monetary sanctions that the Financial Industry Regulatory Authority ("FINRA") had imposed on Eric Smith—penalties that had originated in an administrative proceeding conducted without a jury. Pet. App. 36a–37a. Smith, FINRA, and the SEC all agreed that "FINRA merely acts as an aid to the SEC's ultimate adjudication." Because the parties agreed on that point, the Sixth Circuit treated the SEC as the relevant adjudicatory body, and it concluded that "this case presents the same ultimate problem as did *Jarkesy*: The SEC is imposing sanctions against Smith (albeit on the recommendation of FINRA) without a jury trial before an Article III judge," and that Smith "may well have been entitled to a jury trial in federal court." Pet. App. 19a–20a.

The Sixth Circuit did not reach the merits of Smith's jury-trial claim, however. The court determined that it was "statutorily barred from reaching Smith's constitutional arguments" because he had not

brought those arguments before the SEC and he could not demonstrate a "reasonable ground" for failing to do so. Pet. App. 18a–19a; *see* 15 U.S.C. § 78y(c)(1).

The Sixth Circuit's opinion presents a question this Court has not answered: Can a statutory issue-exhaustion requirement bar review of "a constitutional claim challenging the inherent nature of the agency proceeding itself"? Pet. i. This issue is not confined to the context of the Exchange Act, because Congress has written comparable requirements into other laws. *See, e.g.*, 16 U.S.C. § 825*l*(b); 29 U.S.C. § 160(e); 30 U.S.C. § 816(a)(1). If all these exhaustion requirements apply to constitutional claims, then the government could dispose of the constitutional rights of any litigant who fails to provide a timely objection.

But structural constitutional limits on the government's adjudicative authority do not depend on the diligence of a party's attorney. A claim that rests on these limits therefore cannot be relinquished by the litigant. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850–51 (1986). This Court should grant review and hold that a statutory issue-exhaustion requirement cannot extinguish a constitutional claim that challenges the agency's adjudicative authority.

In the alternative, § 78y(c)(1) still permits review even in the event that it applies to structural constitutional claims, because Smith's omission rested on "reasonable ground." *Jarkesy* was issued fifty-three days before the SEC ruled and more than three years after Smith's briefing had closed, even as the Commission itself remained free to take up *Jarkesy* on its own motion until the day of decision. The SEC's delay in Smith's case was not an isolated incident. The SEC granted itself ten extensions of time, totaling more

than 900 days, Pet. App. 147a; indeed, it consistently postpones decisions in successive appeals. This persistent delay transforms the underlying rule into a permanent barrier to Article III review of constitutional objections that no litigant can preserve. A grant of certiorari is warranted on this basis alone.

ARGUMENT

I. A STATUTORY ISSUE-EXHAUSTION REQUIREMENT DOES NOT APPLY TO CLAIMS THAT CHALLENGE AN AGENCY'S CONSTITUTIONAL AUTHORITY TO ADJUDICATE, BECAUSE LITIGANTS CANNOT WAIVE SUCH CLAIMS.

The Sixth Circuit held itself "statutorily barred from reaching Smith's constitutional arguments" because he had not brought those arguments before the SEC. Pet. App. 19a; *see* 15 U.S.C. § 78y(c)(1). That holding assumes that Smith bore the burden to raise these constitutional issues, but this assumption is in grave tension with the guarantees that Article III of the Constitution provides.

Article III, § 1 vests the judicial power of the United States in the federal courts. U.S. CONST. art. III, § 1. In *Schor*, this Court explained that Article III, § 1 serves two ends: to protect "the role of the independent judiciary within the constitutional scheme of tripartite government," and to safeguard litigants' "right to have claims decided before judges who are free from potential domination by other branches of government." 478 U.S. at 848 (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985), and *United States v. Will*, 449 U.S. 200, 218 (1980)). Whether an Article

III claim can be forfeited by a litigant rests on which of *Schor*'s two ends are in play.

To be sure, a litigant may intentionally and voluntarily waive the right to a civil jury: "[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Schor*, 478 U.S. at 848–49. Among the personal rights the Court listed as subject to waiver was the right to a jury in a civil case, which the litigant surrenders when he or she fails to demand it. *Id.* at 849 (citing FED. R. CIV. P. 38(d)). But a litigant who makes no jury demand is still tried by an Article III judge. That litigant gives up his right to be tried before a jury, but he or she does not thereby abandon any of the forum's other protections.

Here, Smith never received a trial in an Article III court at all. He pressed that objection in the Sixth Circuit when he argued that he was entitled to a jury trial and, "at the very least, to an Article III tribunal." Pet. 2. The court below asked first whether the "action implicates the Seventh Amendment," and second whether the "public rights" doctrine applies, "thereby exempting the case from Article III." Pet. App. 19a. Ultimately, the court found both claims to be forfeited. *Id.*

But the Article III right to a federal court should not be subject to forfeiture, because ensuring that the judiciary fulfils its constitutional role serves a public interest, not simply a personal one. Article III, § 1 protects that public interest by barring congressional attempts "to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating" Article III

courts. *Schor*, 478 U.S. at 850 (quoting *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting)). The parties are disallowed from executing a jurisdictional transfer if that transfer cannot be reconciled with the public interest that § 1 protects; that transfer cannot be executed by agreement or, in Smith's case, by silence. As this Court has explained: "To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2." *Id.* at 850–51.

Subject-matter jurisdiction "can never be forfeited or waived," because subject-matter jurisdiction "involves a court's power to hear a case." *United States v. Cotton*, 535 U.S. 625, 630 (2002). No action or omission by the parties can excuse this subject-matter jurisdiction problem, because the question of the court's authority is logically prior to the question of any particular party's rights. When "Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." *Schor*, 478 U.S. at 851.

In *Jarkesy*, this Court explained that the right to a jury trial before an Article III adjudicator rests on the allocation of authority among the branches: The principles underlying that right are "critical to maintaining the proper role of the Judiciary in the Constitution." 603 U.S. at 127. Weakening those principles "would permit Congress to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch. That is the very opposite of the separation

of powers that the Constitution demands." *Id.* at 140. And the court below understood that "this case presents the same ultimate problem as did *Jarkesy*: The SEC is imposing sanctions against Smith (albeit on the recommendation of FINRA) without a jury trial before an Article III judge." Pet. App. 20a.

Structural constitutional objections to a tribunal must be analyzed in light of the tribunal's authority because the claim "is about subjection to an illegitimate proceeding, led by an illegitimate decisionmaker." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023). Such a claim has just as much force even in cases where the claimant "won before the agency." *Id.* This is such a case; Smith contends that the SEC lacked the authority to adjudicate, and that his objection would have been valid even if the SEC had ruled in his favor.

Even though this Court upheld agency adjudication in *Schor*, that case is distinguishable from Smith's. In *Schor*, the Court upheld the CFTC's exercise of jurisdiction because it found that structural concerns were not implicated on the facts of that case. But the relevant circumstances of *Schor* are not repeated here. The CFTC "deals only with a 'particularized area of law.'" *Schor*, 478 U.S. at 852. CFTC orders "are enforceable only by order of the district court," and the CFTC "does not exercise 'all ordinary powers of district courts,'" so that it may not preside over jury trials. *Id.* at 853. Those features together led the Court to conclude that "the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*." *Id.* at 856.

In contrast, Smith's proceeding has none of those features. As a practical matter, the SEC exercised an

authority that appears indistinguishable from judicial power: The SEC imposed a lifetime bar and monetary sanctions on him, and it did so in place of the jury trial the court below found he "may well have been entitled to." Pet. App. 19a.

Respondents might argue that *Schor* is not applicable to this case because *Schor* was about party consent, whereas § 78y(c)(1) is a directive from Congress to the reviewing court to treat some arguments as waived. That distinction is immaterial. *Schor* holds that where Article III's structural limits are at issue, consent and waiver "cannot be dispositive," because those limits protect the courts rather than the litigant. 478 U.S. at 851. Section 78y(c)(1) does not focus on consent; rather, it requires the examination of whether the litigant brought the objection. If a litigant's deliberate consent is not dispositive, neither is his failure to raise an argument. The fact that § 78y(c)(1) comes from Congress rather than from the parties is ultimately irrelevant, because the statute still makes the litigant's conduct decisive. If consent cannot override the Constitution's structure, neither can forfeiture.

Smith's objection is based on Article III's limits, not on any right he possesses. Section 78y(c)(1) bars only objections the litigant could have brought, and Smith's circumstances fall outside the scope of that statute's operation. The Sixth Circuit should therefore have addressed Smith's argument that the SEC lacked constitutional authority to decide his case.

II. EVEN IF THE CLAIM AT ISSUE WERE A PERSONAL RIGHT THAT SMITH COULD WAIVE, HE HAD "REASONABLE GROUND" FOR FAILING TO BRING IT BEFORE THE SEC.

Assuming arguendo that the entitlement to a jury trial before an Article III adjudicator was a personal right Smith could waive, § 78y(c)(1) still would not bar review of Smith's claim that the SEC lacked constitutional authority to adjudicate his case. That is because there are at least two separate bases for Smith having had "reasonable ground" not to bring that claim before the SEC. 15 U.S.C. § 78y(c)(1). One basis is more concrete; the second is more abstract.

The more concrete reason that Smith had reasonable ground for failing to bring a *Jarkesy* claim rests on the action's calendar; more precisely, Smith's briefing had been completed long before *Jarkesy* was issued. *Jarkesy* was decided on June 27, 2024. The SEC ruled against Smith on August 19, fifty-three days later. Smith's briefing deadlines had elapsed long before either date: the Sixth Circuit found in August 2024 that "[t]he parties completed briefing on Smith's application more than 39 months ago." Pet. App. 147a. There was no way for Smith to bring *Jarkesy* to the attention of the SEC during his designated briefing schedule, because *Jarkesy* had not even been issued by Smith's final deadline.

The SEC's own rule governing review of determinations of self-regulatory organizations like FINRA provides that "[t]he Commission may at any time prior to issuance of its decision raise or consider any matter that it deems material, whether or not raised by the parties." 17 C.F.R. § 201.421(b). The SEC's authority

to raise a material matter remained in effect until August 19, 2024, when the SEC issued its decision. The SEC was also the petitioner in *Jarkesy*, and it lost. 603 U.S. at 140–41. Of course, the SEC knew of *Jarkesy* independently of Smith, but Smith had no comparable authority to direct the Commission's attention to it.

The Sixth Circuit reasoned that Smith "could have asked to file a supplemental brief before the matter was resolved," citing § 201.421(b), and that he "could have filed a motion for reconsideration after the SEC's final order, which did not address *Jarkesy*." Pet. App. 16a. But neither route would provide the same guaranteed ability to raise the *Jarkesy* issue that the SEC possessed. The supplemental briefing route depended on the SEC's discretion under § 201.421(b), which states that an opportunity for supplemental briefing "shall be given where the Commission believes that such briefing would significantly aid the decisional process." The reconsideration route became available only after the SEC decided Smith's case without reference to *Jarkesy*, and only for a ten-day period under 17 C.F.R. § 201.470(b). The Commission could raise *Jarkesy* on its own initiative until it issued its ruling, while Smith could raise *Jarkesy* only by application. In this context, the asymmetry between the SEC's authority and Smith's position gave him reasonable ground for not raising a *Jarkesy* claim.

This Court has explained that "[t]he desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding," and that the rationale for requiring issue exhaustion "is at its greatest" where "the parties are expected to develop the issues in an

adversarial administrative proceeding." *Sims v. Apfel*, 530 U.S. 103, 109–10 (2000).

That explanation demonstrates that the proceeding here is a poor fit for *Sims*'s requirements, because § 201.421(b) authorizes the SEC to raise and consider any material matter "whether or not raised by the parties" and to order supplemental briefing whenever the SEC believes it would aid its decision. Under § 201.421(b), the SEC does not need to wait for a party to raise an issue. The court below described the purpose of § 78y(c)(1) similarly, calling the exhaustion requirement one "designed to afford the agency the opportunity to reconsider its position in the first instance, and to promote efficient litigation." Pet. App. 17a (citing *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 673 (6th Cir. 2018)); *see McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) (exhaustion "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency"). Because the SEC did not need Smith to raise *Jarkesy*, neither of these purposes was served, and the rationale for placing that burden on Smith is therefore almost powerless here. *Sims*, 530 U.S. at 110.

There is a second, more abstract reason that Smith had reasonable ground for failing to bring up *Jarkesy*: The alternative route that the Sixth Circuit said he could have taken would likely not have resolved the larger question of issue exhaustion that is implicated here. The court wrote that "the SEC has in other cases granted motions seeking supplemental briefing on *Jarkesy*'s effect on FINRA adjudications when a party asked the SEC for permission to do so," and cited a single order. Pet. App. 16a (citing *Ricky Alan Mantei*, Exchange Act Release No. 101385 (Oct. 18, 2024)).

However, the import of this order is narrower than the Sixth Circuit suggests.

The court offered the *Mantei* order as evidence that the supplemental-briefing route would have properly put a *Jarkesy* objection before the agency. But in granting Mantei leave, the SEC cautioned that its order "should not be construed as expressing any view as to the merits of the parties' arguments, or whether those arguments have been properly exhausted before FINRA." *Mantei*, Release No. 101385, at 1 n.2. The SEC granted leave to brief *Jarkesy*, but it failed to address whether the *Jarkesy* arguments were exhausted. So even if Smith had chosen the route that the lower court suggests, it is difficult to see how his use of that option would have resolved the exhaustion question that ultimately defeated his claim, given the background conditions that the SEC has historically imposed.

Furthermore, even if Smith had chosen the *Mantei* route, which was the only example the court identified, it would not have provided him with enough time to raise *Jarkesy* before the SEC. In *Mantei*, 64 days elapsed between the motion on August 15, 2024, which FINRA opposed, and the SEC's order granting leave on October 18. *Id.* at 1. Smith, by contrast, had only 53 days—which began when the Court issued *Jarkesy* on June 27, 2024, and ended when the SEC issued its decision in his case on August 19. Even if we suppose—counterfactually—that Smith had moved on the day *Jarkesy* was issued, the SEC would presumably have decided his case eleven days before it ruled on his motion. Furthermore, leave was only the first step of that route, and supplemental briefing in *Mantei* did not close until December 13, nearly four months after the

SEC decided Smith's case. *Id.* at 2. In this counterfactual world, Smith's motion would likely still have been pending when the SEC issued the order that he now seeks to challenge.

And the Commission's position on jury trial claims was also settled. As the panel noted, the Commission "has repeatedly adjudicated the merits of Seventh Amendment challenges" and rejected them. Pet. App. 12a. Smith had reasonable ground not to press an objection that the Commission had repeatedly refused and continued to resist in the Sixth Circuit even after this Court decided *Jarkesy*. Pet. 22.

* * * * *

Smith therefore had "reasonable ground for failure" to raise his objection before the SEC. 15 U.S.C. § 78y(c)(1). *Jarkesy* did not exist when his briefing closed, the Commission remained free to raise it on its own until the day it decided his case, it had already repeatedly refused that same objection, and the one route that the lower court hypothesized for Smith would likely not have been completed in the time he had.

III. GIVEN THE SEC'S CHRONIC DELAYS IN THE DECISIONS IT MAKES, IF THE DECISION BELOW STANDS THEN IT WILL FRUSTRATE A CENTRAL FUNCTION OF APPELLATE REVIEW.

When FINRA disciplines a person, he or she may request SEC review. 15 U.S.C. § 78s(d)(2); 17 C.F.R. § 201.420(a). The SEC's own rules state how long that review should take. A decision on such an application "will be issued within eight months from the

completion of briefing," or within ten months "[i]f the Commission determines that the complexity of the issues presented . . . warrants additional time." 17 C.F.R. § 201.900(a)(1)(iii). The same rule permits the SEC to extend that period "by orders as it deems appropriate in its discretion." *Id.* § 201.900(a)(1)(iv).

The SEC's Rules of Practice have set timeliness guidelines for these appeals since 1995, and the Commission has twice acknowledged that it has not been meeting them. In 2003 the SEC reported that "[i]n the seven years since the adoption of these non-binding targets, the Commission and its administrative law judges have generally failed to meet these goals," and acknowledged that "the Commission recognizes that it too must shoulder responsibility for delays in its appellate review process." Rules of Practice, Exchange Act Release No. 48018, 68 Fed. Reg. 35,787, 35,788 (June 17, 2003). The SEC revised the guidelines in response. It revised them again in 2016, adopting the eight-month target quoted above while noting that it had the discretion to extend that period by its own orders. Amendments to the Commission's Rules of Practice, Exchange Act Release No. 78319, 81 Fed. Reg. 50,212 (July 29, 2016).

And yet, more than 20 years after that acknowledgment, Smith's application was docketed in October 2020 and decided in August 2024, and it was decided then only because the Sixth Circuit intervened. That court found in August 2024 that "[t]he parties completed briefing on Smith's application more than 39 months ago," that "Smith's lifetime bar puts his individual welfare and reputation at stake, and the ongoing delay hinders his ability to earn a living," and that "the SEC has granted itself ten discretionary

extensions of time totaling more than 900 days." Pet. App. 147a. Observing that "there is no obvious explanation for the significant delay," the court ordered the SEC to respond. *Id.* The SEC issued its decision 14 days later.

Smith's experience was not unusual. In applications for review of self-regulatory organization discipline, the SEC routinely extends its own decision deadlines by issuing one extension order after another, often over several years. *See, e.g.*, *Se. Invs., N.C., Inc.*, Exchange Act Release No. 98996 (Nov. 20, 2023) (24th order extending the time for decision in Admin. Proc. File No. 3-19185); *Robert R. Tweed*, Exchange Act Release No. 99136 (Dec. 11, 2023) (17th such order in Admin. Proc. File No. 3-19652); *Titan Secs.*, Exchange Act Release No. 105534 (May 21, 2026) (14th such order in Admin. Proc. File No. 3-20387, where the SEC issued its decision on June 8, 2026).

This pattern of delay has two harmful consequences. *First*, the agency's failure to do its job in a timely manner harms the interests of the parties before it. The exhaustion requirement affords the agency no opportunity to reconsider and promotes no efficiency when it faults a party for failing to raise a point of law that had never existed when briefing deadlines elapsed. *See McCarthy*, 503 U.S. at 145 (exhaustion serves "the twin purposes of protecting administrative agency authority and promoting judicial efficiency"); Pet. App. 17a (describing the rule as "designed to afford the agency the opportunity to reconsider its position in the first instance, and to promote efficient litigation"). The SEC had no position on *Jarkesy* before it was issued, and so there was no opportunity to

promote efficient litigation—there was simply nothing Smith could have provided the SEC.

In this case, whether Smith had "reasonable ground" for failing to bring his objection, 15 U.S.C. § 78y(c)(1), must be evaluated in light of the delay that produced his predicament. The longer an application sits undecided, the likelier it is that the governing law will change while the application sits. The danger of the rule that the lower court applies below is that it is inherently likely to create unreasonable burdens for any regulated party if the agency fails to do its job in a timely manner.

Second, the agency's failure to do its job in a timely manner harms the institutional interests and goals of our judicial system. A pattern of delay of the kind described above will become apparent only across many cases, and a court of appeals will only see such an array of cases if the claims arising from them are reviewable. "Courts catch problems of this scale by reviewing large numbers of cases, identifying patterns of flaws, and determining that something more than random error creates them." Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1140 (2018).

Unfortunately, the rule of the Sixth Circuit's decision frustrates aggregate review. Section 78y(a) channels review of a final Commission order to a court of appeals, whose jurisdiction "becomes exclusive on the filing of the record." 15 U.S.C. § 78y(a)(1), (3). The Sixth Circuit's construction of § 78y(c)(1) thus closes that forum to any appellant who did not bring a constitutional objection before the Commission. A litigant whose application is decided on time can raise legal

objections during briefing, but a litigant whose application is delayed for years is prevented from raising objections that arise after briefing. The decision below therefore makes the reviewability of a constitutional objection turn on the length of the Commission's delay, not on anything the litigant can control.

Nor is delay even needed to defeat a structural Article III claim, because that claim is categorically foreclosed: By definition, no litigant has a cognizable claim if the agency lacks constitutional authority to adjudicate it. Therefore, no litigant can preserve such a claim, and the rule applied below bars its consideration in every case. The restraint Article III, § 1 imposes on Congress would then go unenforced in the proceedings that implicate it most directly, because a respondent did not assert an interest—one that is almost never a litigant's own—that this Court has said "the parties cannot be expected to protect." *Schor*, 478 U.S. at 851. Either way, the objection never reaches the court on which § 78y(a) confers exclusive jurisdiction.

CONCLUSION

For the foregoing reasons, and those stated by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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