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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

CAMERON M. HALLING
Pacific Legal Foundation
555 Capitol Mall
Suite 1290
Sacramento, CA 95814
(916) 419-7747
CHalling@pacificlegal.org

ADITYA DYNAR
Counsel of Record
Pacific Legal Foundation
3100 Clarendon Blvd.,
Suite 1000
Arlington, VA 22201
(202) 807-4472
ADynar@pacificlegal.org

Counsel for Amicus Curiae

QUESTIONS PRESENTED

1. Whether a statutory issue-exhaustion requirement bars a court of appeals from considering a constitutional claim challenging the inherent nature of the agency proceeding itself, if the party did not present that claim to the agency.
2. Whether a party may satisfy 15 U.S.C. § 78y(c)(1)'s issue-exhaustion requirement by showing that presentation of a claim to the agency would have been clearly useless or, instead, must show that the agency was formally powerless to grant the relief requested.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Founded in 1973, Amicus Curiae Pacific Legal Foundation (PLF) is the nation's leading public interest organization that advocates for limited government, property rights, and the separation of powers, particularly where docket-clearing rules or statutes lead to agency aggrandizement and corresponding dismembering of the judicial power. Accordingly, PLF attorneys have been counsel of record in many cases addressing agency overreach.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Statutory issue-exhaustion requirements, like the one at issue here, have given nongovernmental litigants and lower courts across the nation much heartburn. Agencies, like the Securities and Exchange Commission (SEC) and the National Labor Relations Board (NLRB), argue in the lower courts that every claim, including structural claims as to which the agency has neither the power to grant relief nor any mechanism to avoid, must be presented to the

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[1] Pursuant to Rule 37.2, Amicus Curiae provided timely notice to all parties by emailing all counsel of record. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] *Sackett v. EPA*, 598 U.S. 651 (2023); *Black v. SEC*, 125 F.4th 541 (4th Cir. 2025); *KC Transp., Inc. v. Su*, 144 S. Ct. 2708 (2024).

agency.[3] Meanwhile, private adjuncts of agencies, like the Financial Industry Regulatory Authority, Inc. (FINRA), implausibly argue that structural claims must be presented *to the private adjunct*, which has no power to decide or avoid those claims.[4] Some circuit courts have accepted these arguments and some have not. As a result, a mature conflict among the circuits exists, as the Petitioner ably lays out in his petition for a writ of certiorari.

Amicus PLF argues that issue-exhaustion statutes give courts ample discretion to excuse exhaustion for any "reasonable ground," 15 U.S.C. § 78y(c)(1), or "extraordinary circumstances," 29 U.S.C. § 160(e). The statutes do *not* leave that task to an agency or the agency's private adjunct. Where, as here, the enforcement target challenges the structure or very existence of an agency, the nature of those structural claims should be a valid ground to excuse exhaustion.

The exhaustion doctrine developed as a discretionary judge-made rule that required litigants to raise all issues and objections in the district court before they may be presented to the courts of appeals or this Court. But administrative exhaustion statutes are different. These statutes take a doctrine that is designed to work exclusively within Article III and attempt to graft it onto agency adjudication, which often commences and concludes inside Executive Branch agencies, and then comes to Article III courts, often in

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[3] SEC Br., *Black v. SEC*, No. 25-1718(L) (4th Cir. Sep. 23, 2026), Dkt. No. 83; NLRB Br., *3484, Inc. v. NLRB*, Nos. 24-9511, 24-9525 (10th Cir. Oct. 3, 2024), Dkt. No. 42.

[4] FINRA Br. at 17, *Black v. SEC*, No. 25-1718(L) (4th Cir. Sep. 23, 2026), Dkt. No. 81 ("[P]rior to raising an objection to a FINRA disciplinary decision before the SEC, a party must raise that objection before FINRA.").

an appellate posture. That is why administrative exhaustion statutes must overcome "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962); *see also Freytag v. Comm'r*, 501 U.S. 868 (1991) (acknowledging that the Court has exercised its discretion to consider nonjurisdictional claims that were not raised below).

ARGUMENT

The Court Should Take This Case to Decide Whether Administrative Exhaustion Should be Excused for Structural Constitutional Claims

Section 78y(c)(1) grants courts the discretion to excuse exhaustion if a petitioner demonstrates "reasonable ground[s]," a standard particularly relevant for structural constitutional claims that agencies like the SEC lack the authority or institutional competence to resolve. Furthermore, requiring exhaustion for these structural claims serves no institutional interests, as it neither protects agency authority—given the SEC's lack of specialized expertise in constitutional matters—nor promotes judicial efficiency, since the administrative record provides little if any value for subsequent judicial review of such purely legal questions.

A. Section 78y(c)(1) expressly contemplates that courts may excuse exhaustion

The Exchange Act provides that "a person aggrieved by a final order of the [Securities and Exchange] Commission" may obtain judicial review in the appropriate circuit court. 15 U.S.C. § 78y(a)(1). On the filing of such a petition, "the court has jurisdiction" "to affirm or modify and enforce or to set aside the order in whole or in part." *Id.* § 78y(a)(3). SEC

findings as to the facts are "conclusive" "if supported by substantial evidence." *Id.* § 78y(a)(4). Relevant here, "[n]o objection to an order or rule of the Commission, for which review is sought under this section, *may* be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so." *Id.* § 78y(c)(1) (emphasis added).

By its express terms, the exhaustion statute preserves court discretion to excuse exhaustion, requiring only "reasonable ground[s]" for doing so. *Id.* This reasonableness standard preserves court discretion like other statutes that contemplate excusing exhaustion for exceptional or "extraordinary" grounds. 30 U.S.C. § 816(a)(1) (requiring "extraordinary circumstances"); 29 U.S.C. § 160(e). Section 78y(c)(1)'s permissive language (*may* as opposed to *shall*) supports this point and shows the strong textual commitment to a nonjurisdictional, prudential exhaustion requirement. To hold otherwise "would be to stretch forfeiture beyond its breaking point." *Jones Bros., Inc. v. Sec'y of Lab.*, 898 F.3d 669, 674 (6th Cir. 2018).

While the Sixth Circuit here recognized futility as a reasonable ground for excusing exhaustion, Pet. App. 17a, the court made it near impossible to prevail on the futility argument. In the court's view, the petitioner "must show that the SEC did not have the power to remedy the purported [structural] violation he asserts." Pet. App. 18a. For example, if an agency has the power "to vacate the sanctions," then the agency could have, in theory, avoided the constitutional violation had the petitioner presented the structural claim to the agency. *Id.* In such circumstances, it would *not* be futile for the nongovernmental litigant to present structural claims to the agency first.

The holding below gets it exactly backward. The inquiry turns, not on what the agency could have done, but rather on the nature of the claim. Courts routinely excuse exhaustion for facial constitutional claims. For example, in *Jones Brothers*, the Sixth Circuit addressed the Mine Act's twin exhaustion requirements, one of which applies in the court of appeals: "No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 898 F.3d at 673 (quoting 30 U.S.C. § 816(a)(1)). While the "extraordinary circumstances" provision appears to be much stricter than the permissive "may" and "reasonable ground" provision of 15 U.S.C. § 78y(c)(1) at issue here, the Sixth Circuit had no trouble excusing exhaustion. The court noted that the Commission there, "like all administrative agencies, has no authority to entertain a facial constitutional challenge to the validity of a law" because the "agency may not invalidate the statute from which it derives its existence and that it is charged with implementing." *Jones Bros.*, 898 F.3d at 673 (citations omitted). Because "only the Judiciary enjoys the power to invalidate statutes inconsistent with the Constitution," courts "could not fault a petitioner for failing to raise a facial constitutional challenge in front of an administrative body that could not entertain it." *Id.* at 674 (citing *McCarthy v. Madigan*, 503 U.S. 140, 147-48 (1992)).

While the Mine Act established an agency dispute-resolution scheme of limited scope where "'questions of law' include only those legal claims the Commission is fit to decide and fix," the Exchange Act scheme is even more limited. *Compare Jones Bros.*, 898 F.3d at 674, *with* 15 U.S.C. § 78s(d)-(h). SEC does not conduct

de novo review and does not find facts. Instead, it reviews FINRA conclusions only to determine whether the enforcement target engaged in the conduct that FINRA found, whether such conduct violates the rules FINRA specified, and whether FINRA's rules were applied in a manner consistent with the purposes of the Exchange Act. 15 U.S.C. § 78s(e)(1); *see also In re Eric J. Weiss*, Release No. 34-69177, 2013 WL 1122496 (SEC Mar. 19, 2013). SEC reviews FINRA sanctions only to determine whether FINRA "impose[d] any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter or" if the sanction was "excessive or oppressive." 15 U.S.C. § 78s(e)(2). In the end, SEC may modify, affirm, or set aside FINRA's decision. *Id.* § 78s(e)(1).

In these circumstances, the statutes do not specifically authorize SEC to entertain constitutional challenges to its own structure. *Cf. Jones Bros.*, 898 F.3d at 674. While *Jones Brothers* drew a distinction between "the 'constitutional applicability of legislation to particular facts and constitutionality of the legislation' in the first instance," structural constitutional challenges are more akin to the latter. *Id.* at 675 (citations omitted). This is so because, like a challenge to the constitutionality of a statute, a structural constitutional challenge asks the court "to take action which runs counter to the expressed will of the legislative body." *Id.* (citations omitted). Ultimately, it is the statute, not necessarily SEC, that deprives enforcement targets of their jury trial rights.

Moreover, while *Jones Brothers* was "not prepared to say that the nature of [structural constitutional claims] always constitutes an extraordinary circumstance," it still held that "the absence of legal authority addressing whether the [agency] could entertain

the claim does." *Id.* at 677. SEC has no statutory, much less, inherent, authority to address structural constitutional claims. And prevailing legal authority suggests that administrative agencies are ill-suited to addressing such claims at all. *See, e.g.*, *Carr v. Saul*, 593 U.S. 83, 92 (2021); *Free Enter. Fund v. Pub. Co. Acct. & Oversight Bd.*, 561 U.S. 477, 491 (2010) (recognizing that the agency lacked competence and expertise to address constitutional claims); *Califano v. Sanders*, 430 U.S. 99, 109 (1977) (acknowledging that constitutional questions are unsuited to resolution in administrative proceedings); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (stating that matters of constitutional law are beyond the agency's competence). It is unsurprising that SEC has only ever ruled in its own favor when it has addressed constitutional claims. Pet. App. 12a-13a. But that history is also irrelevant because SEC lacks the authority and competence to decide such claims.

This Court should take the case and hold that the same rationale for excusing exhaustion of facial constitutional claims applies to structural constitutional claims as well.

B. Requiring exhaustion for structural constitutional claims serves no institutional interests

Exhaustion is viewed as generally required "because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy*, 503 U.S. at 145. As to the first, exhaustion "appl[ies] with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings

in question allow[s] the agency to apply its special expertise." *Id.* (citing *McKart v. United States*, 395 U.S. 185, 194 (1969); *Bowen v. City of New York*, 476 U.S. 467, 484 (1986)). As to the second, exhaustion promotes judicial efficiency by allowing the agency an opportunity to correct its own errors and "produce a useful record for subsequent judicial consideration, especially in a complex and technical factual context." *Id.* at 145-46 (citing *Weinberger*, 422 U.S. at 765). Absent something about a case or claim that implicates these institutional interests, federal courts are vested with a "virtually unflagging obligation" to exercise the jurisdiction given them. *Id.* at 146 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976)). Accordingly, this Court has declined to require exhaustion even in circumstances where administrative and judicial interests counsel otherwise. *Id.*

Requiring exhaustion before SEC for structural constitutional claims serves neither of these interests. Structural claims do not involve exercise of SEC's discretionary power and they do not present a question that requires SEC's "special expertise." *Id.* at 145; *see also Carr*, 593 U.S. at 92 (noting that agencies lack expertise and competence to adjudicate constitutional claims). Nor does exhaustion promote judicial efficiency here—SEC has no power or authority to correct a constitutional error in its structure and exhaustion would produce nothing useful for subsequent judicial consideration that could not be presented in SEC's appellate brief(s). *See McCarthy*, 503 U.S. at 145-46. There is no "complex or technical factual context" that requires SEC's expertise to address constitutional questions. *Id.*

Moreover, "the interests of the individual weigh heavily against requiring administrative exhaustion" for structural constitutional claims. *Id.* at 146 (recognizing three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion).

First, the record in this case and others show the prejudice resulting from "unreasonable or indefinite timeframe[s] for administrative action." *Id.* at 147 (citations omitted); *see also Black v. SEC*, No. 3:23-cv-00709-MEO-DCK, 2026 WL 812273, at *1 (W.D.N.C. Mar. 24, 2026) (referring to the case as "a web of proceedings" and a "procedural maze"). The fact that an agency can trap enforcement targets in five years of contested proceedings before a private entity, without a jury, and then subsequently give itself nearly four-and-a-half years to decide an appeal therefrom, demonstrates this point.[5]

Second, any administrative remedy is inadequate because of "doubt as to whether the agency [is] empowered to grant effective relief." *McCarthy*, 503 U.S. at 147 (citing *Gibson v. Berryhill*, 411 U.S. 564, 575 n.14 (1973)). SEC is unable to adequately consider whether to grant relief "because it lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute." *Id.* at 147-48 (citing *Moore v. City of E. Cleveland*, 431 U.S. 494, 497 n.5 (1977); *Mathews v. Diaz*, 426 U.S. 67, 76 (1976)); *see also Carr*, 593 U.S. at 92. Exhaustion has not been required "where the challenge is to the adequacy of the agency procedure itself," which is akin to structural constitutional claims. *McCarthy*,

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[5] Pet'rs' Br., *Black v. SEC*, No. 25-1718(L) (4th Cir. Sep. 23, 2026), Dkt. No. 82.

503 U.S. at 148 (citations omitted). And while an agency may be competent to adjudicate the issue presented, it could still "lack authority to grant the type of relief requested." *Id.* (citations omitted). SEC has *no* authority to grant enforcement targets a jury trial consistent with the Seventh Amendment and it cannot declare its own structure unconstitutional. *See id.*

Third, an administrative remedy may be inadequate "where the administrative body is shown to be biased or has otherwise predetermined the issue before it." *Id.* (citations omitted). It is hard to argue that SEC has not already prejudged the Seventh Amendment issue, especially considering the SEC decisions referenced by the panel majority all reaching the same result—in SEC's favor. Pet. App. 12a-13a. Requiring exhaustion of a Seventh Amendment claim before SEC "would be to demand a futile act." *McCarthy*, 503 U.S. at 148 (quoting *Houghton v. Shafer*, 392 U.S. 639, 640 (1968)).

As such, administrative exhaustion should not be required for structural constitutional claims because it serves no institutional interests and the interests of the individual weigh heavily against such a requirement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CAMERON M. HALLING
Pacific Legal Foundation
555 Capitol Mall
Suite 1290
Sacramento, CA 95814
(916) 419-7747
CHalling@pacificlegal.org

ADITYA DYNAR
Counsel of Record
Pacific Legal Foundation
3100 Clarendon Blvd.,
Suite 1000
Arlington, VA 22201
(202) 807-4472
ADynar@pacificlegal.org

Counsel for Amicus Curiae

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