No. 20-276

In the
# Supreme Court of the United States

CHRISTOPHER GIBSON,

*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 Eleventh Circuit

## MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER


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## MOTION FOR LEAVE

Amicus curiae PACIFIC LEGAL FOUNDATION (PLF) respectfully moves for leave to file the accompanying brief, under Supreme Court Rules 21, 33.1, and 37.2. PLF timely served notice of its intent to file the brief. Petitioner consented, but Respondents' counsel did not respond.

PLF frequently participates as lead counsel and as counsel for amici in cases addressing the separation of powers and administrative law. It writes in support of Petitioner here because the question presented raises significant issues concerning the proper scope of agency power and the right of due process for those subject to agency regulation.

Below, PLF draws on its nearly 50 years of experience and provides a discussion of first principles that will inform the Court's consideration of the Petition. Accordingly, PLF respectfully asks the Court to grant it leave to file this amicus brief.

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## IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Founded in 1973, PACIFIC LEGAL FOUNDATION is a nonprofit, tax-exempt, California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited constitutional government, private property rights, and individual freedom.

PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases involving the role of the judiciary as an independent check on the executive and legislative branches under the Constitution's Separation of Powers. *See, e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States").

This case raises core questions concerning the "judicial Power of the United States." PLF offers a discussion of first principles that should illuminate the Court's review.

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[1] Pursuant to this Court's Rule 37.2(a), Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Petitioner consented, but Respondents' counsel did not respond. 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, its members, or its counsel made a monetary contribution to its preparation or submission.

## Introduction and Summary of Argument

The judicial power is "the power to bind parties and to authorize the deprivation of private rights." William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1513–14 (2020). "The judicial Power of the United States" is "vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. And this power, so vested, "extend[s] to all Cases, in Law and Equity, arising under the Constitution [and] the Laws of the United States" and "to Controversies to which the United States [is] a party …." *Id.*, art. III, § 2, cl. 1.

As a result, Congress "cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 330–31 (1816). Rather, the "Constitution assigns that job—resolution of the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law—to the Judiciary." *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (cleaned up).

Here, the SEC seeks to deprive Petitioner of private rights through an in-house administrative action overseen by an SEC-employed administrative law judge. Petitioner contends that the SEC's proceedings are constitutionally invalid. Under the Constitution, these matters are reserved for resolution in the Judicial Branch. But according to the court below, the initial adjudication of these judicial questions is assigned to the Executive Branch.

This Court should grant the Petition and decide whether the Constitution's separation of powers and the allied guarantee of due process allow the federal government to deprive individuals of private and constitutional

rights outside Article III or whether the Federal Government is vested with an undifferentiated governmental power.

## REASONS TO GRANT THE PETITION

### I. THE COURT SHOULD DECIDE WHETHER THE CONSTITUTION'S SEPARATION OF POWERS AND DUE PROCESS GUARANTEES ALLOW CONGRESS TO DELEGATE THE JUDICIAL POWER OF THE UNITED STATES TO THE EXECUTIVE BRANCH

#### A. The Separation of Powers and Due Process

The Constitution's separation of powers is based on traditions—going back to Magna Carta—that preclude government from depriving individuals of life, liberty, or property except by the law of the land or with due process of law. The meaning of "due process of law" and "law of the land" "evolved over a several-hundred-year period, driven … by the increasing institutional separation of lawmaking from law enforcing and law interpreting." Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1679 (2012). But from at least the middle of the Fourteenth Century, "due process" "consistently referred to the guarantee of legal judgment in a case by an authorized court in accordance with settled law." *Id.* "It entailed an exercise of what became known as the judicial power to interpret and apply standing law to a specific legal dispute." *Id.* And when the Fifth Amendment was adopted, it was universally understood that due process applied to "executive officials and courts. It meant that the executive could not deprive anyone of a right except as authorized by law, and that to be legitimate, a deprivation of rights had to be preceded by certain procedural protections characteristic of judicial process: generally, presentment, indictment, and trial by

jury." *Id.* Accordingly, "[g]enerations of Americans assumed that once core private rights had vested in a particular individual, the allied requirements of due process and the separation of powers protected them against many forms of interference by the political branches." Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 562 (2007).

Neither the traditional understandings, nor the Constitution's express separation of powers and guarantees of due process, allow exceptions for the Administrative State's concentrated powers. To the contrary, the "declared purpose of separating and dividing the powers of government, of course, was *to diffuse power* the better to secure liberty." *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (emphasis added) (cleaned up). Perceived benefits of administrative processes do not change the calculus: that "a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution," for "convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 499 (2010) (cleaned up).

### B. The Problems with *Thunder Basin*

Nonetheless, under this Court's *Thunder Basin* regime, courts routinely approve "delayed" judicial review of (judicial) determinations made outside Article III. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). As the court below explained, "Congress may allocate to an administrative body the initial review of such claims, and when it does, the court must undertake the analysis set forth" in *Thunder Basin*. Pet. App. 4a. In these cases—despite the Constitution's exclusive vesting of "the judicial

Power of the United States" in Article III courts and Congress's expressly granting federal district courts "original jurisdiction of all civil actions arising under the Constitution [and] laws . . . of the United States," 28 U.S.C. § 1331—courts are required to determine whether Congress *implicitly* intended to strip district courts of jurisdiction in favor of Article I agencies. The two-prong test asks (1) whether this congressional intent is "fairly discernible in the [relevant] statutory scheme," and (2) whether a litigant's "claims are of the type that Congress intended to be reviewed within [a] statutory structure." *Thunder Basin*, 510 U.S. at 207, 212 (internal quotation marks omitted). Under the second prong, courts consider (A) whether a litigant's claims will (eventually) receive meaningful judicial review; (B) whether agency expertise can be brought to bear on the litigant's claims; and (C) whether those claims are wholly collateral to the statute's review provisions. *Id.* at 212–15; *see also Elgin v. Dep't of Treasury*, 567 U.S. 1, 8–10, 15 (2012).

This test and its application by lower courts raise significant constitutional concerns. Not only does it require courts to (attempt to) divine and defer to Congress's implied intent, it is based on two fatally deficient premises—that Congress has the authority to delegate the "judicial power of the United States" outside Article III and that the Executive Branch has the authority to exercise judicial power.

### 1. The Constitution Trumps Acts of Congress

It is the "very essence of judicial duty" to determine whether the Constitution or a conflicting legislative act governs the case to which they both apply. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Since the Con-

stitution is a "superior, paramount law," an ordinary "legislative act contrary to the constitution is not law." *Id.* And, therefore, "the constitution, and not such ordinary act, must govern the case." *Id.* at 178. To conclude otherwise "would subvert the very foundation of all written constitutions." *Id.* It would declare an act "entirely void" according to the principles and theory of our Constitution, but "completely obligatory" in practice. *Id.* It would "prescrib[e] limits" on the legislature but "declar[e] that those limits may be passed at pleasure." *Id.*

### 2. The *Thunder Basin* Test Ignores Threshold Constitutional Questions

Under *Thunder Basin* and *Elgin*, however, courts ask "only whether Congress' intent to preclude district court jurisdiction [is] fairly discernible in the statutory scheme." *Elgin*, 567 U.S. at 9–10 (internal quotation marks and citations omitted). And circuit courts, including the Eleventh Circuit here,[2] have deferred to Congress and held that the review provisions of federal securities laws require initial judicial review—of even constitutional claims—by the Executive Branch.

This result is not surprising since *Elgin* sidestepped the Court's earlier concern about 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) (quoting *Bowen v. Michigan Acad. of Family Physicians*,

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[2] *Gibson v. SEC*, 795 F. App'x 753 (11th Cir. 2019) [Pet. App. 1a–6a]. *See also Cochran v. SEC*, 969 F.3d 507 (5th Cir. 2020); *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2187 (2017); *Bennett v. SEC*, 844 F.3d 174 (4th Cir. 2016); *Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016); *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015); *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016).

476 U.S. 667, 681 n.12 (1986)). According to *Elgin*, arguments calling for *Webster's* "heightened standard" must not "overlook[]" its "necessary predicate," namely, a statute that purports to "deny any judicial forum" for a colorable constitutional claim. *Elgin*, 567 U.S. at 9. But *Elgin* itself overlooked necessary predicate questions—most importantly whether the Constitution precludes Congress from delegating judicial power to the Executive Branch and whether the Constitution bars the Executive Branch from exercising that power.

### 3. The SEC Improperly Exercises the Judicial Power of the United States

Instead of grappling with these questions, the *Thunder Basin*/*Elgin* regime skips ahead and authorizes "delayed judicial review," *Thunder Basin*, 510 U.S. at 207—on the erroneous assumption that an administrative agency's "initial" review is something other than judicial review.

Yet there can be no doubt in this case that the SEC's initial adjudication was an exercise of judicial power. In the "Initial Decision," the ALJ concluded that Petitioner violated federal securities laws, ordered him to disgorge $82,088 and pay a civil penalty in the amount of $102,000, and suspended his licenses with a right to reapply after three years. Pet. App. 58a, 95a, 99a. The ALJ also rejected Petitioner's argument that SEC ALJs have been unconstitutionally appointed. *Id.* 108a–109a. These are quintessentially judicial questions, and their resolution is a quin-

tessentially judicial act. And all of these issues will be reviewed—on appeal—by the full Commission,[3] which may also review other constitutional questions. *Id.* 105a.

Thus, the Executive Branch, acting through the SEC here, both deprived Petitioner of his private rights—his property and his right to pursue a lawful avocation—and, also, issued a ruling on Petitioner's claim that the ALJ adjudicating the action was unconstitutionally appointed.[4] And in doing so, the Executive Branch exercised the judicial power of the United States. *See* Baude, 133 Harv. L. Rev. at 1513–14 (The judicial power is "the power to bind parties and to authorize the deprivation of private rights."); *id.* at 1520 ("The judicial power attaches special consequences to judicial adjudications, most especially legally binding judgments.").

Therefore, the problem with the *Thunder Basin*/*Elgin* regime is not that the "delayed judicial review" follows an initial (here, SEC) administrative review, conducted with adjudicatory-like processes. It's not "about the *process* of adjudication." Baude, 133 Harv. L. Rev. at 1513.[5] The problem in these cases is that when "delayed *judicial* re-

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[3] Order Granting Petition for Review and Scheduling Briefs, *In re Christopher M. Gibson*, SEC No. 3-17184, Release No. 88799 (SEC May 1, 2020).

[4] As Petitioner explains, without a (rarely granted) stay, the SEC can impose *and enforce* monetary penalties and license suspensions before a litigant has access to a court of law. *See* Pet. at 6–7.

[5] *See also* Gary Lawson, *Take the Fifth . . . Please!: The Original Insignificance of the Fifth Amendment's Due Process of Law Clause*, 2017 B.Y.U. L. Rev. 611, 631 (2017) ("Executive procedures, even highly formal, court-like executive procedures, may or may not be a good idea, and they may or may not serve any number of functions, but they cannot legitimate a deprivation that is not otherwise legitimate.").

view" finally takes place, an administrative agency has already conducted a judicial review and has already deprived the litigant of his private rights; *i.e.*, has already imposed a binding *judgment*.[6] The Executive Branch has (already) exercised the "judicial Power of the United States."

Considering the above, the Fifth Circuit's framing presents the issue in stark terms: "This appeal is not about whether [a litigant] will have the opportunity to press her separation-of-powers claim. She will. It instead asks: Where and when?" *Cochran*, 969 F.3d at 511. Even if the timing of judicial review (the "when") were not itself problematic, the forum for resolving *judicial* disputes (the "where") is one that cannot be brushed aside.

## II. Lower Courts' Application of *Thunder Basin* Denies Litigants their Right to Due Process

As noted above, Congress "cannot vest *any portion* of the judicial power of the United States, except in courts [it] ordained and established." *Hunter's Lessee*, 14 U.S. at 330–31 (emphasis added). Nor, of course, can the Executive Branch exercise the judicial power. Rather, the "predominant principle of executive action is that it cannot deprive people of life, liberty, or property without *judicial* process." Baude, 133 Harv. L. Rev. at 1541 (emphasis added). And, "one of the most fundamental requirements" of the Fifth Amendment's Due Process Clause is "one of form and legality—as a limit on the legislature's ability to dispense with the courts." *Id.* (footnote omitted). Therefore, "it has aptly been said that the Due Process Clause

[6] As the Second Circuit noted, the Dodd-Frank Act "dramatically expanded the SEC's authority to impose penalties administratively, making it essentially 'coextensive with [the SEC's] authority to seek penalties in Federal court.'" *Tilton*, 824 F.3d at 279 (citation omitted).

is an 'instantiation of separation of powers' and that '[d]ue process and Article III in this sense are fused at the hip.'" *Id.* (quoting Chapman & McConnell, 121 Yale L.J. at 1672; and Douglas G. Baird, *Blue Collar Constitutional Law*, 86 Am. Bankr. L.J. 3, 8 (2012)).

When, therefore, litigants are required to slog through one or, upon an administrative appeal, two Executive Branch *judicial adjudications* before they may access an Article III court, they are denied their long-standing due process right against arbitrary deprivation of private rights. *See Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power."). *Cf. also* Lawson, 2017 B.Y.U. L. Rev. at 631 ("There was no need for the Fifth Amendment in 1791 to tell courts that they could not deprive people of life, liberty, or property without due process of law. Due process of law just was, in an existential sense, what courts did when they were doing their jobs properly.") (citing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 157 (2014) ("The common law had its own ideals about the personnel, structure, and mode of proceeding of its courts—ideals that could be summed up as the due process of law.")). The lower courts' application of *Thunder Basin* ignores this foundational principle, as well as important related principles of fairness.

### A. Under the Lower Courts' Application of *Thunder Basin*, No Constitutional Challenge to an Agency's Structure of Proceedings Will Be "Of the Type that Congress Intended to be Reviewed Within Statutory Schemes"

Under *Thunder Basin*, courts ask, in addition to whether Congress's jurisdictional intent is "fairly discernable," whether a litigant's claims are "of the type that Congress intended to be reviewed within [the SEC's] statutory scheme." *Thunder Basin*, 510 U.S. at 207, 212 (internal quotation marks omitted). This depends on three factors: whether a litigant's claims will (eventually) receive meaningful judicial review; whether agency expertise can be brought to bear on the litigant's claims; and whether those claims are wholly collateral to the statute's review provisions. *Id.* at 212–15. These factors, at least as applied by the lower courts construing the securities laws' review provisions, all favor the government and prejudice a litigant's chances of obtaining immediate review of (at least) his constitutional challenges to an agency's structure.

Perhaps most glaringly, whether a regulated party receives initial judicial review turns on the administrative agency's choice of forum. The SEC has the option of enforcing the securities laws in court or in house. 15 U.S.C. § 78u-2. If the SEC chooses to proceed in district court, then the respondent will receive immediate judicial review of his constitutional claims. But if the SEC initiates an administrative enforcement action, the lower courts have concluded that the respondent may not access Article III courts, even for constitutional challenges to the agency itself or to administrative proceedings themselves, until the administrative process is complete.

The circuit courts have concluded that these constitutional challenges are "of the type that Congress intended to be reviewed within [the SEC's] statutory scheme." *Thunder Basin*, 510 U.S. at 207, 212 (internal quotation marks omitted). *See, e.g.*, *Jarkesy*, 803 F.3d at 17. They also contend that *Elgin* narrowed *Free Enterprise Fund*, under which immediate district-court review was required for a challenge, like Petitioner's claims here, to the agency's constitutional validity or to its (allegedly) unconstitutional adjudicative procedures. *Free Enter. Fund*, 561 U.S. at 490. *See, e.g.*, *Bebo*, 799 F.3d at 769–72 (acknowledging that under *Free Enterprise Fund* the SEC-review statute does not strip district courts of jurisdiction "to hear at least certain types of constitutional claims," but ultimately concluding that *Elgin* had narrowed the jurisdictional holding of *Free Enterprise Fund*).

According to the Fourth Circuit, *Free Enterprise Fund* was limited to situations in which no reviewable SEC action was possible. In those cases, review outside the statutory scheme was permissible. *Bennett*, 844 F.3d at 183. But when a litigant raising a constitutional claim is a respondent in an SEC administrative-enforcement action, that litigant "necessarily challenges" an SEC action and, therefore, review within the statutory scheme is required. *Id. See also Cochran*, 969 F.3d at 515 ("Cochran, like the bank that sued the FDIC, is 'already embroiled in an enforcement proceeding'; she does 'not have to "bet the farm" to challenge agency action. The farm [is] already on the table.'") (quoting *Bank of La. v. FDIC*, 919 F.3d 916, 927 (5th Cir. 2019)); *Hill*, 825 F.3d at 1243 ("Here, in contrast [to *Free Enterprise Fund*], the respondents do challenge Commission action—action which, if allowed to proceed, necessarily will result in a final Commission order.").

In *Free Enterprise Fund*, the Public Company Accounting Oversight Board had merely investigated alleged violations, but had not charged an accounting firm. *Id.*, 561 U.S. at 487. There, the regulated party was permitted immediate judicial review of its constitutional challenges. But, in the case below, as in the other circuit-court cases referenced here, the respondents have been charged—and, in Petitioner's case here, *already sanctioned* by the agency.

Thus, application of the *Thunder Basin*/*Elgin* regime appears to result in a situation in which regulated parties are permitted initial judicial review of their constitutional claims only if they are *not* threatened with the deprivation of their private rights. Absent an express provision otherwise, how could a constitutional challenge to an agency's structure or existence ever not be "of the type Congress intended to be reviewed within [a] statutory structure"? *Free Enterprise Fund,* 561 U.S. at 489 (citation omitted). *Cf. Cochran*, 969 F.3d at 515 ("The seemingly anomalous result that a party subject to the less onerous agency action of investigation may run to federal court while a party that has been charged must wait flows directly from the principle that federal court jurisdiction is a matter of statute. . . . There is no scheme for judicial review of SEC investigations, so falling back on general federal question jurisdiction does not undermine any contrary congressional path."). Therefore, even assuming that the statutory-review provisions do not, as argued above, violate the Constitution's separation of powers by allowing Executive Branch agencies to exercise the judicial power, this Court should still accept this case for review to address whether this anomalous result is consistent with litigants' rights of due process and simple fairness.

### B. The *Thunder Basin* Factors Tip the Scales in the Government's Favor

The same problems exist under each of the three "*Thunder Basin* factors"—whether a litigant's claims will (eventually) receive meaningful judicial review; whether agency expertise can be brought to bear on the litigant's claims; and whether those claims are wholly collateral to the statute's review provisions. *Id.* at 212–15.

#### 1. No Meaningful Review

Courts routinely find that delayed judicial review is "meaningful" enough, but they give short shrift to the harms that occur before that "meaningful" review and as a consequence of the delay.[7] As the Eleventh Circuit observed, SEC administrative actions "differ from cases brought in federal district courts in several respects." *Hill*, 825 F.3d at 1238. When the SEC proceeds in-house, either the full Commission or an SEC-employed ALJ adjudicates the action. 15 U.S.C. § 78-d-1(a)–(b); 17 C.F.R. § 201.110. The process violates the legal maxim that "[n]o

[7] Lower courts dismiss arguments that delayed review unfairly makes litigants spend time and money in allegedly unconstitutional proceedings. According to the D.C. Circuit, the "only independent harms [a respondent] will face as a result of his continuing to undergo the Commission proceeding are the burdens abided by any respondent in an enforcement proceeding or any criminal defendant who must wait for vindication." *Jarkesy*, 803 F.3d at 28. "The *judicial* system tolerates those harms, and they are insufficient for us to infer an exception to an otherwise exclusive scheme." *Id.* (emphasis added). But the SEC is *not* part of the *judicial* system. Delays incurred in the judicial system are not analogous to delays in the adjudication of private rights outside the judicial system. This regime also ignores the advantages gained by agencies in terms of preventing judicial review of their actions. *See Tilton*, 824 F.3d at 298 n.5 (Droney, J., dissenting) (98% of respondents settle; and in a "number of cases" the SEC "threaten[s] administrative proceedings" before ALJs in a calculated effort to compel settlement).

man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." *The Federalist No. 10*, at 59 (Madison) (J. Cooke ed. 1961). This maxim is violated twice in the SEC process—first when the ALJ hears the case and then again when the full Commission reviews an ALJ's decision.

Further, in these proceedings, the "respondent" is not afforded a jury, and neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence apply. Instead, the SEC's Rules of Practice control. 17 C.F.R. § 201.100 *et seq.* These rules allow only limited discovery, often at the discretion of the ALJ. *Id.* §§ 201.232, 201.233(a). On appeal to the full Commission, the Commission "may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision" and it "may"—or may not—"make any findings or conclusions that in its judgment are proper and on the basis of the record." *Id.* § 201.411(a). And it may—or may not—allow the submission of additional evidence. *Id.* § 201.452.

For the supposedly meaningful judicial review of final SEC orders, "the Exchange Act specifies what constitutes the agency record, [15 U.S.C.] § 78y(a)(2), the standard of review, *id.* § 78y(a)(4), and the process for seeking a stay of the Commission order either before the Commission or in the court of appeals, *id.* § 78y(c)(2)." *Bennett*, 844 F.3d at 177. This "delayed" judicial review therefore denies private parties the right to a judicial determination of facts and law. *See* Nelson, 107 Colum. L. Rev. at 590 (When core private rights are at stake, "not just any sort of 'judicial' involvement [will] do," and courts must "be able to exercise their own judgment" about the details relevant to a particular case or controversy.). This review burdens the party's ability to succeed on appeal because when circuit

courts finally hear these cases, they must defer to the agency's own factual determinations and, in many cases, to the agency's legal interpretations. *Cf.* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1248–49 (1994) ("[T]he agency decision, even before the bona fide Article III tribunal, possesses a very strong presumption of correctness on matters both of fact and of law.") (footnote omitted).

None of this provides "meaningful" judicial review.

### 2. Agencies Have No Expertise in General Questions of Administrative and Constitutional Law

Agency "expertise" has uniformly meant expertise in complex, technical areas. That's the *raison d'etre* of the Administrative State. *See, e.g.*, Felix Frankfurter, *The Public and Its Government* 152 (Yale Univ. Press 1930) ("[T]he staples of contemporary politics—the organization of industry, the control of public utilities, the well-being of agriculture, the mastery of crime and disease—are deeply enmeshed in intricate and technical facts, and must be extricated from presupposition and partisanship.").

In contrast, as this Court recognized, "standard questions of administrative law" that do not require "technical considerations of agency policy" are outside an agency's competence and expertise. *Free Enter. Fund*, 561 U.S. at 491 (cleaned up). *See also Elgin*, 567 U.S. at 29–30 (Alito, J., dissenting) (joined by Ginsburg and Kagan, JJ.) ("[C]onstitutional challenges to the laws that [agencies] administer … lie outside the realm of special agency expertise."). Lower courts acknowledge that this point "has some force." *Bebo*, 799 F.3d at 767 (noting that a constitutional challenge to the agency "can reasonably be characterized" as outside the scope of the agency's expertise).

But in *Thunder Basin* and *Elgin*, the Court dismissed this common-sense approach and decided that agency expertise should be "brought to bear" as a means of judicial abdication. And the lower courts have routinely avoided thorny constitutional issues. The Fifth Circuit, for example, stated that the "benefit of agency expertise should instead be assessed by looking at the overall case, so this factor accounts for the possibility that the agency's resolution of other issues 'may obviate the need to address the constitutional challenge.'") (quoting *Elgin*, 567 U.S. at 22–23)).

Similarly, the D.C. Circuit said that it could "fairly discern Congress's intent to preclude suits by respondents in SEC administrative proceedings in the mine-run of cases," because, "'[g]enerally, when Congress creates procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive.'" *Jarkesy*, 803 F.3d at 16 (quoting *Free Enterprise,* 561 U.S. at 489). But the "particular problem" at issue in these cases—whether the SEC's administrative-enforcement proceedings are constitutionally valid—has nothing to do with the SEC's expertise. As *Jarkesy* itself noted, the "securities laws contain an equally comprehensive structure for the adjudication of *securities violations* in administrative proceedings"—not constitutional violations *Id.* (emphasis added).

Finally, the same analysis would apply to many federal agencies. Constitutional challenges could be raised against agencies whose expertise varies from, as here, securities (SEC), to communications (FCC), elections (FEC), and competition (FTC). How do the agencies' varying areas of expertise establish that a litigant's constitutional claims are "of the type that Congress intended to be

reviewed within the statutory scheme" that each agency administers? *Thunder Basin*, 510 U.S. at 212.

In fact, courts are "at no disadvantage in answering" questions of administrative and constitutional law. *Free Enter. Fund*, 561 U.S. at 491 And the Constitution has decided that it is to the advantage of the people's liberties that only courts answer such questions, at least when the potential deprivation of private rights is threatened. *Cf. Oil States Energy Srvcs., LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365, 1380 (2018) (Gorsuch, J., dissenting) ("The Constitution 'reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.'") (citation omitted). Ultimately, it is the Judicial Branch's duty to police the Constitution's separation of powers and hold the political branches accountable for overreach. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 473 (2001). The Court should reconsider whether an agency's technical expertise can be used as a shield to delay and, often, prevent judicial review.

### 3. Congress is Incentivized to Draft "Comprehensive" Statutes to Prevent Judicial Review

This Court "has not explained precisely how to make th[e wholly-collateral] determination." *Tilton*, 824 F.3d at 287; *see also Bebo*, 799 F.3d 765, 773 (7th Cir. 2015) (same); *Bennett*, 844 F.3d at 186 (determining whether a claim is "wholly collateral" is "not free from ambiguity").

In response, courts have found that a litigant's constitutional claims are not wholly collateral to a statutory-review provision either because (1) the claims are substantively intertwined with the merits; or because (2) the claims have been raised in response to, and so are procedurally intertwined with, an administrative proceeding,

*i.e.*, the constitutional claims are used as a vehicle to challenge an agency's administrative proceeding. *See Bennett* at 186–87; *Bebo* at 774 (concluding that "this unsettled issue does not affect the outcome of this case").

Since *Elgin*, courts have relied on the second reading. But unless one fits within the razor-thin parameters of *Free Enterprise Fund*, it is difficult to imagine a scenario in which a regulated party's constitutional claims are not "the vehicle by which" the party challenges an agency's substantive charges. *Elgin*, 567 U.S. at 22. Indeed, when a party is already the subject of an administrative-enforcement proceeding, it appears to be impossible for that party to obtain immediate judicial review of constitutional challenges to the laws that agencies administer.

This is a factor that will virtually never work in a private party's favor. In *Bennett*, the respondent argued that her constitutional claim was wholly collateral to the SEC proceeding "because it challenge[d] the legality of the forum itself and [did] not seek to affect the merits of [the] SEC proceeding." *Id.*, 844 F.3d at 187. The Fourth Circuit acknowledged that at "one level, this makes conceptual sense: Even if she is successful in challenging the appointment of the Commission's ALJs, the SEC could still bring a civil enforcement action in district court on the same substantive charges." *Id.* But the court ultimately ruled that *Elgin's* reading controls, "even though it reduces the factor's independent significance." *Id.* Thus, Courts will be hard pressed to recognize any constitutional claim to be "*wholly* collateral" from the statutes that form the basis of an agency's claims—effectively removing this factor from the *Thunder Basin* analysis.

Finally, to the extent this factor remains relevant, it provides another excuse to give dispositive jurisdictional control to the SEC itself. For example, the Second Circuit

held that the respondent's constitutional claim was not "wholly collateral" to the securities statutes because the SEC "*chose* to enforce the Investment Advisers Act against the appellants by initiating an administrative proceeding and appointing an ALJ to act as the hearing officer." *Tilton* at 288 (emphasis added); *see id.* ("As the district court recognized, it is difficult to see how the Appointments Clause claim can still be considered collateral to any Commission orders or rules from which review might be sought, since the ALJ and the Commission will, one way or another, rule on those claims and it will be the Commission's order that the appellants will appeal.") (cleaned up).

All of this runs counter to common sense, not to mention the Constitution's carefully balanced separation of powers. *See Elgin*, 567 U.S. at 29–30 (Alito, J., dissenting) ("[C]onstitutional challenges to the laws that [agencies] administer" "are [] wholly collateral to other types of claims" that agencies are "empowered to consider."). The Court should grant review and clarify what, if anything, the "wholly collateral" factor means.

## III. LITIGANTS SHOULD BE ENCOURAGED TO BRING CONSTITUTIONAL CHALLENGES

The SEC's separation-of-powers violation "inflict[ed] a 'here-and-now' injury" that must be remedied by a court. *Seila Law, LLC v. CFPB*, 140 S. Ct. 2183, 2196 (2020) (quoting *Bowsher*, 478 U.S. at 727 n.5); *see Free Enter. Fund*, 561 U.S. at 513 (same). Under the *Thunder Basin* regime, however, litigants are prevented from initial *judicial* review and are incentivized by the time and expense of the administrative process to give up before the promised "delayed" judicial review. This runs counter to this Court's express recognition that citizens should have incentives to bring constitutional claims. *Cf. Lucia v.*

*SEC*, 138 U.S. 2044, 2055 n.5 (2018) ("Appointments Clause remedies are designed not only to advance those purposes [preventing structural constitutional violations] directly, but also to create incentives to raise Appointments Clause challenges.").

*Thunder Basin* poses an especially vexing problem—it reinforces separation-of-powers violations while simultaneously making it more difficult to challenge those violations. And, of course, in establishing the United States government, the sovereign people assigned to three—and only three—different "departments" "their respective powers" and "establish[ed] certain limits not to be transcended by those departments." *Marbury*, 5 U.S. at 176 (1803). If "those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation[,]" then the "distinction, between a government with limited and unlimited powers, is abolished[.]" *Id.* at 176–77. "The Constitution does not vest the Federal Government with an undifferentiated 'governmental power.'" *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 67 (2015) (Thomas, J., dissenting).

The Court should grant the Petition and reconsider whether the *Thunder Basin* regime of "delayed judicial review" following an initial *judicial* review by an administrative agency is consistent with the Constitution's separation of powers and the allied guarantees of due process.

## CONCLUSION

The Petition should be granted.

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Respectfully submitted,

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