NO. 20-276

In the
Supreme Court of the United States

CHRISTOPHER M. GIBSON,
Petitioner,
v.
SECURITIES AND EXCHANGE COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE CATO INSTITUTE, THE COMPETITIVE ENTERPRISE INSTITUTE, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute ("Cato") was established in 1977 as a nonpartisan public policy research foundation 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 promote the principles of limited constitutional government that are the foundation of liberty. Cato publishes books and studies, conducts conferences, issues the annual *Cato Supreme Court Review*, and files *amicus* briefs with courts.

The Competitive Enterprise Institute ("CEI"), founded in 1984, is a non-profit public policy organization dedicated to advancing the principles of free enterprise, limited government, and individual liberty. CEI frequently publishes original research and commentary on government financial policies and regulations. It also regularly participates in litigation concerning the scope and application of financial rulings and the federal agencies that promulgate them. CEI served as co-counsel to the successful petitioners in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010).

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business

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[1] All parties consented to the filing of this brief after receiving notice. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the Courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Amici support the petition because they have a strong interest in enforcing separation-of-powers principles, ensuring the democratic accountability of executive officers, and protecting against threats to federal court access when citizens have legitimate complaints about unconstitutional governmental action.

SUMMARY OF ARGUMENT

This case presents a recurring, exceptionally important issue of citizen access to federal court when personal liberty is threatened by ongoing executive-branch action that violates essential separation-of-powers principles. It also highlights the intolerable predicament faced by aggrieved citizens when structural constitutional violations are allowed to persist until any meaningful remedy evaporates.

The Eleventh Circuit denied petitioner access to federal court to challenge what he credibly alleges to be an ongoing constitutional injury—being forced to defend a Securities and Exchange Commission proceeding in which the presiding administrative law judge ("ALJ") is unconstitutionally protected by at least two levels of protection from presidential removal. That denial, based on a flawed interpretation of *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), virtually ensures that petitioner will never obtain a meaningful remedy for his constitutional injury. It also contravenes this Court's controlling decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), which was not mentioned in the decision below.

The agency seeking to barricade the courthouse doors in this case—the SEC—is no stranger to this Court. Over the past decade, the Court has granted certiorari to hear four separate challenges to long-standing SEC statutory interpretations that were not within the agency's core expertise. In all four cases the Court concluded that the SEC had erred, sometimes for decades and sometimes with the

agreement of lower courts. *See Gabelli v. SEC*, 568 U.S. 442, 454 (2013) (unanimously rejecting SEC position that limitations period of 28 U.S.C. § 2462 is subject to "discovery rule"); *Kokesh v. SEC*, 137 S. Ct. 1635, 1645 (2017) (unanimously rejecting SEC position that disgorgement claims are exempt from the limitations period of 28 U.S.C. § 2462); *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (holding, after SEC belatedly confessed error, that SEC ALJs were unconstitutionally appointed); *Liu v. SEC*, 140 S. Ct. 1936, 1944-50 (majority), 1953-56 (dissent) (2020) (both majority and sole dissent questioning SEC position that disgorgement order was "equitable relief" under 15 U.S.C. § 78u(d)(5)); *see also Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 780-81 (2018) (unanimously invalidating SEC rule due to agency's misinterpretation of Dodd-Frank whistleblower statute).

As this case illustrates, the SEC is again steering lower courts astray on an important legal issue that is beyond the agency's competence. Moreover, because many other statutory administrative schemes feature comparable versions of the judicial-review scheme at issue here, resolution of this case could have far-reaching benefits that go beyond this particular case.

There is no circuit split on the question presented. But two circuit judges, several district judges, and at least two commentators have persuasively argued against the approach taken by the Eleventh Circuit in this case and by four other circuits in similar cases. Given the snowball effect of each circuit largely following the others on the relevant issue, a circuit split might never emerge and there is no reason to

wait. *Amici* strongly agree with petitioner that this is a case where "the parade is marching in the wrong direction." *United States v. Smith*, 440 F.2d 521, 527 (7th Cir. 1971) (Stevens, J., dissenting). This Court's intervention is urgently needed to turn that parade around.

ARGUMENT

I. The Decision Below Curtails and Disincentivizes an Essential Means of Challenging Structural Separation-of-Powers Violations.

Federal district courts are generally presumed to have plenary jurisdiction when private citizens and businesses allege colorable claims that federal executive-branch agencies and officials are pursuing punitive governmental action against them without legitimate constitutional authority. Such claims present quintessential federal questions falling squarely within the jurisdictional grant of 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution … of the United States"); *see also* 5 U.S.C. § 702 (authorizing judicial relief, including injunctive relief, when a person is "suffering legal wrong because of agency action, or [is] adversely affected or aggrieved by agency action"). The exercise of federal court jurisdiction over these claims is necessary to protect constitutional commitments to the rule of law, separation of powers, due process, individual liberty, and political accountability. *See generally Bell v. Hood*, 327 U.S. 678, 684 (1946) ("it is established practice for [the Supreme Court] to sustain the jurisdiction of federal courts to issue

injunctions to protect rights safeguarded by the Constitution"); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) ("injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally").

These principles apply in full force when, as here, a private party alleges a structural constitutional defect that violates the Constitution's separation of powers. Indeed, because the political branches do not always jealously guard their constitutionally defined roles when structuring government agencies, challenges by private parties often serve as the most effective vehicles to enforce separation of powers. *See, e.g., Seila Law LLC v. Consumer Fin. Protection Bd.*, 140 S. Ct. 2183 (2020); *Lucia*, 138 S. Ct. 2044; *Free Enter. Fund*, 561 U.S. 477. Allowing these challenges is therefore vital to our constitutional order. Absent compelling evidence, courts should not infer congressional intent to strip courts of jurisdiction to consider them.

The approach taken by the court below, like that taken by other circuits in similar cases, severely curtails and disincentivizes private challenges to structural separation of powers violations. The court held that a common statutory feature of federal administrative schemes—allowing parties aggrieved by an agency "final order" to seek review of that order in a federal appeals court—evidences a "fairly discernable" intent by Congress to strip federal district courts of jurisdiction to hear structural constitutional challenges to the agency's process even before that process results in a final order, and when it is not known whether or when the process will result

in a final order that aggrieves anyone. That approach effectively turns the usual presumption of district court access on its head whenever Congress has provided for eventual appeals court review of final agency orders. As relevant here, it requires private citizens and businesses to endure the entire, multi-year gauntlet of the SEC's administrative enforcement process before they are afforded an opportunity to convince a court that the process itself is unconstitutional.

This approach delays vital private challenges to structural constitutional defects in the agency's process until years after injury is suffered, leaving challengers with no timely or meaningful remedy. More troubling, it dramatically shrinks the universe of potential private challenges because, as explained below, the vast majority of SEC administrative respondents are never afforded the chance to challenge the constitutionality of the SEC's process after it has run its full course.

II. The Decision Below Contravenes Controlling Precedent.

Notwithstanding the general presumption of district court jurisdiction over constitutional claims, in certain cases—most notably *Thunder Basin Coal Co.*, 510 U.S. 200, *Free Enterprise Fund*, 561 U.S. 477, and *Elgin v. Department of Treasury*, 567 U.S. 1 (2012)—this Court has recognized a limited exception in the administrative law context. The cases hold that if Congress has enacted a statute providing for delayed, post-agency appellate review of adverse agency action, and if Congress's intent to strip district courts of their presumptive jurisdiction over challenges to agency

action is either explicit or "fairly discernible," then district courts may lack jurisdiction to adjudicate at least some kinds of challenges to agency action notwithstanding Section 1331. *See Free Enter. Fund*, 561 U.S. at 489.

In applying these principles to the Securities Exchange Act of 1934 (the "Exchange Act"), *Free Enterprise Fund* is controlling. The Court there held that Exchange Act Section 25(a), 15 U.S.C. § 78y(a)—the same statute at issue here—evidences no "fairly discernable" congressional intent to strip district courts of jurisdiction over structural constitutional challenges they would otherwise be empowered to entertain.

> [T]he text [of Section 25(a)] does not expressly limit the jurisdiction that other statutes confer on district courts. *See, e.g.*, 28 U.S.C. §§ 1331, 2201. *Nor does it do so implicitly*.

561 U.S. at 489 (emphasis added). Yet directly at odds with this controlling precedent, and without mentioning it, the decision below concluded that Section 25(a) *does* implicitly strip district courts of jurisdiction over cases like this one.

In addition to analyzing the statutory text, *Free Enterprise Fund* gave significant weight to the fact that the SEC had not yet issued a final order against the petitioners who were seeking relief from an administrative process that might eventually culminate in one. This Court held that individuals who assert structural constitutional objections to the administrative process they are being forced to endure need not wait to find out whether a final order will

ultimately materialize, nor do they need to "bet the farm" by taking action that would ensure or expedite issuance of such an order. *Id.* at 490-91 (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007)); *cf. Sackett v. EPA,* 566 U.S. 120, 130-31 (2012) (regulated parties need not choose "voluntary compliance" in order to obtain judicial review of agency action).

Petitioner's predicament in this case is materially similar to that of the petitioners in *Free Enterprise Fund*. The SEC has not issued a final order against him and there is no assurance that it will ever do so. In theory he could have prematurely invited such an order and expedited his ticket to a federal appeals court by "betting the farm" on his constitutional claim — for example, by refusing to participate in the SEC process (and thereby incurring sanctions by default), or by confessing to a violation he does not believe he committed. But *Free Enterprise Fund* makes clear that he is not required to take that gamble. 561 U.S. at 490-91.

Some courts have suggested that, unlike in *Free Enterprise Fund*, the farm is "already on the table" whenever the SEC initiates an administrative enforcement proceeding like the one now pending against petitioner. *See Cochran v. SEC*, 969 F.3d 507, 515 (5th Cir. 2020) (quoting *Bank of La. v. FDIC*, 919 F.3d 916, 927 (5th Cir. 2019)). But that suggestion misunderstands the SEC's administrative enforcement process. SEC orders instituting administrative enforcement proceedings are not final orders. They are preliminary orders that merely initiate proceedings to determine *whether* a final order

should someday be issued. *See In re Gibson*, Exchange Act Release No. 77466, at 1, 10 (March 29, 2016) (SEC order instituting proceedings against Gibson). Allegations recited against a respondent at this stage are explicitly those of SEC-subordinate staff-level employees, not of the statutorily-empowered Commissioners. *Id.* In these proceedings the Commissioners place themselves in the prospective role of final adjudicators—the administrative equivalent of a court of appeals—and they thus must remain strictly neutral and unbiased unless and until called upon to adjudicate the staff's allegations. For relevant purposes, the SEC's role here is materially similar to its prospective adjudicative role in *Free Enterprise Fund*, because in neither case had the SEC yet adjudicated the matter or issued any final order that was subject to appeals court review under Exchange Act Section 25(a).

Even if *Free Enterprise Fund* were not directly controlling, there is no evidence that Congress even thought about stripping district courts of jurisdiction over cases filed before the SEC issues any final order, much less intended to do so. The available textual evidence suggests otherwise. For example, post-agency appellate review under Section 25(a) is explicitly permissive rather than mandatory. *See* 15 U.S.C. § 78y(a)(1) (an aggrieved litigant "may" seek post-agency review in a court of appeals). This permissive language must also be read in conjunction with a nearby provision that explicitly preserves "any and all" other avenues of relief—presumably including the right to seek appeals court review *after* any final order is issued. *See id*. § 78bb(a)(2) ("the rights and remedies provided by this chapter shall be in addition

to any and all other rights and remedies that may exist at law or in equity"); *cf. Sackett*, 566 U.S. at 129 ("if the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the [Administrative Procedure Act's] presumption of reviewability for all final agency action, it would not be much of a presumption at all"). In addition, Section 25(a) makes clear that appellate court jurisdiction becomes exclusive only after the SEC issues a final order, only if an aggrieved litigant chooses to invoke it and, even then, only when the SEC files its administrative record with the court. *See id.* § 78y(a)(3). Read together, these statutory provisions negate any reasonable inference that Congress intended even to limit, much less to divest, district court jurisdiction under 28 U.S.C. § 1331 to adjudicate colorable constitutional challenges raised months or even years before any final order is issued.

III. The Decision Below Deprives Individuals of Any Meaningful Remedy.

The decision below—and similar decisions it cites from other courts—rests on the mistaken premise that the kind of here-and-now constitutional injury suffered by petitioner can be meaningfully remedied on post-agency review under Exchange Act Section 25(a). That is plainly not the case. Most SEC administrative respondents never get *any* opportunity to seek post-agency review under Section 25(a), and even for the relatively few who do, that review comes too late to provide meaningful relief for the type of constitutional injury suffered.

For example, post-agency review in a court of appeals under Section 25(a) is categorically

unavailable to SEC litigants who ultimately prevail in the administrative process, because the statute allows review only to litigants who are "aggrieved" by the SEC's "final order." 15 U.S.C. § 78y(a)(1). According to published empirical analyses, SEC administrative litigants prevail in at least ten percent of fully adjudicated cases. Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315, 346-53 (2017); Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015).

Indeed, this was the fate of at least two SEC litigants in cases that were cited by the court below—that is, after these litigants were denied district court access to press their structural constitutional challenges, they endured the objectionable SEC administrative process and ultimately prevailed on the merits. *See In re Tilton*, SEC Initial Decision No. 1182, 2017 SEC LEXIS 3051 (ALJ Sept. 27, 2017) (ALJ initial decision dismissing charges) and Exchange Act Release No. 4815, 2017 SEC LEXIS 3707 (Nov. 28, 2017) (SEC Finality Notice); *In re Hill*, SEC Initial Decision No. 1123 (ALJ Apr. 18, 2017) (ALJ initial decision dismissing charges) and Exchange Act Release No. 34-80953 (June 16, 2017) (SEC Finality Notice). Likewise, after this Court upheld their structural constitutional challenge, the petitioners in *Free Enterprise Fund* ultimately achieved a resolution with the Public Company Accounting Oversight Board in which their matter was closed without any final order being issued. *See Beckstead and Watts Settles Inspection Case with PCAOB*, ACCT. TODAY (Feb. 23, 2011).

Although successful litigants undoubtedly welcome their escape from the threat of punitive sanctions, Section 25(a) provides no remedy for the constitutional injury they have already endured from having been forced for many months (and perhaps years) to obey the *ultra vires* commands of a federal officer. Nor do they have any incentive to devote additional time and expense to pressing ahead with their constitutional claims, because by that point the constitutional injury cannot be undone or meaningfully remedied by a court of appeals. Accordingly, under the approach taken by the court below, a successful defense on the underlying merits of the SEC charges does nothing to remedy the constitutional injury already suffered nor to "moot" that injury; to the contrary, success on the merits renders the *constitutional* injury permanent, irreversible, and entirely unreviewable.

Section 25(a) likewise offers no relief to the large portion of SEC administrative litigants who agree to a consent order with the SEC in settlement of their administrative case. Although many litigants settle before an ALJ is even assigned to their case, others settle during or after the ALJ phase of the proceeding. *See* Velikonja, 92 WASH. L. REV. at 340, 346, 364-65.[2]

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[2] At least some administrative litigants who settle immediately—that is, before an ALJ is appointed—reportedly do so partially out of concern about the perceived unfairness of ALJ proceedings and the knowledge that independent oversight by any Article III judicial officer is unlikely to occur for years, if ever. *See* Velikonja, 92 WASH. L. REV. at 365 (noting that "willingness to settle may be affected by their perception that ALJs are less fair," and that "[t]he SEC has reportedly threatened investigated parties with litigation before ALJs if they are unwilling to

Indeed, this was the recent fate of another SEC litigant denied access to federal court to press the same structural constitutional claim that petitioner seeks to litigate here. *See In re Lucia*, Exchange Act Release No. 34-89078 (June 16, 2020) (SEC settlement order); *see also In re Timbervest, LLC*, Exchange Act Release No. 40-5093, 2018 SEC LEXIS 3633 (Dec. 21, 2018) (Commission final settlement order without fraud finding issued more than five years after initiation of administrative proceeding and more than four years after an unconstitutional ALJ, following a hearing, had imposed fraud-based penalties that were then upheld on initial appeal to SEC).

Regardless of when they settle, however, none of these settling litigants have any hope of obtaining court of appeals review of their case under Section 25(a), because SEC rules and policy require all settling litigants to expressly waive their right to "judicial review by any court." SEC R. of Prac. 240(c)(4)(v), 17 C.F.R. § 201.240(c)(4)(v). Section 25(a) thus offers no more help to these settling litigants than it does to prevailing litigants, because in either case their constitutional injury becomes permanent, irreversible, and unreviewable. Stated another way, if a litigant settles after enduring proceedings before

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settle"); U.S. Chamber of Commerce Ctr. for Capital Markets Competitiveness, *Examining U.S. Securities and Exchange Commission Enforcement: Recommendations on Current Processes and Practices* 12 (2015) (hereinafter "*Chamber Recommendations*") ("[SEC] settlements are increasingly likely to be settled administrative proceedings rather than civil injunctive actions").

an unconstitutional ALJ, the SEC essentially gets away with that constitutional violation, scot-free.

Nor is it a practical option for SEC administrative litigants to stand on principle and refuse to participate in what they believe to be *ultra vires* proceedings under the control of a federal officer who lacks lawful authority to conduct the proceeding or to issue commands. Even if a litigant nominally preserves the constitutional objection for later appeal, otherwise declining to participate in the proceeding would mean "betting the farm" on the constitutional objection, because refusing to obey the ALJ would invariably lead to a default on the merits of the SEC's underlying securities law claims, with associated punitive sanctions imposed. *See generally* SEC R. of Prac. 155, 17 C.F.R. § 201.155 (default if litigant fails to appear at a hearing or conference, fails to answer or respond to a motion, or fails to timely cure a deficient filing), SEC R. of Prac. 180, 17 C.F.R. § 201.180 (default if litigant fails to make a required filing or to timely cure a deficient filing), SEC R. of Prac. 220(f), 17 C.F.R. § 201.220(f) (default if litigant fails to file an answer), SEC R. of Prac. 221(f), 17 C.F.R. § 201.221(f) (default if litigant fails to appear at a prehearing conference), and SEC R. of Prac. 310, 17 C.F.R. § 201.310 (default if litigant fails to appear at a hearing).

Moreover, that default would be virtually impossible to undo later without ultimately winning the constitutional argument, because the SEC would almost certainly affirm the default if appealed, and unless the court of appeals ultimately sustained the constitutional objection, the court would likely be required by Section 25 to uphold the default on the

merits. *See* 15 U.S.C. § 78y(c)(1) ("No 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(a)(4) (SEC factual findings are "conclusive" as long as supported by "substantial evidence").[3]

All of which leaves the relatively few SEC litigants who have the resources and fortitude to endure the entire SEC administrative process but ultimately lose on the merits.[4] Then and only then can they finally seek the limited appellate relief promised by Section 25(a). But even if they eventually prevail

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[3] Arguing petitioner's structural constitutional violation to the SEC commissioners would plainly be futile considering the SEC's many adjudicative opinions already rejecting this argument. *See, e.g.*, *In re John Thomas Capital Mgmt. Grp. LLC*, Exchange Act Release No. 33-10834, at 42-44 (Sept. 4, 2020); *In re OptionsXpress, Inc.*, Exchange Act Release No. 33-10125, 2016 SEC LEXIS 2900, at *75-79 (Aug. 18, 2016) (Opinion of the Commission); *In re Timbervest, LLC*, Exchange Act Release No. 40-4197, 2015 SEC LEXIS 3854, at *46-49 (Sept. 17, 2015) (Opinion of the Commission).

[4] As noted by one academic who has conducted exhaustive research on SEC enforcement case statistics: "Only a small minority of enforcement actions are contested to the end and ultimately decided by a dispositive motion or after trial. Of the cases that are not filed as settled, more than half ultimately settle. Of the remainder, most are decided by default or voluntarily dismissed because the defendant died, ceased to exist, could not be served, or some similar reason, and only a sliver are contested to the end and decided by a judge, a jury, or an ALJ." Velikonja, 92 WASH. L. REV. at 340; *see also Chamber Recommendations*, *supra* note 2, at 12 (most SEC enforcement settlements are effectuated administratively rather than in federal court).

on their constitutional claim in the appeals court, by that point the constitutional injury has already been suffered and is effectively irreversible. The court of appeals cannot undo or meaningfully remediate it at that point. Indeed, ironically, the most likely outcome would be the Pyrrhic victory of a remand to the SEC to start all over again before another ALJ purporting to be cleansed of all constitutional infirmity, as happened when this Court held that SEC ALJs were unconstitutionally appointed. *See Lucia*, 138 S. Ct. at 2055-56 ("the appropriate remedy for an adjudication tainted with an appointments violation is a new hearing before a properly appointed official" (quotation marks omitted)); *In re Pending Admin. Proceedings*, Exchange Act Release No. 33-10536, 2018 SEC LEXIS 2058 (Aug. 22, 2018) (reassigning more than 100 then-pending administrative proceedings pursuant to *Lucia*).

In sum, far from guaranteeing a meaningful remedy for the type of constitutional injury alleged by petitioner, post-agency appellate review under Section 25(a) is a largely empty promise for most SEC administrative litigants All those who settle with the SEC or prevail on the merits are denied any opportunity to seek such review and, even for those who lose on the merits or by default, review comes far too late or carries far too much litigation risk to be meaningful. To effectively protect private citizens from the irreparable constitutional harm inflicted by a constitutionally illegitimate law-enforcement proceeding launched against them, district courts must be available and stand ready to intervene before the injury becomes effectively irremediable.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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