No. 21-1239

IN THE

Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION, ET AL.,

Petitioners,

v.

MICHELLE COCHRAN,

Respondent.

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

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF RESPONDENT

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Respondent.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF believes judicially created barriers to meaningful Article III review are inconsistent with the separation of powers. Those facing *ultra vires* or unconstitutional agency enforcement actions should not have to face years of potentially ruinous costs to have their day in court.

Consistent with AFPF's particular interest in this case, AFPF has also appeared as *amicus curiae* in *Axon Enterprise, Inc. v. Federal Trade Commission,* No. 21-86, which presents the related question "[w]hether Congress impliedly stripped federal district courts of jurisdiction over constitutional challenges to the Federal Trade Commission's structure, procedures, and existence by granting the

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[1] All parties have consented to the filing of this brief. *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

courts of appeals jurisdiction to 'affirm, enforce, modify, or set aside' the Commission's cease-and-desist orders." Axon Cert. Pet. i. AFPF believes that the FTC and SEC inhouse administrative enforcement schemes are *both* unconstitutional for many reasons. And *neither* the FTC Act *nor* the SEC Act implicitly strip district court jurisdiction over constitutional (and at least some *ultra vires*) challenges to these administrative agencies' inhouse administrative prosecutions.

SUMMARY OF ARGUMENT

It is not the law that an agency can do whatever it wants for as long as it wants to a business or individual—no matter how *ultra vires*, abusive, or unconstitutional—without being subject to judicial review unless and until that abusive process ends. Were that the case, agency enforcement action would supplant the jurisdiction of Article III courts even in cases of constitutional questions, presenting a clear violation of the separation of powers. That proposition is particularly true with respect to so-called "independent" agencies, where even the political branches cannot meaningfully intervene, leaving agencies wholly unaccountable until any opportunity for meaningful redress has been extinguished.

Nothing in the SEC Act—or materially indistinguishable statutory schemes of other agencies like the FTC—shutters the courthouse doors for those facing unconstitutional agency enforcement actions. Nothing in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), or any of this Court's other precedent purports to bar review of Ms. Cochran's claims. In

fact, this Court's precedent in *Free Enterprise Fund v. Public Co. Accounting Oversight Board,* 561 U.S. 477 (2010), says the exact opposite.

Any handwringing about administrative or judicial efficiency, or purported administrative expertise, as justifying this abdication of the judicial role—particularly as to constitutional questions and statutory interpretation—must yield in the face of citizens' basic right to be free from extralegal administrative proceedings. Courts must retain jurisdiction, in the Article III sense, to act as a necessary safety valve for meritorious *ultra vires* and constitutional claims—particularly structural constitutional claims that go to the very legality of the process, as is the case here.

Here, the district court had federal question jurisdiction over Ms. Cochran's constitutional claims. Nothing in the SEC Act purports to bar district court review of these claims. Accordingly, the district court had a duty to exercise jurisdiction and address the merits of Ms. Cochran's constitutional objections to the SEC's administrative prosecution.

On the merits, the SEC's administrative process offends the Constitution in many ways. If the SEC wants to prosecute Ms. Cochran and seek substantial civil penalties, it should be required to prove up its case in federal court, subject to the protections of the Federal Rules of Civil Procedure and the Federal Rules of Evidence, not to mention Article III, due process, and the Seventh Amendment. The Constitution requires no less.

ARGUMENT

I. THE SEC ACT DOES NOT IMPLIEDLY STRIP JURISDICTION OVER MS. COCHRAN'S CLAIMS.

A. Courts Have Jurisdiction Over Constitutional and *Ultra Vires* Challenges to SEC Administrative Prosecutions.

Ms. Cochran has brought substantial claims against the SEC. Section 1331 states that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331; *see also id.* § 1361 (mandamus). "Not some or most—but all." Pet. App. 6a. 5 U.S.C. § 702 waives SEC's sovereign immunity for all "agency actions," *see Trudeau v. FTC*, 456 F.3d 178, 187 (D.C. Cir. 2006), including the filing of administrative charges, *see FTC v. Standard Oil Co. of California*, 449 U.S. 232, 238 n.7 (1980). The Declaratory Judgment Act authorizes declaratory and injunctive relief.[2] 28 U.S.C. §§ 2201, 2202; *see Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution[.]"); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021) ("[A] person exposed to a risk of future harm may pursue . . . injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial.").

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[2] In addition, under the All Writs Act, courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions[.]" 28 U.S.C. § 1651(a).

Thus, the district court had a duty to exercise federal-question jurisdiction over Ms. Cochran's constitutional claims, and the power to grant Ms. Cochran the relief she sought, absent a jurisdiction-stripping statute.[3] There is no such statute. *See also* Pet. App. 7a ("The statute says nothing about people . . . who have not yet received a final order of the Commission. Nor does it say anything about people . . . who have claims that have nothing to do with any final order that the Commission might one day issue.").

To be sure, Congress may statutorily limit the subject-matter jurisdiction of lower federal courts. *See* U.S. Const. Art. III, § 2; 5 U.S.C. § 703; *see also Sheldon v. Sill,* 49 U.S. (8 How.) 441, 449 (1850). But "[i]n light of §1331, the question is not whether Congress has specifically conferred jurisdiction, but whether it has taken it away." *Elgin*, 567 U.S. at 25 (Alito, J., dissenting). If Congress wants to do that, it must clearly say so. *See Cameron v. EMW Women's Surgical Center, P.S.C.*, 142 S. Ct. 1002, 1009 (2022) ("We do not read a statute or rule to impose a jurisdictional requirement unless its language clearly does so." (citing *Henderson v. Shinseki*, 562 U.S. 428, 439 (2011)).

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[3] As Judge Silberman has explained: "The courts' power to impose equitable remedies against agencies is broader than its power to impose legal remedies against individuals. . . . The court's power to enjoin unconstitutional acts by the government . . . is inherent in the Constitution itself." *Hubbard v. U.S. EPA, Adm'r*, 809 F.2d 1, 11 n.15 (D.C. Cir. 1986) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

Here, Congress has not clearly stated an intent to shut the courthouse doors to Ms. Cochran's constitutional claims.[4] The SEC's judicial review provision creates only a limited exception to the general rule of district-court jurisdiction by providing jurisdiction in the Courts of Appeals when a petition for review of a final Commission order is filed in a U.S. Court of Appeals, "which *becomes exclusive* on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part." 15 U.S.C. § 78y(a)(3) (emphasis added). "[T]here would be no point in making jurisdiction 'exclusive' in the court of appeals if no other court ever had jurisdiction." Pet. App. 9a. No other straight-to-the-Court-of-Appeals process is provided to transfer jurisdiction away from the district court when the case presents itself in another posture. No exception to ordinary jurisdiction of the federal courts can be inferred from the narrow exclusive jurisdiction provision in the SEC Act for appeals from final orders. *Cf. E.I. Du Pont de Nemours & Co. v. FTC*, 488 F. Supp. 747, 750 (D. Del. 1980) (applying this analysis to analogous FTC Act). *See generally* Antonin Scalia & Bryan Garner, *Reading Law* 107 (2012).

Rather, the SEC Act quite sensibly places exclusive jurisdiction in the Courts of Appeals when a suit involves a challenge to an SEC final order—the role of the court in such circumstances is more akin to

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[4] Even if the question was close, any statutory ambiguities should be construed against the interests of its drafter: the government. *See also Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring in judgment). The benefit of any doubt must go to Ms. Cochran.

that of an appellate court and, given the administrative proceedings that have already occurred, going straight to the court of appeals allows for more prompt completion of judicial review. But this path for exclusive review of a particular type of agency order indicates nothing about the availability of judicial review for other claims involving the agency. *Cf. Sackett v. EPA*, 566 U.S. 120, 129 (2012) ("[I]f the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA's presumption of reviewability for all final agency action, it would not be much of a presumption at all.").

This Court has previously explained how the judicial review provision at issue here works *with* other statutes, not against them: "[T]he text does not expressly limit the jurisdiction that other statutes confer on district courts. Nor does it do so implicitly." *Free Enter. Fund*, 561 U.S. at 489 (citing 28 U.S.C. §§ 1331, 2201); *see also* Pet. App. 25a ("To put it plainly: *Free Enterprise Fund* held that § 78y does not provide an adequate possibility of meaningful judicial review for challenges to the structure of the Exchange Act's statutory-review scheme."). "Here, the text is as unambiguous as can be. Section 1331 creates jurisdiction, and § 78y strips only part of it." Pet. App. 35a (Oldham, J., concurring); *see also Tilton v. SEC*, 824 F.3d 276, 299 n.6 (2d Cir. 2016) (Droney, J., dissenting).

The SEC Act provides for jurisdiction channeling to the Courts of Appeals of claims challenging an SEC final order; it otherwise leaves in place district courts' general federal-question jurisdiction. District courts have a "virtually unflagging" obligation to decide

cases within their jurisdiction. *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 572 U.S. 118, 126 (2014); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) ("We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."). And as Chief Justice Marshall has explained, courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. . . . Questions may occur which . . . [courts] would gladly avoid; but . . . [courts] cannot avoid them." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). That observation resonates here. For "'[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.'" *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358–59 (1989) (Scalia, J.) (quoting *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909)).

If the SEC scheme is unconstitutional, that is for the courts to decide—let the chips fall where they may. *Cf. Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021) ("[W]henever a separation-of-powers violation occurs, any aggrieved party with standing may file a constitutional challenge."). But "[t]he SEC should not be the decider of its own constitutionality." Linda Jellum, *The SEC's Fight to Stop District Courts From Declaring Its Hearings Unconstitutional*, 101 Tex. L. R. (forthcoming 2022).[5] And it is no answer to "allow

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[5] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4041454.

the agency to duck and weave its way out of meaningful judicial review" of that question. *See Fleming v. USDA*, 987 F.3d 1093, 1111 (D.C. Cir. 2021) (Rao, J., concurring in part, dissenting in part).

B. Case Law Does Not Bar the Courthouse Doors to Constitutional Claims.

Nor does case law bar the courthouse doors. *Thunder Basin*, 510 U.S. 200, and *Elgin*, 567 U.S. 1, were both rooted in implied congressional intent. The principles they announce cannot be transplanted from old soil to new without an assessment of the congressional intent embodied there. And that assessment of the SEC Act confirms Congress did not intend to preclude Ms. Cochran from raising her claims in federal district court. Nothing in *Thunder Basin* or *Elgin* compels otherwise. *See also* Pet. App. 78a (Oldham, J., concurring) ("*Elgin* did not purport to transform the *Thunder Basin* test from a claim-focused inquiry to a case-focused inquiry.").

The SEC Act's history and structure is significantly different from that of the statutes at issue in *Thunder Basin* and *Elgin*. In *Thunder Basin*, for example, the Mine Act's history shows Congress specifically intended to *narrow* the scope of district court review. *See* 510 U.S. at 209–11 & n.15 (noting Congress amended the Act to eliminate district court review and finding "the legislative history and these amendments to be persuasive evidence that Congress intended to" preclude judicial review). Similarly, Congress intentionally *narrowed* the scope of district court jurisdiction when it enacted the Civil Service Reform Act ("CSRA"), the statute at issue in *Elgin*. *See* 567 U.S. at 11–12. The SEC Act's history includes

no similar history. The Mine Act also allowed aggrieved mine operators, not the Secretary, to initiate actions before the Commission. *Thunder Basin*, 510 U.S. at 209. And the CSRA set forth in "painstaking detail . . . the method for covered employees to obtain review of adverse employment actions[.]" *Elgin*, 567 U.S. at 11–12.

By contrast, businesses and individuals like Ms. Cochran have no ability to obtain review of their constitutional challenges to the SEC's authority through the SEC Act scheme unless and until the SEC issues a final order against them. Moreover, the Mine Act involved administrative proceedings before an independent commission (rather than the agency enforcing the Mine Act), *see Thunder Basin*, 510 U.S. at 204; *Sec'y of Labor v. Knight Hawk Coal, LLC,* 991 F.3d 1297, 1300 (D.C. Cir. 2021), and the CSRA involved actions by the government as an employer, rather than a regulator*, see United States v. Fausto*, 484 U.S. 439, 443–47 (1988); *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 448 (D.C. Cir. 2009) (Kavanaugh, J.) ("The CSRA is also exclusive: It constitutes *the* remedial regime for federal employment and personnel complaints."). Those are different animals from inhouse enforcement proceedings brought by administrative agencies, particularly when, as here, those enforcement proceedings are interfering with private rights.

Thunder Basin itself confirms that the district court had jurisdiction. There, the Court emphasized that preclusion does not apply to claims that are "wholly collateral to a statute's review provisions and outside the agency's expertise, particularly where a finding of preclusion could foreclose all meaningful

judicial review." *Thunder Basin*, 510 U.S. at 213 (cleaned up). Nor does it preclude all constitutional claims. *See id.* at 216–18; *Ironridge Global IV, Ltd. V. SEC*, 146 F. Supp. 3d 1294, 1303 n.5 (N.D. Ga. 2015) ("[S]ince *Thunder Basin*, other courts have held that the Mine Act does not preclude all constitutional claims from district court jurisdiction.") (citation omitted)); *see also* Luis Inaraja Vera, *Delayed Judicial Review of Agency Action*, 56 Harv. J. on Legis. 199, 228 (2019) (*Thunder Basin* "was not a facial challenge to the constitutional validity of the enforcement and judicial review provisions of the Mine Safety Act." (citing *Thunder Basin*, 510 U.S. at 218 n.22)). Here, Ms. Cochran's constitutional claims are collateral to the enforcement proceeding, rely on superior law, and the SEC lacks expertise or authority to address these claims. *Cf. Free Enter. Fund*, 561 U.S. at 491 & n.2 (noting "Petitioners' constitutional claims are . . . outside the Commission's competence and expertise").

Likewise, *Standard Oil*, 449 U.S. 232, if anything, shows that the district court should have reached the merits of Ms. Cochran's claims, confirming that issuance of an administrative complaint is an "agency action" that waives sovereign immunity.[6] *See id.* at 238 n.7. But that is all. *Standard Oil* did not address the issue of jurisdiction, instead solely addressing the

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[6] The district court mistakenly overread *Standard Oil* to foreclose the possibility of injunctive relief. *See* Pet. App. 143a–144a ("Were it not for the problem created by the ruling of the Supreme Court in [*Standard Oil v.*] *Federal Trade Commission*, the court would give serious consideration to grant of plaintiff's request for a preliminary injunction. As it is, the court considers that it is not authorized to do so.").

APA's general requirement of "final agency action" to state a claim on which relief may be granted under the APA. *See id.* at 244; *see* Pet. App. 26a ("*Standard Oil* did not concern implied jurisdiction stripping; rather, the issue before the Court was whether the FTC had taken a 'final agency action' within the meaning of the Administrative Procedure Act[.]" (citations omitted)); *see also Athlone Indus., Inc. v. Consumer Prod. Safety Com.*, 707 F.2d 1485, 1489 n.30 (D.C. Cir. 1983) (distinguishing *Standard Oil*).

That hurdle does not apply in cases claiming constitutional violations or *ultra vires* agency action. To the extent that dicta in *Standard Oil* can be used to support the proposition that no irreparable harm flows from the disruption and litigation expense caused by protracted administrative enforcement proceedings, *see* 449 U.S. at 244, and thus the federal judiciary is powerless under all circumstances to review administrative agency enforcement proceedings (it does not), that decision should be narrowed or abandoned.

C. District Courts Have Jurisdiction Over At Least Some *Ultra Vires* Claims.

While not directly at issue here, this Court should also make clear nothing in the SEC Act purports to strip jurisdiction over *ultra vires* claims, particularly in extreme cases of SEC overreach causing severe

hardship,[7] consistent with pre-*Thunder Basin* circuit precedent. *See, e.g.*, *Touche Ross & Co. v. SEC,* 609 F.2d 570, 575–76 (2d Cir. 1979) (citing *Sterling Drug, Inc. v. Weinberger*, 509 F.2d 1236, 1239 (2d Cir. 1975) (Friendly, J.)). *Cf. American Gen. Ins. Co. v. FTC,* 496 F.2d 197, 200 (5th Cir. 1974) (possible jurisdiction over "gross and egregious" errors). After all, "[t]he acts of all [government] . . . officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *Am. Sch. Of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902); *see, e.g., Leedom v. Kyne,* 358 U.S. 184 (1958); *Stark v. Wickard,* 321 U.S. 288 (1944). *See generally Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, 1327–29 (D.C. Cir. 1996).

As Judge Silberman has observed: "If a plaintiff is unable to bring his case predicated on either a specific or a general statutory review provision, he may still be able to institute a non-statutory review action."[8] *Chamber of Commerce*, 74 F.3d at 1327 (citing Byse

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[7] Nor does *Standard Oil* bar review of all *ultra vires* claims. *Cf. Pepsico, Inc. v. FTC*, 472 F.2d 179, 187 (2d Cir. 1972) (Friendly, J.) (tentatively accepting principle that "one can find 'final agency action for which there is no other adequate remedy in a court' if an agency refuses to dismiss a proceeding that is plainly beyond its jurisdiction as a matter of law or is being conducted in a manner that cannot result in a valid order").

[8] Subject-matter jurisdiction to adjudicate these types of *ultra vires* claims seeking negative injunctions does not hinge on the presence or absence of "final agency action," as these are not APA claims. *See also Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991) ("The judicial review provisions of the APA are not jurisdictional[.]").

and Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308, 321 (1967)); *see* 28 U.S.C. § 1361. These types of claims would fall outside the SEC Act's review scheme, as SEC would not have any lawful authority even to bring the inhouse enforcement action.[9]

D. The SEC Act and the FTC Act Should Be Interpreted *In Para Materia*: Neither Impliedly Shutters the Courthouse Doors.

"As the federal government has previously explained, the SEC statutory review scheme is materially identical to the FTC statutory review scheme." Cert. Pet. 6 (citing BIO 14, *Axon Enterprise*, (No. 21-86)); *see also Axon Enter. v. FTC*, 986 F.3d 1173, 1180 (9th Cir. 2021) (noting FTC Act's review scheme "is almost identical to the statutory review provision in the SEC Act"), cert. granted in part, 142 S. Ct. 895 (2022). Amicus agrees insofar as neither statute implicitly strips district court jurisdiction to adjudicate constitutional (and at least some *ultra vires*) challenges to ongoing administrative prosecutions, which, as discussed below, are unconstitutional for a host of reasons. *See infra* Section IV. That proposition also holds true with respect to materially identical statutory schemes

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[9] Usurper in unlawful office claims would also appear to fall outside the SEC Act and similar review schemes. *See generally Calcutt v. Fed. Deposit Ins. Corp.*, No. 20-4303, 2022 U.S. App. LEXIS 15979, at *111–14 (6th Cir. June 10, 2022) (Murphy, J., dissenting).

allowing other "independent" administrative bodies to bring inhouse prosecutions on their home turf.

II. SEC'S RIGGED ADMINISTRATIVE PROCESS IRREPARABLY HARMS MS. COCHRAN.

Absent judicial review now, Ms. Cochran will suffer multiple irreparable harms. Forcing Ms. Cochran through a protracted and expensive unconstitutional administrative process "before [she] may assert [her] constitutional claim in a federal court means that by the time the day for judicial review comes, [she] will already have suffered the injury that [she is] attempting to prevent." *Tilton*, 824 F.3d at 298 (Droney, J., dissenting); *see also Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2196 (2020) ("[W]hen . . . a [removal restriction] provision violates the separation of powers it inflicts a 'here-and-now' injury on affected third parties that can be remedied by a court." (citation omitted)); *Bond v. United States*, 564 U.S. 211, 222 (2011). *Cf. Doe Co. v. Cordray,* 849 F.3d 1129, 1136 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("Irreparable harm occurs almost by definition when a person or entity demonstrates a likelihood that it is being regulated on an ongoing basis by an unconstitutionally structured agency[.]"). That constitutes irreparable harm.

That is not the only irreparable harm at issue—even accepting the dubious proposition that the "expense and disruption of . . . protracted adjudicatory proceedings" is merely "part of the social burden of

living under government[.]"[10] *See Standard Oil*, 449 U.S. at 244. Time and again, courts have also held unrecoupable costs, reputational harm, adverse publicity, and loss of good will can constitute irreparable harm. *See, e.g., Odebrecht Constr. v. Sec'y, Fla. DOT*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("inability to recover monetary damages because of sovereign immunity" is irreparable harm); *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991) ("loss of customers and goodwill"); *Housworth v. Glisson*, 485 F. Supp. 29, 35 (N.D. Ga. 1978) ("injury . . . caused by the publicity attending the license revocations").[11] Individual respondents in SEC administrative prosecutions are also essentially unemployable in their chosen profession for the duration. *See* Cert. Amicus Br. of Raymond Lucia *et al*. 2, 12 (describing years-long irreparable harms caused by SEC inhouse enforcement proceedings). *Cf. Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1166 (9th Cir. 2011) (plaintiff's "likely loss

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[10] The district court was "deeply concerned with the fact that . . . [Ms. Cochran] already has been subjected to extensive proceedings before an ALJ who was not constitutionally appointed, and contends that the one she must now face for further, undoubtedly extended, proceedings likewise is unconstitutionally appointed." Pet. App. 143a. As the district court explained: "She should not have been put to the stress of the first proceedings, and, if she is correct in her contentions, she again will be put to further proceedings, undoubtedly at considerable expense and stress, before another unconstitutionally appointed administrative law judge." Pet. App. 143a.

[11] *Any* of these irreparable harms is sufficient to support an injunction.

of the ability to pursue her chosen profession" constitutes irreparable harm).

Further still, this Court's precedent indicates retrospective relief may be ill-suited for remedying removal defects. *See Collins*, 141 S. Ct. at 1787–89; Pet. App. 75a (Oldham, J., concurring) (suggesting that, under *Collins*, "it will be very challenging to obtain meaningful retrospective relief for constitutional removability claims" and, as a result, "challengers with meritorious removability claims may often be left without any remedy if they are forced to wait until after enforcement proceedings conclude").[12]

This should not be allowed to continue. This Court should not "require plaintiffs to bet the farm" as a condition precedent to obtaining judicial review. *See Free Enter. Fund*, 561 U.S. at 490–91. But that is exactly what is at stake. *See Tilton*, 824 F.3d at 298 n.5 (Droney, J., dissenting) ("[I]t might well be that choosing to litigate is, in fact, equivalent to 'betting the farm.'"); Pet. App. 69a (Oldham, J., concurring) ("Throughout the entire administrative process . . . the target must choose whether to settle or bet the farm.").[13] And the high (constitutionally dubious)

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[12] Unlike here, where Ms. Cochran seeks prospective injunctive relief, in *Collins*, "the only remaining remedial question concern[ed] retrospective relief." 141 S. Ct. at 1787; *id.* at 1795 (Gorsuch, J., concurring in part).

[13] *Cf. Axon,* 986 F.3d at 1193 (Bumatay, J., concurring in judgment in part, dissenting in part) ("Without a guaranteed

price respondents—particularly small businesses and individuals—must pay to access judicial review through the SEC Act scheme underscores the importance of district court jurisdiction. *See* Cert. Br. of Raymond Lucia *et al.* 12–13.

The SEC Act and similar statutory review schemes should not be interpreted to "enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the . . . [agency's] jurisdiction." *Sackett*, 566 U.S. at 130–31. *Cf.* Gideon Mark, *SEC and CFTC Administrative Proceedings,* 19 U. Pa. J. Const. L. 45, 57 (2016) ("during the period 2002–2014 the SEC's settlement rate remained constant at about 98%"). "[A]t least at some point, even the temporary subjection of a party to a Potemkin jurisdiction so mocks the party's rights as to render end-of-the-line correction inadequate." *United States v. Microsoft Corp.*, 147 F.3d 935, 954 (D.C. Cir. 1998). So too here.

III. THE SEC'S INHOUSE PROCESS DEPRIVES RESPONDENTS OF ANY OPPORTUNITY FOR FAIR AND LEVEL REVIEW.

The SEC inhouse prosecution scheme is indeed a Potemkin jurisdiction. Like the unconstitutional FTC administrative process at issue in *Axon*, the SEC's

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vehicle for court review, Axon's only recourse is to intentionally lose before the FTC to receive any assurance of Article III adjudication of its clearance process claim. . . . I see no reason why Axon must 'bet the farm' to get its day in court.").

inhouse process—in which it acts as investigator, prosecutor, and judge of its own cause[14]—is rigged against respondents. *See* David Zaring, *Enforcement Discretion at the SEC*, 94 Tex. L. Rev. 1155, 1165 (2016) ("In ALJ proceedings, the SEC's Enforcement Division brings the case against the defendant, the judge is an employee of the SEC, and appeals from the proceeding go to SEC commissioners, making the SEC plaintiff, judge, and reviewer."); Chris Cox, *The Growing Use of SEC Administrative Proceedings*, 7 (May 13, 2015), tinyurl.com/yyusqwh2.

Worse, since 2010, the SEC has been able to obtain civil penalties through its inhouse administrative process. "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 (alteration in original; citation omitted). This means "that the S.E.C. can today obtain through internal administrative proceedings nearly everything it might obtain by going to court." Jed S. Rakoff, U.S. Dist. Judge for the S. Dist. of N.Y., PLI Securities Regulation Institute Keynote Address: Is the S.E.C. Becoming a Law Unto

[14] Making matters worse, the SEC itself recently revealed "a control deficiency related to the separation of its enforcement and adjudicatory functions within its system for administrative adjudications." Commission Statement at 1 (appended to Letter of April 8, 2022, from the Solicitor General). Specifically, "certain Adjudication memoranda were, for a period of time, accessible to all Enforcement staff, including attorneys investigating and prosecuting the enforcement matters discussed in those Adjudication memoranda." Commission Statement at 2.

Itself?, 5 (Nov. 5, 2014), https://securitiesdiary.files.wordpress.com/2014/11/rakoff-pli-speech.pdf. Thus, the SEC "now has an essentially unfettered choice between taking its civil complaint to an Article III or agency judge." Zaring, 94 Tex. L. Rev. at 1164; *see* 15 U.S.C. § 78u-2(a).

For obvious reasons, the SEC frequently prefers to litigate on its home turf, where it enjoys substantial homefield advantages. For starters, the SEC itself makes the rules of the game, stacking the deck against respondents like Ms. Cochran. "SEC administrative proceedings are governed by the SEC's Rules of Practice ('SEC RoP') . . . . Neither the Federal Rules of Civil Procedure ('FRCP') nor the Federal Rules of Evidence ('FRE') apply." Mark, 19 U. Pa. J. Const. L. at 65–66. "There is no provision in the SEC's RoP for making a motion to dismiss, asserting a counterclaim, or moving for summary judgment." *Id.* "There is no right to a jury trial." *Id.* at 67. "There is very limited discovery . . . . In general, neither interrogatories nor discovery depositions are allowed. This is true even in complex cases where the Division may have conducted dozens of on-the-record examinations of fact witnesses before the OIP was filed." *Id.* at 67–68. "[T]he discovery problem is compounded because the SEC often makes broad assertions of both the work product doctrine and the deliberative process privilege, and those assertions are typically upheld." *Id.* at 78. "Hearsay is admissible and can provide the basis for a finding that a securities violation has occurred." *Id.* at 68–69. *But cf. SEC v. Healthsouth Corp.*, 261 F. Supp. 2d 1298, 1328 (N.D. Ala. 2003) (explaining "[h]earsay testimony is

presumptively unreliable under the common law" and rejecting SEC's hearsay in federal court action).

Unsurprisingly, the SEC "win[s] the vast majority of these in-house prosecutions[.]" Adam M. Katz, *Eventual Judicial Review*, 118 Colum. L. Rev. 1139, 1153–54 (2018). In contested cases, SEC ALJs overwhelmingly rule against respondents.[15] *See* Gideon Mark, *Response: SEC Enforcement Discretion*, 94 Tex. L. Rev. Online 261, 262 (2016) ("During the period from October 2010 to March 2015, the SEC prevailed against 90% of respondents in contested cases heard by ALJs, and in the same period the SEC had a considerably lower success rate of 69% in federal court."); Drew Thornley & Justin Blount, *SEC In-House Tribunals: A Call for Reform*, 62 Vill. L. Rev. 261, 286 (2017) (citing Jean Eaglesham, *SEC Wins with In-House Judges*, Wall Street Journal (May 6, 2015), https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803). Respondents can then appeal the ALJ's initial decision to the Commission—the very same body that voted to authorize the enforcement action. *See* 17 C.F.R. § 201.410. But "[t]he appellate statistics from direct appeals before the SEC, meaning appeals from an ALJ's decision to the Commission itself, are equally dire for defendants. In some situations, exercising this right of appeal resulted in a worse outcome for defendants when the

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[15] Former and current SEC ALJs have acknowledged that the SEC's inhouse process is "slanted" against respondents. *See* Office of Inspector General, Report of Investigation, Case No. 15-ALJ-0482-1, at 19–20 (2016), https://www.sec.gov/oig/reportspubs/Final-Report-of-Investigation.pdf.

Commission increased the initial penalty."[16] Thornley & Blount, 62 Vill. L. Rev. at 286; *see also* Eaglesham, *supra* (Commission adopted ALJ factual findings 95 percent of time).

Only after this process concludes will a respondent have access to judicial review in a federal court of appeals. 15 U.S.C. § 78y(a)(1). But even that judicial review is hardly meaningful given the highly deferential standard of review. *See* 15 U.S.C. § 78y(a)(4) ("The findings of the Commission as to the facts identified by the Commission . . . if supported by substantial evidence, are conclusive."); *see also Lorenzo v. SEC,* 872 F.3d 578, 583 (D.C. Cir. 2017) ("we have repeatedly described the [substantial evidence] standard as a 'very deferential' one" (citation omitted)). *Cf. id.* at 597 (Kavanaugh, J., dissenting) (this standard "as applied here, seems akin to a standard of 'hold your nose to avoid the stink'").

Judicial deference to the Commission's factual findings deprive even the few respondents who survive the SEC's administrative process of any opportunity for independent Article III review on a level playing field, further stacking the deck against respondents. *See also Lorenzo*, 872 F.3d at 599–602

[16] Commission review of initial ALJ decisions is "discretionary." 15 U.S.C. § 78d-1(b). "[T]he SEC can decide against reviewing an ALJ decision at all. And when the SEC declines review (and issues an order saying so), the ALJ's decision itself 'becomes final' and is 'deemed the action of the Commission.'" *Lucia v. SEC*, 138 S. Ct. 2044, 2054 (2018) (citing 17 C.F.R. § 201.360(d)(2); 15 U.S.C. § 78d-1(c)).

(Kavanaugh, J., dissenting). *Cf.* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1247 (1994) ("This kind of deferential review arguably fails to satisfy Article III."). Indeed, the substantial evidence standard essentially reverses the burden of proof on petitions for review, given that substantial evidence is a lower standard of proof than the preponderance standard.[17] *See also Meadows v. SEC*, 119 F.3d 1219, 1224 (5th Cir. 1997) ("'Substantial evidence . . . is more than a mere scintilla and less than a preponderance.'" (citation omitted)); *Gebhart v. SEC*, 595 F.3d 1034, 1043 (9th Cir. 2010) ("[A] reviewing court must uphold the agency's [factual] findings 'unless the evidence presented would compel a reasonable finder of fact to reach a contrary result.'" (citation omitted)).

In short, SEC administrative prosecutions are severely slanted against respondents from start to finish. *See generally Lorenzo*, 872 F.3d at 596–602 (Kavanaugh, J., dissenting) (describing unfair process).

IV. SEC'S UNCONSTITUTIONAL STRUCTURE THREATENS INDIVIDUAL LIBERTY.

On the merits, SEC's existence offends the Constitution in many ways. To begin, the—at minimum—two-tier ALJ removal restrictions plainly

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[17] In some instances, respondents in SEC administrative prosecutions must affirmatively prove their innocence to avoid liability. *See* Comments of Andrew N. Vollmer on Office of Mgmt. & Budget RFI, OMB-2019-0006, at 5 (Mar. 9, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3551634.

violate the Constitution. The SEC ALJs cannot exercise the judicial power. *See also* U.S. Const. Art. III, § 1; *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 330–31 (1816) ("Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself[.]"). Instead, no matter how one chooses to describe the work ALJs are tasked with doing, "under our constitutional structure they *must be* exercises of—the 'executive Power.'" *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (citing U.S. Const. Art. II, §1, cl. 1); *see also Free Enterprise Fund*, 561 U.S. at 514; *id.* at 516 (Breyer, J., dissenting). *But cf. Calcutt,* 2022 U.S. App. LEXIS 15979, at *123 (Murphy, J., dissenting) ("The parties assume that the FDIC performs only executive functions. Our resolution should not be taken to have impliedly adopted that premise. The FDIC did not just *prosecute* this action. It also *adjudicated* the action[.]" (emphasis in original)).

This Court has held "Congress cannot limit the President's authority" through granting "two levels of protection from removal for those who nonetheless exercise significant executive power." *Free Enter. Fund*, 561 U.S. at 514. Straightforward application of *Lucia v. SEC*, 138 S. Ct. 2044 (2018), requires the conclusion that SEC ALJs are Officers of the United States, who exercise significant executive power, *see id.* at 2055. "Specifically, SEC ALJs exercise considerable power over administrative case records by controlling the presentation and admission of evidence; they may punish contemptuous conduct; and often their decisions are final and binding." *Jarkesy v. SEC*, 34 F.4th 446, 464 (5th Cir. 2022) (citing *Lucia*, 138 S. Ct. at 2053–54). SEC ALJs enjoy

at least two tiers of removal protections. 5 U.S.C. § 7521(a), (b)(1) (permitting an ALJ to be removed only "for cause"); 5 U.S.C. § 1202(d) (permitting MSPB Board members to be removed "only for inefficiency, neglect of duty, or malfeasance in office"); *Jarkesy*, 34 F.4th at 464 (noting "the SEC Commissioners may only be removed by the President for good cause"). This arrangement violates Article II. *Free Enter. Fund*, 561 U.S. at 514; *see also Jarkesy*, 34 F.4th at 464 ("hold[ing] that the removal restrictions are unconstitutional").

That is a problem because "[i]n the case of a removal defect, a wholly unaccountable government agent asserts the power to make decisions affecting individual lives, liberty, and property." *Collins,* 141 S. Ct. at 1797 (Gorsuch, J., concurring in part). Indeed, "[i]f anything, removal restrictions may be a greater constitutional evil than appointment defects. . . . It is the power to supervise—and, if need be, remove—subordinate officials that allows a new President to shape his administration and respond to the electoral will that propelled him to office." *Id.* at 1796 (Gorsuch, J., concurring in part). After all, "[f]ew things could be more perilous to liberty than some 'fourth branch' that does not answer even to the one executive official who is accountable to the body politic." *Id.* at 1797 (Gorsuch, J., concurring in part) (citing *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting)); *see also City of Arlington*, 569 U.S. at 313–14 (Roberts, C.J., dissenting).

That is not the only constitutional problem with SEC's administrative enforcement scheme. Among other infirmities, SEC's combination of investigative, prosecutorial, and adjudicative functions violates due

process. Under our Constitution, SEC is not allowed to act as investigator, prosecutor, and judge of its own cause.[18] *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) ("[A]n unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case."). *See generally* Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. Mich. J.L. Reform 103 (2018).

More broadly, as Professors Chapman and McConnell have explained:

> The basic idea of due process, both at the Founding and at the time of adoption of the Fourteenth Amendment, was that the law of the land required each branch of government to operate in a distinctive manner, at least when the effect was to deprive a person of liberty or property. . . . The judiciary was required to adjudicate cases in accordance with longstanding procedures, unless the legislature substituted alternative procedures of equivalent fairness.

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[18] Because SEC administrative prosecutions implicate core private rights, the statutory review provision mandating judicial deference to the SEC's factual findings, 15 U.S.C. § 78y(a)(4), may well be unconstitutional. *See generally* Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?,* 16 Geo. J.L. & Pub. Pol'y 27, 42–58 (2018); John Gibbons, Comment, *Why Judicial Deference to Administrative Fact-Finding is Unconstitutional*, 2016 B.Y.U.L. Rev. 1485, 1502–1521 (2016).

Chapman & McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1781–82 (2012). "Fundamentally, . . . [due process] was about securing the rule of law. It ensured that the executive would not be able unilaterally to deprive persons within the nation of their rights of life, liberty, or property except as provided by common law or statute and as adjudicated by independent judicial bodies[.]" *Id.* at 1808. The SEC inhouse enforcement scheme fails this test.

The Constitution also bars administrative bodies from adjudicating private rights inhouse; that task is reserved for Article III courts. *Cf. B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 171 (2015) (Thomas, J., dissenting) ("Under our Constitution, the 'judicial power' belongs to Article III courts and cannot be shared with the Legislature or the Executive." (citation omitted)). *See generally Wellness Int'l Network, Ltd. V. Sharif*, 575 U.S. 665, 714–15 (2015) (Thomas, J., dissenting) ("Nineteenth-century American jurisprudence confirms that an exercise of the judicial power was thought to be necessary for the disposition of private, but not public, rights."); *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1381 (2018) (Gorsuch, J., dissenting) ("Article III[] explains that the federal 'judicial Power' is vested in independent judges. As originally understood, the judicial power extended to 'suit[s] at the common law, or in equity, or admiralty.'" (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856)). Here, the SEC's inhouse administrative prosecution implicates core private rights. Specifically, the SEC is seeking

substantial civil penalties against Ms. Cochran. *See* Pet. App. 2a.

This "Court has held that actions seeking civil penalties are akin to special types of actions in debt from early in our nation's history which were distinctly legal claims." *Jarkesy*, 34 F.4th at 454 (citing *Tull v. United States*, 481 U.S. 412, 417–19 (1987)). And "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law." *Tull*, 481 U.S. at 422. Accordingly, the SEC's enforcement action against Ms. Cochran simply "is not the sort that may be properly assigned to agency adjudication under the public-rights doctrine." *Jarkesy*, 34 F.4th at 455. *Cf. Calcutt*, 2022 U.S. App. LEXIS 15979, at *123–26 (Murphy, J., dissenting) (suggesting possibility that the FDIC inhouse enforcement process violates Article III and due process). Instead, it belongs in an Article III court.

The SEC's administrative enforcement scheme suffers from yet another, related constitutional defect: it denies Ms. Cochran her Seventh Amendment right to be tried by a jury of her peers.[19] *See* U.S. Const. amend. VII. To be sure, "[t]his Court's precedents establish that, when Congress properly assigns a matter to adjudication in a non-Article III tribunal, 'the Seventh Amendment poses no independent bar to

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[19] *See generally Feltner v. Columbia Pictures Tv*, 523 U.S. 340, 348 (1998) ("Seventh Amendment . . . applies not only to common-law causes of action, but also to 'actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century[.]'" (citation omitted)).

the adjudication of that action by a nonjury factfinder.'" *Oil States Energy Servs.*, 138 S. Ct. at 1379 (quoting *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 53–54 (1989)). But Congress has not done so here. And because the agency is seeking civil penalties, the Seventh Amendment jury-trial right applies. *See Jarkesy*, 34 F.4th at 454–55.

This should not be allowed to stand. If SEC wants to prosecute Ms. Cochran, due process, Article III, and the Seventh Amendment all require SEC to do so in federal court before an independent judge subject to Ms. Cochran's right to be tried by a jury of her peers).[20] *See Lorenzo*, 872 F.3d at 602 (Kavanaugh, J., dissenting) ("Administrative adjudication of individual disputes is usually accompanied by deferential review. . . . That agency-centric process is in some tension with Article III of the Constitution, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment."); *see also United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1993 (2021) (Gorsuch, J., concurring in part, dissenting in part) ("Any suggestion that the neutrality and independence the framers guaranteed for courts could be replicated within the Executive Branch was never more than wishful thinking.").

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[20] The SEC's enforcement scheme also appears to unconstitutionally delegate legislative power to the SEC. *See Jarkesy*, 34 F.4th at 459–63.

V. COMMON OBJECTIONS TO OPENING THE COURTHOUSE DOORS AND ENFORCING THE CONSTITUTION LACK MERIT.

The sky will not fall if this Court opens the courthouse doors and enforces the Constitution's demands. And this Court should not be swayed by any handwaving parade-of-horribles arguments to the contrary.

First, with respect to the immediate questions presented by this case and *Axon*, allowing litigants enmeshed in administrative prosecutions to raise constitutional and *ultra vires* challenges in federal district court will not cause floodgates problems. *Cf.* Pet. App. 109a–110a (Costa, J., dissenting) (arguing efficiency and "systemic concerns about piecemeal review in the mine run of cases" counsels against district court jurisdiction); SEC CA5 *En Banc* Br. 30–32. As Judge Jed Rakoff explained in finding jurisdiction over an equal-protection challenge to an SEC administrative enforcement action, frivolous claims can be screened out at the motion to dismiss stage. *See Gupta v. SEC*, 796 F. Supp. 2d 503, 514 (S.D.N.Y. 2011). And respondent-plaintiffs cannot derail ongoing administrative proceedings by obtaining an injunction unless they can show they are "likely to succeed on the merits" and "likely to suffer irreparable harm in the absence of preliminary relief," among other things. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). In any event, "when Congress vests a district court with jurisdiction, it's obliged to exercise it—efficiencies aside." Pet. App. 79a (Oldham, J., concurring).

Second, with respect to the broader constitutional problems with inhouse enforcement processes, particularly those implicating core *private* rights, enforcing the Constitution's demands also will not cause practical or floodgates problems. The SEC and FTC already have authority to bring enforcement actions directly in federal court and have done so for years. *See Jarkesy*, 34 F.4th at 455–56; *see also AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1347 (2021). And these executive agencies can continue to enforce the law—in federal court.

Conversely, matters involving garden variety *public* rights, such as claims involving government benefits and federal employment disputes, need not be addressed by Article III courts in the first instance.[21] After all, as Professor Mila Sohoni has explained, "a government denial of Social Security benefits or a termination of a government employee for cause would not" implicate private rights. Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 Nw. U.L. Rev. 1569, 1586 (2013); *see also Austin v. Shalala*, 994 F.2d 1170, 1177 (5th Cir. 1993) (noting "public right for the government to recover the overpayment of social security benefits" properly assigned to agency). Accordingly, these matters may be initially assigned to administrative forums. And the overwhelming majority of ALJs are tasked with this sort of work. To

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[21] *Cf. Free Enter. Fund*, 561 U.S. at 542–43 (Breyer, J., dissenting) ("[T]he Federal Government relies on 1,584 ALJs to adjudicate administrative matters in over 25 agencies. These ALJs adjudicate Social Security benefits, employment disputes, and other matters highly important to individuals.").

put this in perspective, as of 2017, there were 1,655 Social Security Administration ALJs and 101 Department of Health and Human Services/Office of Medicare Hearings and Appeals ALJs. *See generally* OPM, ALJs By Agency (as of March 2017), https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency. By contrast, SEC employees 5 ALJs, and FTC employs 1 of the 1,931 ALJs employed by the federal government. *See id.*

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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