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 A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Since the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, the Securities and Exchange Commission (SEC) has brought an increasing number of enforcement actions before the agency itself, rather than in federal court. The SEC routinely delegates its authority to preside over these actions to its own cadre of administrative law judges (ALJs). Because these ALJs exercise "significant authority," they are "Officers of the United States" for purposes of the Constitution's Appointments Clause. *Lucia v. SEC*, 138 S. Ct. 2044, 2051-55 (2018) (quoting U.S. Const. art. II, § 2, cl. 2). For individuals subject to SEC enforcement proceedings, the ALJs' actions and findings can have significant, often life-ruining consequences.

The SEC's ALJs, however, suffer from a blatant constitutional defect: they are insulated from removal by multiple "layers of good-cause tenure" protection, which this Court found "incompatible with the Constitution's separation of powers" in *Free Enter. Fund v. Pub. Co. Acctg. Oversight Bd.*, 561 U.S. 477, 497-98 (2010). The ALJs' actions are also subject to the same administrative review scheme that the Court held in *Free Enterprise Fund* did not "expressly" or "implicitly" strip federal district courts of their jurisdiction to adjudicate federal "separation-of-powers claim[s]." *Id.* at 489-91 & n.2; *see* 28 U.S.C. § 1331. The question presented is:

Whether Congress has implicitly stripped federal district courts of jurisdiction to adjudicate separation of powers challenges to the authority of SEC ALJs to preside over enforcement proceedings.

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INTEREST OF AMICUS CURIAE[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the rigorous enforcement of constitutional limitations on the activities of federal and state governments. SLF drafts legislative models, educates the public on key policy issues, and litigates often before the Supreme Court. *See*, *e.g.*, *Seila Law L.L.C. v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *Sissel v. Dep't of Health & Human Services*, No. 15-543, cert. denied, 136 S. Ct. 925 (2016).

SUMMARY OF ARGUMENT

Petitioner Gibson is one of many citizens who has been investigated, prosecuted, and subjected to a hearing—all within a single agency in a single branch of government. Worse, many of the agents who oversee these proceedings are insulated by two layers of protection from removal: neither they nor their supervisors can be removed without good cause. Pet. at 13. And when Petitioner attempted to challenge the

[1] Rule 37 statement: The parties were notified and consented to the filing of this brief more than 10 days before its filing. *See* Sup. Ct. R. 37.2(a). No party's counsel authored any of this brief; amicus alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

removal protections afforded to SEC ALJs in federal court, the Eleventh Circuit Court of Appeals refused to hear his constitutional claim until the administrative proceedings were over. *Id.*

The problem with the Eleventh Circuit's ruling is twofold. First, petitioners like Gibson suffer significant losses and often choose not to continue the burden of litigation in federal court. More importantly, this Court's decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010) demands the opposite result. There, the Court held that Article III courts retain jurisdiction over claims challenging separation of powers violations.

Despite this holding, many lower courts of appeals, like the Eleventh Circuit, consistently misapply *Free Enterprise Fund*. Federal courts are undoubtedly in the best position to hear federal constitutional claims. Thus, certiorari is needed to clarify *Free Enterprise Fund* and, more importantly, to ensure federal courts retain their vital role as a check on executive overreach.

ARGUMENT

As Petitioner notes, 28 U.S.C. § 1331 vests the federal district courts with "original jurisdiction of all civil actions arising under the Constitution." Pet. at 14. That jurisdiction, which is wide-ranging, can be divested by Congress either expressly or implicitly. *Id*. at 15. Petitioner challenges the legitimacy of the tribunal he appears before based on the tribunal's

removal protections. He does not contend that Congress expressly stripped the federal district courts of jurisdiction over constitutional claims like these. The question therefore is whether Congress impliedly stripped the federal district courts of jurisdiction to consider constitutional challenges to the unconstitutional removal protection afforded SEC ALJs.

In this brief, SLF will first show that *Free Enterprise Fund* has not been sub silentio gutted by *Elgin v. Dep't of the Treasury*, 567 U.S. 1 (2012). Instead, the two decisions involve different statutes and different constitutional claims. Then, it will show how the decisions of lower courts of appeals misconstrue *Free Enterprise Fund* and improperly limit its reach.

I. The test established in *Free Enterprise Fund* controls the jurisdictional issue in this case.

In *Free Enterprise Fund*, this Court held that the double for-cause removal provisions protecting the members of the Public Company Accounting Oversight Board violated the Constitution because it violated separation of powers principles. In so doing, this Court held that the lower courts had jurisdiction to consider the Fund's challenge to the Board's statutory protection from removal. More particularly, this Court held that 15 U.S.C. § 78y, which allows an aggrieved party to seek review of "a final order of the [SEC]" or an SEC rule in a court of appeals, neither expressly nor impliedly stripped the lower courts of jurisdiction over

the challenge to the Board's authority. *Free Enter. Fund*, 561 U.S. at 489.

This Court explained that Congress must display a "fairly discernible" intent to limit judicial review within the statutory scheme. Additionally, the claims must be "of the type Congress intended to be reviewed within th[e] statutory structure." *Id.* (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212 (1994)). Most importantly, the Court established a test to determine the extent of Article III courts' jurisdiction: "we presume that Congress does not intend to limit jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Id.* (quoting *Thunder Basin*, 510 U.S. at 212-13).

Applying that test, this Court first rejected the notion that there were other ways for the Fund to seek judicial review. It observed that the Fund "object[ed] to the Board's existence, not to any of its auditing standards." *Id.* at 490. Those constitutional claims were also not within the SEC's expertise and core competence. Instead, the Fund presented "standard questions of administrative law, which the courts are at no disadvantage in answering." *Id.* at 491.

This Court next distinguished *Free Enterprise Fund* from *Thunder Basin*, noting that the "primary claims" in that case "ar[o]se under the Mine Act and f[e]ll squarely within the [agency's] expertise." *Id.* (quoting *Thunder Basin*, 510 U.S. at 214-15). Indeed,

the agency had "recently addressed the precise . . . claims presented." *Id*. Finally, the Fund's claims did not involve "technical considerations of [agency] policy." *Id*. (quoting *Johnson v. Robison*, 415 U.S. 361, 373 (1974)). Without a nexus to agency practice, the Court held that there was no reason to remand the Fund's constitutional claim against the Board's removal protection to the SEC.

A few years later, this Court applied the *Free Enterprise Fund* analysis to a different claim and found that the Article III courts lacked jurisdiction. *Elgin*, 567 U.S. at 5. It held that the Civil Service Reform Act (CSRA) "provides the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action by arguing that a federal statute is unconstitutional." *Id*. That avenue goes from the agency to the Merit Systems Protection Board (MSPB), and from there to the Federal Circuit Court of Appeals.

In *Elgin*, this Court rejected the plaintiffs' attempt to invoke *Free Enterprise Fund* as a basis for jurisdiction in the federal district courts. But even though *Elgin* reached a different result on the jurisdictional question, that result turned on the nature of the plaintiffs' claims and the statutory structure—it did not do away with the test entirely.

For example, this Court found that the plaintiffs had a meaningful opportunity for review of their claims because, even if the MSPB could not declare a federal statute unconstitutional, the Federal Circuit

could. *Id*. at 21. As the Court explained, the Federal Circuit is "an Article III court fully competent to adjudicate petitioners' claims that Section 3328 and the Military Selective Service Act's registration requirement are unconstitutional." *Id*. at 17.[2]

Likewise, the plaintiffs' constitutional claims of bill of attainder and sex discrimination were not "wholly collateral" to the statutory scheme. They were "the vehicle" to relief, and the relief sought was "precisely" what "the CSRA empowers the MSPB and the Federal Circuit to provide." *Id*. at 22. The Court concluded, "Far from a suit wholly collateral to the CSRA scheme, the case before us is a challenge to CSRA-covered employment action brought by CSRA-covered employees requesting relief that the CSRA routinely affords." *Id*.

The Court also held that the plaintiffs' claims were not outside the agency's expertise. It reasoned that there are "many threshold questions that may accompany a constitutional claim and to which the MSPB can apply its expertise." *Id.* The resolution of those questions about one or more of the plaintiffs might make it unnecessary to address their constitutional claims. *Id*. at 23.

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[2] The *Elgin* Petitioners claimed that the Military Selective Service Act, which required only males to register, unconstitutionally discriminated on the basis of sex, and that 5 U.S.C. § 3328, which bars the federal employment of any individual who knowingly and intentionally fails to register with the Selective Service, was an unconstitutional bill of attainder. *Elgin*, 567 U.S. at 7.

In sum, the Court in *Elgin* found that claims under the CSRA, whether constitutional or other, did not satisfy the test for jurisdiction in the federal district courts. It did not modify or undercut *Free Enterprise Fund's* jurisdictional analysis. The Court simply concluded that the plaintiffs' claims did not meet the *Free Enterprise Fund* test.

II. Contrary to the conclusion of the Eleventh Circuit, the federal district courts have jurisdiction over Petitioner's challenge to the constitutionality of the SEC ALJ's authority under a *Free Enterprise Fund* analysis.

Petitioner's claims are "nearly indistinguishable" from those in *Free Enterprise Fund. See Tilton v. SEC*, 824 F.3d 276, 292 (2d Cir. 2016) (Droney, J., dissenting). The jurisdictional question should thus be resolved based on the *Free Enterprise Fund* analysis because it is a constitutional claim that Article III courts are in the best position to hear. The Eleventh Circuit, and the other courts of appeals that have addressed the issue, have erred in declining to do so.

A. The Circuit Courts of Appeals err in failing to apply the *Free Enterprise Fund* test to petitioners like Gibson by requiring them to carry SEC proceedings to conclusion.

Several Circuit Courts of Appeals require administrative tribunals to issue final decisions before petitioners can challenge the tribunals' constitutional authority. Such rulings force petitioners "to participate in an adjudicative system that may well be constitutionally illegitimate." *Cochran v. SEC*, ___ F.3d ___, 2020 WL 4593226 at *18 (5th Cir. Aug. 11, 2020) (Haynes, J., dissenting). Even so, the Courts of Appeals routinely postpone judicial review until after the administrative proceeding is complete. *See Cochran*, 2020 WL 4593226, at *15; *Bennett v. U.S. SEC*, 844 F.3d 174, 182 (4th Cir. 2016); *Hill v. SEC*, 825 F.3d 1236, 1245-46 (11th Cir. 2016); *Jarkesy v. SEC*, 803 F.3d 9, 20 (D.C. Cir. 2015); *Bebo v. SEC*, 799 F.3d 765, 772 (7th Cir. 2015).

This rationale is flawed because only the initiation of administrative proceedings makes a petitioner's claim ripe. At that point, he faces the burden of appearing before an unconstitutionally protected ALJ. Even if he were aware of an SEC investigation, a petitioner could not raise his constitutional challenge because he would only have a generalized grievance, which cannot establish standing. *See*, *e.g.*, *Lance v. Coffman*, 549 U.S. 437, 439 (2007).[3] Indeed, the SEC

[3] In *Bennett v. SEC*, the Seventh Circuit noted that the SEC investigated for three years but Bennett did not sue until the SEC

might decide not to initiate an administrative proceeding, thereby obviating any injury.

Moreover, as Judge Haynes pointed out, Petitioner is in a "lose-lose situation in front of the SEC." *Cochran*, 2020 WL 4593226, at *18 (Haynes, J., dissenting in part). He explained that a petitioner could pursue her removal claim in a court of appeals if she lost in front of the SEC. "But if she wins in front of the SEC and no sanction is imposed, she will lose the opportunity to have a court consider her now-moot removal challenge, all while having been subject to a potentially unconstitutional proceeding." *Id*. Thus, delaying review of claims like these fails to follow the *Free Enterprise Fund* test and, more importantly, violates separation of powers principles.

B. The lower courts err in conflating collateral matters with the result sought by the Petitioner.

Claimants typically assert two kinds of constitutional claims against the SEC. First, there are the claims that the SEC ALJs were unconstitutionally appointed and enjoy unconstitutional protection from removal. *See*, *e.g.*, *id.* at *18; *Bennett*, 844 F.3d at 177-78; *Hill*, 825 F.3d at 1239. Second, there are claims that, in the conduct of the administrative proceedings, the SEC has acted unconstitutionally. *See Jarkesy*, 803

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instituted its proceedings against her. 844 F.3d at 187. The court nowhere addressed when Bennett suffered the kind of constitutional injury sufficient to give her standing.

F.3d at 14. These two kinds of claims are different, but the lower courts have read *Elgin* incorrectly to treat them in the same way.[4]

Appointment and removal claims are substantively collateral to an SEC proceeding. As the Court in *Free Enterprise Fund* observed, the Fund "object[ed] to the Board's existence, not to any of its auditing standards. Petitioners' general challenge to the Board [was] 'collateral' to any Commission orders or rules from which review might be sought." *Free Enter. Fund*, 561 U.S. at 490; *see also Tilton*, 824 F.3d at 297 (Droney, J., dissenting) (writing that an Appointments Clause challenge "is completely collateral to the work of the PCAOB as well as to the work of the SEC and its ALJs."). As Judge Droney observed, *Elgin* "does not suggest that *no challenge* that would end ongoing proceedings could be considered collateral to a statute's review provisions. Such an interpretation would swallow the rule, for there would no longer be any need to evaluate the substance of a claim as long as the claim could somehow serve to end administrative proceedings in a plaintiff's favor." (emphasis in original).

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[4] To the extent that the lower courts of appeals have relied on both *Elgin* and *Thunder Basin*, they overlook the way this Court carved out an exception to *Thunder Basin* in *Free Enterprise Fund*. *Elgin* did not overrule *Free Enterprise Fund*—it merely found that the claims made by Elgin did not satisfy the applicable test. Thus, *Free Enterprise Fund* and *Elgin* should be reconciled, leaving each case to be applied when appropriate.

Nothing that might happen before the ALJ or the SEC, other than the rejection of the SEC's case, can assist in the consideration of a constitutional complaint. Thus, 15 U.S.C. § 78y does not strip the district courts of jurisdiction over such collateral claims.

The lower courts of appeals, however, see the Appointments Clause and removal challenges as part of an effort to defeat the SEC's claim. In *Bennett v. SEC*, for example, the Seventh Circuit said that the petitioner's constitutional claim "appears to be the 'vehicle by which she seeks' to vacate the ALJ's initial findings." 844 F.3d at 187 (citing *Elgin*, 132 S. Ct. at 2139); *Tilton*, 824 F.3d at 288. Some of those courts even characterize the constitutional claims as affirmative defenses. *See Bennett*, 844 F.3d at 187; *Tilton*, 824 F.3d at 288. Again, though, there is no suggestion that Petitioner is doing any more than preserving his constitutional challenge by raising it at every stage of the proceeding.

C. The lower courts err in their consideration of agency expertise.

In *Free Enterprise Fund*, the Court found that the removal claim presented "standard questions of administrative law" which are not within the SEC's expertise. 561 U.S. at 491. It explained that the removal claim did not turn on an understanding of industry standards or practice. *Id*.

The lower courts of appeals, however, see *Elgin* as having "adopted a broader conception of agency

expertise in the jurisdictional context." *Tilton*, 824 F.3d at 289. That broader conception swallows the entire inquiry, mooting any suggestion to the contrary. In *Bennett v. SEC*, for example, the Seventh Circuit pointed to the way *Elgin* suggested that threshold statutory questions might make it unnecessary to reach the constitutional issue. 844 F.3d at 187.

Precisely how this might happen regarding the removal claim is hard to divine. The only possibility is that the SEC rejects the substantive claim, in which case it would be unnecessary to reach the constitutional claim. *See*, *e.g.*, *Hill*, 825 F.3d at 1250-51 (finding the SEC might bring its expertise to bear on the substantive claim "even if its expertise could offer no added benefit to the resolution of the constitutional claims themselves."). It hardly seems reasonable to suggest that the SEC ALJ or the SEC would agree with the constitutional claim and drop their case.

CONCLUSION

This Court should grant the petition for writ of certiorari to remedy lower courts' misapplication of the *Free Enterprise Fund* analysis and, on review, reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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