No. 21-1239

IN THE
Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION, ET AL.,

Petitioners,

v.

MICHELLE COCHRAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RAYMOND J. LUCIA, SR., GEORGE R. JARKESY, JR., AND CHRISTOPHER M. GIBSON AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Securities Exchange Act of 1934 implicitly strips federal district courts of jurisdiction to adjudicate structural constitutional claims challenging Securities and Exchange Commission administrative proceedings.

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INTEREST OF *AMICI CURIAE*

Raymond J. Lucia, Sr. is a former investment professional who had an unblemished career of nearly forty years before he found himself in the crosshairs of the Securities and Exchange Commission's "'bold and unrelenting'" enforcement tactics.[*] Mary Jo White, SEC Chair, *A New Model for SEC Enforcement* (Nov. 18, 2016), tinyurl.com/ul7njec. Mr. Lucia's five-year fight against the SEC's unconstitutional administrative process—culminating in a victory before this Court, *see Lucia* v. *SEC*, 138 S. Ct. 2044 (2018)—almost bankrupted him. On remand, Mr. Lucia continued to fight for two more years, collaterally challenging his unconstitutional remand proceedings before being forced to settle. *See Raymond J. Lucia Cos.* v. *SEC*, 2019 WL 3997332 (S.D. Cal. Aug. 21, 2019), *appeal dismissed sub nom. Lucia* v. *SEC*, 2020 WL 5588651 (9th Cir. June 23, 2020).

George R. Jarkesy, Jr. is an investment professional whose untarnished record spanned nearly two decades. He is not, and for decades has not been, required to register with the SEC. Nevertheless, he too found himself in the SEC's crosshairs in 2013. After the lower courts closed the courthouse doors on his collateral constitutional challenge, *see Jarkesy* v. *SEC*, 48 F. Supp. 3d 32, 38, 40 (D.D.C. 2014), *aff'd*, 803 F.3d 9 (D.C. Cir. 2015), he fought the SEC for five more years before finally being able to obtain judicial review of his constitutional claims. His appeal on direct review remains pending today.

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[*] All parties received timely notice of and have consented to the filing of this brief. *Amici* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Christopher M. Gibson is a former investment adviser who has been trapped in a nightmare involving the SEC for much of his professional life. During a two-year investigation and six-year litigation before a biased and unconstitutional adjudicator, Mr. Gibson has vigorously contested the truth of the SEC's allegations against him. It is now four years since *Lucia* required a new hearing in his case; yet the Commission has refused even to schedule oral argument or enter any final decision. Because lower courts have refused to hear his collateral constitutional challenges, *see Gibson* v. *SEC*, 2019 WL 5698679 (N.D. Ga. May 8, 2019), *aff'd*, 795 F. App'x 753 (11th Cir. 2019), the SEC's delays have entirely barred Mr. Gibson's access to an Article III court.

Thus, for *years*—seven years for Mr. Lucia (before he settled), over seven years for Mr. Jarkesy, and six years (and counting) for Mr. Gibson—the SEC subjected *Amici* to the "'here-and-now' injury" of being forced to defend themselves against an unconstitutional administrative tribunal. *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2196 (2020) (citation omitted). And thus, for *years*, *Amici* have suffered. They have been unemployable in their chosen profession and unable to obtain a license in other professions; their bank and brokerage accounts have been closed; interest rates on their loans have skyrocketed; and their assets have been decimated—all while the SEC (through biased press releases ghostwritten by the Enforcement Division) has dragged their reputation through the mud, and left it there, *see* Russell G. Ryan, *Get the SEC out of the PR Business*, Wall St. J. (Nov. 30, 2014), tinyurl.com/582w4c5f. For years.

This is not the outcome Congress intended, nor one the Constitution permits. The federal courts sit

to resolve constitutional disputes between citizens and the government—not to avoid them. *Amici*'s experience, unfortunately, is "hardly unique." *Jarkesy*, 803 F.3d at 29. *Amici* therefore respectfully urge this Court to grant certiorari now and afford Ms. Cochran (and hundreds like her) the one thing *Amici* sought these many years: their day in court.

SUMMARY OF ARGUMENT

All parties agree that certiorari is warranted in this case. *See* Pet. 6; Resp. Br. 11. The only question is whether this Court should hold the petition pending resolution of *Axon Enterprise, Inc.* v. *FTC*, No. 21-86 (cert. granted Jan. 24, 2022), or instead grant the petition now and decide this case alongside *Axon*.

The Court should grant the petition now. That is the only way to resolve the circuit split below and to save hundreds of individuals from additional years of protracted litigation over whether any decision in *Axon* opens the courthouse doors to collateral constitutional challenges to the SEC's in-house tribunals.

If the Court were instead to hold the petition for *Axon*, the split created by the decision below would persist. The en banc Fifth Circuit concluded below that *Free Enterprise Fund* alone "controls" the result in the Exchange Act context. Pet. App. 13a (discussing *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010)). Unlike *Free Enterprise Fund*, however, a decision on only the Federal Trade Commission Act would not resolve the "*precise* jurisdictional [issue] under § 78y" of the Exchange Act. *Id.* at 5a. And given the FTC Act's distinct statutory regime, with distinct statutory text, history, and purpose, there is little reason to think any other court of appeals—much less all of them—would reverse their

own precedents on Section 78y and join the Fifth Circuit. If anything, this Court's decision in *Axon* might rely on a distinction between the FTC Act and Exchange Act that could deepen the existing circuit split.

Unless this Court grants the petition now, hundreds of individuals who are compelled each year to defend themselves in the SEC's in-house proceedings will have no meaningful opportunity to contest the constitutionality of those proceedings. As the then-top enforcement official at the SEC has openly bragged, the mere "'threat[ ] [of] administrative proceedings'" is enough to coerce settlement—without any judicial review—in the "'vast majority of [the SEC's] cases.'" *Tilton* v. *SEC*, 824 F.3d 276, 298 n.5 (2d Cir. 2016) (Droney, J., dissenting) (quoting SEC's then-Director of Enforcement). *Amici*'s own experiences attest that the procedural unfairness built into the SEC's proceedings imposes a crushing burden on defendants, who are generally unemployable for the duration of the proceedings and must exhaust all of their resources as they wait *years* to have their day in federal court.

Nobody should have to wait in line for the better part of a decade before a court can adjudicate her constitutional dispute with the government.

ARGUMENT

At bottom, this case presents a pure question of statutory interpretation: whether Section 78y of the Exchange Act implicitly divests federal district courts of jurisdiction to adjudicate an individual's claim that she is being forced to defend herself in an unconstitutional administrative tribunal. The answer to *that* question turns on "the text" of Section 78y and

whether the Exchange Act's "'statutory scheme' displays a 'fairly discernible' intent to limit" the scope of federal-question jurisdiction granted by 28 U.S.C. § 1331. *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010) (quoting *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994)).

In *Axon*, this Court will decide whether the Federal Trade Commission Act similarly limits the scope of federal-question jurisdiction. Given that the FTC Act is a *different* statutory regime than the Exchange Act—with different statutory text, history, and purpose—a decision in *Axon* is unlikely to resolve the circuit split over the question presented in this case. Holding the petition for *Axon*, therefore, would only perpetuate that circuit split and add years of protracted litigation over the jurisdiction-stripping issue. During that time, defendants in SEC administrative proceedings will continue to see their constitutional rights violated with no meaningful opportunity for judicial review.

For both reasons, the Court should grant the petition now, rather than hold it for *Axon*.

I. GRANTING THE PETITION NOW IS THE ONLY WAY TO RESOLVE AN INTRACTABLE CIRCUIT SPLIT.

This Court's review is needed now because holding the petition in light of *Axon* almost certainly will *not* resolve the split among the courts of appeals.

As the United States recognizes, the relevant analytical "framework" is rooted in the specific "statutory scheme of administrative and judicial review" at issue. Br. in Opp. 7–8, *Axon*, *supra* (No. 21-86) ("*Axon* BIO"). A decision analyzing only the FTC Act's statutory scheme thus has little prospect of changing any

Circuit's analysis of Section 78y of the Exchange Act—especially given *Free Enterprise Fund*'s on-point analysis of that latter provision. If anything, holding the petition for *Axon* could deepen the existing circuit split—after years of expensive litigation—as the Court's decision may rest on one of several potential statutory distinctions between the FTC Act and Exchange Act.

A. Jurisdiction-stripping analysis is (and must be) statute-specific. This Court has required "'clear and convincing evidence'" of congressional intent to "restrict access to judicial review." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 141 (1967) (citation omitted). And "[t]he best evidence of congressional intent . . . is the statutory text that Congress enacted." *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 392 n.4 (2013) (Sotomayor, J., dissenting) (citing *W. Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98 (1991)). As this Court explained in *Thunder Basin*, Congress "has allocated initial review to an administrative body" only where "such intent is 'fairly discernible in the statutory scheme'" at issue. 510 U.S. at 207 (citation omitted).

Accordingly, this Court grounded *Thunder Basin*'s analytical framework in the relevant "statute's language, structure, and purpose," in "its legislative history," and in whether that particular "'statutory scheme'" "afforded meaningful review" for the petitioner's claims. 510 U.S. at 207 (citation omitted). Applying this framework in *Free Enterprise Fund*, the Court similarly stressed that "the text" of "§ 78y" of the Exchange Act "did not strip the District Court of jurisdiction over" constitutional separation-of-powers claims. 561 U.S. at 489–91; *see also Elgin* v. *Dep't of Treasury*, 567 U.S. 1, 10 (2012) ("examin[ing] the CSRA's text, structure, and purpose").

The up-shot of this Court's teachings is clear: Whether one statutory regime strips jurisdiction over a particular type of claim rarely, if ever, drives the analysis of whether a different statutory regime—with different statutory text, different statutory history, and different statutory purpose—does the same.

B. Given this statute-specific analysis, the only way to resolve the circuit split below is to decide this case alongside *Axon*. In the absence of an immediate grant here, there is virtually *no* chance that lower courts will resolve this split on their own.

A decision in *Axon* on a different statutory regime—with different statutory text, history, and purpose—is unlikely to change the law in any Circuit. The en banc Fifth Circuit ruled that *Free Enterprise Fund* is "control[ling]" precedent because it "already rejected the SEC's *precise* jurisdictional argument under § 78y." Pet. App. 5a, 10a–13a. Because *Axon* involves the FTC Act, that case presents no opportunity to address whether "*Free Enterprise Fund* is squarely on point" with respect to the Exchange Act. *Id.* at 10a; *see Tech. Automation Servs. Corp.* v. *Liberty Surplus Ins. Corp.*, 673 F.3d 399, 405 (5th Cir. 2012) ("for a Supreme Court decision to change [the Fifth] Circuit's law," it "must 'unequivocally' overrule prior precedent" (citation omitted)). Indeed, to the extent *Free Enterprise Fund* has some bearing on the FTC Act, too, the Court should grant review here to address both contexts side by side.

Nor would the other courts of appeals likely change their contrary view. *See* Pet. 6 (listing circuit split). A ruling in *Axon* that the FTC Act strips jurisdiction over Axon's claims most likely would not provide any basis for those courts to overturn their own similar rulings as to Section 78y. And even if *Axon*

were to hold that the FTC Act does not strip jurisdiction, there is little reason to think such a ruling would address Section 78y or the Exchange Act sufficiently directly to warrant overturning those circuits' prior precedent. *See*, *e.g.*, *Taylor* v. *Grubbs*, 930 F.3d 611, 619 (4th Cir. 2019) ("circuit precedent 'controls' where [the] Supreme Court did not directly contradict our prior holding" (citation omitted)); *Dawson* v. *Scott*, 50 F.3d 884, 892 n.20 (11th Cir. 1995) (requiring "directly applicable" intervening Supreme Court decision).

At minimum, it is fantasy to assume that *all five* of those circuits would reverse their precedents—and align with the Fifth Circuit—in light of a decision by this Court on an altogether different statutory regime. No matter how the Court resolves *Axon*, therefore, a circuit split almost assuredly will persist. Revisiting that split circuit by circuit, moreover, would be cumbersome and chaotic, requiring years of expensive litigation as some district courts could feel bound by pre-*Axon* precedents. All of that, however, is unnecessary and can be avoided if the Court reviews this case now.

C. It gets worse. The Court's decision in *Axon* may rest on one of several statutory distinctions between the FTC Act and Exchange Act. Absent resolution by this Court now, those distinctions could deepen the existing circuit split after years of further litigation.

First, unlike the FTC Act, the Exchange Act permits judicial review of any "final order of the Commission," 15 U.S.C. § 78y(a)(1), and is not limited to judicial review of only "cease and desist" orders, *id.* § 45(c). If the Court were to hold the petition here, it necessarily *could not* resolve whether this statutory

distinction makes any difference. The question presented in *Axon* is specifically limited to a statute permitting judicial review of "the Commission's cease-and-desist orders." Pet. i, *Axon*, *supra* (No. 21-86) ("*Axon* Pet."). It does not "fairly include[ ]" the question presented here, which is premised on the Exchange Act's distinct statutory scheme and different statutory language. *See* Resp. Br. 15–16 & n.5 (emphasis removed); Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court").

Moreover, the Court would have no occasion to rule on this distinction because both parties in *Axon* agree that permitting review of some final orders is materially distinct from permitting review of all final orders. Axon says this distinction "cuts in favor of reading the FTC Act *more* narrowly when it comes to jurisdiction-stripping." *Axon* Pet. 21. And the United States disagrees solely on the erroneous basis that "there are no other orders that the FTC might issue" beyond cease-and-desist orders. *Axon* BIO 9 n.*. In fact, the FTC Act specifies that the "remedies available to the Commission with respect to unfair and deceptive acts or practices . . . includ[e] restitution to domestic or foreign victims." 15 U.S.C. § 45(a)(4)(B).

Unless this Court grants the petition now, there is likely to be drawn-out litigation on whether this statutory distinction is material, and that could further fracture the courts of appeals. Under the en banc Fifth Circuit's decision below, the distinction should make no difference because, like the FTC Act, the Exchange Act "says nothing about people, like Cochran, who have not yet received a final order [or cease-and-desist order] of the Commission." Pet. App. 7a. But at least one other circuit judge seems to have adopted

Axon's view, explaining that the FTC Act does not strip jurisdiction in part because "[n]ot all actions the FTC takes are subject to Article III scrutiny." *Axon Enter., Inc.* v. *FTC*, 986 F.3d 1173, 1192 (9th Cir. 2021) (Bumatay, J., dissenting in part).

Second, unlike the FTC Act, the Exchange Act does not specify that the court of appeals' jurisdiction "shall be exclusive," 15 U.S.C. § 45(d), but provides instead that it shall "*become*[ ] exclusive" after the record is filed, *id.* § 78y(a)(3) (emphasis added). The en banc Fifth Circuit held below that "the use of 'becomes' necessarily implies a transformation" from non-exclusive jurisdiction before a petition for review is filed to exclusive jurisdiction "*after* a petition is filed." Pet. App. 9a n.6.

Although the United States apparently disagrees that this is a "material[ ]" distinction, *see* Pet. 6, other courts of appeals might or might not agree with the United States' position. Here, too, unless the Court were to decide this case alongside *Axon*, the Court's decision may rest on the statutory language in the FTC Act, without having any occasion to resolve whether the distinct language in the Exchange Act makes any difference. And in the absence of such plenary review, this distinction could prompt protracted litigation and further splintering among the courts of appeals.

Third, unlike the FTC Act, the Exchange Act expressly provides that, with one exception concerning class actions, "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." 15 U.S.C. § 78bb(a)(2) (emphasis added). This Court has previously ruled that a nearly identical provision in the Food, Drug, and Cosmetic Act "strongly buttresse[s]"

the conclusion that Congress did not intend to strip jurisdiction. *Abbott Labs.*, 387 U.S. at 144; *see* 21 U.S.C. § 371(f)(6) ("The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law"). But if the Court were to hold the petition here, it necessarily could not resolve how such a broad saving clause affects the analysis, as the equivalent FTC Act provision is significantly more limited and mentions no effect on existing rights or remedies. *See* 15 U.S.C. § 51 (FTC Act does not "alter, modify, or repeal the . . . antitrust Acts or the Acts to regulate commerce").

Absent resolution by this Court, therefore, a ruling that the FTC Act does not strip jurisdiction over Axon's separation-of-powers claim would cause years of extended litigation and would potentially fracture the courts of appeals even further as to whether the Exchange Act strips jurisdiction over constitutional claims like Ms. Cochran's.

II. GRANTING THE PETITION NOW IS THE ONLY WAY TO PREVENT CONTINUED VIOLATION OF INDIVIDUAL RIGHTS.

As *Amici* know too well, additional years of protracted litigation over the jurisdiction-stripping issue would have devastating consequences for defendants in SEC administrative actions. During that time, the crushing process of litigating against the SEC—at the SEC—combined with the downside risk of receiving the SEC's severe penalties will force defendants to settle long before their constitutional challenge reaches an Article III court on direct review.

Unless this Court grants the petition now, hundreds of individuals compelled each year to defend themselves in unconstitutional SEC proceedings will

suffer irreparable harm without any meaningful opportunity for judicial review.

A. The SEC's proceedings are so "slanted against defendants" (as two current ALJs put it) that almost no one has the time, resources, and energy needed to fight it out to the end. Office of Inspector General, Report of Investigation, Case No. 15-ALJ-0482-1, at 20 (2016), tinyurl.com/y9xjr7fr. The promise of judicial review is illusory.

SEC proceedings take years, and defendants usually "settle because their business, job, or personal relationships will not survive sustained adverse publicity repeating the SEC's allegations over and over during the long life of litigation." Comments of Andrew N. Vollmer on Office of Mgmt. & Budget Request for Information, OMB-2019-0006, at 4 (Mar. 9, 2020), tinyurl.com/y5qcknzx. Mr. Gibson, for example, already has been fighting for *eight years*, including a two-year investigation. *See In re Gibson,* 2016 WL 1213259 (SEC Mar. 29, 2016) (order instituting proceedings). Even though *Lucia* required a new hearing four years ago, the SEC has prevented his case from reaching an Article III court by refusing to schedule oral argument or enter any final decision. Mr. Jarkesy likewise fought for *nine years*, including a two-year investigation, before he could have his day in court—and that was an "expedited" process. *In re John Thomas Capital Mgmt. Grp. LLC*, 2015 WL 728006, at *2 (SEC Feb. 20, 2015).

Throughout these lengthy proceedings, the costs keep piling on. In addition to facing steep legal fees, the target of SEC administrative actions is generally unemployable for the duration of those proceedings. His chosen profession is out of the question. *See*, *e.g.*, FINRA R. 1014(a)(3)(C) (judging an application for

membership based, in part, on whether an "Associated Person is the subject of a pending . . . regulatory action or investigation by the SEC"). And starting his own firm, of any type, is generally impossible as well; given the pending enforcement action, no lender will want to lend, especially at a reasonable cost. Self-funding is not an option either—as Mr. Gibson, Mr. Jarkesy, and Mr. Lucia all learned—because banks and brokerage firms close the accounts of anyone on the wrong side of the "v." in an SEC proceeding. Indeed, Mr. Lucia nearly went bankrupt fighting his enforcement proceeding, a fate all too common among defendants in SEC administrative actions.

The downside risk of contesting the SEC's charges compounds the pressure to throw in the towel and forego any constitutional challenge to the SEC's home-court process. Consider Mr. Jarkesy's case. The SEC slapped him with civil penalties of $300,000 and disgorgement of $684,935. *In re John Thomas Capital Mgmt. Grp. LLC*, 2020 WL 5291417, at *2 (SEC Sept. 4, 2020). And it issued various lifetime bans, *id.*—the "'securities industry equivalent of capital punishment,'" *Saad* v. *SEC*, 873 F.3d 297, 306 (D.C. Cir. 2017) (Kavanaugh, J., concurring) (citation omitted). Mr. Lucia, too, was handed civil penalties totaling $300,000 and various lifetime bans that took nearly three years for a court to vacate. *In re Raymond J. Lucia Cos.*, 2015 WL 5172953, at *2 (SEC Sept. 3, 2015), *vacated sub nom. Raymond J. Lucia Cos.* v. *SEC*, 736 F. App'x 2 (D.C. Cir. 2018).

Such immense downside risk, coupled with the crushing costs and delays associated with litigating at the SEC, means that—in the words of the former SEC Deputy General Counsel—"[m]any SEC cases lack merit, but the defendants settle" anyway. Vollmer,

supra, at 4. The unsparing reality is that virtually every defendant in an SEC administrative action has no real choice but to settle. That leaves their constitutional challenges to the SEC's one-sided process unheard and the constitutional infirmities in that process unaddressed.

B. Unless the Court decides this case now, defendants in SEC administrative actions will face not only years of continued litigation over the jurisdiction-stripping issue, but also the "'here-and-now' injury" of being forced to defend themselves against an unconstitutional administrative proceeding. *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2196 (2020) (citation omitted); *see also Lorenzo* v. *SEC*, 872 F.3d 578, 602 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (describing the "tension" between the Commission's "agency-centric process" and deeply rooted constitutional safeguards), *aff'd*, 139 S. Ct. 1094 (2019).

The SEC does not merely enjoy a "home-court advantage" in those proceedings. Jean Eaglesham, *SEC Wins with In-House Judges*, Wall St. J. (May 6, 2015), tinyurl.com/y44yqfwm. In sports, a neutral arbiter applies neutral rules to home and road team alike. At the SEC, by contrast, the home team runs the show. The government hand-picks its own referees and then exerts substantial institutional pressure on those referees to (in the words of a former ALJ) place the "'burden'" on the "'accused'" to "'show that they didn't do what the agency said they did.'" Jean Eaglesham, *SEC Is Steering More Trials to Judges It Appoints*, Wall St. J. (Oct. 21, 2014), tinyurl.com/yb6dgtzb.

At the SEC's home court, moreover, the rules change depending on whether the SEC or the defendant has the ball. Time limits, for example, are rigid and rapid, *see* 17 C.F.R. § 201.360(a)(2)(ii)—until they

are not. When the *defendant* asks for a continuance because, say, he was in a traffic accident, *In re J.S. Oliver Capital Mgmt. LP*, 2014 WL 10937777, at *1 (SEC Jan. 3, 2014), or just was served with a document dump "larger than the entire printed Library of Congress," *In re Harding Advisory LLC*, 2014 WL 10937716, at *2 (SEC Jan. 24, 2014), the SEC invariably denies the motion. But when the *Commission's* ALJ seeks an extension of time merely because he is busy, for example, the SEC invariably grants the motion. *See*, *e.g.*, *In re Harding Advisory LLC*, 2014 WL 4160053 (SEC Aug. 21, 2014); *In re J.S. Oliver Capital Mgmt., LP*, 2014 WL 2965407 (SEC July 2, 2014).

The "protections that our civil justice system affords litigants" to "protect [their] reputation[s], livelihood[s], and property" are likewise "denied to *every* litigant in an [SEC] administrative proceeding." Chris Cox, *The Growing Use of SEC Administrative Proceedings* 3–4 (May 13, 2015), tinyurl.com/yyusqwh2. The Commission sits as both prosecutor and judge and is unable to maintain any actual separation of these functions. *See* Dave Michaels, *SEC Says Employees Improperly Accessed Privileged Legal Records*, Wall St. J. (Apr. 6, 2022), tinyurl.com/mr6r5mmt (enforcement employees "improperly accessed documents prepared for cases being litigated in the agency's administrative court system"). Hearsay evidence is freely admitted, even when such evidence would never "be allowed into evidence in federal district court." *In re Melton*, 2000 WL 898566, at *5 (SEC July 7, 2000). And defendants are limited to just three or five depositions, *see* 17 C.F.R. § 201.233(a)—far below the ten depositions minimum allowed in federal court, *see* Fed. R. Civ. P. 30(a)(2)(A)(i), and the virtually limitless depositions and subpoenas the Commission can

use to develop its own evidentiary record during its multi-year investigations, *see*, *e.g.*, 15 U.S.C. § 78u(b).

Even in the rare case where defendants fight until the very end, it can take years of additional litigation to obtain complete judicial review—and that may not provide meaningful relief. Mr. Lucia learned this lesson the hard way. It took nearly three years for a federal court to uphold his Appointments Clause challenge to the ALJ who decided his case. And even then, he was forced to settle the case after nearly two more years of litigation—under the threat of *another* trip through the SEC's administrative gauntlet—before any court could hear his remaining constitutional challenges. *See In re Raymond J. Lucia Cos.*, 2020 WL 3264213 (SEC June 16, 2020).

* * *

"The SEC should not be the decider of its own constitutionality. But that is what is happening." Linda D. Jellum, *The SEC's Fight to Stop District Courts from Declaring Its Hearings Unconstitutional*, 101 Tex. L. R. (forthcoming 2022), tinyurl.com/ykxydwe7. Only this Court can open the courthouse doors for all the individuals who find themselves before the SEC's in-house tribunals, being squeezed to settle. There is no basis—in policy, logic, or equity—to keep those courthouse doors closed and force defendants to continue litigating the jurisdiction-stripping issue while they suffer immense financial harm and the "'here-and-now' injury" of defending themselves against an unconstitutional tribunal. *Seila Law*, 140 S. Ct. at 2196 (citation omitted). The Court should grant the petition now and should not wait until *Axon* is decided.

CONCLUSION

The petition for a writ of certiorari should be granted now.

Respectfully submitted.

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