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

REPLY BRIEF FOR RESPONDENT

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INTRODUCTION

This is a statutory interpretation case about district court "jurisdiction." Pet. (I). The government's merits brief is not. Indeed, at the outset of its brief, the government takes the extraordinary step of rewriting its own question presented to strip it of the word "jurisdiction." Gov't Br. (I). And then, instead of meaningfully grappling in its brief with the text of the jurisdictional statutes at issue—28 U.S.C. § 1331 and 15 U.S.C. § 78y—the government quickly glosses over those statutes and pivots to new arguments that have nothing to do with jurisdiction.

The government's attempt to shift the focus underscores the weakness of its case on the actual question presented. Section 1331 unambiguously grants district courts jurisdiction over all civil actions arising under the Constitution. And Section 78y just as unambiguously grants courts of appeals jurisdiction over final SEC orders. Nothing in Section 78y's grant of jurisdiction strips district courts of the jurisdiction granted by Section 1331 over structural constitutional claims—like Cochran's here—that are not tied to any final SEC order. Thus, Section 1331 jurisdiction remains over these claims. As the Fifth Circuit held, that is the only plausible way to read these statutes. And this Court already reached that very conclusion in a case concerning the same statutes and same kind of structural constitutional claim. *See Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 489-91 (2010).

The government's efforts to complicate this straightforward statutory analysis are unpersuasive. Before its merits brief in this Court, the government had maintained in numerous cases that district court

jurisdiction is precluded over the structural constitutional claims at issue under the atextual, multi-factor "framework" established by *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). *See, e.g.*, *Axon* BIO 7-8 (No. 21-86). The government's brief in this Court largely abandons the *Thunder Basin* framework and, instead, offers scattershot arguments that have little connection to the statutes and jurisdictional question at hand. This new approach is no better than the old one—both approaches subvert the text of the statutes at issue and *Free Enterprise Fund*. And the government's decision to essentially scrap the *Thunder Basin* theory embraced by the dissent below and other courts only highlights that this approach has always been unsound.

The government's arguments ultimately expose an independent agency intent on shrouding its administrative apparatus from constitutional scrutiny for as long as possible—no matter the cost. The government touts a handful of instances in which individuals endured years of unconstitutional administrative proceedings in order to present their structural constitutional claims to a federal court. But that is cold comfort to the countless individuals like Cochran, who remain enmeshed in the SEC's administrative machinery before unconstitutional decisionmakers and must withstand extraordinary pressure to settle before they ever see a federal court. And the fact that a few have survived this gauntlet is hardly reason to erase the jurisdiction that Congress granted under Section 1331 over the claims at issue.

The Fifth Circuit's judgment should be affirmed.

ARGUMENT

I. DISTRICT COURTS HAVE JURISDICTION OVER STRUCTURAL CONSTITUTIONAL CHALLENGES TO THE SEC'S ADMINISTRATIVE REGIME

A. Ordinary Principles Of Statutory Interpretation Compel The Conclusion That District Court Jurisdiction Exists

1. The government is quite right that the Court should resolve this case according to "ordinary rules of statutory interpretation." Gov't Br. 33. The "first" rule of statutory interpretation, however, is that "unambiguous" statutory text controls. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

The statutes at issue here are "as unambiguous as can be." Pet. App. 35a (Oldham, J., concurring). As the government admits (at 17), Cochran's claim falls within the jurisdiction granted to district courts in Section 1331, which covers "all civil actions arising under the Constitution." 28 U.S.C. § 1331. The district court thus possesses subject-matter jurisdiction over Cochran's claim unless Section 78y "strip[s] this jurisdiction." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 643 (2002). But as the government also admits (at 34-35), Section 78y addresses only review of a "final order of the Commission." 15 U.S.C. § 78y(a)(1). Cochran is not challenging a final order of the Commission. So, the jurisdiction granted by Section 1331 remains. That straightforward reading of the jurisdictional statutes at issue resolves this case. Resp. Br. 28-33.

2. a. To the extent it grapples with the statutory text, the government relies (at 18-20) almost exclusively on the "canon that a specific authorization takes precedence over a general one." But, as this

Court has explained, this "canon is inapplicable" when the "'more specific provision'" does not actually "speak[] to" the particular "type of case" at issue. *Marx v. General Revenue Corp.*, 568 U.S. 371, 387 (2013) (citation omitted); *see, e.g.*, *National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 336 (2002) ("The specific controls but only within its self-described scope."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 184 (2012) (Scalia & Garner). That is the case here, because Section 78y—the supposedly "more specific" grant of jurisdiction—is limited to "person[s] aggrieved by a final order of the Commission." 15 U.S.C. § 78y(a)(1). Thus, the specific-trumps-the-general "canon is inapplicable." *Marx*, 568 U.S. at 387; *see* Pet. App. 64a-65a (Oldham, J., concurring).

Rather than confront the actual text of Section 78y, the government just rewrites it. Throughout its brief, the government argues from the premise that Section 78y actually covers—and thus "implicitly" strips district courts of jurisdiction over—"the Commission['s] final orders *and the administrative proceedings that lead to those orders*." Gov't Br. 18-19 (emphasis added). But that is not what Section 78y says. Section 78y is unambiguously limited to "final order[s] of the Commission." 15 U.S.C. § 78y(a)(1). And as the government well knows, "this Court is not free to 'rewrite the statute' to the Government's liking." *National Ass'n of Mfrs. v. Department of Defense*, 138 S. Ct. 617, 629 (2018) (*NAM*); *see id.* at 632 (rejecting government's effort to "broaden" a jurisdictional statute governing "actions 'issuing or denying' a permit" to also "cover any agency action that dictates whether a permit is issued or denied").

The government also points (at 14) to "background principles of administrative law" under which a party seeking review of a final agency order "may challenge not only the order itself, but also actions taken in the administrative proceeding." That is irrelevant. Section 78y explicitly refers only to "final order[s]" of the SEC. In ascertaining jurisdiction, unambiguous statutory text governs over generalized background principles. *See NAM*, 138 S. Ct. at 634. This Court has rejected similar efforts to broaden *express* jurisdiction-stripping statutes to encompass non-specified preliminary actions. *See, e.g.*, *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482-83 (1999); *Jennings v. Rodriguez*, 138 S. Ct. 830, 840-41 (2018) (plurality opinion). There is no reason to do any different here, where Section 78y does not expressly strip any court of any jurisdiction but instead grants it to the courts of appeals for a certain specified action—a final SEC order.

The government argues (at 33-34) that this Court has "read statutes that expressly authorize review in one court as implicitly foreclosing review in another." But this case lacks the central feature that this Court has relied upon to find jurisdiction stripped in such cases: that the claims challenge the "type of [agency] action" that is "covered" by the statutory text. *Elgin v. Department of the Treasury*, 567 U.S. 1, 12 (2012); *see infra* at 8-9. The claims at issue here are *not* that type because they do not challenge any "final order" of the SEC. There is, accordingly, no basis to imply that Section 78y strips jurisdiction over the claims at issue. The government's argument is, at bottom, statutory revision "disguised as implication." Scalia & Garner 97. That is no more proper here than any other context. *See id.* at 367-68 (stressing that

jurisdictional statutes must be given their ordinary meaning and are not subject to "special rules").

b. The government also invokes (at 21-22) provisions in an entirely different section of the Exchange Act concerning temporary cease-and-desist orders, 15 U.S.C. § 78u-3(c)-(d). These provisions were enacted in 1990, Pub. L. No. 101-429, § 203, 104 Stat. 931, 939-40—more than 55 years after Section 78y. They thus shed little light on Section 78y's meaning. *See Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 108-09 (2014).

The government's argument is also puzzling on its own terms. The government suggests (at 21) that the heading in Section 78u-3(d)(4)—"Exclusive review"—is used to "describe th[e] scheme" in *Section 78y*, and thereby "confirms" that "[Section] 78y[] is exclusive." The provision itself, however, says precisely the opposite: "Section 78y of this title shall *not* apply" to temporary orders. 15 U.S.C. § 78u-3(d)(4) (emphasis added). Instead, judicial review of those orders is available under Section 78u-3(d)(2). Section 78u-3(d)(4)'s heading, in turn, clarifies that *that* provision is "[e]xclusive" with respect to temporary orders; it says nothing about Section 78y's exclusivity. In any event, Cochran is not challenging a temporary order, so the fact that a later-enacted section of the Exchange Act permits review of "*some other* actions" is "not enough to eliminate jurisdiction under § 1331" here. *Verizon*, 535 U.S. at 643; *see Bowen v. Michigan Acad. of Fam. Physicians*, 476 U.S. 667, 674 (1986).

Meanwhile, the government dismisses (at 36-37) the Exchange Act's saving clause, 15 U.S.C. § 78bb(a)(2). Unlike Section 78u-3(d)(4), the saving clause *was* enacted at the same time as Section 78y. It therefore "strongly buttresse[s]" the conclusion

compelled by the statutory text—that Section 78y does not "preclude traditional avenues of judicial relief." *Abbott Labs. v. Gardner*, 387 U.S. 136, 142, 144-45 (1967); *see* Resp. Br. 31. The government attempts (at 36-37) to narrow the saving clause and argues that there was no relevant remedy to preserve in this context. But this Court has rejected attempts to engraft "artificial" limits on similar provisions, *Abbott Labs.*, 387 U.S. at 145, and "equitable relief" in an action under Section 1331 "'has long been recognized as the proper means for preventing entities from acting unconstitutionally,'" *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (citation omitted).

3. Getting nowhere with the text of the Exchange Act, the government looks elsewhere.

a. In particular, the government invokes the APA's judicial review provisions. Gov't Br. 12, 14, 22-26, 29-30, 34, 41. All of these arguments—which are brand new in this Court, *see infra* at 21—are red herrings. The question presented in this case concerns only federal district court "jurisdiction." Pet. (I); *see* Pet. App. 2a. And, as this Court has recognized, "[t]he judicial review provisions of the APA are not jurisdictional." *Air Courier Conf. of Am. v. American Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991). Thus, arguments about "reviewab[ility] under the APA"—including doctrines like "final[ity]"—have no bearing on federal courts' "subject-matter jurisdiction." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 745 n.11 (1985).[1]

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[1] Sporadic references in lower-court decisions to the APA's provisions as "jurisdictional" (*see* Gov't Br. 26 n.1) are simply relics from the days when courts' "use of 'jurisdictional' was 'less

The government nevertheless tries to inject its new APA arguments into this case by asserting (at 22) that the Court should "read" the jurisdictional statutes at issue "against the backdrop of the APA." But this argument is simply a backdoor way of arguing that a non-jurisdictional statute—the APA—should be read as a jurisdictional provision, erasing the very line repeatedly drawn by the Court in cases like *Air Courier* and *Florida Power*. And, in any event, the APA was enacted in 1946, *see* Pub. L. No. 79-404, 60 Stat. 237—more than a decade *after* Section 78y. The pertinent backdrop against which Congress actually enacted Section 78y is the federal district courts' longstanding exercise of jurisdiction to grant equitable relief against unconstitutional exercises of executive power. Resp. Br. 32.

b. The government next cites a smattering of cases arising in a "variety of contexts." Gov't Br. 17-19, 30-32, 47-49. Notably, the government largely ignores the case that arose in this precise context—*Free Enterprise Fund*. As explained below, *Free Enterprise Fund* controls. *See infra* at 11-13. But the other cases do not help the government anyway.

Only some of the government's cases actually concern jurisdiction. And, as discussed, in the cases in which this Court has found jurisdiction stripped in the agency context, the statute granting exclusive jurisdiction to a court or agency expressly covered the agency actions at issue. Thus, in *Elgin*, the statute vesting the Merit Systems Protection Board with jurisdiction over "specified adverse employment actions" covered the employees' challenges to

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than meticulous.'" *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1848 n.4 (2019) (citation omitted).

"adverse employment actions." 567 U.S. at 5, 11-12. Similarly, in *Thunder Basin Coal Co. v. Reich*, the statute vesting the Mine Safety and Health Review Commission with jurisdiction over challenges to "any citation" covered the company's challenge to an "'anticipated citation.'" 510 U.S. 200, 206-07 (1994) (citation omitted).[2] This case is fundamentally different. Here, Cochran does *not* challenge the agency action addressed by Section 78y—i.e., a "final order" by the Commission.

The government then invokes (at 48-49) cases that involve other, non-jurisdictional doctrines like finality, *see FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980), and administrative exhaustion, *see Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535 (1954); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974). As explained, however, the question presented in this case concerns *jurisdiction*. The resolution of that question is governed by "statutory text," *NAM*, 138 S. Ct. at 634, rather than the kinds of exclusively "pragmatic considerations," *Standard Oil*, 449 U.S. at 243, that may govern other doctrines. *See* Pet. App. 26a (distinguishing *Standard Oil*).

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[2] *See also Whitney Nat'l Bank v. Bank of New Orleans & Tr. Co.*, 379 U.S. 411, 422 (1965) (statute vesting Federal Reserve Board with jurisdiction over certain bank-related determinations precluded review of such determinations in district court); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958) (statute vesting courts of appeals with jurisdiction over Federal Power Commission orders precluded review of such orders in district court); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938) (statute precluding district courts from enjoining or otherwise "prevent[ing]" National Labor Relations Board authority (citation omitted)).

Moreover, courts have long held that "exhaustion is not required" when—as here—"'the very administrative procedure under attack is the one which the agency says must be exhausted.'" *Ellis v. Blum*, 643 F.2d 68, 78 (2d Cir. 1981) (Friendly, J.) (citation omitted); *cf. Bowen v. City of New York*, 476 U.S. 467, 484 (1986) (refusing to "require claimants to exhaust administrative remedies merely to enable them to receive the procedure they should have been afforded in the first place"). These non-jurisdictional cases thus get the government nowhere, either.

Finally, the government cites (at 15, 49-50) cases involving appellate jurisdiction over district court decisions. Once again, these cases—interpreting different statutes in different contexts—have little to do with the statutory interpretation question in this case. Moreover, in those cases, the jurisdiction of the courts of appeals was limited to reviewing *only* final judgments, *see* 28 U.S.C. § 1291; there was no equivalent to Section 1331's broad grant of federal-question jurisdiction in that context.

c. The government also tries (at 45, 52, 54) to leverage "constitutional avoidance" principles. The "doctrine of [constitutional] avoidance," however, "comes into play *after* the court has acquired jurisdiction of a case." *Clinton v. Jones*, 520 U.S. 681, 690 (1997) (emphasis added). The government's attempt to use it as a means of ousting district courts of jurisdiction altogether is a non-starter. Indeed, this Court rejected that idea more than two centuries ago, when Chief Justice Marshall declared that a court cannot "decline the exercise of jurisdiction" granted by Congress merely "because [the case] approaches the confines of the constitution." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.);

see also Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 815 n.21 (1976).

B. The Government's Attempt To Sidestep *Free Enterprise Fund* Is Unavailing

The foregoing explains why the government's reading of Section 78y fails. But this is not news. In *Free Enterprise Fund*, this Court rejected the government's argument that Section 78y explicitly or implicitly ousts district courts of their jurisdiction over the kind of claims at issue here. 561 U.S. at 489. *Free Enterprise Fund* thus "controls this case." Pet. App. 10a-15a, 31a; *see* Resp. Br. 34-43.

The government admits (at 38) that *Free Enterprise Fund* analyzed "the same provision that is at issue in" this case (Section 78y) and held that it "did not preclude" district court jurisdiction over the same kind of "structur[al]" "constitutional challenge[]" asserted in this case. *See* Pet. App. 10a ("In *Free Enterprise Fund,* the Supreme Court rejected the precise argument the SEC makes here—that the Exchange Act divests district courts of jurisdiction over removal power challenges."). Nevertheless, the government gives *Free Enterprise Fund* the back of the hand, not addressing the decision until page 37 of its brief. And then, it simply dismisses (at 38-41) *Free Enterprise Fund*'s unequivocal statutory holding on the ground that it was based on "idiosyncratic factors that are absent here." This argument fails.

The government claims that the petitioners in *Free Enterprise Fund* "challenged a *Board* 'investigation'" whereas Cochran is challenging "ongoing *Commission* proceedings" before an ALJ. Gov't Br. 38-39 (citation omitted). Yet, like the dissent below, the government "fails to point to

anything in the text of the Exchange Act or in *Free Enterprise Fund* that distinguishes between investigation and enforcement." Pet. App. 13a n.9. In other words, this distinction is made up. The marker that Section 78y *does* adopt in granting jurisdiction is a "final order" of the SEC. And, in that respect, this case is identical to *Free Enterprise Fund*: as there, no "final order" of the agency is being challenged here.

Moreover, "the Board" in *Free Enterprise Fund* operated "under the SEC's oversight, particularly with respect to the issuance of rules or the imposition of sanctions," which were "subject to" review by the Commission. 561 U.S. at 486. The same is true of SEC ALJs, who superintend enforcement proceedings under the SEC's oversight. Gov't Br. 3-4. Thus, if actions by an ALJ are considered "steps taken during an SEC proceeding," *id.* at 38, then the same follows for actions by the Board. The government offers no basis for treating ALJ and Board actions differently in this respect. Indeed, Cochran addressed the flaws with this investigation/enforcement distinction in her opening brief, *see* Resp. Br. 41-43, and the government has no direct response.

Likewise, the government admits (at 39) that Cochran's challenge will "be reviewable in courts of appeals if"—but only if—"the Commission[] issue[s] [an] adverse final order[]." The Commission may never issue such an order. Resp. Br. 38-39. Thus, just as "not every Board action is encapsulated in a final Commission order," Gov't Br. 39 (quoting *Free Enter. Fund*, 561 U.S. at 490), not every ALJ action is encapsulated in a final Commission order. That Cochran's constitutional claim may be reviewable "if the Commission[] issue[s] [an] adverse final order[]" in her case is thus beside the point. *Id.*

The government also argues (at 39-41) that Cochran has "already engaged in the conduct that exposes [her] to possible liability under the . . . Exchange Act." But the same was true of the petitioner in *Free Enterprise Fund*; indeed, that conduct prompted the Board to institute "a formal investigation" that was ongoing when the petitioner filed suit. 561 U.S. at 487. But the petitioner in *Free Enterprise Fund* had no way of forcing the agency to issue an order appealable under Section 78y beyond "ignoring Board requests for documents and testimony" during the investigation. *Id.* at 490. The same is true here—short of "ignor[ing]" the ALJ's "requests" for Cochran's participation in the enforcement proceedings and thereby defaulting her case, Cochran has no way of forcing the agency to issue an appealable order. Resp. Br. 39.

In short, the government's grab-bag effort to distinguish *Free Enterprise Fund* fails. "*Free Enterprise Fund* is squarely on point" and is "enough to decide this case," just as the Fifth Circuit held. Pet. App. 10a, 16a. The government's brazen attempt to dismantle that precedent should be rejected.

C. The Government's Passing Application Of The *Thunder Basin* Factors Fails

Until this case, the government had succeeded in persuading appellate courts that the "*Thunder Basin* factors" required stripping district courts of their jurisdiction under Section 1331 over the claims at issue. *See* Resp. Br. 43; Pet. App. 82a-83a, 91a (Costa, J., dissenting). But the government all but abandons any serious attempt to defend its position under those factors and, instead, relegates its short discussion of the factors to the tail-end of its brief (at 51-56). That

discussion only confirms that the government's conception of the *Thunder Basin* factors is flawed.

1. To begin with, the central premise for applying *Thunder Basin* is inapplicable here. As discussed, the *Thunder Basin* analysis applies only where the challenged "[agency] action at issue" falls within the statutory text of the statutory scheme. *Elgin*, 567 U.S. at 12-13. Thus, in both *Thunder Basin* and *Elgin* the claims at issue *could* have been brought within the statutory scheme at issue. *See id.*; *Thunder Basin,* 510 U.S. at 208. But that is not the case here because Cochran is not challenging a "final order" of the SEC, which is the only reviewable agency action specified in Section 78y. And while the government might find it "bizarre" to follow the statutory text (Gov't Br. 34), this Court should not.

2. In any event, contrary to the government's arguments, each of the *Thunder Basin* factors points *against* a finding of implied jurisdiction-stripping here, just as this Court concluded in *Free Enterprise Fund*. 561 U.S. at 489-91.

First, the government claims (at 52-54) that Cochran's structural constitutional claim is not "collateral" to Section 78y's review scheme because she is asserting her claim as a means of halting her "specific administrative proceeding[]." This argument makes no sense. The inquiry here concerns the *type* of claim being asserted, not the reason for asserting it. It is difficult to understand what kind of viable claim would be considered "collateral" in the government's view. And that appears to be the point, since the government urges the Court (at 53-54) to disregard the distinction "between systemic and case-specific" claims altogether for the sake of convenience. But that is the "critical difference" that separates

collateral and non-collateral claims in this Court's precedent, *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 492, 497-98 (1991), which the government fails to acknowledge.

Second, the government contends (at 54-56) that Cochran's structural constitutional claim falls within the SEC's "expertise" by pointing to "other issues" unrelated to the constitutional claim. But the SEC's expertise in deciding unrelated issues says nothing about whether the agency is competent to resolve a challenge to the constitutional structure of the proceeding itself. *Elgin* is not to the contrary. There, "*threshold* questions" "accompan[ied] [the] constitutional claim," such as whether the statute applied to the claimant at all. 567 U.S. at 22 (emphasis added). That is not the case here. Resp. Br. 37. Moreover, the forms of relief sought in *Elgin*—reinstatement and back pay—rendered the constitutional and non-constitutional issues interchangeable. 567 U.S. at 22-23. Here, by contrast, a decision in favor of "Cochran on statutory, regulatory, or factual grounds," Gov't Br. 54, will not remedy the injury inflicted by having to appear before an unconstitutionally insulated ALJ. Any SEC expertise in adjudicating statutory, regulatory, or factual questions will have no bearing on the structural constitutional claim in this case.

Finally, the government argues (at 51-52) that a "meaningful opportunity for judicial review" exists as long as a party *might* be able to "raise its constitutional challenges in an Article III court at the end of agency proceedings." But the government's focus on the possibility of judicial review misstates the inquiry; the question is whether precluding district court jurisdiction "*could* foreclose all

meaningful judicial review." *Thunder Basin*, 510 U.S. at 212-13 (emphasis added). In other words, is meaningful judicial review not merely possible but guaranteed? The mere possibility of judicial review is always present in *Thunder Basin* cases; accepting the government's possibility test would drain the requirement of a "meaningful opportunity" from the inquiry entirely. Resp. Br. 44-45.

Here, it is clear that judicial review of the claims at issue is *not* guaranteed. Indeed, it is undisputed that the vast majority of ALJ proceedings do not produce an appealable final order. *Id.* at 38 & n.8. And the government acknowledges that, in that circumstance, judicial review is not available at all. Gov't Br. 52. The government hypothesizes that Cochran might be "'successful in vindicating [her] rights'" by "prevail[ing] before the Commission[] on other grounds," thereby rendering judicial review "[un]necessary." *Id.* (citation omitted). But even in that unlikely scenario, the result would not "vindicate" Cochran's rights; to the contrary, it would disregard them, as any victory would be conditioned on Cochran's suffering the here-and-now injury of being subjected to executive authority wielded by an unconstitutionally insulated decisionmaker.

Moreover, the government overlooks the requirement that the opportunity for judicial review be *meaningful*. As Cochran explained, post-agency judicial review cannot be considered "meaningful" when, as here, it arrives only after the plaintiff has suffered the very constitutional injury that she is seeking to prevent. Resp. Br. 39-41. The government does not even try to respond to those arguments. Nor does the government dispute that, in light of the remedial holding in *Collins v. Yellen*, 141 S. Ct. 1761,

1788-89 (2021), retrospective relief for removal-power claims may be difficult to obtain and may leave structural constitutional defects practically unreviewable. Resp. Br. 40 & n.9.

3. To the extent it is ever appropriate, implied jurisdiction-stripping should be the exception, not the rule. The government's broad conception of *Thunder Basin* would call into question the doctrine itself. Resp. Br. 43-46; *see* WLF Amicus Br. 7-22. Far from embracing *Thunder Basin*, it is imperative that this Court make clear that the lower courts have misunderstood the limits on implied jurisdiction-stripping in holding that district courts lacked jurisdiction over the claims at issue here.

D. The Government's Policy Arguments Are Both Irrelevant And Unavailing

Finally, the government resorts (at 15-16, 44-51) to unabashed policy arguments, urging the Court to "balance [the] competing interests" at stake and make its own judgment on whether jurisdiction is warranted. These policy arguments fail.

1. The Court's task here, of course, is to "give effect to the law Congress enacted," not "to assess the consequences of each [party's] approach and adopt the one that produces the least mischief." *Lewis v. City of Chicago*, 560 U.S. 205, 217 (2010). Adhering to that familiar principle of statutory interpretation is no less important when it comes to "the scope of federal jurisdiction," which is constitutionally controlled by "Congress, and not the Judiciary." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 359 (1989). The government cannot supplant the unambiguous jurisdictional provisions in this case with atextual "what-makes-best-sense assertions" or

other "'untethered notions of what might be good public policy.'" *Badgerow v. Walters*, 142 S. Ct. 1310, 1321 (2022) (citation omitted).

2. In any event, the government's policy arguments are profoundly mistaken.

First, the government frets (at 44, 50) that "allowing" district courts to exercise jurisdiction over structural constitutional claims will result in "inefficienc[ies]" in agencies and courts. Of course, "when Congress vests a district court with jurisdiction, it's obligated to exercise it—efficiencies aside." Pet. App. 79a (Oldham, J., concurring). Regardless, district courts possess multiple screening mechanisms to address that concern. Indeed, as the government admits (at 44 n.2), a district court will not enjoin ongoing agency proceedings unless the plaintiff demonstrates a likelihood of success on the merits. And when a plaintiff does establish such a likelihood of success, "inefficiencies" are hardly a basis for allowing an unconstitutional process to persist. Complaints about judicial "interfere[nce] with" agency proceedings, Gov't Br. 15, likewise ring hollow when action is commanded by the Constitution itself.

Although the government ironically touts the handful of agency litigants who have successfully asserted structural constitutional challenges against the SEC in an Article III court after the conclusion of agency proceedings, it overlooks what they endured to get there, including *years* of SEC proceedings. *See* Resp. Br. 41; Lucia Amici Br. 4-5, 10-11. Delaying judicial review of potentially meritorious structural constitutional claims, and unnecessarily requiring years of defective (and possibly duplicative) administrative proceedings, is hardly efficient. *See* Pet. App. 80a-81a (Oldham, J., concurring).

Second, the government claims (at 45-46) that Cochran's jurisdictional rule will be "difficult to administer." But the line between constitutional challenges to the inherent structure of an administrative proceeding or its decisionmaker and case-specific challenges in an individual case is hardly as complicated as the government suggests. This Court has done it repeatedly. *See, e.g.*, *Free Enter. Fund*, 561 U.S. at 489-91; *McNary*, 498 U.S. at 492-94; *Bowen*, 476 U.S. at 484-85; *cf. Elgin*, 567 U.S. at 25-26 (Alito, J., dissenting) (drawing similar distinction). The government, on the other hand, offers no rule at all. On its view, jurisdiction evidently turns on some combination of "idiosyncratic factors" present in *Free Enterprise Fund*, the atextual factors derived from *Thunder Basin*, and a host of background rules that have no statutory mooring. That is scarcely the way to delineate when federal jurisdiction exists.

3. The government also drastically discounts the real harms on the other side of the balance. The government trivializes these harms as merely the "expense and annoyance of litigation" and claims that they are just "part of the social burden of living under government." Gov't Br. 48 (citation omitted). But the harms at stake here are far more serious than mere expense and annoyance. The SEC's prolonged administrative adjudications inflict a devastating toll on the Americans whose lives, reputations, and ability to earn a living are upended by the mere initiation of those proceedings. *See* Resp. Br. 6-7; Lucia Amici Br. 6-7. An SEC charge and press release often operate as an occupational death sentence. Even a regulator intent on enforcing the litany of

rules and regulations on the books should have some regard for the human toll that its actions inflict.

More fundamentally, Cochran is seeking to avoid the constitutional "'here-and-now' injury" inflicted by each transgression of the Constitution's separation of powers in her proceeding. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2196 (2020). That injury is distinct from the burdens of litigation, and it suffices to demonstrate the need for district court jurisdiction in this context.

II. THE GOVERNMENT'S NEW, NON-JURISDICTIONAL ARGUMENTS ARE IMPROPER AND MERITLESS

The government raises new arguments that have nothing to do with jurisdiction. First, the government asserts (at 27-30) that Cochran lacks a statutory cause of action. Second, the government asserts (at 23-25, 34) that Cochran's claim is barred by the judicial review provisions of the APA. These arguments are improper, forfeited, and meritless.

1. For starters, the government's new arguments are outside the question presented. The question on which this Court granted certiorari is whether the district court had "jurisdiction" to hear Cochran's claim. Pet. (I). Indeed, "subject-matter jurisdiction" was the only issue decided below on which the government sought certiorari. Pet. App. 2a.

The government's new arguments, however, do not concern jurisdiction. As this Court has repeatedly stressed, "[w]hether a cause of action exists is not a question of jurisdiction." *Air Courier*, 498 U.S. at 523 n.3. Likewise, "[t]he judicial review provisions of the APA are not jurisdictional," *id.*, including the APA's requirement of "final" agency action, *Florida Power & Light*, 470 U.S. at 745 n.11; *see Trudeau v. FTC*, 456

F.3d 178, 183-84 (D.C. Cir. 2006); 33 Charles Alan Wright et al., *Federal Practice & Procedure* § 8361 (2d ed. 2022) (Wright & Miller). The Fifth Circuit made clear that it was *not* addressing non-jurisdictional issues because they are irrelevant to the question of jurisdiction. Pet. App. 26a-27a & n.14. There is no basis for this Court to do any different.

2. Because the government's new arguments are "not jurisdictional," they are also subject to being "waived [or forfeited] by the Government" if not timely raised. *Air Courier*, 498 U.S. at 523 n.3; *see, e.g.*, *id.* at 522-23 & n.23 (assuming that "a cause of action exists" because the government failed to argue otherwise in "either of the lower courts"); *Marcum v. Salazar*, 694 F.3d 123, 128 (D.C. Cir. 2012) ("In this case, the Government never raised finality with the District Court and therefore forfeited the objection.").

The government has clearly forfeited its new no-cause-of-action and APA arguments. The government did not raise these arguments in the district court. *See* D. Ct. Doc. 19 (Mar. 12, 2019). Nor did the government raise these arguments in any of the *four* briefs it filed in the Fifth Circuit. *See* Gov't C.A. Br. (Aug. 9, 2019); Gov't C.A. Opp. to Inj. Pending Appeal (Aug. 26, 2019); Gov't C.A. Opp. to Reh'g En Banc (Oct. 16, 2020); Gov't C.A. En Banc Br. (Dec. 30, 2020). Nor did the government raise these arguments in its certiorari petition to this Court. The Court therefore should deem these arguments forfeited. *United States v. Jones*, 565 U.S. 400, 413 (2012).

3. Finally, the government's new arguments are meritless. Indeed, in *Free Enterprise Fund*, the government made these same arguments—asserting that the petitioners were not challenging "'final agency action'" under the APA and otherwise lacked

a "cause of action." Gov't Br. 21-22 & n.7, *Free Enter. Fund*, *supra* (No. 08-861); *see also* Gov't Cert. Opp. 13, *Free Enter. Fund*, *supra* (No. 08-861) (same). But this Court rejected those arguments, holding that suits under Section 1331 seeking "equitable relief" are "'the proper means for preventing [governmental] entities from acting unconstitutionally.'" *Free Enter. Fund*, 561 U.S. at 491 n.2 (citations omitted).

Under this line of precedent, it is settled that "a federal court may use its equitable powers to enjoin violations of law by governmental officials with no more statutory authority than general federal question jurisdiction under [Section] 1331." 33 Wright & Miller § 8307. Moreover, this kind of claim is distinct from an APA claim. *Id.*; *see, e.g.*, *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1325-32 (D.C. Cir. 1996). Thus, the government's reliance (at 23-25) on the APA's limitations on judicial review are not only forfeited but irrelevant to this case as well.

While again ignoring *Free Enterprise Fund*, the government concedes (at 28) that federal courts do have the authority to enjoin federal officials from violating the Constitution; but it adds that this authority must be executed consistent with the "limits set forth in a federal statute." Here, no statutory limit would preclude the exercise of this equitable authority; the only conceivable limitation in Section 78y—the reference to "final order[s]" of the SEC—is inapplicable. The same cause of action recognized in *Free Enterprise Fund* thus is equally available here. And, just as there, this Court should hold that federal district courts have jurisdiction under Section 1331 to adjudicate it.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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