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 PHILLIP GOLDSTEIN, MARK CUBAN, NELSON OBUS, AND INVESTOR CHOICE ADVOCATES NETWORK AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are Phillip Goldstein, Mark Cuban, Nelson Obus, and Investor Choice Advocates Network ("ICAN"). Each of the individual *amici* is a sophisticated businessman and investor who has litigated against the United States Securities and Exchange Commission (the "SEC" or "Commission"). ICAN is a nonprofit, public interest law firm working to expand access to markets by underrepresented investors and entrepreneurs. *Amici* have an interest in the outcome of this case because they believe it is important that future litigants are not forced into administrative proceedings that both favor the SEC and infringe on individuals' constitutional rights. In other words, *amici* appreciate that when the SEC elects to use an administrative proceeding, determining a respondent's liability and punishment without the involvement of a jury, these proceedings disregard the protections guaranteed to litigants by the United States Constitution, and lead to unequal and unjust results. As market participants and adverse parties to litigation with the SEC, *amici* have a particular interest that defendants in SEC enforcement actions are able to vigorously defend themselves with the full protections granted defendants in federal courts, including the right to a jury trial.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket consents to the filing of *amicus curiae* briefs. *See* Sup. Ct. R. 37.3.

SUMMARY OF THE ARGUMENT

The Respondent asserts that federal district courts have not been stripped of jurisdictional authority to hear a challenge to the Securities and Exchange Commission's use of administrative law judges in enforcement proceedings. The Fifth Circuit endorsed this position when it rejected the SEC's argument that the Securities and Exchange Act of 1934 precludes federal district courts from hearing structural constitutional claims. The SEC was wrong then and is wrong now. The importance of resolving this question has been highlighted by this Court's consolidation of the current case with *Axon Enterprise, Inc. v. FTC*, 142 S. Ct. 895 (2022) (No. 21-86).

Amici raise a complementary consideration: it is critical that federal district courts have the ability to hear structural constitutional challenges because the SEC's administrative proceedings violate individuals' Seventh Amendment right to a trial by jury in an Article III court. The SEC's ability to selectively forum shop violates the Seventh Amendment and leads to bizarre and unequal results for similarly situated defendants in SEC enforcement actions. A defendant's constitutional rights should not be held hostage to the whim of a government plaintiff seeking home court advantage. Furthermore, Congress has never determined that the SEC's administrative proceedings require fact-finding incompatible with the Seventh Amendment right to a jury trial. Nor would protecting defendants' Seventh Amendment right overly burden the SEC, given that the SEC already has a constitutionally sound practice by using "follow-on administrative proceedings." These

important additional considerations weigh in favor of affirming the ruling of the en banc Fifth Circuit.

ARGUMENT

I. THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION GUARANTEES SEC DEFENDANTS THE RIGHT TO A JURY

The Seventh Amendment guarantees defendants the right to a jury trial on the merits in those actions that "are analogous to '[s]uits at common law[,]'" like civil enforcement actions. *Tull v. United States*, 481 U.S. 412, 417 (1987). In *Tull*, the seminal case establishing a right to a jury trial in civil enforcement actions, the defendant/petitioner, a real estate developer, was sued by the federal government for purported violations of the Clean Water Act. *Id.* at 414. After denying the defendant's request for a jury trial, the district court found the defendant guilty of violating the Clean Water Act and imposed a monetary penalty. *Id.* at 415, 420. On appeal, the Fourth Circuit affirmed the judgment. *Id.* at 416. This Court granted certiorari on the question of "whether the Seventh Amendment guaranteed [the defendant] a right to a jury trial on both liability and amount of penalty in an action instituted by the Federal Government seeking civil [monetary] penalties and injunctive relief . . . ." *Id.* at 414 (citation omitted). This Court reversed, holding that while the defendant was not entitled to a jury determination of the penalty, he had a "constitutional right to a jury trial to determine his liability on the legal claims." *Id.* at 425. The Court was unanimous on this point. *Id.*; *id.*

at 427 (Scalia, J., concurring in part and dissenting in part).[2]

Several Circuit Courts have applied the right to a jury determination of liability for civil penalties to SEC enforcement actions. *See SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 781-82 (5th Cir. 2017) (accepting SEC's position that defendant was entitled to a jury determination of liability for aiding and abetting Securities Exchange Act of 1934 ("Exchange Act") section 13(a) violation); *Jarkesy v. SEC*, 34 F.4th 446, 447 (5th Cir. 2022) (holding "the SEC's in-house adjudication of Petitioners' case violated their Seventh Amendment right to a jury trial"); *SEC v. Capital Sols. Monthly Income Fund, LP*, 818 F.3d 346, 354-55 (8th Cir. 2016) (recognizing defendant's right to a jury trial on liability in SEC enforcement action); *SEC v. Lipson*, 278 F.3d 656, 662 (7th Cir. 2002) (holding defendant was entitled to jury determination of liability).

Life Partners Holdings is particularly instructive here. 854 F.3d at 765. The SEC originally filed suit against Life Partners Holdings, Inc. ("Life Partners") and three of its executives in United States District Court alleging various violations of the Securities Act of 1933 and the Exchange Act. *See* Complaint, *SEC v. Life Partners Holdings, Inc.*, No. 1:12-CV-00033-RP (W.D. Tex. Jan. 3, 2012), ECF No. 1. While Martin

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[2] This Court confirmed this holding in *Feltner v. Columbia Pictures Television, Inc.*, stating, "[i]n *Tull*, we held that the Seventh Amendment grants a right to a jury trial on all issues relating to liability for civil penalties . . . ." 523 U.S. 340, 354 (1998).

settled the case against him before trial, *see* Final Judgment as to Defendant David M. Martin, *SEC v. Life Partners Holdings, Inc.*, No. 1:12-CV-00033-RP (W.D. Tex. Jan. 9, 2014), ECF No. 201, a jury in the Western District of Texas found the other two Life Partners executives liable. *See Life Partners Holdings*, 854 F.3d at 772. After the jury found the pair liable, the court imposed a civil monetary penalty against each of the executives and enjoined each from committing further securities law violations. *Id.* The two liable executives appealed both the jury's verdict and the district court's penalty determination to the Fifth Circuit, arguing, inter alia, that the court's imposition of civil monetary penalties violated their Seventh Amendment rights to a jury. *Id.* at 781. The SEC took the position that, because a jury determined the underlying liability of the defendants, the district court was within its discretion to determine the amount of the civil monetary penalty. *Id.* The Fifth Circuit, relying on *Tull*, agreed with the SEC that a jury trial to determine liability was sufficient to meet the *Tull* requirements for complying with the Seventh Amendment, even if a jury did not determine the penalty. *Id.* at 782. Thus, based at least in part on the SEC's own arguments, Circuit Courts have determined that those charged with aiding and abetting a violation of Exchange Act section 13(a) have a constitutional right to a jury trial on the issue of liability.

Yet here, the SEC has accused Ms. Cochran of the same conduct--aiding and abetting a violation of Exchange Act section 13(a)--but decided to bring the case in its own administrative proceeding before one of its own ALJs. In so doing, the SEC denied Ms.

Cochran the very same constitutional protection of a right to a jury determination of liability that it conceded was owed to the defendants in *Life Partners Holdings*. *See* 854 F.3d at 781. Indeed, if the SEC is permitted to go forward with an administrative proceeding, Ms. Cochran will never have the opportunity to argue her case in front of a panel of her peers. Nor would Ms. Cochran necessarily be able to seek judicial review to vindicate her rights if district courts are stripped of jurisdiction. *See* Opening Brief for Respondent at 38, *SEC v. Cochran*, (No. 21-1239) (2022). The SEC can use its home field advantage to pressure defendants like Ms. Cochran to settle, inflicting grievous constitutional injuries without producing an appealable final order. *Id.* This is not a just, or constitutional, result.

II. THE SEC'S FORUM SHOPPING LEADS TO UNCONSTITUTIONALLY UNEQUAL PROTECTION

Under the scheme the SEC would have this Court bless, the prosecutor in civil enforcement actions, in this case the Commission, would have complete discretion to choose to pursue two identical defendants in such disparate ways that one defendant would receive constitutional protections and the other would not. Such unfettered discretion will result in disfavored forum shopping and unequal application of the law.

Courts have long voiced concerns over both private litigants' and the government's use of impermissible forum shopping.[3] While it is not

[3] *See, e.g., Commodity Futures Trading Comm'n v. First Nat'l Monetary Corp.*, 565 F. Supp. 30, 33 (N.D. Ill. 1983) (noting that

atypical--or even necessarily impermissible--for a party to seek a forum it believes may be more sympathetic, when a government agency unilaterally selects a forum that deprives--with no rational basis--a defendant of constitutional protections afforded to other similarly situated defendants, such disparate outcomes are not permissible under the Equal Protection Clause of the Constitution. *See Gupta v. SEC*, 796 F. Supp. 2d 503, 513-14 (S.D.N.Y. 2011) (denying SEC's motion to dismiss Equal Protection challenge to SEC administrative proceeding).[4]

In *Gupta*, the SEC brought an administrative proceeding against one individual despite having filed federal court actions against other individuals and entities based on related allegations. In denying the SEC's motion to dismiss Gupta's complaint challenging the administrative proceedings on Equal Protection grounds, the court observed, "[a] funny thing happened on the way to this forum. On March 1, 2011, the Securities and Exchange Commission . . . decided it preferred its home turf." *Gupta*, 796 F. Supp. 2d at 506. The court further noted that the complaint "alleges that the SEC intentionally,

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the government should be held to the same standard as private litigants and should not be allowed to choose a forum based merely on its convenience).

[4] While this Court has noted that discretionary decisions by agencies regarding similarly situated individuals do not inherently violate the Equal Protection Clause, *see Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 601-02 (2008), where, as here, there is "no rational basis for the difference in treatment," such decisions violate the Equal Protection Clause. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564-66 (2000).

irrationally, and illegally singled Gupta out for unequal treatment" and that "[t]hese allegations . . . would state a claim even if Gupta were entirely guilty of the charges made against him . . . [and] even if the SEC were acting within its discretion when it imposed disparate treatment on Gupta, that would not necessarily exculpate it from a claim of unequal protection if the unequal treatment was still arbitrary and irrational." *Gupta*, 796 F. Supp. 2d at 513 (citing *Olech*, 528 U.S. at 564-66).

The court denied the SEC's motion to dismiss Gupta's Equal Protection claim, finding that "the selective prosecution/equal protection claim will turn entirely on extrinsic evidence of whether the SEC's decision to treat Gupta differently from the other Galleon-related defendants was irrational, arbitrary, and discriminatory." *Gupta*, 796 F. Supp. 2d at 514. The SEC would have to overcome the fact that Gupta was "being treated substantially disparately from 28 essentially identical defendants, with not even a hint from the SEC, even in their instant papers, as to why that should be so." *Id.*

As was the situation in *Gupta*, so it is here regarding Ms. Cochran. Forum shopping by itself may not be impermissible. But forum shopping by the federal government to pursue the same claims and penalties against similarly situated individuals so that one individual has access to a jury and the other does not violates the Equal Protection Clause of the Constitution.

III. CONGRESS HAS NOT ASSIGNED THE SEC A FUNCTION INCOMPATIBLE WITH THE SEVENTH AMENDMENT RIGHT TO A JURY

Even if the Constitution permitted the SEC to bypass a defendant's Seventh Amendment rights--which it does not--Congress has not determined that SEC administrative proceedings require fact-finding activities incompatible with the Seventh Amendment right to a jury trial. Therefore, Congress has not mandated that the SEC pursue federal securities law liability determinations in administrative proceedings. Accordingly, SEC administrative proceedings are not like those addressed in *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977).

In *Atlas Roofing*, this Court took up the question of whether Congress was empowered to create a cause of action by statute that included civil penalties enforceable in an administrative agency where there is no jury trial. *Id.* at 444. The petitioners in *Atlas Roofing* were cited for violations of the Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 651 *et seq.*, which specifically provided that all appeals of citations were to be made to the Secretary of Labor and then heard by an administrative law judge. 430 U.S. at 445-46. Petitioners contested these citations and, per statute, were afforded hearings before ALJs, who affirmed the citations. *Id.* at 447-48. After the Fifth Circuit affirmed, this Court took up the case and found that the Seventh Amendment "does not prohibit *Congress* from assigning the factfinding function . . . to an administrative forum with which the jury would be incompatible" and that where the function of deciding whether a violation of a statutory

obligation has occurred has been "committed *exclusively* to an administrative agency . . ." the statutory scheme survives Seventh Amendment scrutiny. *Id.* at 450 (emphases added).

But that is not the case here. Congress did not "exclusively" commit the fact-finding function in SEC enforcement actions seeking monetary penalties to an administrative agency. Quite the contrary: the SEC is permitted--if not explicitly obligated--to bring such actions in the district courts of the United States. *See* Exchange Act, 15 U. S. C. § 78aa ("The district courts of the United States . . . shall have exclusive jurisdiction of violations of [the Exchange Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by [the Exchange Act] or [the] rules or regulations thereunder . . . ."). In fact, initially, the SEC could bring securities-fraud actions "*only* in Article III courts." *Jarkesy*, 34 F.4th 446 at 459 (emphasis original). And beyond that grant of exclusive federal court jurisdiction, the SEC has statutory discretion to bring enforcement actions in federal court. *See* 15 U.S.C. § 78u(d)(3)(A) ("Whenever it shall appear to the Commission that any person has violated any provision of this chapter [or] the rules or regulations thereunder . . . the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid . . . .").[5] In

[5] By contrast, the statute at issue in *Atlas Roofing* provided that where a citation was contested, the Occupational Safety and Health Review "Commission shall afford an opportunity for a hearing" and "shall thereafter issue an order, based on findings

short, and as the SEC itself has acknowledged by bringing enforcement actions such as *Life Partners Holdings* in federal court, there is nothing about the sorts of claims presented against Ms. Cochran that requires an ALJ, or the Commissioners, to conduct specialized fact-findings or make determinations of liability. *Life Partners Holdings*, 854 F.3d at 781-82; *see also Jarkesy*, 34 F.4th 446 at 458-59 (stating that federal courts have long dealt extensively with securities cases and are perfectly competent to continue doing so). Thus, the holding of *Atlas Roofing* does not provide the SEC with legal authority to deprive Ms. Cochran of her constitutional right to a jury determination of whether she violated the Exchange Act.

IV. THE SEC REGULARLY EMPLOYS A CONSTITUTIONAL METHOD FOR FEDERAL SECURITIES LAW LIABILITY DETERMINATIONS

To be sure, Congress has authorized the SEC both to impose civil penalties and to bar individuals from practicing before the Commission. *See* 15 U.S.C. § 78u-2(a)(1) and 15 U.S.C. § 78d-3(a)(3). However, nothing in either statute requires the Commission to impose such punishments prior to a federal court determination of liability, and, in fact, the SEC regularly imposes punishments administratively after liability has been determined in federal court.

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of fact, affirming, modifying, or vacating . . .” the citation. 29 U.S.C. § 659(c).

The SEC itself refers to these oft-employed proceedings as "follow-on administrative proceedings" ("Follow-on APs"). In a recent annual report, the SEC's Division of Enforcement noted that in FY 2018 alone the SEC brought *two hundred ten* (210) "'follow-on' proceedings seeking bars based on the outcome of Commission actions or actions by criminal authorities or other regulators . . . ." (U.S. Securities and Exchange Commission Division of Enforcement Annual Report FY 2018, https://www.sec.gov/files/enforcement-annual-report-2018.pdf).

The case against David Martin in *Life Partners Holdings* is a representative example of a Follow-on AP. The SEC first sued Mr. Martin in federal court, affording him constitutional protections and giving him the opportunity to have liability determined by a jury. *See* Complaint, *Life Partners Holdings*, No. 1:12-CV-00033-RP, ECF No. 1. Mr. Martin settled his federal court case with the SEC, and the court entered a final judgment against him. *See* Final Judgment as to Defendant David M. Martin, *Life Partners Holdings*, No. 1:12-CV-00033-RP, ECF No. 201. Following conclusion of the federal court case, the SEC conducted a Follow-on AP in which the SEC suspended Mr. Martin's ability to practice as an accountant before the SEC. *See* Order Instituting Administrative Proceedings Pursuant To Rule 102(e)(3), Securities Exchange Act Release No. 71523, Administrative Proceeding File No. 3-15747 (Feb. 11, 2014), https://www.sec.gov/litigation/admin/2014/34-71523.pdf. The SEC's administrative order against Mr. Martin explicitly cites the federal court judgment

as a "finding" that formed the basis for the administrative proceeding and suspension. *Id.*

The SEC's widespread practice of using Follow-on APs to impose penalties after the conclusion of a federal court action may in fact *reduce* the SEC's administrative burden because the SEC often uses the federal court findings to resolve the Follow-on APs by summary disposition without hearing. *See Seghers v. SEC*, 548 F.3d 129, 133 (D.C. Cir. 2008). In *Seghers*, the SEC brought an action in federal court in the Northern District of Texas alleging violations of the federal securities laws. A jury returned a verdict against Seghers, who then filed a motion for judgment as a matter of law, which the district court denied. The Fifth Circuit affirmed the district court's judgment. *SEC v. Seghers*, 298 F. App'x 319, 324 (5th Cir. 2008) (finding in part "the jury's findings that Seghers violated the relevant securities laws are supported by legally sufficient evidence"). The SEC's Division of Enforcement then instituted a Follow-on AP against Seghers, and the SEC's ALJ imposed by summary disposition a bar against Seghers from associating with any investment adviser. *Seghers*, 548 F.3d at 132.

This very common sequencing by the SEC--liability established in federal court with remedies imposed in a Follow-on AP--both protects defendants' constitutional rights and allows the SEC to engage in its mission without undue burden. Indeed, initially pursuing a matter administratively often requires respondents--and the SEC--to endure several years of proceedings and appeals. *See* Opening Brief for Respondent at 48, *SEC v. Cochran*, (No. 21-1239) (2022). Employing Follow-on APs would not reduce

efficiency or result in a greater burden. *Jarkesy*, 34 F.4th at 463. Sequencing liability and remedies determinations in a constitutional manner is neither untested nor burdensome.

CONCLUSION

For the foregoing reasons, the Court should affirm the en banc Fifth Circuit's ruling.

July 7, 2022

Respectfully Submitted,

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