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 THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a federal district court has jurisdiction to hear a suit in which the respondent in an ongoing Securities and Exchange Commission administrative proceeding seeks to enjoin that proceeding, based on an alleged constitutional defect in the statutory provisions that govern the removal of the administrative law judge who will conduct the proceeding.

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INTERESTS OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Monetary and Financial Alternatives reveals the shortcomings of today's monetary and financial regulatory systems and identifies and promotes alternatives more conducive to a stable, flourishing, and free society. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. Cato has a strong interest in enforcing separation-of-powers principles and protecting against threats to federal court access when citizens have legitimate complaints about unconstitutional administrative proceedings.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress has delegated ever greater judicial authority to the Securities and Exchange Commission ("SEC") because the agency's in-house courts are supposed to be efficient. *See* Pet. App. 75a (Oldham, J., concurring) (explaining that SEC's architects believed "agency adjudications were more efficient than court cases"); *see also* Jed. S. Rakoff, Keynote Address at PLI Securities Regulation Institute: Is the

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[1] All parties consented to the filing of this brief. No party's counsel authored this brief in any part and *amici* alone funded its preparation and submission.

S.E.C. Becoming a Law Unto Itself?, (Nov. 5, 2014) (observing that "a claim of greater efficiency" is the "stated rationale" for the growth of SEC's adjudicative functions since agency's inception). On paper, at least, there is every reason to expect that the agency process would be streamlined. Discovery is highly limited, and there is no jury. *See, e.g.*, 17 C.F.R. § 201.233(a)(1) (affording a single respondent only three depositions). Through its combination of prosecutorial and adjudicative functions, the SEC's very structure is designed for efficiency, if not fairness.

In practice, however, the agency's adjudications of complex matters are grossly inefficient, as demonstrated by the respondent's plight. She has been enmeshed in an administrative proceeding for more than six years—not including a lengthy investigation by the SEC's enforcement staff—and now the government asks this Court to have her start the entire administrative process anew. Despite ruling against the respondent, the district court below found it "deeply concern[ing]" that she would endure yet another round of (potentially unconstitutional) proceedings, "undoubtedly at considerable expense and stress." Pet. App. 143a.

Alas, such extreme delays are common for anyone who risks defending themselves from an SEC enforcement actions on the agency's home court. There are, for example, thirteen pending enforcement proceedings on the five-member Commission's appellate review docket—seven of them commenced,

like the respondent's case, more than six years ago.[2] The mean and median age of these cases are 2,177 days and 2,291 days, respectively. By comparison, federal civil cases disposed of through judgments obtained via jury verdict had an average case duration of 771 days. *See* Taylor Dalton, *The Trajectory of Civil Cases in Federal Court*, Above the Law (May 28, 2021).[3]

The SEC's sluggishness speaks squarely to the question presented. In evaluating implied preclusion

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[2] Mark Feathers, Exchange Act Release No. 71565, Admin. Proc. File No. 3-15755 (Feb. 18, 2014); Robare Grp., Ltd. et al., Exchange Act Release No. 72950, Admin. Proc. File No. 3-16047 (Sept. 2, 2014); Lauries Bebo & John Buono, Exchange Act Release No. 73722, Admin. Proc. File No. 3-16293 (Dec. 3, 2014); Alexandre S. Clug et al., Exchange Act Release No. 10886, Admin. Proc. File No. 3-16318 (Dec. 16, 2014); Traci J. Anderson et al., Exchange Act Release No. 74273, Admin. Proc. File No. 3-16386 (Feb. 13, 2015); Edward M. Daspin et al., Exchange Act Release No. 74799, Admin. Proc. File No. 3-16509 (Apr. 23, 2015); Christopher M. Gibson, Exchange Act Release No. 77466, Admin. Proc. File No. 3-17184 (Mar. 29, 2016); James A. Winkelmann, Sr. & Blue Ocean Portfolios, LLC, Exchange Act Release No. 77862, Admin. Proc. No. 3-17253 (May 19, 2016); Saving2Retire, LLC & Marian P. Young, Investment Advisors Act Release No. 4457, Admin. Proc. File No. 3-17352 (July 19, 2016); Digital Brand Media & Mktg. Grp., Inc. & Intellicell Biosciences, Inc., Exchange Act Release No. 80701, Admin. Proc. File No. 3-17990 (May 16, 2017); Anton & Chia, LLP & Gregory A. Wahl et al., Exchange Act Release No. 82206, Admin. Proc. File No. 3-18292 (Dec. 4, 2017); Joseph S. Amundsen et al., Exchange Act Release No. 85081, Admin. Proc. File No. 3-18994 (Feb. 8, 2019); Matthew R. Rossi & SJL Capital, LLC, Exchange Act Release No. 85683, Admin. Proc. File No. 3-19145 (Apr. 17, 2019).

[3] *Available at* https://tinyurl.com/ycyctbmp.

defenses, this Court presumes "Congress does not intend to limit jurisdiction if a finding of preclusion could foreclose all meaningful judicial review." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 489 (2010) (citations and quotations omitted). Eventual review, at some point in the remote future, is not meaningful review. The respondent faces a Hobbesian dilemma. She can default on the underlying allegations, thereby achieving some semblance of efficiency before the SEC's administrative process. Or she can contest her guilt, in which case she can count on spending years more before the SEC's interminable adjudicative regime. This Court, however, "do[es] not require plaintiffs to bet the farm . . . by taking the violative action before testing the validity of the law." *Id.* at 490 (quotations and citations omitted). Accordingly, the Court should affirm and allow the respondent her day in federal court to challenge the constitutionality of the SEC's protracted proceedings.

ARGUMENT

EVENTUAL REVIEW IS NOT MEANINGFUL REVIEW

In 1995, to "better facilitate full, fair and efficient proceedings," the SEC established nonbinding deadlines to govern its administrative proceedings. *See* 60 Fed. Reg. 32,738, 32,738 (June 23, 1995). Since then, these deadlines have been honored primarily in the breach. In 2003, the agency conceded that "the Commission and its administrative law judges have generally failed to meet these goals." 68 Fed. Reg. 35,787, 35,787 (July 17, 2003). And a 2015 study

found that only two of fifteen surveyed SEC opinions were issued within the guidelines period. *See* U.S. Chamber of Commerce Center for Capital Markets Competitiveness, Examining U.S. Securities and Exchange Commission Enforcement: Recommendations on Current Process and Practices 16 (2015). According to the SEC's own data, the Commission hasn't published a timely opinion on an enforcement action since at least September 30, 2017. *See* Report on Administrative Proceedings for the Period October 1, 2021 through March 31, 2022, Exchange Act Release No. 94820 (Apr. 29, 2022); Report on Administrative Proceedings for the Period April 1, 2020 through September 30, 2020, Exchange Act Release No. 90289 (Oct. 20, 2020); Report on Administrative Proceedings for the Period October 1, 2018 through March 31, 2019, Exchange Act Release No. 85750 (Apr. 30, 2019).

To be sure, these time constraints typically are beside the point, as most SEC proceedings do not involve adversarial litigation culminating in a judgment by the agency adjudicator. The SEC prefers to settle and achieves this result for almost all its enforcement actions. Pet. App. 80-81 (Oldham, J., concurring) (describing the SEC's settlements policy and citing research showing that "during the period 2002-2014 the SEC's settlement rate remained constant at about 98%"). Of those cases that don't settle, the agency commonly secures default judgments against defendants that don't participate in the proceedings. *See* 17 C.F.R. § 201.155. Even among non-settling, non-default proceedings, most are "follow on" actions, where the agency seeks

additional penalties based on facts that already had been established by a civil or criminal action in a state or federal court. David Zaring, *Enforcement Discretion at the SEC*, 94 Tex. L. Rev. 1155, 1181 (2016) (describing follow on proceedings as "ordinarily straightforward"). The upshot is that only a small fraction of agency enforcement actions entail adversarial litigation over facts and law.

For such complex cases, the SEC's non-binding guidelines require administrative law judges ("ALJs") to schedule a hearing within ten months of the initiation of proceedings. *See* 17 C.F.R. § 201.360(a)(2)(ii). After the hearing, the agency "contemplate[s]" that it will take "approximately two months" for the submission of post-hearing briefs. 81 Fed. Reg. 50,212, 50,213 (July 29, 2016). Finally, the ALJ's initial decision is due 120 days from the completion of post-hearing briefing *See* 17 C.F.R. § 201.360(a)(2)(i). Adding it all up, the ALJs have approximately sixteen months to try contested cases.

Of course, the SEC "follow[s] the almost-universal model of adjudication in the Executive Branch," whereby decisions by inferior adjudicative officers are subject to review by principal officers on the Commission. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1979, 1987 (2021); *see also id.* at 1284 ("The Administrative Procedure Act, from its inception, authorized agency heads to review such decisions."). After the ALJ's initial decision, therefore, a final judgment only occurs when the Commission issues an

opinion on appeal or a notice of finality. *See* 17 C.F.R. §§ 201.360(d), 201.410.

Although there is no statutorily prescribed standard for Commission review of ALJ decisions, the agency's Rules of Practice effectively provide for *de novo* review by allowing the Commission to hold additional hearings and expand the evidentiary record. *See* 17 C.F.R. §§ 201.451, 201.542. Ultimately, the Commission "may affirm, reverse, modify, set aside or remand … in whole or in part, an initial decision by a hearing officer." 17 C.F.R. § 201.411(a). For complex cases, the Commission has ten months to review the ALJ's decision, but the clock does not start until briefing is completed and the Commission has heard oral arguments, if any. 17 C.F.R. § § 201.900(a)(iii).

Putting it all together, the SEC has about twenty-six months to conduct an administrative proceeding, in addition to however long the Commission takes to conduct a hearing and full briefing. These are generous targets. Even if the Commission aced its deadlines, the agency's proceedings would be no more efficient—and likely less so—than judgments obtained through a federal court proceeding culminating in a jury verdict, which, again, average 771 days, or just over twenty-five months, in duration.

Still, the SEC has failed to meet even these permissive timelines, though the lion's share of blame does not rest with the agency's ALJs, who, for the most part, either meet or come close to meeting their target deadlines. *See, e.g.*, Report on Administrative Proceedings for the Period October 1, 2021 through

March 31, 2022, Exchange Act Release No. 94820 (Apr. 29, 2022) (finding that ALJs issued ten initial decisions since October 1, 2020, of which six were issued timely). The bottleneck instead occurs with the Commission's appellate role. Over the last five years, the SEC has issued only three opinions involving agency enforcement actions. Alexandre S. Clug et al., Exchange Act Release No. 10886, Admin. Proc. File No. 3-16318 (Nov. 9, 2020); John Thomas Capital Mgmt. Grp. LLC, d/b/a Patriot 28 LLC et al., Exchange Act Release No. 10834, Admin. Proc. File No. 3-15255 (Sept. 4, 2020); Equity Trust Co., Exchange Act Release No. 10420 (Sept. 28, 2017). Meanwhile, the agency's backlog has grown to thirteen cases, and the average pending proceeding is more than six years old, as discussed above.

It is worth elaborating why the wheels of "justice" churn so slowly at the SEC. The Supreme Court's decision in *Lucia* of course contributed to the agency's dilatory performance. *See Lucia v. SEC*, 138 S. Ct. 2044, 2055 (June 21, 2018) (remanding constitutionally defective administrative proceeding back to SEC for a new "hearing before a properly appointed" official). But *Lucia*'s fallout is by no means the sole or even predominant cause of the SEC's inefficiency. Seven of the 13 pending proceedings before the Commission didn't involve a second ALJ proceeding, either because the parties waived such

procedures, or because a hearing hadn't occurred by the time *Lucia* was decided.[4]

Perhaps the most significant reason for the Commission's chronic inefficiency involves the SEC's inability to operate with a full slate of five commissioners. Due to evolving institutional customs, "[l]ong-running vacancies have become more common at independent financial regulatory agencies." Justin Schardin & Ashmi Sheth, Bipartisan Policy Center, Financial Regulators Struggling with Longer Vacancies at the Top 2 (2017).[5] For almost four months in early 2017, the agency had only two commissioners—a bare quorum. Work ground to a halt because "one commissioner can effectively stop the SEC from acting by simply not attending a meeting." *Id.* at 12. More generally, longer vacancies on the Commission mean less agency capacity to complete work.

At the same time, fewer commissioners complete their five-year terms. *See, e.g.*, Benjamin Bain, *U.S. SEC Republican Commissioner Elad Roisman Plans*

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[4] Also, the agency contributed to disruption through an ill-fated effort to preemptively address a possible adverse outcome in *Lucia* by having properly appointed ALJs "ratify" the decisions they had made when they were unconstitutionally appointed. *See* Pending Admin. Procs., Exchange Act Release No. 10440, Exchange Act Release No. 82178, Investment Advisers Act Release No. 4816, Investment Company Act Release No. 32929 (Nov. 30, 2017). These ratification actions, involving months of work, were obviated when this Court held that the proper remedy was a new proceeding before a new judge, rather than ratification by the same judge.

[5] *Available at* https://tinyurl.com/5e4a23ev.

to Step Down by January, Bloomberg (Dec. 20, 2021).[6] (reporting on Commissioner Roisman's resignation more than one year before his term expired). Since 2020, there have been four different chairmen helming the agency, two of whom were designated as acting chairman. There are significant costs associated with turnover of the sort that has plagued the SEC, including the time it takes time for incoming staff to get up to speed on the agency's dockets.

Budget constraints are a further cause for delay. Like all agencies, the SEC has limited resources. With the passage of the Dodd-Frank Act in 2010, the agency's adjudicative authority increased significantly, leading to an increased administrative burden. Just last May, Chairman Gary Gensler told congressional overseers that, "The SEC has not grown to meet the needs of the 2020s." Ted Knutson, *SEC Stretched Thin Chair Tells Congressional Appropriators*, Forbes (May 26, 2022).[7]

Regardless of why, the SEC's in-house courts, at their theoretical best, are no more efficient than civil proceedings in federal court, and they are significantly less so in practice. In combination, the harms inflicted on litigants by dilatory agency adjudications—the protracted delays, the associated expenses, and the attendant anxiety—must surely amount to irreparable harm. The respondent is thus caught in a Catch-22: Either she "bet[s] the farm" on her constitutional claims by defaulting on the

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[6] *Available at* https://tinyurl.com/2mhwnt9a.

[7] *Available at* https://tinyurl.com/3r6sekx3.

underlying allegations, and thereby "wins" her day in federal court to challenge the constitutionality of the agency's proceeding; or she continues to litigate in the agency proceeding, which has lasted for more than six years so far and with no plausible end in sight. *See Free Enter. Fund*, 561 U.S. at 490. That is a choice worthy of Camus or Kafka, not America.

CONCLUSION

For the above reasons, the judgment below should be affirmed.

Respectfully submitted,

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