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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF MICHELLE COCHRAN

JOHN F. KERKHOFF
Counsel of Record
ADITYA DYNAR
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 610
Arlington, VA 22201
Phone: (202) 888-6881
jkerhoff@pacificlegal.org
adynar@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTION PRESENTED

Did Congress, through the Securities Exchange Act, strip district courts of jurisdiction over constitutional challenges to the Securities and Exchange Commission's structure, procedures, and existence?

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

IDENTITY AND INTEREST OF AMICI CURIAE ... 1

INTRODUCTION AND
SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Application of *Thunder Basin* Has Failed To Account for the Constitution's Separation of Powers and Due Process Guarantees 4

a. What the Constitution Says: Due Process of Law and Separation of Powers..... 6

b. What Congress Has Said: Sections 1331 and 2201, and the Securities Exchange Act 8

c. What This Court Has Said: *Thunder Basin*, *Elgin*, and *Free Enterprise* 11

d. What Lower Courts Say: No Review 14

II. *Thunder Basin* Should be Refined or Clarified To Satisfy Constitutional Commands..... 16

a. *Thunder Basin*'s proper scope and application must include consideration of constitutional issue..... 17

i. Question 1: Does a statute explicitly grant jurisdiction over these claims? 19

ii. Question 2: Does a subsequent statute explicitly strip courts of jurisdiction over these claims? 19

iii. Question 3: Did Congress implicitly strip courts of jurisdiction over these claims? 20

1. This Court should apply a strong presumption of no jurisdiction stripping given Section 1331, Section 2201, and Article III 20

2. Congress must clearly strip jurisdiction 22

3. The *Thunder Basin* factors are helpful guides in determining whether Congress spoke clearly 24

iv. Question 4: Did Congress strip jurisdiction consistent with the Constitution's separation of powers and due process? 28

CONCLUSION 31

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 21

Alabama Ass'n of Relators v. Dep't of Health and Human Servs.,
141 S. Ct. 2485 (2021) 22

Axon Enterprises Inc. v. FTC,
986 F.3d 1173 (9th Cir. 2021) 14–15, 24, 27

Axon Enterprises Inc.v. Federal Trade Commission,
No. 21-86 (2022)..... 1

Bank Markazi v. Peterson,
578 U.S. 212 (2016) 16

Bebo v. SEC,
799 F.3d 765 (7th Cir. 2015) .....*passim*

Bell v. Hood,
327 U.S. 678 (1946) 9

Bennett v. SEC,
844 F.3d 174 (4th Cir. 2016) 14–15, 26–27

Bowles v. Russell,
551 U.S. 205 (2007) 3, 16, 18, 28

Bowsher v. Synar,
478 U.S. 714 (1986) 21

Calcutt v. FDIC,
__ F.4th __, No. 20-4303,
2022 WL 2081430 (6th Cir. 2022) 29

Carr v. Saul,
141 S. Ct. 1352 (2021) 27

Chrysafis v. Marks,
141 S. Ct. 2482 (2021) 25

Cohens v. Virginia,
19 U.S. (6 Wheat.) 264 (1821) 17

Collins v. Yellen,
141 S. Ct. 1761 (2021) 4

Dep't of Transp. v. Ass'n of Am. R.R.,
575 U.S. 43 (2015) 18

Elgin v. Dep't of Treasury,
567 U.S. 1 (2012) .....*passim*

Free Enterprise Fund v. v. Public Co.
Acct. Oversight Bd.,
561 U.S. 477 (2010) .....*passim*

Garland v. Aleman Gonzalez,
142 S. Ct. 2057, No. 20-322, 2022
WL 2111346 (June 13, 2022)..... 9

Gibson v. SEC,
795 F. App'x 753 (11th Cir. 2019) 14

Grable & Sons Metal Prods., Inc. v.
Darue Eng'g & Mfg.,
545 U.S. 308 (2005) 9

Gregory v. Ashcroft,
501 U.S. 452 (1991) 23

Hayburn's Case,
2 U.S. (2 Dall.) 408 (1792) 5–6

Hill v. SEC,
825 F.3d 1236 (11th Cir. 2016) 14

I.N.S. v. St. Cyr,
533 U.S. 289 (2001) 9, 23

Jarkesy v. SEC,
34 F.4th 446 (5th Cir. 2022) 25, 29

Jarkesy v. SEC,
803 F.3d 9 (D.C. Cir. 2015) 14–15

Lucia v. SEC,
138 S. Ct. 2044 (2018) 1

Mach Mining, LLC v. EEOC,
575 U.S. 480 (2015) 21

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 2

Marshall v. Jerrico, Inc.,
446 U.S. 238 (1980) 7

Martin v. Hunter's Lessee,
14 U.S. (1 Wheat.) 304 (1814) 4, 18, 28

Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) 6

New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans,
491 U.S. 350 (1989) 9

NFIB v. Dep't of Labor,
142 S. Ct. 661 (2022) 22

Perez v. Mortgage Bankers Ass'n,
575 U.S. 92 (2015) 6, 17

Rapanos v. United States,
547 U.S. 715 (2006) 1

Sackett v. EPA,
566 U.S. 120 (2012) 1

Salinas v. U.S. R.R. Ret. Bd.,
141 S. Ct. 691 (2021) 21

Seila Law LLC v. Consumer Fin. Protection Bureau,
140 S. Ct. 2183 (2020) 9

Stern v. Marshall,
564 U.S. 462 (2011) 4–5, 29

Thunder Basin Coal Co. v. Reich,
510 U.S. 200 (1994) .....*passim*

Tilton v. SEC,
824 F.3d 276 (2d Cir. 2016)..... 14, 27, 30

U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.,
578 U.S. 590 (2016) 1

United States Forest Servs. v. Cowpasture River Preservation Ass'n, 140 S. Ct. 1837 (2020) 22

United States v. Fisher, 6 U.S. (2 Cranch) 358 (1805) 23

United States v. Home Concrete & Supply, LLC, 566 U.S. 478 (2012) 24

United States v. Nordic Village, Inc., 503 U.S. 30 (1992) 23

Utility Air Regulatory Grp. v. EPA, 573 U.S. 302 (2014) 22

Webster v. Doe, 486 U.S. 592 (1988) 9, 21

West Virginia v. EPA, __ U.S. __, Nos. 20-1530, 20-1531, 20-1778, 20-1780, 2022 WL 2347278 (June 30, 2022) 23

Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv., 139 S. Ct. 361 (2018) 21

Whitman v. Dep't of Transp., 547 U.S. 512 (2006) 11, 19, 21

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 21–22

Zivotofsky ex rel. Zivotofsky v. Clinton,
566 U.S. 189 (2012) 6, 17

Statutes and Regulations

15 U.S.C. § 78-d-1(a) 25

15 U.S.C. § 78-d-1(b) 25

15 U.S.C. § 78y 10, 25–26

28 U.S.C. § 1331 ..... *passim*

28 U.S.C. § 2201 ..... *passim*

17 C.F.R. § 201.100 25

17 C.F.R. § 201.110 25

Constitutions

U.S. Const. art. I, § 1 6

U.S. Const. art. I, § 7, cl. 2 6

U.S. Const. art. II, § 1 6

U.S. Const. art. III ..... *passim*

U.S. Const. art. III, § 2 20

U.S. Const. art. III, § 3 6

Other Authorities

Amar, Akhil Reed, *America's Constitution: A Biography* (2006) 19

Baude, William, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511 (2020) 4, 18, 29

Bernick, Evan, *Is Judicial Deference to Agency Fact-Finding Unlawful*, 16 Geo. J. L. & Pub. Pol'y 30 (2018) 7, 26

Calabresi, Steven G., & Lawson, Gary S., *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 Colum. L. Rev. 1002 (2007)..... 19

Chapman, Nathan S. & McConnell, Michael W. *Due Process as Separation of Powers*, 121 Yale L.J. 1672 (2012)..... 7, 29

Dr. Bonham's Case, 77 Eng. Rep. 646 (C.P. 1610) 25

The Federalist No. 10 (James Madison) (Cooke ed. 1961)..... 25

The Federalist No. 80 (Alexander Hamilton) (Cooke ed. 1961)..... 25

The Federalist No. 82 (Alexander Hamilton) (Cooke ed. 1961)..... 5

Lawson, Gary, *Take the Fifth . . . Please!: The Original Insignificance of the Fifth Amendment's Due Process of Law Clause*, 2017 B.Y.U. L. Rev. 611 7

Lawson, Gary, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994) 26

McRee, Griffith J., II, *Life and Correspondence of James Iredell* (1857) 17

Nelson, Caleb, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559 (2007) 15, 30

Redish, Martin H., *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 Duke L.J. 197 (1983) 26

Sohoni, Mila, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 Nw. U. L. Rev. 1569 (2013) 27

Whitehouse, Sheldon, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 Wm. & Mary L. Rev. 1241 (2014) 6

Wilson, James, Lectures on Law, ch. XI (1791), *reprinted in* 1 Collected Works of James Wilson (Kermit L. Hall & Mark David Hall, eds., Liberty Fund 2011)..... 25

IDENTITY AND INTEREST OF AMICI CURIAE[1]

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt, California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited constitutional government, private property rights, and individual freedom.

PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel in several cases involving the role of the Judicial Branch as an independent check on the Executive and Legislative branches under the Constitution's Separation of Powers. *See, e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States"). It also regularly participates in this Court as amicus curiae. *See, e.g.*, *Axon Enterprises Inc. v. Federal Trade Commission*, No. 21-86 (2022); *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (SEC administrative law judge is "officer of the United States" under the Appointments Clause).

---

[1] No party's counsel authored any part of this brief. No person or entity, other than Amicus Curiae and its counsel, paid for the brief's preparation or submission. All parties consented.

This case addresses the federal courts' jurisdiction to hear constitutional challenges to an administrative agency's structure. The decision under review held that the Securities Exchange Act did not strip federal courts of jurisdiction to entertain structural constitutional challenges to the Securities and Exchange Commission's in-house adjudicative process and its officers' removal protections. PLF explains how the result below upholds the judicial duty vested by the sovereign people in the judicial branch and protects the separation of powers and core constitutional and individual liberties.

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal courts—and *only* federal courts—may exercise the "judicial Power of the United States." Since the Founding, that power has included the duty to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). And nearly 150 years ago, Congress confirmed that district courts have jurisdiction to decide all cases that implicate constitutional claims and provide redress. 28 U.S.C. § 1331.

So when parties allege a constitutional violation, federal courts generally have jurisdiction. That much is not in doubt here. Instead, this case turns on a different question: Did Congress, through the Securities Exchange Act, *strip* federal district courts of jurisdiction to hear claims regarding the constitutionality of a federal agency?

No.

Nothing in the Act *explicitly* strips courts of jurisdiction. And no one suggests otherwise. Nor does the Act *implicitly* deprive courts of jurisdiction.

This latter point deserves closer attention. Nearly two decades ago, this Court created a test designed to help identify when Congress has silently taken jurisdiction away from federal courts. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). And while the so-called *Thunder Basin* factors sought to faithfully find Congress's intent, they skip critical constitutional questions that *must* be addressed. Congress, after all, can strip federal courts of already granted jurisdiction only "[w]ithin constitutional bounds." *Bowles v. Russell*, 551 U.S. 205, 212 (2007). The Court now should account for core constitutional deficits inherent in elevating congressional silence above statutory words.

A refined test is badly needed. Given the broad grant of jurisdiction to federal courts under Section 1331, courts must start with a presumption that they can hear structural constitutional claims. And if Congress wants to overcome the century-and-a-half-old statute, it should speak clearly in doing so. Even then, courts must guarantee that Congress does not limit jurisdiction in a way that clashes with the Constitution's guarantees.

Indeed, the years since *Thunder Basin* have only revealed its shortcomings. The test has morphed into a virtual rubber-stamp for the government. Until this case, in fact, lower courts hardly ever allowed a litigant access to federal court before succumbing to a federal agency's proceedings.

Thunder Basin was never meant to foreclose such a broad swath of cases. It merely reflected judicial understanding that sometimes Congress strips courts of jurisdiction. That's true as far as it goes. But experience has revealed that *Thunder Basin* must be

clarified to ensure that courts and agencies comport with the Constitution's separation of powers and the due process of law.

This case presents the opportunity to do so. Congress explicitly granted jurisdiction under Section 1331 and a mechanism to obtain redress under Section 2201. Such congressional commands should not be lightly cast aside. Instead, courts ought to return to first principles in applying *Thunder Basin* by closely examining whether Congress sought to preclude judicial review, and, if so, whether Congress did so consistent with Article III, Due Process, and the Separation of Powers. That approach would return the proper balance between Congress, the Courts, and the Executive Branch.

ARGUMENT

I. Application of *Thunder Basin* Has Failed To Account for the Constitution's Separation of Powers and Due Process Guarantees

Our Constitution divides power to protect and secure liberty. *Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021). The "judicial Power of the United States"—delegated by the sovereign people—rests with federal judges under Article III. U.S. Const. art. III. It includes "the power to bind parties and to authorize the deprivation of private rights." William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1513–14 (2020). And under Article III, constitutional cases must be decided in *some* federal court. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328–30 (1814) (holding the "whole judicial power" "shall be vested" in federal courts (emphasis deleted));

see also Stern v. Marshall, 564 U.S. 462, 484 (2011) (The "Constitution assigns th[e] job—resolution of the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law—to the Judiciary.") (simplified).

But because Congress has the power to create or eliminate lower federal courts, it may confer jurisdiction on such courts or take it away—so long as *some* federal court retains the "judicial Power of the United States" to entertain a constitutional claim. *The Federalist* No. 82, at 556 (Hamilton) (Cooke ed. 1961) ("[A]ll causes of the specific classes" named in Article III "shall for weighty public reasons receive their original or final determination in the courts of the Union."). In doing so, though, Congress must respect the separation of powers and due process of law. Congress cannot, for example, vest the "judicial Power" in the Executive Branch. *See, e.g.*, *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792). Nor can Congress gerrymander jurisdiction such that it tramples on a party's due process rights. *Cf. Stern*, 564 U.S. at 482–84. ("article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entitles outside Article III.").

So whenever a party brings a constitutional claim, jurisdiction lies in some federal court. But in which court? And when does that court have jurisdiction? The answers to those questions turn on (1) what the Constitution says, (2) what Congress has said, and (3) what this Court has said.

a. What the Constitution Says: Due Process of Law and Separation of Powers

The Constitution "vests" powers in different branches, U.S. Const. art. I, § 1; art. II, § 1; art. III, § 3, with some overlap, *see, e.g., id.* art. I, § 7, cl. 2 (presidential veto). *See Hayburn's Case*, 2 U.S. at 410 n.* ("[T]he legislative, executive and judicial departments are each formed in a separate and independent manner; and . . . the ultimate basis of each is the constitution only, within which the limits of which each department can alone justify any act of authority."). This structure:

- protects against arbitrary rule, *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991); *see also* Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 Wm. & Mary L. Rev. 1241, 1270 (2014) ("The American system of government is built on Montesquieu's and Locke's premise that divided government and separated powers are most protective of individual liberty."); and
- requires that independent federal judges decide constitutional questions, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194–95 (2012) ("[T]he Judiciary has a responsibility to decide cases properly before it."); *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring) ("When a party properly brings a case or controversy to an Article III court, that court is called upon to exercise the 'judicial Power of the United

States.'"); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (holding judges must be neutral in adjudicative proceedings).

Similarly, the Constitution's guarantee of "due process of law" "refer[s] to the guarantee of legal judgment in a case by an authorized *court* in accordance with settled law." Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1679 (2012). "Due Process of Law" dates back to the Magna Carta, and its meaning "evolved over a several-hundred-year period, driven . . . by the increasing institutional separation of lawmaking from law enforcing and law interpretating." *Id.* Due process, then, reflected similar concerns as those inherent in the Constitution's structure: It "meant that the executive could not deprive anyone of a right except as authorized by law, and that to be legitimate, a deprivation of rights had to be preceded by certain procedural protections characteristic of judicial process: generally, presentment, indictment, and trial by jury." *Id.*

In at least two ways, then, the Constitution requires that when the government seeks to take a person's life, liberty, or property, it must proceed through *judicial* process in Article III *courts*. *See* Gary Lawson, *Take the Fifth . . . Please!: The Original Insignificance of the Fifth Amendment's Due Process of Law Clause*, 2017 B.Y.U. L. Rev. 611, 631–32 (noting that the "judicial Power" requires independent judges to provide due process of law); *cf.* Evan Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful*, 16 Geo. J. L. & Pub. Pol'y 27, 30 (2018) (Deferring to agency factfinding in core private rights

cases "constitutes an abdication of the duty of independent judgment that Article III imposes upon federal judges; and denies litigants due process of law.").

The upshot is that the Constitution places outer limits on Congress's ability to strip courts of jurisdiction. The legislature cannot, for example, pull core private rights cases turning on constitutional questions completely from federal courts and place them in the Executive Branch. Nor can Congress take away the "judicial Power" from federal courts and vest it in the executive. Statutes governing jurisdiction, then, must be read with these constitutional baselines in mind. Doing so preserves the Constitution's structure to protect liberty—just as the Founders intended.

b. What Congress Has Said: Sections 1331 and 2201, and the Securities Exchange Act

Shortly after the Civil War, Congress vested federal district courts with jurisdiction to hear all claims "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. And shortly after the Second World War, Congress vested federal district courts with the authority, "[i]n a case of actual controversy," to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201. This language mirrors language in Article III and complies with the Constitution's guarantee that the "judicial Power" will be vested in federal courts.

Section 1331 applies broadly. It is "invoked by and large by plaintiffs pleading a cause of action created by federal law." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). And this Court's "precedents have long permitted private parties aggrieved by an official's exercise of executive power to challenge the official's authority to wield that power." *Seila Law LLC v. Consumer Fin. Protection Bureau*, 140 S. Ct. 2183, 2196 (2020); *see Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect right safeguarded by the Constitution.").

Of course, despite Section 1331's broad *grant* of jurisdiction, Congress can pull away that jurisdiction in specific contexts. For example, this Court recently explained that clear text in the immigration statutes revoked some jurisdiction from federal courts. *See Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, No. 20-322, 2022 WL 2111346, at *4 (June 13, 2022). But courts require a "heightened showing" from statutes that could "preclude judicial review of *constitutional* claims." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (emphasis added); *see New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 359 (1989) (Congress can strip jurisdiction only "within the constitutionally permissible bounds."). Indeed, in many constitutional contexts—such as habeas corpus—there is a "longstanding rule requiring a clear statement of congressional intent" to defeat jurisdiction. *I.N.S. v. St. Cyr*, 533 U.S. 289, 298 (2001). In all events, "[i]n light of § 1331, the question is not whether Congress has specifically conferred jurisdiction,"—because we already know that it has—

"but whether it has taken it away." *Elgin v. Dep't of Treasury*, 567 U.S. 1, 25 (2012) (Alito, J., dissenting).

So what did Congress say here? It passed the Securities Exchange Act of 1934, which includes 15 U.S.C. § 78y. That statute permits judicial review of "a final order of the Commission" or "a rule of the Commission" in a "United States Court of Appeals." The word "only" appears nowhere in Section 78y. It does not mention Section 1331 or Section 2201. Nor does it say courts lack jurisdiction over any particular claim.

Section 78y does not say, for example, that federal courts review *only* "a final order of the Commission." If it did, this might be a different case. Put otherwise, by giving federal courts jurisdiction to review final orders of the Commission, the statute does not thereby deprive federal courts of jurisdiction to hear all claims "arising under the Constitution, laws, or treaties of the United States," or to "declare the rights and other legal relations" causing the controversy. 28 U.S.C. §§ 1331, 2201.

And so the question arises: does the statute at issue preclude jurisdiction under this Court's precedents? Answering that question requires investigating if "the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Free Enterprise Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 489 (2010) (quoting *Thunder Basin*, 510 U.S. at 207, 212). It does not.

c. What This Court Has Said: *Thunder Basin*, *Elgin*, and *Free Enterprise*

Section 1331 is "a very familiar" statute. *Whitman v. Dep't of Transp.*, 547 U.S. 512, 513–14 (2006) (per curiam). So "[t]he question . . . is not whether [the statute at issue] *confers* jurisdiction, but whether [it] *removes* the jurisdiction given to the federal courts." *Id.* at 514 (emphasis added). Through a series of cases, this Court has developed a test to determine when statutes strip jurisdiction.

Thunder Basin came first. There, this Court held that the statutory-review scheme in the Federal Mine Safety and Health Act barred "district court[s] from exercising subject-matter jurisdiction over a pre-enforcement challenge to the Act." 510 U.S. at 202. The case involved a statutory interpretation issue, but the petitioner did *not* challenge the constitutional structure of the agency itself.

The Court engaged in a two-prong test, asking (1) whether there is a congressional intent "fairly discernible in the statutory scheme," and (2) whether a litigant's "claims are of the type that Congress intended to be reviewed within [a] statutory structure." *Id.* at 207, 212. At the second prong, courts consider: (i) whether the claim will eventually receive meaningful judicial review, (ii) whether agency expertise can be brought to bear on the litigant's claims, and (iii) whether those claims are wholly collateral to the "statute's review provisions." *Id.* at 212–15.

The facts help explain. The federal Mine Safety and Health Administration (MSHA) sought to force a coal company to post the designations of mine

workers' union representatives—even though the representatives were not employees of the company at that time. *Id.* at 204. The company (Thunder Basin) argued that "designation of nonemployee [union] 'representatives' violated the principles of collective-bargaining representation" under federal law." *Id.* at 205. It also argued that being forced to defend itself in front of the Federal Mine Safety and Health Review Commission *before* getting to federal court would violate the Fifth Amendment because "the company would be forced to choose between violating the Act and incurring possible escalating daily penalties." *Id.*

This Court held the Mine Act precluded jurisdiction. For starters, the Act set up a detailed review scheme. And second, the *type of claim* that the petitioner alleged fell within the scheme. That's because the company's arguments hinged on the interpretation of the Act. *Id.* at 214–15. Yes, the company also made a due process argument, but not one about the structure or existence of MSHA. Instead, the company argued only that it should not be forced into a comply-or-face-fines scenario. Ultimately, though, the petitioner could receive meaningful judicial review by asking for non-enforcement of the Act. *See Elgin*, 567 U.S. at 32 (Alito, J., dissenting) (explaining that in *Thunder Basin* "[t]he only constitutional issue was a matter of timing.")

Next came *Free Enterprise*. There, as here, the Court considered the Securities Exchange Act, though in a different context. *See* 561 U.S. at 487 The petitioner in *Free Enterprise* challenged the structure of the Public Company Accounting Oversight Board. *Id.* The Court was explicit about the Act: "the text does

not expressly limit the jurisdiction that other statutes confer on district courts. *See*, *e.g.,* 28 U.S.C. §§ 1331, 2201. Nor does it do so implicitly." *Id.* at 489.

The Court reached that conclusion, in part, because the petitioner might *never* have received meaningful judicial review. After all, the firm was *not* challenging a final order of the SEC, which is what the Securities Exchange Act contemplates. *Id.* at 490. And the petitioner's constitutional claims were "outside the Commission's competence and expertise." *Id.* at 491.

Last came *Elgin*. There, former federal employees who had been fired for failing to register for the military draft argued that the statute was unconstitutional. But the Civil Service Reform Act "provide[d] the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action." 567 U.S. at 5. So the employees were required to proceed through the Merit System Protection Board (MSPB), even though they had filed an action in federal court challenging the requirement to register for the draft.

Elgin again applied the *Thunder Basin* factors and held that the Civil Service Reform Act provided the exclusive avenue for judicial review. But the key point: the employees *did not argue* that the MSPB *itself* or its process violated the Constitution. All that the employees challenged was a *separate* statute that required them to register for the draft. And *that* argument fits well within the "type" that can (and will) be reviewed later in court.

In short, *Thunder Basin* and *Elgin* depart from *Free Enterprise* in at least one crucial respect: In

Thunder Basin and *Elgin*, the petitioners merely argued for non-enforcement of a particular statute. But *Free Enterprise* involved a constitutional challenge to the structure of the entity at issue.

Lower courts have struggled to apply the *Thunder Basin* factors, as this case and its companion, *Axon Enterprises Inc. v. FTC*, demonstrate. And this Court, while it has applied the factors in *Elgin* and *Free Enterprise*, has had no occasion to evaluate the continued workability of *Thunder Basin*.

d. What Lower Courts Say: No Review

Struggling to make sense of the "of the type" language from *Thunder Basin*, courts below have tugged in favor of precluding judicial review for structural claims. *See, e.g.*, *Axon Enterprises Inc. v. FTC*, 986 F.3d 1173, 1180–82 (9th Cir. 2021); *Gibson v. SEC*, 795 F. App'x 753 (11th Cir. 2019); *Jarkesy v. SEC*, 803 F.3d 9, 17 (D.C. Cir. 2015); *Bennett v. SEC*, 844 F.3d 174, 183 (4th Cir. 2016); *Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016); *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016); *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015). These cases bar a party from bringing any structural constitutional claim. In fact, the current application of *Thunder Basin* means that *all* claims may be kept out of court because they all will be "of the type that Congress intended to be reviewed within the statutory structure." 510 U.S. at 212.

"Meaningful review," according to lower courts, is possible if a party can *eventually* receive review (which occurs, of course, only if the private party *loses* in the agency proceeding). *See Bennett*, 844 F.3d at 183 (holding that *Free Enterprise* applies only when *no* reviewable SEC action was possible); *Hill*, 825 F.3d

at 1243 (Commission action will eventually "necessarily . . . result in a final Commission order."); *Jarkesy*, 803 F.3d at 28. Indeed, lower courts find jurisdiction stripped even when they conclude that constitutional claims lie outside of the agency's expertise and that the claims may be wholly collateral to the underlying action—two of the *Thunder Basin* factors. *E.g.*, *Axon*, 986 F.3d at 1187 (noting that "[t]he *Thunder Basin* factors point in different directions," but "[w]e agree with other circuits . . . that . . . the presence of meaningful judicial review is enough to find that Congress precluded district court jurisdiction over the type of claims that Axon brings." (citing *Bennett*, 844 F.3d at 183 n.7; *Bebo*, 799 F.3d at 774)). In other words, *Thunder Basin* has collapsed into a single factor: Whether, at some time in the far distant future, the party *might* get to federal court for review.

That is not what *Thunder Basin* intended. The separation of powers and due process of law do not contemplate *some* eventual review—they require more. *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 590 (2007) ("[N]ot just any sort of 'judicial' involvement [will] do" because courts must "be able to exercise their own judgment" about the particular case.). Perhaps because the Court in *Thunder Basin* failed to fully explain what claims were "of the type" that Congress can strip from courts, lower courts have failed to account for key constitutional principles that must guide them in evaluating whether a party will receive meaningful review. To ensure that lower courts do not read implications into *Thunder Basin* (which itself implies Congress intended to strip jurisdiction), this Court can reinvigorate a proper *Thunder Basin* test.

Cf. Bebo, 799 F.3d at 769–72 (improperly concluding that *Elgin* narrowed *Free Enterprise*'s holding).

In short, *Thunder Basin* has evolved into a test that simply asks whether a court may see the claim sometime down the road. That must change.

II. *Thunder Basin* Should be Refined or Clarified To Satisfy Constitutional Commands

Because lower courts have failed to account for constitutional principles in applying *Thunder Basin*, the test should be clarified or refined. To see why, start with what we know for sure:

- **One**: The Constitution permits jurisdiction stripping only if consistent with the separation of powers, Article III, and due process of law. *See Bowles*, 551 U.S. at 212 ("*Within constitutional bounds*, Congress decides what cases the federal courts have jurisdiction to consider." (emphasis added)); *see also Bank Markazi v. Peterson*, 578 U.S. 212, 227–28 (2016) (explaining that Congress may not regulate jurisdiction in an unconstitutional manner).
- **Two**: Congress, through Section 1331, gave district courts jurisdiction over all federal constitutional claims.
- **Three**: Cochran here brings claims "arising under" the Constitution, clearly falling within Section 1331 (no one argues to the contrary).
- **Four:** The Exchange Act does not "expressly limit the jurisdiction" that Section 1331

> grants, "[n]or does it do so implicitly." *Free Enterprise Fund*, 561 U.S. at 489.

One wonders, then, how this has become a Supreme Court case. The Government relies heavily on the fact that Cochran could *eventually* at *some point* get into federal court. But that is not enough. Nor will it always be true (for example if a party "wins" in the agency proceeding). Michelle Cochran's claims must be heard in court *now*.

a. *Thunder Basin*'s proper scope and application must include consideration of constitutional issues

Without refinement of *Thunder Basin*, lower courts will continue to push away core constitutional questions. But that approach clashes with the Constitution's Vesting Clauses. Judges—who have received a portion of the sovereign people's power—may not "opt out of exercising" the judicial power, which includes "an obligation to guard against deviations from [constitutional] principles." *Perez*, 575 U.S. at 118–19 (Thomas, J., concurring). "[T]he Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky*, 566 U.S. at 194–95 (2012) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)). As the Founders well understood, federal courts "cannot wilfully blind themselves" from the "exercise of the [judicial] power." Letter from James Iredell to Richard Spaight (Aug. 26, 1787), in Griffith J. McRee, II, *Life and Correspondence of James Iredell* 173, 174 (1857).

And so when courts consider whether Congress has stripped Section 1331 jurisdiction, they must ask, too, whether Congress did so "[w]ithin constitutional

bounds." *Bowles*, 551 U.S. at 212. Our legislative branch cannot divest from our judicial branch the power that the sovereign people have vested in judges. *Hunter's Lessee*, 14 U.S. at 330–31 (Congress "cannot vest any portion of the judicial power of the United States, except in *courts* [it] ordained and established."). Said another way: If, in taking away district court jurisdiction, Congress also placed the "judicial Power" in an Article II forum, a constitutional problem would arise. Lawson, 2017 B.Y.U. L. Rev. at 631 (explaining that executive adjudications "cannot legitimate a deprivation that is not otherwise legitimate" regardless of the procedures used); *see* Baude, 133 Harv. L. Rev. at 1541 (The Executive Branch "cannot deprive people of life, liberty or property without judicial process."); But "[t]he Constitution does not vest the Federal Government with an undifferentiated 'governmental power'" *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 67 (2015) (Thomas, J., dissenting). It vests *particular* powers in *distinct* branches.

In other words, using administrative agencies as "judicial" fora to deprive parties of their private rights creates a problem—one of constitutional magnitude. Lower courts applying *Thunder Basin* have not grappled with these fundamental issues. Instead, they try to reconstruct what Congress might have wanted—what, they say, is "fairly discernible." But Congress does not intend to do what it cannot do under the Constitution. Thus, this Court should clarify that in every case raising jurisdiction stripping, *Thunder Basin* must be read alongside key constitutional protections to fully guard against potential infringement of separation of powers and due process.

So just how should courts proceed? Along with the *Thunder Basin* factors—meaningful judicial review, agency expertise, and whether claims are wholly collateral to the statutory review provision—courts ought to consider the following questions.

i. Question 1: Does a statute explicitly grant jurisdiction over these claims?

Yes.

Section 1331 applies, and no one here disputes the point. *Whitman*, 547 U.S. at 513–14. Thus, as with all structural constitutional claims, courts should start with the presumption that district courts have jurisdiction.

ii. Question 2: Does a subsequent statute explicitly strip courts of jurisdiction over these claims?

No.

The Exchange Act "does not expressly limit the jurisdiction" that Section 1331 confers, and no one disputes this point, either. *Free Enterprise Fund*, 561 U.S. at 489. Of course, Congress *can* explicitly strip jurisdiction from district courts in some cases. But even so, it cannot wrest all constitutional claims from all federal courts—such claims must be vested *somewhere* in the federal judiciary. Steven G. Calabresi & Gary S. Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 Colum. L. Rev. 1002, 1005 (2007); Akhil Reed Amar, *America's Constitution: A Biography* 226–29 (2006) (Congress could not "transfer the final word in federal-law cases from federal courts to state judges" because "'all'

meant just what it said: Federal courts had to be the last word in 'all'" cases involving the Constitution.).

Here, though, because no one argues that Congress has explicitly stripped jurisdiction, the Court need not grapple with this question further.

iii. Question 3: Did Congress implicitly strip courts of jurisdiction over these claims?

No again.

As this Court said in *Free Enterprise Fund*: the Exchange Act "does not expressly limit the jurisdiction" conferred by Section 1331, and "[n]or does it do so implicitly." 561 U.S. at 489. That ought to be enough to decide this case, but lower courts have not followed *Free Enterprise*. Instead, arguing that *Elgin* has displaced *Free Enterprise,* courts continue to overlook core constitutional concerns. *See Bebo*, 799 F.3d at 769–772 (concluding that *Elgin* had narrowed the jurisdictional holding of *Free Enterprise*).

Thus, this Court should clarify that any alleged jurisdiction-stripping statute must comport with the separation of powers and due process of law. A proper three-part framework—set out below—would guide courts in answering those questions.

1. This Court should apply a strong presumption of no jurisdiction stripping given Section 1331, Section 2201, and Article III

The Constitution says federal courts possess the power to hear "all Cases . . . arising under this Constitution." U.S. Const. art. III, § 2. And Congress

has done just so in Section 1331, which grants district courts "jurisdiction of all civil actions arising under the Constitution." 28 U.S.C. § 1331. This "very familiar" statute means that in all constitutional cases the question is "whether [a statute] removes the jurisdiction given to the federal courts." *Whitman*, 547 U.S. at 513–14; *see Elgin*, 567 U.S. at 25 (Alito, J., dissenting) ("In light of § 1331, the question is not whether Congress has specifically conferred jurisdiction but whether it has taken it away.").

So courts must start with a presumption of jurisdiction when parties raise constitutional claims. Doing so fits neatly with the well-worn practice of judicial review. Courts give a "strong presumption favoring judicial review of administrative action" which the government rebuts only by carrying a "'heavy burden' of showing that the statute's 'language or structure' forecloses judicial review." *Salinas v. U.S. R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021) (quoting *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015)); *cf. Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (noting the "strong presumption" favoring judicial review); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) ("[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."). Thus, courts should presume that Section 1331 grants jurisdiction absent a "heightened showing" that statutes might "preclude judicial review of constitutional claims." *Webster*, 486 U.S. at 603. And more importantly, this presumption gives life to the sovereign people's desire to protect liberty by separating powers. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) ("The declared purpose of separating and

dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'" (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring))).

Put simply: Article III and Section 1331 say what they mean. They grant jurisdiction. And if Congress wants to override those foundational texts, it has much work to do.

2. Congress must clearly strip jurisdiction

Given the presumption of jurisdiction, Congress must be clear to overcome Section 1331 and Section 2201. If, for example, Congress says "no district court shall have jurisdiction to entertain these claims," then it might explicitly take away the power to hear a case. But congressional drafting rarely comes so neatly packaged. And so courts should assess whether the words that Congress used reflect an obvious intent to strip jurisdiction.

Ensuring that Congress is crystal clear before this Court says that a statute overrides Article III and Section 1331 makes good sense. Clear statements, after all, are well known to the law. *See e.g.*, *NFIB v. Dep't of Labor*, 142 S. Ct. 661, 665 (2022) (applying clear-statement rule to sprawling agency powers over economy); *Alabama Ass'n of Relators v. Dep't of Health and Human Servs.*, 141 S. Ct. 2485, 2489 (2021) ("We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" (quoting *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)); *United States Forest Servs. v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837, 1850 (2020) ("Our precedents require

Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."); *West Virginia v. EPA*, __ U.S. __, Nos. 20-1530, 20-1531, 20-1778, 20-1780, 2022 WL 2347278, at *17 (June 30, 2022) (requiring a "clear congressional authorization"); *id* at *18 (Gorsuch, J., concurring, with whom Alito, J., joins) ("Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional guarantees.").

And the jurisdictional context is no exception. Here, too, this Court has told Congress to say what it means. *St. Cyr*, 533 U.S. at 298 (noting a "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction"). "*Implications* from statutory text . . . are not sufficient to repeal habeas jurisdiction." *Id.* at 299. (emphasis added); *see also United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992) (holding that the waiver of sovereign immunity "must be 'unequivocally expressed'" (citation omitted)); *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991) (applying plain-statement rule in case involving "the usual constitutional balance of federal and state powers").

These clear-statement approaches simply reflect the Founding-era view that "where the general system of the laws is departed from, the legislative intention must be expressed with *irresistible clearness* to induce a court of justice to suppose a design to effect such objects." *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 390 (1805) (Marshall, C.J.) (emphasis added). Getting around Article III and Sections 1331 and 2201

certainly "depar[ts] from" the "general system," and so Congress must be clear. *Id.*

Thus, to the extent *Thunder Basin*'s first prong—whether the congressional intent to strip jurisdiction is "fairly discernible in the statutory scheme"—departs from the first principles of the Constitution, the Court should clarify that the first prong requires a clear statement from Congress. *Thunder Basin*, 510 U.S. at 207. The Court should clarify the first prong to ask whether it is *clearly* discernible that Congress intended to strip jurisdiction.

3. The *Thunder Basin* factors are helpful guides in determining whether Congress spoke clearly

But when is it "clear" that Congress stripped jurisdiction? And what claims count? Congress need not use "magic words" or a special formula. *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 493 (2012) (Scalia, J., concurring in part and concurring in the judgment). If it is clear—not merely "fairly discernable"—that Congress wanted to strip jurisdiction, then courts may decline to hear the case.

1. *Meaningful judicial review*. Courts see this factor as the most important. *Axon*, 986 F.3d at 1187 ("We agree with other circuits . . . that . . . the presence of meaningful judicial review is enough to find that Congress precluded district court jurisdiction over the type of claims that Axon brings."). But they hardly treat it as such. In fact, courts have all but substituted the word "possible" for "meaningful."

Start with basics: meaningful means *meaningful*. And no such kind of review occurs in the SEC in-house

proceeding, where an SEC-appointed ALJ decides the case before an appeal to the SEC itself (which issued the complaint). 15 U.S.C. § 78-d-1(a)–(b); 17 C.F.R. § 201.110. This alone runs afoul of the longstanding rule that "no man can be a judge in his own case consistent with the Due Process clause." *Chrysafis v. Marks*, 141 S. Ct. 2482, 2482 (2021); *see Dr. Bonham's Case*, 77 Eng. Rep. 646 (C.P. 1610) ("[N]o one ought to be a judge in his own cause."); *The Federalist* No. 10, at 59 (Madison) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and not improbably, corrupt his integrity."); *id.*, No. 80, at 538 (Hamilton) ("No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias."); James Wilson, Lectures on Law, ch. XI at 739 (1791), *reprinted in* 1 Collected Works of James Wilson (Kermit L. Hall & Mark David Hall, eds., Liberty Fund 2011) (Any act that will "make a man judge in his own cause, is void in itself.")

On top of that, private parties before the SEC do not get a jury even though the SEC adjudicates private rights while imposing severe financial penalties. *Jarkesy v. SEC*, 34 F.4th 446, 453–57 (5th Cir. 2022). Nor does the "respondent" receive the benefit of the Federal Rules of Civil Procedure and Federal Rules of Evidence. Instead, the SEC plays by its own rules. 17 C.F.R. § 201.100 *et seq*.

More still, any "review" by federal judges turns on the record that the *SEC developed*, and "the Exchange Act specifies what constitutes the agency record, 15 U.S.C. § 78y(a)(2), the standard of review, *id.* § 78y(a)(4), and the process for seeking a stay of the Commission order either before the Commission or in

the court of appeals, *id.* § 78y(c)(2)." *Bennett*, 844 F.3d at 177. The entire case, then—the evidence and claims being ultimately reviewed—is shaped by the *agency*. It determines the record. It determines whether to issue an order. It determines whether to drop the case entirely. The agency pulls all the strings of the ultimate "review" before an appellate court. What's more, judicial deference to fact-finding and legal determinations means that no "meaningful" review occurs. *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1248–49 (1994) ("[T]he agency decision, even before the bona fide Article III tribunal, possesses a very strong presumption of correctness on matters both of fact and of law."); Bernick, 16 Geo. J. L. & Pub. Pol'y at 30 (Deferring to agency factfinding in core private rights cases "constitutes an abdication of the duty of independent judgment that Article III imposes upon federal judges; and denies litigants due process of law.").

In other words, review in an Article III forum occurs only *after* a party is (1) subject to a biased proceeding, (2) with no jury, (3) with an agency-crafted record, (4) to which federal judges will ultimately defer.

In no meaningful sense is *that* review *meaningful*. And when determining whether Congress sought to strip courts of jurisdiction, courts must not turn a blind eye to such burdens imposed on litigants. Surely, after all, Congress did not so intend.

This is no new insight. Long before *Thunder Basin*, scholars questioned "[w]hether there is '*meaningful' review*" when courts defer to agency factfinding. Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983

Duke L.J. 197, 227 (1983) (emphasis added). Such deference "skew[s] too far in favor of agencies" in federal court, so courts should employ "more robust review to agency adjudication where private rights are at stake." Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 Nw. U. L. Rev. 1569, 1597 (2013). But because courts do not do so, deference doctrines cut against meaningful review.

2. *Agency Expertise*. Agencies do not have expertise in deciding constitutional issues. *Free Enterprise*, 561 U.S. at 491 (stating that expertise means "technical considerations of agency policy."). As this Court recently explained "agency adjudications are generally ill suited to address structural constitutional challenges." *Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021). Just so. And thus, when a party brings a structural constitutional claim, courts ought to weigh *against* jurisdiction stripping.

3. *Wholly Collateral*. This factor has courts confused. *See Tilton*, 824 F.3d at 287; *Bennett*, 844 F.3d at 186 (finding decision is "not free from ambiguity"); *Bebo*, 799 F.3d at 774 (noting "this unsettled issue"); *Axon*, 986 F.3d at 1185 (concluding that claims were "arguably" wholly collateral and noting that courts have "offered two competing ways to consider" the factor).

This Court should clarify: "Wholly collateral" means claims that do not rise and fall with the merits of the administrative complaint. The constitutionality of the SEC administrative-adjudication scheme, for example, is wholly collateral to the merits of Cochran's case because it has nothing to do with the allegations in the SEC's complaint in this case. After

all, "constitutional challenges to the laws that [agencies] administer" "are . . . wholly collateral to other types of claims" which agencies are "empowered to consider." *Elgin*, 567 U.S. at 29–30. The lower courts remain in disarray on this point. But to the extent it is used to excavate Congress's intent, the "wholly collateral" inquiry must apply to constitutional claims falling well outside the agency's complaint.

* * *

Only *after* examining these factors can one determine whether Congress clearly intended to strip jurisdiction. But the factors must be applied rigorously. And even then, there is a final step: Would congressional jurisdiction stripping violate the Constitution?

iv. Question 4: Did Congress strip jurisdiction consistent with the Constitution's separation of powers and due process?

No once more.

This final question must be addressed in every case. Because Congress can strip jurisdiction only "[w]ithin constitutional bounds," courts must consider whether Congress, in stripping jurisdiction, acted constitutionally. *Bowles*, 551 U.S. at 212. And if not, jurisdiction stripping cannot be the correct result.

For instance, Congress cannot bar all federal courts from hearing all constitutional claims. *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 328–30 (holding the "whole judicial power" "shall be vested" in federal courts) (emphasis deleted). Or, a statute that stripped a court of jurisdiction and forced a party to navigate

through an Article II forum that exercises the "judicial Power" would violate Article III and the separation of powers. *Stern*, 564 U.S. at 469 (holding Congress cannot give Article I court the "judicial power of the United States by entering final judgment on a common law tort claim"); *see* Baude, 133 Harv. L. Rev. at 1541 (The Executive Branch "cannot deprive people of life, liberty or property without judicial process."). And finally, a statute cannot strip jurisdiction if it would ensure that the party would lose his private rights to life, liberty, or property without adequate due process in a judicial forum. Lawson, 2017 B.Y.U. L. Rev. at 631 (explaining that executive adjudications "cannot legitimate a deprivation that is not otherwise legitimate" regardless of the procedures used); Chapman & McConnell, 121 Yale L.J. at 1679 (Due process "consistently referred to the guarantee of legal judgment in a case by an authorized court in accordance with settled law.").

The SEC process violates these latter two constraints. It adjudicates private rights and issues binding orders that deprive people of their property with no judicial process. It exercises the judicial power by binding parties in cases involving private rights and imposing fines. *See Jarkesy*, 34 F.4th at 458 (SEC "fraud claims and civil penalties are analogous to traditional fraud claims at common law" and are "about the redress of private harms."). And "both Article III and the Due Process Clause generally require the government to follow common-law procedure (including, fundamentally, the use of a 'court') when seeking to deprive people of their private rights to property or liberty." *Calcutt v. FDIC*, __ F.4th __, No. 20-4303, 2022 WL 2081430, at *39 (6th Cir. 2022) (Murphy, J., dissenting). "Generations of

Americans assumed that once core private rights had vested in a particular individual, the allied requirements of due process and the separation of powers protected them against many forms of interference by the political branches." Nelson, 107 Colum. L. Rev. at 562.

The SEC's in-house adjudication here runs roughshod over these longstanding constitutional norms. The SEC's process violates the separation of powers and due process. It levies huge civil penalties that affect private rights. *Tilton*, 824 F.3d at 279 ("SEC's authority to impose penalties administratively" has been "dramatically expanded" such that it is "essentially 'coextensive with [the SEC's] authority to seek penalties in Federal court.'" *Id.* (citation omitted)). It imposes a binding judgment. And so courts *cannot* read the Exchange Act to strip jurisdiction. Doing so would be outside of "constitutional bounds."

Thunder Basin and *Elgin* sidestep these necessary predicate questions about whether the Constitution permits the Executive Branch from exercising the power that the purported jurisdiction-stripping statute supplies. That ignores our Constitution's design, which the sovereign people established by delegating limited powers to separate branches. Eroding these key constitutional constraints threatens our government's very structure and in turn puts individual liberty in grave danger.

CONCLUSION

The separation of powers and due process of law protect liberty and guard against arbitrary rule. That structure allows Congress to strip federal courts of jurisdiction only when done clearly and within constitutional limits. It has done neither here.

The judgment should be affirmed.

DATED: July 6, 2022.

Respectfully submitted,

JOHN F. KERKHOFF
Counsel of Record
ADITYA DYNAR
Pacific Legal Foundation
3100 Clarendon Blvd.
Suite 610
Arlington, VA 22201
Phone: (202) 888-6881
jkerhoff@pacificlegal.org
adynar@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation