No. 25-465

In the Supreme Court of the United States

TIMOTHY BARTON,

Petitioner,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm devoted to defending constitutional freedoms from the administrative state's depredations. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as the right to a jury trial, to due process of law, and to have laws made by the nation's elected legislators through constitutionally prescribed channels (*i.e.*, the right to self-government). These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, executive branch officials, administrative agencies, and even some courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints against the modern administrative state. Although Americans still enjoy the shell of their Republic, a very different sort of government has developed within it—a type that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

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[1] In accordance with Supreme Court Rule 37.2, NCLA provided timely notice to counsel of record for the parties of its intention to file this brief. No party's counsel authored any portion of this brief, and no party, party counsel, or person other than *amicus curiae* made a monetary contribution intended to fund this brief's preparation or submission. *See* S. Ct. R. 37.6.

As a staunch defender of constitutional liberties, the constitutional separation of powers, and the rule of law, NCLA has a strong interest in the Court's consideration of this case. Moreover, as a key advocate in cases including *Lucia v. SEC*, *SEC v. Cochran*, *SEC v. Jarkesy*, and *Relentless v. Department of Commerce*, which involved related issues, NCLA has a unique perspective to offer the Court.

As explained herein, NCLA is concerned that the Fifth Circuit and other federal courts are routinely overlooking important structural constitutional problems that arise from increasingly routine judicial appointments of receivers like the one appointed in this case. One particular problem relevant to this case, as currently presented, is that the district court's appointment of the receiver appears to contravene the Appointments Clause of the Constitution. NCLA respectfully urges the Court to consider that constitutional problem while granting the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

NCLA agrees with Petitioner that the statute the district court presumably relied on to authorize its appointment of the receiver—Section 21(d)(5) of the Securities Exchange Act of 1934—cannot plausibly be read to vest courts with power to appoint a receiver having the degree of sweeping powers granted in this case.[2] NCLA writes separately to highlight a structural constitutional problem that arises from this absence of statutory authority: The district court's receivership order violated the Appointments Clause.

"The Appointments Clause of the Constitution lays out the permissible methods of appointing 'Officers of the United States,' a class of government officials distinct from mere employees." *Lucia v. SEC*, 585 U.S. 237, 241 (2018) (quoting U.S. CONST. art. II, § 2, cl. 2). One such method is the appointment of "inferior" officers by "Courts of Law." U.S. CONST. art. II, § 2, cl. 2. But this method is permissible only if Congress has vested the power in the courts "by Law"—that is, by enacting a statute that authorizes the appointment. For example, in *Morrison v. Olson*, 487 U.S. 654 (1988), the Court upheld the constitutionality of a statute that empowered a special Article III court to appoint an "independent counsel" is certain circumstances. *Id.* at 670-77. Similarly, Congress has statutorily empowered district courts to appoint United States Attorneys for their

[2] Neither the district court nor the Fifth Circuit cited any statute as authorizing the receiver's appointment. The Petition reasonably identifies and addresses Exchange Act § 21(d)(5) as the most plausible source of any such statutory authority. That statute was the only one SEC cited when seeking appointment of the receiver.

districts under certain limited circumstances. 28 U.S.C. § 546(d).

The district court's appointment order bestowed on the receiver such a significant degree of authority and discretion as to render him an "officer" of the United States under this Court's Appointments Clause jurisprudence. If, as the Petition amply demonstrates, Congress has never enacted a law authorizing such appointment, then the district court's appointment of the receiver was constitutionally invalid.

ARGUMENT

I. IMPORTANT CONTEXTUAL BACKGROUND

Although litigants and courts rarely mention it, the fundamental design of receiverships like the one challenged by the Petition is apparent. At core, such receiverships are an expedient ploy by Respondent Securities and Exchange Commission ("SEC")—enabled by courts—to circumvent the uniform, comprehensive, and predictable bankruptcy process established by Congress through decades of legislative trial and error. Receiverships in SEC law-enforcement cases function to evade the carefully crafted statutory bankruptcy process and replace it with an *ad hoc*, non-statutory shadow process more to SEC's liking. This Court has never blessed this end run around the statutory bankruptcy process, but the Petition presents an ideal—and long overdue—vehicle for the Court to step in and either stop it or at least erect appropriate constitutional guardrails.

The Constitution vests in *Congress*—not courts—the power "[t]o establish … uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. This Court has repeatedly confirmed that the language of this Bankruptcy Clause is broad and covers "nothing less than the subject of the

relations between a debtor and his creditors." *See, e.g.*, *Siegel v. Fitzgerald*, 596 U.S. 464, 473 (2022) (cleaned up). The Founders were keenly aware of the inconsistent patchwork of bankruptcy laws that existed first among the various colonies and later among the several states, and they plainly thought it best to have a uniform system to sort out the complexities and competing interests inherent in situations of insolvency. Congress has exercised its constitutional power through various iterations of what is now the Bankruptcy Code, which comprehensively establishes a uniform system of laws and processes—indeed an entire Article I court system—specifically designed to deal with situations of insolvency like the one that led to this litigation. Three years ago, this Court reemphasized the constitutional importance of uniformity in this area of the law. *See id.* at 477-78.

SEC has never liked what Congress enacted in this area. Among other things, SEC thinks Congress was wrong to assign the lowest creditor priority to equity shareholders of bankrupt companies; it thinks those shareholders should sit at the top the pecking order, not the bottom. *See generally* Reid Skibell & Joseph Gallagher, *Choosing Between an SEC Receivership and Bankruptcy*, LAW360 (Mar. 11, 2021, 1:25 PM), https://www.law360.com/articles/1363507/choosing-between-an-sec-receivership-and-bankruptcy ("SEC's preferred path has increasingly been to force securities defendants into receiverships," thus empowering SEC "to choose winners and losers in the assignment of blame and the distribution of assets"); Sean Kelly, Note, *SEC v. Creditors: Why SEC Civil Enforcement Practice Demonstrates the Need for a Reprioritization of Securities Fraud Claims in Bankruptcy*, 92 ST. JOHN'S L. REV. 915, 919 (2018) (noting that Congress rejected SEC's arguments in passing the Bankruptcy Reform Act of 1978); MaryBeth C. Allen, Note, *Take From the*

Fraudulent and Give to the Defrauded: The Code's Use in Asset Recovery in Criminal Securities Fraud Cases, 21 AM. BANKR. INST. L. REV. 191, 199 (2013) ("The receiver is very analogous in its goals and functionality to a bankruptcy trustee; however the SEC receiver is a means to collect the assets to restore victims of fraud without concern for the priority scheme in bankruptcy."); Marcus F. Salitore, *SEC Receivers vs. Bankruptcy Trustees: Liquidation by Instinct or Rule*, AM. BANKR. INST. J., Oct. 2003 (federal receiver "becomes a liquidator without the supporting structure of the Bankruptcy Code, Rules, and precedent," and "[t]he procedure for liquidation becomes *ad hoc*, employing 'equity' as the only guideline").

And so, over the past half-century or so, SEC has successfully enlisted courts to build an *ad hoc* shadow bankruptcy process whereby SEC recommends and district courts appoint private citizens—often the same person in successive cases—as receivers to perform functions that mimic those typically performed by trustees in bankruptcy cases (applying bankruptcy law). According to SEC's public website, there are currently well over 100 "active SEC enforcement actions in which receivers or similar agents have been appointed," many of which have been ongoing for more than a decade. *See Receiverships*, SEC, https://www.sec.gov/enforcement-litigation/receiverships (Feb. 12, 2025). Importantly, these receivers are court-appointed and court-supervised *judicial* officers, whereas bankruptcy trustees are appointed and supervised by *executive* branch officials under the supervision of the Attorney General.

Over time, SEC has convinced courts to bestow increasingly sweeping powers on these receivers. They no longer just passively "receive" and safeguard assets until the court resolves the dispute between SEC and the

defendant. As this case demonstrates, receivers in SEC cases are now routinely empowered to manage, control, and operate multiple corporations; sell and lease company property; waive attorney-client and other privileges; hire attorneys, accountants, brokers and other agents; issue subpoenas and other compulsory information requests; conduct investigations; commence and prosecute lawsuits against third parties in federal and state courts; settle claims; and compensate themselves, their staffs, and their appointed sub-agents using the corporate assets they are appointed to safeguard and manage.

In addition, in the case below, the district court's receivership order includes a now-routine provision that explicitly stays all bankruptcy proceedings involving the receiver or any property under the asserted control of the receiver. App. 91a-92a. This provision further subverts Congress's legislative judgment in the Bankruptcy Code that, with limited exceptions, disputes involving an insolvent person or entity should be litigated in a bankruptcy court or automatically stayed in deference to the bankruptcy process. 11 U.S.C. § 362.

II. A RECEIVER'S VAST POWER AND DISCRETION RENDER HIM A CONSTITUTIONAL OFFICER

An appointee endowed with the kind of vast, sweeping executive power the district court gave the receiver in this case is, at a minimum, an inferior officer within the meaning of the Appointments Clause. This Court has held that officers are those who exercise "significant" authority and discretion pursuant to the laws of the United States, regardless of whether they can issue final, binding decisions on behalf of the government. *See, e.g.*, *Lucia*, 585 U.S. at 245-46 (2018);

Freytag v. Commissioner, 501 U.S. 868, 881 (1991); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

The receiver appointed in this case clearly satisfies this standard. The district court's appointment order empowers the receiver to, among other things, (1) take "exclusive jurisdiction and possession" of more than 50 corporations, App. 72a-74a; (2) to manage, control, and operate those corporations, App. 76a; (3) to sell or lease any property of those corporations, App. 92a-93a; (4) to waive attorney-client and other privileges, App. 94a; (5) to hire attorneys, accountants, brokers, and other agents, App. 76a; (6) to issue subpoenas and other compulsory information requests, App. 77a; (7) to conduct investigations, App. 93a-94a; (8) to commence and prosecute lawsuits in federal and state courts, App. 77a, 93a; (9) to settle claims, App. 77a; and (10) to compensate himself, his staff, and his appointed sub-agents from the corporate assets he was appointed to safeguard and manage, App. 98a.

SEC has elsewhere explicitly conceded that these are "broad powers." SEC, *Investor Bulletin: 10 Things to Know About Receivers*, INVESTOR.GOV (Aug. 27, 2015).[3] So have courts and commentators. *See, e.g.*, *SEC v. Lauer*, No. 9:03-cv-80612, 2015 WL 11004892, at *2 (S.D. Fla. 2015); *United States v. Coughlin*, No. 4:12-cr-166, 2013 WL 1506990, at *1 (E.D. Tex. 2013); Allen, *supra* at 200 (receivers in SEC cases are generally given "very broad powers to manage and conserve the property"); Megan Smith, Note, *SEC Receivers and the Presumption of Innocence: The Problem with Parallel Proceedings in Securities Cases and the Ever Increasing Powers of the Receivers,* 11 HOUS. BUS. & TAX L.J. 203, 213 (2011)

[3] https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins-87.

(courts "usually grant very broad powers to the receiver").

Moreover, the receiver's powers in this case are not just judicial in nature. They include the power to conduct investigations, pursue litigation in federal and state courts, and negotiate settlements of claims as an agent of the government—quintessentially *executive* powers. *See, e.g.*, *Morrison*, 487 U.S. at 691 (finding "no real dispute" that the investigative and prosecutorial functions of a court-appointed independent counsel are executive in nature); *id.* at 706 (Scalia, J., dissenting) (independent counsel performs "a quintessentially executive function"). Unlike in *Morrison*, however, there is an obvious "incongruity" in the district court's appointment here because, among other things, all of the receiver's ongoing *executive* functions are performed under the direction and supervision of the appointing *judicial* officer (not SEC or anyone else in the executive branch). Worse yet, much of the litigation pursued by the receiver is purposefully brought before and decided by the same judge who appointed and supervises the receiver.

III. CONGRESS HAS NOT, "BY LAW," VESTED COURTS WITH THE POWER TO APPOINT RECEIVERS WHO WIELD THE SIGNIFICANT AUTHORITY OF INFERIOR OFFICERS

Neither the district court nor the Fifth Circuit cited any statute as purported authority for appointing the receiver. Other courts have candidly admitted that no such statute exists. *See, e.g.*, *SEC v. Malek*, 397 F. App'x 711, 713 (2d Cir. 2010) (acknowledging that "neither the Securities Act of 1933 nor the Securities Exchange Act of 1934 expressly vests the power to appoint receivers in the district courts"); *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980) ("The power of a district court to impose

a receivership or grant other forms of ancillary relief does not in the first instance depend on a statutory grant of power from the securities laws.")

Of course, Congress knows how to write statutes that authorize the appointment of receivers and similar judicial adjuncts. For example, 28 U.S.C. § 3103 gives district courts express authority and detailed guidance in appointing receivers in certain government debt-collection cases, of which this case is not one. Likewise, 28 U.S.C. § 631 empowers district courts to appoint Magistrate Judges to assist them with certain judicial functions detailed in the ensuing statutory provisions. Indeed, statutes also expressly authorize district courts to appoint their clerks of court, *id.* at § 751, their law clerks and secretaries, *id.* at § 752, their court reporters, *id.* at § 753, and their criers and bailiffs, *id.* at § 755, even though few, if any, of these appointees exercise the degree of "significant authority" that would render them constitutional officers.

To be sure, a nearby code section alludes to receivers already lawfully appointed in cases "involving property, real, personal, or mixed, situated in different districts." *Id.* at § 754.[4] But even that provision does not—in stark linguistic contrast with the above-cited surrounding code sections that expressly vest *appointment* power—purport to vest courts with the antecedent power to appoint such receivers, least of all the type of receivers typically appointed in SEC law-enforcement cases. Rather, § 754 is best read as *presupposing* a valid appointment under another statute—for example, the above-referenced 28 U.S.C. § 3103, or one of the many

[4] Section 754 also presumably contemplates litigants in diversity-of-citizenship cases who were validly appointed as receivers under state law.

other federal statutes that expressly authorize the appointment of receivers under specified circumstances. *See, e.g.*, 12 U.S.C. § 191(a) (authorizing Comptroller of the Currency to appoint receivers for uninsured national banks); 12 U.S.C. § 2183(b) (authorizing the Farm Credit Administration Board to appoint the Farm Credit System Insurance Corporation as receiver for a Farm Credit institution under specified circumstances); 12 U.S.C. § 1821(c) (authorizing appointment of FDIC as receiver for distressed federal depository institutions); 12 U.S.C. § 4617 (authorizing Director of Federal Housing Finance Agency to appoint that agency as receiver for certain regulated entities).

Notably, Congress also knows how to statutorily empower courts to appoint receivers in other securities-law contexts not applicable here. For example, when enacting the now-repealed Public Utility Holding Company Act of 1935 (a year after enacting the Exchange Act), Congress expressly provided that in any proceeding in federal court under the act, "the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court ... ." Pub. L. No. 74-333, § 11(f), 49 Stat. 803, 822. Likewise, the Investment Company Act of 1940 still provides that in proceedings to enforce certain provisions of that statute:

> the court as a court of equity may, to the extent it deems necessary or appropriate, take exclusive jurisdiction and possession of the investment company or companies involved and the books, records, and assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, who with the approval of the court shall have power to

> dispose of any or all of such assets, subject to such terms and conditions as the court may prescribe.

15 U.S.C. § 80a-41(d).

No remotely similar language empowers courts to appoint receivers in SEC enforcement cases like this one brought under the parallel provisions of the Exchange Act and the Securities Act of 1933. In the district court, SEC pointed to Exchange Act § 21(d)(5), which vaguely provides that "In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. § 78u(d)(5). But the text of that section—which does not mention the word "appoint" or "receiver"—bears no resemblance to the explicit language Congress has used when authorizing court appointments of receivers and other inferior officers pursuant to the Appointments Clause. Moreover, there is no evidence in the legislative history of § 21(d)(5)—added by the Sarbanes-Oxley Act of 2002, decades after SEC had already been successfully convincing courts to appoint receivers without it or any other statutory authority—that the provision was meant to vest district courts with the power to appoint receivers in SEC cases.

Because no statute vests in district courts the power to appoint receivers with authority significant enough to render them inferior officers, the district court's appointment of the receiver in this case violated the Appointments Clause of Article II of the Constitution.[5]

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[5] Even if such a statute existed, it would likely violate the uniformity requirement of the Constitution's Bankruptcy Clause

CONCLUSION

For the foregoing reasons, *amicus curiae* NCLA respectfully urges the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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November 17, 2025

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because it would ensure wildly disparate outcomes for similarly situated debtors based entirely on whether, in the race to the courthouse, SEC arrived at the district court before the debtor or its creditors arrived at the bankruptcy court.