Nos. 21-86 and 21-1239

In the Supreme Court of the United States

AXON ENTERPRISE, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, ET AL.

SECURITIES AND EXCHANGE COMMISSION, ET AL., PETITIONERS

v.

MICHELLE COCHRAN

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND FIFTH CIRCUITS

BRIEF FOR THE FEDERAL PARTIES

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QUESTIONS PRESENTED

1. Whether a federal district court may hear a suit in which the respondent in a Federal Trade Commission (FTC) administrative proceeding seeks to enjoin that proceeding based on alleged constitutional defects in the statutory provisions that govern removal of the FTC's Commissioners and administrative law judge.

2. Whether a federal district court may hear a suit in which the respondent in a Securities and Exchange Commission (SEC) administrative proceeding seeks to enjoin that proceeding based on alleged constitutional defects in the statutory provisions that govern removal of the SEC's administrative law judges.

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OPINIONS BELOW

In *Axon Enterprise, Inc.* v. *FTC*, the opinion of the court of appeals (*Axon* Pet. App. 1a-46a) is reported at 986 F.3d 1173. The order of the district court (*Axon* Pet. App. 49a-89a) is reported at 452 F. Supp. 3d 882.

In *SEC* v. *Cochran*, the opinion of the en banc court of appeals (*Cochran* Pet. App. 1a-111a) is reported at 20 F.4th 194. The opinion of the court of appeals panel (*Cochran* Pet. App. 114a-138a) is reported at 969 F.3d

507. The memorandum opinion and order of the district court (*Cochran* Pet. App. 139a-144a) is not reported but is available at 2019 WL 1359252.

JURISDICTION

In *Axon*, the judgment of the court of appeals was entered on January 28, 2021. A petition for rehearing was denied on April 15, 2021 (*Axon* Pet. App. 47a-48a). The petition for a writ of certiorari was filed on July 20, 2021, and was granted, limited to Question One presented by the petition, on January 24, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

In *Cochran*, the judgment of the en banc court of appeals was entered on December 13, 2021. The petition for a writ of certiorari was filed on March 11, 2022, and was granted on May 16, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-9a.

STATEMENT

A. Legal Background

In 1914, Congress established the Federal Trade Commission (FTC) to protect consumers and promote competition. See 15 U.S.C. 41. In 1934, it established the Securities and Exchange Commission (SEC) to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. See 15 U.S.C. 78d(a).

Each Commission consists of five members appointed by the President with the advice and consent of the Senate. See 15 U.S.C. 41, 78d(a). The President may remove FTC Commissioners for "inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. 41. The same removal standard has long been understood

to apply to SEC Commissioners. See *Free Enterprise Fund* v. *PCAOB*, 561 U.S. 477, 487 (2010).

Each Commission appoints one or more administrative law judges (ALJs) to help it perform its adjudicative functions. See 15 U.S.C. 41 note, 78d-1(a). Under a statute that applies to federal agencies generally, an ALJ may be removed from office "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U.S.C. 7521(a).

Each Commission enforces a range of statutes. The statutes enforced by the FTC include the Federal Trade Commission Act (FTC Act), ch. 311, 38 Stat. 717, 15 U.S.C. 41 *et seq.*, and the Clayton Act, ch. 404, 38 Stat. 730. Those enforced by the SEC include the Securities Exchange Act of 1934 (Exchange Act), ch. 323, 48 Stat. 881, 15 U.S.C. 78a *et seq.* We refer to the FTC Act and Exchange Act collectively as the Acts.

The Acts empower the Commissions to address violations by bringing civil actions and instituting administrative proceedings. The FTC Act empowers the FTC to bring civil suits for monetary penalties and injunctions, see 15 U.S.C. 45(m), 53(b), and administrative proceedings seeking cease-and-desist orders, see 15 U.S.C. 45(b). The Exchange Act empowers the SEC to bring civil actions for monetary penalties and equitable relief, see 15 U.S.C. 78u(d), 78u-1, and administrative proceedings seeking civil penalties, cease-and-desist orders, and other remedies, see 15 U.S.C. 78u-2, 78u-3.

When the Commissions conduct adjudications, they use similar procedural frameworks. Each Commission may delegate the initial stages of the proceeding to itself, one or more Commissioners, or an ALJ. See 15 U.S.C. 41 note, 78d-1(a). If the Commission assigns the

initial stages to an ALJ, the ALJ oversees discovery, holds a hearing, and issues an initial decision. See 16 C.F.R. 3.21-3.56; 17 C.F.R. 201.221-201.360. Either party may appeal an adverse decision to the Commission, or the Commission may review a decision on its own. See 16 C.F.R. 3.52-3.53; 17 C.F.R. 201.410-201.411. If the ALJ's decision is not reviewed, it becomes the final decision of the Commission. See 15 U.S.C. 78d-1(c); 16 C.F.R. 3.51(a). If it is reviewed, the Commission considers the case de novo and issues a final decision. See 16 C.F.R. 3.54; 17 C.F.R. 201.411(a).

The Acts establish similar schemes for judicial review of the Commissions' orders. Each Act provides that the respondent may file a petition for review in a court of appeals if the Commission issues an adverse order. See 15 U.S.C. 45(c), 78y(a)(1). Each specifies the permissible venues, the deadline for seeking review, the contents of the agency record, the standard of review applicable to the Commission's factual findings, and the procedure for staying the Commission's order pending review. See 15 U.S.C. 45(c) and (g), 78y.

B. *Axon*

1. Axon Enterprise, Inc. makes and sells body-worn cameras and other policing equipment. *Axon* Pet. App. 51. After Axon bought its closest competitor in 2018, the FTC investigated the acquisition. *Ibid.*

In 2020, Axon sued the FTC and its Commissioners in federal district court in Arizona. See *Axon* Pet. App. 52. Axon alleged that (1) the tenure protections granted to the FTC's Commissioners and ALJ violated Article II, and (2) the FTC's enforcement procedures violated the Due Process Clause. See *ibid.* Axon also raised an antitrust claim that it later dropped. See *id.* at 11 n.3. The complaint asked the court to enjoin the FTC from

"pursuing an administrative enforcement action against Axon." *Axon* Compl. 28.

The day Axon sued, the FTC brought an administrative proceeding against it. *Axon* Pet. App. 52. The Commission alleged that Axon's acquisition of its competitor severely limited competition for body-worn cameras, violating both the FTC Act's prohibition of unfair methods of competition and the Clayton Act. *Ibid.*; *Axon* C.A. E.R. 6.

Axon moved for a preliminary injunction to halt the administrative proceeding. *Axon* Pet. App. 52. The district court denied the motion and dismissed Axon's complaint for lack of jurisdiction. *Id.* at 49-89. The court held that the FTC Act channels disputes concerning the FTC's adjudications to courts of appeals, precluding review in district courts. *Id.* at 61-66. The court further held that the preclusion of district-court review encompassed Axon's removal-power and due-process claims. *Id.* at 66-89. The court did not reach the FTC's alternative argument that Axon's suit violated the Administrative Procedure Act (APA) and that Axon lacked a cause of action. See *Axon* D. Ct. Doc. 19, at 12-14.

2. The Ninth Circuit temporarily stayed the FTC proceeding pending resolution of the appeal. *Axon* C.A. Order (Oct. 2, 2020).

The Ninth Circuit affirmed, holding that the FTC Act channels disputes concerning the FTC's adjudications to courts of appeals and that Axon's claims fell within the Act's review scheme. *Axon* Pet. App. 1-46. The court explained that, under this Court's precedents, a claim presumptively falls outside a review scheme if the plaintiff cannot obtain meaningful review within that scheme, the claim is wholly collateral to that scheme, and the claim falls outside the agency's exper-

tise. *Id.* at 11. The court explained that Axon could obtain meaningful review in courts of appeals and that its claims were not collateral to the review scheme. *Id.* at 12-22. The court acknowledged that the FTC lacked the expertise to address constitutional claims, but it concluded that this factor alone could not justify anticipatory district-court review. *Id.* at 23-26. Like the district court, the Ninth Circuit did not reach the FTC's argument that Axon's suit violated the APA and that Axon lacked a cause of action. See *Axon* Gov't C.A. Br. 30-34.

Judge Bumatay concurred in part and dissented in part. *Axon* Pet. App. 29-46. He would have held that the district court could review Axon's removal-power claim. *Id.* at 42-44. He also would have held that the district court could review Axon's contention that the FTC's process for clearing mergers violated the Due Process Clause. *Id.* at 35-41. He agreed with the district court, however, that the court lacked power to review Axon's contention that the process by which the FTC conducts administrative proceedings violates the Due Process Clause by combining prosecutorial and adjudicative functions in a single agency. *Id.* at 44-46.

Axon filed a petition for rehearing en banc. *Axon* Pet. App. 47. The Ninth Circuit denied the petition with no judge requesting a vote. *Id.* at 47-48.

C. *Cochran*

1. In 2016, the SEC instituted administrative and cease-and-desist proceedings against Michelle Cochran, a certified public accountant, to determine whether Cochran violated the Exchange Act and engaged in improper professional conduct in connection with her audits of publicly traded companies. *Cochran* Pet. App. 2a. An ALJ found that Cochran had violated the Exchange Act and had engaged in improper professional

conduct. See *id.* at 2a-3a. The ALJ imposed a civil penalty; barred Cochran from appearing or practicing before the SEC, with the right to apply for reinstatement after five years; and ordered her to cease and desist from future violations. See *ibid.* In the meantime, this Court held in *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), that the SEC's ALJs are officers of the United States and that their appointments must comply with the Constitution's Appointments Clause. *Id.* at 2049. In light of that decision, the SEC remanded Cochran's case for a fresh hearing before a different, properly appointed ALJ. *Cochran* Pet. App. 3a.

Before a new hearing on remand occurred, Cochran sued the SEC, its Chairman, and the Attorney General in federal district court in Texas. See *Cochran* J.A. 41. Cochran alleged that (1) the tenure protection accorded to the SEC's ALJs violates Article II, and (2) the SEC's processes for conducting adjudications violate the Due Process Clause. *Id.* at 60-63. The complaint asked the court to enjoin the SEC from "carrying out an administrative proceeding" against Cochran. *Id.* at 64.

The district court dismissed Cochran's complaint for lack of subject-matter jurisdiction. *Cochran* Pet. App. 139a-144a. The court held that the Exchange Act requires all challenges to the SEC's adjudications to be brought in courts of appeals, and that the Act's review scheme encompasses the constitutional claims that Cochran raised here. *Id.* at 141a-144a.

2. A motions panel of the Fifth Circuit enjoined the administrative proceedings against Cochran pending the disposition of her appeal. *Cochran* Pet. App. 4a.

A panel of the Fifth Circuit affirmed the dismissal of Cochran's complaint. *Cochran* Pet. App. 114a-138a. The panel concluded that, by authorizing review of the

SEC's orders in courts of appeals, Congress had precluded review in district courts. *Id.* at 118a-119a. The panel also found no sound reason to infer that Congress had exempted removal-power claims from the Exchange Act's general channeling of cases to courts of appeals. *Id.* at 119a-128a.

Judge Haynes dissented in part. *Cochran* Pet. App. 132a-138a. She agreed with the panel majority that "the district court lacked jurisdiction over" Cochran's due-process claim. *Id.* at 132a n.1. But she would have held that Cochran's Article II claim could go forward in district court because it "is not the type over which Congress intended to limit jurisdiction." *Id.* at 138a.

3. The Fifth Circuit granted rehearing en banc. *Cochran* Pet. App. 112a-113a. The en banc court affirmed the district court's decision in part, reversed in part, and remanded. *Id.* at 1a-111a.

The Fifth Circuit held that the district court had jurisdiction over Cochran's removal-power claim. *Cochran* Pet. App. 5a-32a. The court identified various features of the Exchange Act that in its view suggested that district courts could review that claim. *Id.* at 6a-16a. The court further concluded that Cochran's removal-power claim would not receive meaningful judicial review in a court of appeals; that the claim was wholly collateral to the review scheme; and that the claim lay outside the SEC's expertise. *Id.* at 16a-32a. The court did not address whether the district court had erred in dismissing Cochran's due-process claim, finding that Cochran had forfeited that claim by failing to discuss it in her brief. *Id.* at 4a n.4.

Judge Oldham, joined by five other judges, issued a concurring opinion responding to the dissent. *Cochran* Pet. App. 35a-81a.

Judge Willett concurred in the judgment. He viewed this Court's decision in *Free Enterprise Fund* as controlling here and as establishing that the district court could hear Cochran's claims. *Cochran* Pet. App. 2a n.2.

Judge Costa, joined by six other judges, dissented. *Cochran* Pet. App. 82a-111a. The dissenting judges would have held that, by providing for review of SEC orders in courts of appeals, Congress had precluded review in district courts. *Id.* at 86a. They also would have held that Congress did not exempt Cochran's removal-power claim from that review scheme. *Id.* at 94a.

SUMMARY OF ARGUMENT

A. The FTC Act and Exchange Act set out detailed schemes for judicial review of orders issued by the Commissions during administrative adjudications. With one exception that is inapplicable here (for temporary cease-and-desist orders issued by the SEC), the Acts limit judicial review in two important ways. First, they authorize review only at the end of the administrative proceedings, after the Commissions issue their final orders. Second, the Acts authorize review only in courts of appeals, not in district courts. There is no dispute that Axon and Cochran could raise all their constitutional claims in courts of appeals upon review of final orders.

B. Axon and Cochran may not evade those limits by suing the Commissions in district court before agency proceedings conclude. It is a familiar rule of statutory interpretation that a specific provision controls over a general one. This Court therefore has often held that general provisions granting jurisdiction to district courts must yield to more specific provisions granting jurisdiction to other courts. Here, the Acts specifically grant courts of appeals jurisdiction to review the Com-

missions' adjudications when the agencies issue their final orders.

The APA confirms that Axon and Cochran may not challenge the Commissions' adjudications in district court before those adjudications conclude. The APA generally authorizes judicial review only of "final agency action." 5 U.S.C. 704. A "preliminary, procedural, or intermediate" action ordinarily is subject to review only "on the review of the final agency action." *Ibid.* The actions that Axon and Cochran challenge here—the commencement of agency adjudications and assignment of the initial stages to ALJs—are preliminary, not final. Under the APA, they are subject to review only "on the review of the final agency action"—which, under the Acts, takes place in courts of appeals. *Ibid.*

Even if the district court could exercise jurisdiction, Axon and Cochran lack a cause of action to bring these suits. Axon and Cochran identify no federal statute that expressly grants them a cause of action. They rely instead on the federal courts' general equitable powers. But when Congress enacts a remedial scheme, as it has in the FTC Act and Exchange Act, federal courts should not override the scheme's limits by devising a substitute equitable remedy.

Precedent confirms that Axon and Cochran may not circumvent the Acts' limitations on judicial review by suing in district court before the conclusion of agency proceedings. The Court has repeatedly held that, when Congress authorizes courts of appeals to review an agency's adjudications, it precludes district courts from reviewing those adjudications. Until the Fifth Circuit's decision in *Cochran*, the courts of appeals had uniformly agreed that the FTC Act and Exchange Act preclude

district-court review of ongoing FTC and SEC administrative proceedings.

C. The nature of Axon's and Cochran's substantive challenges—*i.e.*, their claim that the Commissions' members or ALJs enjoy tenure protections that conflict with the President's removal power under Article II—does not alter the proper mode and timing of judicial review. The Acts' review schemes, read in light of the APA, encompass the Commissions' final orders, together with preliminary actions that precede those orders. Neither the Acts nor the APA contains an exception for constitutional claims, Article II claims, or removal-power claims. To the contrary, the APA encompasses suits alleging that an agency has acted "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. 706(2)(B). And petitions for review filed at the end of agency proceedings have repeatedly raised the types of challenges that Axon and Cochran assert here—namely, claims that the agency adjudication violated Article II.

The consequences of Axon's and Cochran's theory also counsel against adopting it. Their theory would turn constitutional avoidance upside down, accelerating judicial consideration of constitutional claims while deferring consideration of non-constitutional claims. Their theory also would produce parallel litigation by bifurcating judicial review, with a district court and a court of appeals (perhaps in another circuit) reviewing different claims arising out of the same agency proceeding. In addition, Axon's and Cochran's theory would be difficult to administer. Axon, Cochran, and the judges who endorsed their positions in the Fifth and Ninth Circuits agree that certain constitutional claims fall outside the Acts' review schemes, yet they disagree on which

claims can be reviewed immediately and on how far that special carveout extends.

The district courts in these cases thus correctly dismissed Axon's and Cochran's suits. This Court should affirm the Ninth Circuit's judgment and reverse the Fifth Circuit's judgment.

ARGUMENT

A PARTY MAY NOT CHALLENGE ONGOING FTC AND SEC ADJUDICATIONS IN DISTRICT COURT

The question in these cases is not whether Axon and Cochran may pursue their constitutional claims. They may assert all those claims in courts of appeals on review of final Commission orders pursuant to the judicial review provisions of the FTC Act and the Exchange Act. The question here is whether Axon and Cochran may short-circuit the review schemes established by Congress by preemptively suing in district court to enjoin agency proceedings. They may not.

Three principles taken together control these cases. *First*, the only statutory provisions that expressly authorize judicial review of Commission adjudications are the review provisions of the FTC Act and Exchange Act. Those provisions authorize review only in courts of appeals, and only after administrative proceedings conclude. *Second*, the non-final agency actions that Axon and Cochran challenge—the commencement of agency adjudications and the assignment of those proceedings to FTC and SEC ALJs—are not reviewable to begin with under the APA or under any more specific judicial-review provision. *Third*, the existence of the express statutory review scheme precludes courts from creating new remedies that Congress has not authorized. While federal courts can sometimes impose judge-made equitable remedies when that is necessary to ensure mean-

ingful review of constitutional claims, courts cannot appropriately exercise equitable discretion in ways that would subvert congressional policy choices regarding the proper mode and timing of judicial review.

Because Congress has authorized only courts of appeals to review the Commissions' conduct of administrative adjudications, the district courts lacked jurisdiction over Axon's and Cochran's suits. And even if the district courts had jurisdiction, the suits fail because Axon and Cochran do not have a cause of action. The proper disposition of these cases does not meaningfully depend on whether the barrier to their adjudication is lack of jurisdiction, the absence of any applicable cause of action, or a combination of the two. A holding that no district-court cause of action is available "would only require a new Rule 12(b)(6) label for the same Rule 12(b)(1) conclusion." *Morrison* v. *National Australia Bank*, 561 U.S. 247, 254 (2010).

A. Parties May Seek Court-Of-Appeals Review Of FTC And SEC Adjudications After The Agency Proceedings Conclude

The FTC Act and Exchange Act authorize judicial review of specified orders issued in the Commissions' enforcement proceedings. Two features of the Acts' review schemes are particularly relevant here. First, each Act authorizes review only after agency proceedings conclude; a party may not seek judicial review *in medias res*. Second, each authorizes review in courts of appeals, not in district courts.

1. The FTC Act and Exchange Act authorize judicial review only after agency proceedings conclude

The FTC Act and Exchange Act authorize judicial review of the Commissions' initiation and conduct of ad-

ministrative proceedings only after the proceedings conclude. The FTC Act provides that a person may file a petition for review only after the FTC issues "an order * * * to cease and desist" from using a method, act, or practice. 15 U.S.C. 45(c). The Exchange Act provides that an aggrieved party may file a petition for review only after the SEC issues a "final order." 15 U.S.C. 78y(a)(1). The difference in wording reflects the fact that the FTC may impose only cease-and-desist orders, see 15 U.S.C. 45(c), while the SEC may impose a wider range of remedies, including cease-and-desist orders, civil penalties, and disgorgement, see, *e.g.*, 15 U.S.C. 78u-2, 78u-3. For the sake of brevity, we use the term "final order" to cover both the FTC's cease-and-desist orders and the SEC's final orders.

On judicial review of either Commission's final order, a party may challenge not only the order itself, but also actions taken in the administrative proceeding. Under background principles of administrative law, an agency's "preliminary" actions ordinarily "should be reviewed in the same forum as the final order resolving the core issue." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743 (1985). The APA codifies that rule, providing that a "preliminary, procedural, or intermediate agency action not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. 704. This Court has applied that principle to the FTC Act, holding that, when a court of appeals reviews an FTC cease-and-desist order, it may also review the proceeding that led to the order. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 245 (1980) (citing 5 U.S.C. 704 (1976)). The Court has also reviewed earlier stages of an SEC proceeding in reviewing an SEC final order. See *Lucia* v. *SEC*, 138 S. Ct. 2044, 2051-2055 (2018).

That review includes claims of constitutional error in the proceedings. In *Lucia*, for example, the Court considered whether an SEC proceeding violated the Constitution because the ALJ who issued the initial decision had not been appointed in accordance with the Appointments Clause. See 138 S. Ct. at 2051-2055.

Judicial review of the Commissions' actions thus works like appellate review of district courts' rulings. In general, a litigant may appeal a district court's ruling as of right only after final judgment. See 28 U.S.C. 1291. But in that appeal, the party may challenge rulings made by the district court at any stage of the case. See *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). So too here, a party may file a petition for review only after the Commission issues its final order. In that petition, however, the party may challenge actions taken by the Commission or the ALJ at any stage of the administrative proceeding.

Congress had good reason to design the review scheme that way. An FTC or SEC proceeding can involve myriad preliminary steps on the way to a final order, including issuance of the administrative complaint, assignment of the case to an ALJ, discovery, evidentiary rulings, the ALJ hearing, the ALJ's initial decision, the Commission's decision to grant review, and de novo proceedings in the Commission. Allowing judicial intervention each time the Commission or an ALJ takes one of those steps would interfere with the orderly and efficient conduct of the proceeding. It would also burden reviewing courts, requiring them to engage in piecemeal review and to decide issues whose resolution might prove to have been unnecessary upon completion of the agency proceeding. Deferring review until entry of the final order avoids the costs associated with prem-

ature judicial intervention, while ensuring that a reviewing court may hold the Commission to account once the proceeding concludes.

2. The FTC Act and Exchange Act authorize judicial review only in courts of appeals

The FTC Act and Exchange Act authorize courts of appeals, not district courts, to review the Commissions' final orders. The FTC Act states that the subject of an FTC cease-and-desist order may file a petition for review in a "court of appeals," and that the "court of appeals" has "exclusive" "jurisdiction * * * to affirm, enforce, modify, or set aside" the FTC's order. 15 U.S.C. 45(c)-(d). The Exchange Act similarly provides that an aggrieved party may file a petition for review in a "United States Court of Appeals," and that the court has "exclusive" "jurisdiction * * * to affirm or modify and enforce or to set aside" the SEC's order. 15 U.S.C. 78y(a)(1) and (3).

Each Act states that, *after* the Commission issues a final order, the district court may grant injunctions and impose civil penalties to *enforce* that order. See 15 U.S.C. 45(*l*)-(m) and 78u(d)-(e). But those provisions do not authorize district courts to reverse the Commissions' final orders, let alone to intervene in the agency proceedings before any final order has been issued.

Congress again had good reason to design the review scheme that way. Placing initial review in a district court would require the district court and the court of appeals to duplicate the same task. Each court would have to decide whether the Commission's order and the proceeding leading up to it complied with the Constitution and federal law. See *Florida Power & Light*, 470 U.S. at 744.

B. A Party May Not Challenge An Ongoing Commission Proceeding In District Court

Axon and Cochran have eschewed the path to judicial review set forth in the FTC Act and Exchange Act—namely, filing petitions for review after the Commissions' proceedings end, in courts of appeals. They have instead filed suit in district court, seeking injunctions against ongoing agency adjudications. But Congress did not leave that path open to them.

By authorizing review of final Commission orders in courts of appeals, the FTC Act and Exchange Act preclude district courts from exercising subject-matter jurisdiction over Axon's and Cochran's suits. The APA confirms that, when special statutory review provisions like these apply, they provide the exclusive mechanism for reviewing the specified agency conduct. The Court can determine on that basis alone that Axon's and Cochran's suits must be dismissed. Cf. *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 218 & n.23 (1994) (ruling for the government on subject-matter jurisdiction and finding it unnecessary to reach the government's alternative arguments concerning the APA and the absence of a cause of action). But even apart from that jurisdictional defect, the absence of any statutory provision that even arguably authorizes Axon and Cochran to obtain immediate district-court review of the non-final agency actions at issue here provides an independent ground for dismissal.

1. District courts lack subject-matter jurisdiction over challenges to ongoing Commission proceedings

Axon (Br. 1) and Cochran (Br. 2) invoke 28 U.S.C. 1331, which grants district courts jurisdiction over civil actions arising under federal law. But in a variety of circumstances, this Court has construed statutory pro-

visions that authorized court-of-appeals review of specified agency actions as implicitly precluding jurisdiction in district courts. See, *e.g.*, *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 8-10 (2012); *Thunder Basin*, 510 U.S. at 207. To determine whether a statute precludes district-court review of a claim, a court asks whether preclusion of that type of claim is "fairly discernible" from the statute. *Elgin*, 567 U.S. at 12. Preclusion of district-court review is "fairly discernible" from the FTC Act and Exchange Act here.

a. It is a familiar rule of statutory interpretation that the specific controls over the general. When Congress enacts "a general authorization" alongside "a more limited, specific authorization," the "terms of the specific authorization must be complied with." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012). In particular, a "specific remedial scheme" usually "'pre-empts more general remedies.'" *United States* v. *Bormes*, 568 U.S. 6, 12-13 (2012) (citation omitted). That canon serves in part to prevent use of the general statute to circumvent limits on the more specific statute. See *Varity Corp.* v. *Howe*, 516 U.S. 489, 511 (1996).

The more detailed the specific statute, the more compelling the inference that it forecloses more general avenues of relief. See *Brown* v. *GSA*, 425 U.S. 820, 833-834 (1976). When Congress enacts "a precisely drawn, detailed statute," it "would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented" by the simple expedient of invoking a more general statute. *Id.* at 833-834. Said otherwise, exclusivity is often "'fairly discernible' in the detail of the legisla-

tive scheme." *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 351 (1984).

Applying those principles, this Court has often held that general grants of jurisdiction to district courts must yield to more specific grants of jurisdiction to other tribunals—even when the specific provision is not expressly designated as "exclusive." The Court has long held, for example, that district courts lack jurisdiction to review state-court decisions, in part because the certiorari statute vests this Court with jurisdiction to review those decisions. See *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). District courts lack jurisdiction to hear certain claims brought by federal employees, because Congress has established a detailed framework for resolving those claims in the Merit Systems Protection Board (MSPB) and the Federal Circuit. See *Elgin*, 567 U.S. at 10-15. And district courts lack jurisdiction to hear certain tax cases, because Congress has provided a detailed framework for reviewing those cases in the Tax Court. See *Hinck* v. *United States*, 550 U.S. 501, 506-510 (2007).

b. The FTC Act and Exchange Act establish specific schemes to review the Commissions' final orders and the administrative proceedings that lead to those orders. The Acts' detailed review provisions prescribe the time for review (after the Commission issues its final order); the forum (the court of appeals); the permissible venues (specified circuits); the deadline for seeking review (60 days after entry or service of the order); the standard of review for factual findings (supported by evidence for the FTC, supported by substantial evidence for the SEC); the contents of the agency record (the materials listed in 28 U.S.C. 2112); and the process for adducing new evidence (remanding the matter to the

agency). See 15 U.S.C. 45(c)-(d), 78y(a)-(c). Under the principles discussed above, those precisely drawn review provisions control all requests for review of the Commissions' conduct of enforcement proceedings.

Allowing parties to seek judicial review outside the Acts' schemes would undermine the Acts' limitations on review. The Acts defer review until the end of the Commissions' proceedings, but parties could instead seek review while those proceedings remain ongoing. The Acts limit review to courts of appeals, but parties could instead seek review in district courts. The Acts authorize review only in certain circuits, but parties could instead invoke the general venue statutes to sue elsewhere. The Acts set a 60-day deadline for seeking review, but parties could instead seek review beyond that deadline. And so on for the Acts' other provisions. The canon that a specific authorization takes precedence over a general one is intended to avoid such results.

The Acts' preclusion of review operates as a limit on district courts' jurisdiction. The general terms of Section 1331 grant district courts jurisdiction over civil actions arising under federal law. But the more specific terms of the FTC Act and Exchange Act grant courts of appeals "jurisdiction" to review the Commissions' final orders. 15 U.S.C. 45(d), 78y(a)(3). The specific grants of jurisdiction in those statutes take precedence over the more general grant of jurisdiction in Section 1331.

The Acts' careful allocation of authority between the Commissions and courts of appeals confirms the conclusion that district courts lack jurisdiction to review the Commissions' proceedings. Each Act empowers the Commission to conduct adjudications; vests the Commission and the court of appeals with concurrent jurisdiction over the matter between the filing of the petition

for review and the filing of the agency record; and provides that the court of appeals' jurisdiction becomes "exclusive" when the record is filed. See 15 U.S.C. 45(c)-(d), 78y(a)(3) and (c)(2). It is fairly discernible from that structure that *no court* has jurisdiction to review the administrative proceeding before the filing of the petition for review. Said otherwise, by meticulously dividing jurisdiction between the agency and the court of appeals, Congress foreclosed overlapping assertions of jurisdiction by district courts.

c. A separate provision of the Exchange Act, 15 U.S.C. 78u-3, reinforces that analysis with respect to the SEC. Section 78u-3 empowers the SEC to issue a temporary cease-and-desist order while an administrative proceeding is pending. See 15 U.S.C. 78u-3(c). It also provides that, if the SEC issues such an order, the respondent may seek immediate judicial review in district court. See 15 U.S.C. 78u-3(d)(2). It then states:

> **(4) Exclusive review**
>
> Section 78y of this title shall not apply to a temporary order entered pursuant to this section.

15 U.S.C. 78u-3(d)(4).

Section 78u-3 confirms that the Exchange Act's review scheme, set out in 15 U.S.C. 78y, is exclusive. It uses the phrase "Exclusive review" to describe that scheme. 15 U.S.C. 78u-3(d)(4). The provision also shows that, when Congress meant to authorize review during an ongoing proceeding and in district court, it said so. Section 78u-3 further highlights Congress's intent that a respondent's right to judicial review would be triggered only by SEC orders that direct the respondent's behavior *outside* the administrative proceedings, not by agency orders that simply compel par-

ticipation in the administrative adjudication itself. If Cochran is right that the Exchange Act does not provide an exclusive review scheme, then the clauses authorizing immediate review of temporary cease-and-desist orders would be superfluous.

2. The APA confirms that district courts may not review ongoing Commission proceedings

A court should read the FTC Act and Exchange Act against the backdrop of the APA. The APA's review provisions "constitute a general restatement of the principles of judicial review." U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 93 (1947). The APA states that "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action." 5 U.S.C. 703. That language makes clear that a "special statutory review proceeding," such as the judicial-review mechanisms established by the FTC Act and Exchange Act, is a form of APA review subject (except to the extent a particular special review statute provides otherwise) to the APA's requirements and limitations. See *ICC* v. *Locomotive Engineers*, 482 U.S. 270, 282 (1987) (noting that the APA "codifies the nature and attributes of judicial review" even for review proceedings conducted under other statutes). This Court has previously applied the APA's judicial-review provisions to review proceedings under the FTC Act. See *Standard Oil*, 449 U.S. at 245. It should do likewise for review proceedings under the Exchange Act. Here, the APA confirms that Axon and Cochran may not challenge the Commissions' ongoing enforcement proceedings in district court.

a. Section 10(d) of the APA, entitled "Actions reviewable," provides:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

5 U.S.C. 704. The first sentence makes clear that, unless particular non-final action has been "made reviewable by statute," a party may seek direct judicial review only if the challenged action is "final." *Ibid.* The second sentence makes clear that, in reviewing the "final agency action," a court may review "preliminary, procedural, or intermediate" agency action as well. *Ibid.*

This Court has accordingly applied opposite default rules to judicial review of final and non-final agency action. On the one hand, the Court has applied "a 'strong presumption' in favor of judicial review of final agency action." *American Hospital Ass'n* v. *Becerra*, 142 S. Ct. 1896, 1902 (2022) (citation omitted). The party that opposes such review bears the burden of showing that a statute precludes it. *Ibid.* On the other hand, the Court has applied a "strong presumption" that "judicial review will be available only when agency action becomes final." *Bell* v. *New Jersey*, 461 U.S. 773, 778 (1983). In the "absence of specific evidence of contrary congressional intent," "preliminary" action is subject to review only "in the same forum as the final order." *Florida Power & Light*, 470 U.S. at 743; see *Cochran* Pet. App. 87a (Costa, J., dissenting) (noting that the Exchange Act "does nothing new in requiring final agency action before judicial review").

The actions that Axon and Cochran challenge are preliminary, not final. To rank as "final," agency action must both (1) "mark the 'consummation' of the agency's decisionmaking process" and (2) determine "'rights or obligations'" or produce "'legal consequences.'" *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997) (citation omitted). The actions challenged here—conducting proceedings and assigning the initial stages to ALJs—do not mark the "consummation" of either Commission's decisionmaking process. They instead show that the process has just commenced.

Those agency actions also do not determine "rights or obligations" or produce other "legal consequences." The final orders issued at the end of the Commissions' proceedings do determine legal obligations: they might require parties to cease and desist from certain practices or (in the case of the SEC's orders) pay civil penalties or disgorge wrongfully obtained funds. See p. 14, *supra*. The same is true of a temporary cease-and-desist order issued by the SEC during the pendency of an administrative adjudication. See pp. 21-22, *supra*. But merely conducting a proceeding or assigning it to an ALJ produces no such legal effects.

This Court's decision in *Standard Oil* confirms that conclusion. In *Standard Oil*, a private party (Socal) sued the FTC in district court, claiming that the agency had violated the FTC Act by issuing an administrative complaint "without having 'reason to believe' that Socal was violating the Act." 449 U.S. at 235 (quoting 15 U.S.C. 45(b) (1976)). The Court held that issuance of the complaint did not amount to final agency action and thus was not reviewable during the pendency of the agency adjudication. *Id.* at 239. The Court observed that the "Commission's averment of 'reason to believe'

that Socal was violating the Act is not a definitive statement of position," but instead "represents a threshold determination that further inquiry is warranted and that a complaint should initiate proceedings." *Id.* at 241. The same logic applies to the actions challenged in these cases.

Because the agency actions challenged here are "preliminary, procedural, or intermediate," they are presumptively "subject to review" only "on the review of the final agency action"—*i.e.*, on the review of the relevant Commission's final order. 5 U.S.C. 704. The Acts, in turn, require that review to occur in courts of appeals. To obtain immediate review despite the lack of finality, Axon and Cochran would have to identify a "statute" that makes the challenged agency actions "reviewable." *Ibid.* But they cite no such statute.

b. Section 10(c) of the APA poses a further obstacle to Axon's and Cochran's suits. That provision, titled "Form and venue of proceeding," states:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.

5 U.S.C. 703. Section 10(c) makes clear that a party presumptively must seek review by using the "special statutory review proceeding" and by suing in the "court specified by statute." *Ibid.* Only in the "absence or inadequacy" of such a statutory review mechanism may the party file "actions for declaratory judgments or

writs of prohibitory or mandatory injunction" in a "court of competent jurisdiction." *Ibid.*

Here, the FTC Act and Exchange Act set forth the applicable form of proceeding: a petition for review. The Acts also specify the court in which to file such a petition: the court of appeals. No "inadequacy" exists in that procedure; to the contrary, as discussed in more detail below, courts of appeals can meaningfully review Axon's and Cochran's claims. See pp. 51-52, *infra*. Under Section 10(c), Axon and Cochran must follow the path to review set out in the Acts. They may neither invoke a different form of proceeding (such as an action for a declaratory judgment or an injunction) nor sue in a different court (such as a district court).

The Acts thus are properly understood to divest district courts of subject-matter jurisdiction over Axon's and Cochran's current suits. If Axon and Cochran had sued in district court to challenge final Commission orders after the administrative adjudications concluded, those suits would fail for lack of jurisdiction, since Congress has specified courts of appeals as the proper fora for such challenges. The fact that Axon's and Cochran's current suits are deficient in another respect as well—*i.e.*, because they challenge non-final agency actions that are not reviewable to begin with—cannot cure that jurisdictional defect.[1]

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[1] That is so whether or not the non-final character of the challenged agency actions, and the consequent unavailability of judicial review under either the Acts or the APA, are themselves viewed as jurisdictional barriers to suit. Courts of appeals disagree about whether the APA's final-agency-action requirement is jurisdictional in the strict sense of the term. Compare *San Francisco Herring Ass'n* v. *U.S. Department of the Interior*, 946 F.3d 564, 571 (9th Cir. 2019) (jurisdictional), with *Flytenow, Inc.* v. *FAA*, 808 F.3d 882, 888 (D.C. Cir. 2015) (not jurisdictional), cert. denied, 137 S. Ct. 618 (2017).

3. No cause of action enables a party to seek district-court review of ongoing Commission proceedings

Even if this Court concludes that the district courts here had jurisdiction over these suits, the absence of any affirmative statutory authorization for those suits is a sufficient ground for dismissing them. As a general rule, a plaintiff may sue only if some source of law grants him a cause of action. See *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). That rule applies to suits against agencies no less than to suits against private defendants. "To challenge an agency action in court, a plaintiff must invoke some law creating and defining a right to seek judicial review." 33 Charles Alan Wright et al., *Federal Practice and Procedure* § 8301, at 3 (2d. ed. 2018) (Wright & Miller). Axon and Cochran identify no source of law that entitles them to seek immediate district-court review of the Commissions' adjudications.

Axon (Br. 4) and Cochran (Br. 21) contend that Section 1331 creates a cause of action that enables parties to seek injunctive relief against federal officials on constitutional claims. That is incorrect. Section 1331 "does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951). Indeed, the suggestion that Section 1331 makes *all* federal agency action presumptively reviewable immediately (*e.g.*, *Cochran* Pet. App. 6a; Axon Br. 4), without regard to its finality, reflects an extraordinary departure from established administrative-law principles codified in the APA. That is particularly so because, if Section 1331 had the review-authorizing effect that Axon, Cochran, and the Fifth Circuit attribute to it, that effect could not logically be confined to constitutional challenges, since Section 1331

more broadly encompasses "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. 1331.

To be sure, district courts have the authority to enjoin federal officials (and, for that matter, state officials) from violating the law. See *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, 110 (1902) (federal officials); *Ex parte Young*, 209 U.S. 123, 156 (1908) (state officials). But the "ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity"—a "judge-made remedy." *Armstrong* v. *Exceptional Child Care Center*, 575 U.S. 320, 327 (2015). In most contexts, the availability of such relief and the conditions on which it may be granted are now governed by the APA and by more specific statutes that address particular categories of agency action. The "judge-made remedy" (*ibid.*) can still serve an important gap-filling function when meaningful judicial review of a constitutional claim would otherwise be unavailable. But a litigant may not invoke that remedy to evade the limits set forth in a federal statute. See *id.* at 327-328; *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 74 (1996).

The Constitution vests primary responsibility to create and limit causes of action in Congress. See *Sandoval*, 532 U.S. at 286. When Congress creates "a remedial process that it finds sufficient," "the courts cannot second-guess that calibration by superimposing" a judge-made remedy. *Egbert* v. *Boule*, 142 S. Ct. 1793, 1807 (2022). The Court has thus refused, in various contexts, to supplement statutory remedies with judicial ones. See *Seminole Tribe*, 517 U.S. at 44 (equity); *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (admiralty); *Schweiker* v. *Chilicky*, 487 U.S. 412, 423 (1988)

(*Bivens*); *Milwaukee* v. *Illinois*, 451 U.S. 304, 326 (1981) (federal common law).

It is also a longstanding maxim that "equity follows the law." *Conard* v. *The Atlantic Insurance Co.*, 1 Pet. 386, 441 (1828). A court of equity may not "create a remedy in violation of law, or even without the authority of law." *Rees* v. *Watertown*, 19 Wall. 107, 122 (1874). The "power of federal courts of equity to enjoin unlawful executive action" is thus "subject to express and implied statutory limitations." *Armstrong*, 575 U.S. at 327. When "'Congress has provided what it considers adequate remedial mechanisms for constitutional violations,'" a court should refrain from "casting aside those limitations'" and creating its own remedies. *Seminole Tribe*, 517 U.S. at 74 (citation omitted).

The FTC Act and Exchange Act provide what Congress considers adequate mechanisms to remedy any errors connected to administrative adjudications. As discussed above, each statute allows a party to file a petition for review in a court of appeals once the Commission issues a final order. Together with the APA, those Acts also allow parties in those petitions to challenge actions taken at earlier stages of the agency proceedings. But except when the SEC issues a temporary cease-and-desist order, neither Act allows a party to seek district-court review while the proceeding is ongoing. A court should apply those limits, not drain them of meaning by devising a substitute equitable remedy.

It would be especially incongruous for federal courts to fashion an equitable remedy in contravention of the APA, whose purpose is to codify the law governing equitable relief against federal agencies. The APA authorizes "relief other than money damages," 5 U.S.C. 702; provides that the "form of proceeding for judicial

review" may include "actions for declaratory judgments or writs of prohibitory or mandatory injunction," 5 U.S.C. 703; and sets out "general provisions for equitable relief," *Doe* v. *Chao*, 540 U.S. 614, 619 n.1 (2004). And whether or not the APA's general "final agency action" requirement is properly viewed as jurisdictional (see p. 26 n.1, *supra*), it is an integral feature of the APA's review scheme. That framework extends to constitutional claims; the APA directs the reviewing court to "interpret constitutional and statutory provisions" and to decide whether the agency action is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. 706(2)(B). That Axon and Cochran seek equitable relief on a constitutional claim is thus a reason to apply the APA's limits, not a reason to disregard them.

4. Precedent confirms that parties may not challenge ongoing Commission proceedings in district court

This Court has often construed statutory provisions that authorized courts of appeals to review agency adjudicative orders as precluding review in other courts. See 16 Wright & Miller § 3943, at 992-993 (2012). In *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), the Court held that, because Congress had empowered courts of appeals to review the National Labor Relations Board's orders, district courts were "without power to enjoin the Board from holding [administrative] hearings." *Id.* at 47. In *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), the Court held that Congress had provided a "specific, complete and exclusive mode for judicial review of the [Federal Power] Commission's orders" by authorizing review in courts of appeals. *Id.* at 336. And in *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965), the Court held that, by enacting a "specific statutory scheme for ob-

taining review" of the Federal Reserve Board's orders in courts of appeals, Congress had foreclosed review in district courts—despite "the absence of an express statutory command of exclusiveness." *Id.* at 422.

This Court's decision in *Thunder Basin Coal Co.* v. *Reich*, *supra*, is particularly instructive because the review scheme at issue in that case followed the same template as the review schemes here. See *Jarkesy* v. *SEC*, 803 F.3d 9, 22 (D.C. Cir. 2015) (*Jarkesy I*) (describing the review provisions in *Thunder Basin* and the review provisions of the Exchange Act as "near-identical"). Like the Acts, the statute in *Thunder Basin* empowered an agency (a mine safety commission) to conduct enforcement proceedings; allowed respondents to file petitions for review in courts of appeals after entry of the agency's orders; granted courts of appeals jurisdiction to affirm, modify, or set aside the orders; listed permissible venues; specified the contents of the record; established the standard of review for factual findings; and created a procedure for adducing new evidence. See 30 U.S.C. 816(a)(1). The Court held that the statute's "comprehensive" scheme precluded district courts from exercising "jurisdiction over challenges to agency enforcement proceedings." *Thunder Basin*, 510 U.S. at 208. Axon and Cochran offer no meaningful distinction of that decision.

Courts of appeals have long agreed that the FTC Act precludes district courts from reviewing ongoing FTC proceedings. A few years after that statute was enacted, the Eighth Circuit explained that a party may obtain review of an FTC proceeding only after the FTC issues a cease-and-desist order. See *Chamber of Commerce* v. *FTC*, 280 F. 45, 48 (1922). In the hundred years since, although courts of appeals have disagreed about

whether that limit is "jurisdictional," they have adhered to the understanding that district courts ordinarily lack authority to review or enjoin FTC administrative proceedings. See *Axon* Pet. App. 1-46; *Ukiah Adventist Hospital* v. *FTC*, 981 F.2d 543, 549 (D.C. Cir. 1992), cert. denied, 510 U.S. 825 (1993); *Dairymen, Inc.* v. *FTC*, 684 F.2d 376, 378-379 (6th Cir. 1982), cert. denied, 462 U.S. 1106 (1983); *American General Insurance Co.* v. *FTC*, 496 F.2d 197, 200 (5th Cir. 1974); *Seven-Up Co.* v. *FTC*, 478 F.2d 755, 756-757 (8th Cir.), cert. denied, 414 U.S. 1013 (1973); *Coca-Cola Co.* v. *FTC*, 475 F.2d 299, 302-305 (5th Cir.), cert. denied, 414 U.S. 877 (1973); *Maremont Corp.* v. *FTC*, 431 F.2d 124, 127-128 (7th Cir. 1970); *Frito-Lay, Inc.* v. *FTC*, 380 F.2d 8, 9-10 (5th Cir. 1967); *Miles Laboratories* v. *FTC*, 140 F.2d 683, 684-685 (D.C. Cir.), cert. denied, 322 U.S. 752 (1944).

So too for the SEC. Soon after Congress enacted the Exchange Act, the Second Circuit held that district courts generally lack power to enjoin ongoing SEC proceedings. See *SEC* v. *Andrews*, 88 F.2d 441, 441-442 (1937). Until the Fifth Circuit's decision in *Cochran*, the courts of appeals uniformly adhered to that position. See *Bennett* v. *SEC*, 844 F.3d 174, 188 (4th Cir. 2016); *Hill* v. *SEC*, 825 F.3d 1236, 1241 (11th Cir. 2016); *Tilton* v. *SEC*, 824 F.3d 276, 291 (2d Cir. 2016), cert. denied, 137 S. Ct. 2187 (2017); *Jarkesy I*, 803 F.3d at 29-30 (D.C. Cir. 2015); *Bebo* v. *SEC*, 799 F.3d 765, 768-775 (7th Cir. 2015), cert. denied, 577 U.S. 1236 (2016); *Allan* v. *SEC*, 577 F.2d 388, 391-392 (7th Cir. 1978).

5. The contrary arguments advanced by Axon and Cochran lack merit

a. Axon (Br. 22) and Cochran (Br. 21) argue that only a clear congressional statement can displace district courts' authority to hear cases arising under the

Constitution. This Court rejected that argument in *Elgin*. There, the Court distinguished a statute that "purports to 'deny any judicial forum for a colorable constitutional claim'" from one that "channels judicial review of a constitutional claim" to a particular court. *Elgin*, 567 U.S. at 9 (citation omitted). The Court explained that, because complete denial of judicial review could raise serious constitutional questions, a court should read a statute to produce that result only if the statute is unambiguous. *Ibid.* The Court further explained, however, that this "heightened standard" of clarity "does not apply where Congress simply channels judicial review of a constitutional claim to a particular court." *Ibid.* In that circumstance, a court instead should apply ordinary rules of statutory interpretation, with no thumb on the scales, to determine whether preclusion of district-court review is "fairly discernible in the statutory scheme." *Id.* at 17; see *Thunder Basin*, 510 U.S. at 215 n.20.

Axon (Br. 27) and Cochran (Br. 21) also emphasize that neither the FTC Act nor the Exchange Act expressly states that district courts lack authority to review the Commissions' proceedings. But this Court has often read statutes that expressly authorize review in one court as implicitly foreclosing review in another. See pp. 19, 30-31, *supra*. Contrary to Cochran's portrayal (Br. 23-24), those decisions do not elevate unenacted legislative intent over enacted text. A text includes "not only what is express but also what is implicit." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 8 (2012). Jurisdiction granted by statute "can be eliminated by implication of a later statute," and the notion that a legis-

lature must speak "expressly" to "oust courts of jurisdiction" is "false." *Id.* § 65.

In any event, the government's argument rests on more than implications. As shown above, the express terms of the APA confirm that district courts may not hear challenges to ongoing FTC and SEC proceedings. See pp. 22-26, *supra*. And it is ironic for Axon and Cochran to complain about implied preclusion of review, when neither of them can point to any express statutory provision that even arguably grants them a cause of action. See pp. 27-30, *supra*.

b. Axon and Cochran argue that three aspects of the Acts show that they do not preclude district courts from reviewing Commission proceedings. The Fifth Circuit relied on the same rationales. See *Cochran* Pet. App. 7a-10a. Those arguments lack merit.

i. Axon (Br. 31-32) and Cochran (Br. 18) contend that, because the Acts empower courts of appeals to review the Commissions' final orders, they preclude only district-court review of the final orders themselves, leaving district courts free to review the administrative proceedings that precede those orders. See *Cochran* Pet. App. 7a-8a. That argument disregards the core APA principle, referenced above, that only "final agency action" is immediately reviewable, with all preliminary actions "subject to review on the review of the final agency action." 5 U.S.C. 704; see pp. 23-25, *supra*. The contrary approach that Axon and Cochran advocate would lead to bizarre results: A Commission final order would be reviewable in one court, but the administrative proceeding leading up to that order would be reviewable in another.

ii. Axon (Br. 31) and Cochran (Br. 32) also emphasize that, under the text of each Act's review provision,

a party aggrieved by the Commission's final order in an administrative adjudication "may" file a petition for review in a court of appeals. See *Cochran* Pet. App. 8a. But the word "may" in this context signifies only that the losing party need not seek review at all. See *id.* at 89a (Costa, J., dissenting). It has no bearing on whether the review mechanism that Congress specified impliedly precludes the judicial fashioning of an equitable remedy to be imposed by a different court at a different stage of the proceedings.

iii. Axon (Br. 31-32) and Cochran (Br. 10) additionally argue that, because the Acts grant courts of appeals "exclusive" jurisdiction only upon the filing of the agency record, district courts remain free to exercise jurisdiction before that point. That argument ignores the statutory contexts in which the references to "exclusive" jurisdiction appear. Each Act empowers the Commission to conduct adjudications; vests the Commission and the court of appeals with concurrent jurisdiction over the matter between the filing of the petition for review and the filing of the agency record; and provides that the court of appeals' jurisdiction becomes "exclusive" when the record is filed. See 15 U.S.C. 45(c)-(d), 78y(a)(3) and (c)(2). As discussed above, that structure shows that no court may exercise jurisdiction while the Commission's proceeding is ongoing—not that district courts may assert overlapping jurisdiction.

The statute in *Thunder Basin* shared all three features that Axon and Cochran highlight as purportedly salient provisions of the Acts. That law provided that courts of appeals could review the agency's "order[s]," that an aggrieved person "may" seek review, and that the court's jurisdiction would become "exclusive" upon the filing of the agency record. 30 U.S.C. 816(a)(1).

This Court nevertheless held that the mine-operator plaintiff could not "evade the statutory-review process by enjoining the [agency] from commencing enforcement proceedings." *Thunder Basin*, 510 U.S. at 216.

c. Cochran makes one argument that applies only to the Exchange Act. She invokes (Br. 31) that statute's saving clause, which provides that, subject to some exceptions, "the rights and remedies provided by" the Exchange Act "shall be in addition to any and all rights and remedies that may exist at law or in equity." 15 U.S.C. 78bb(a)(2). That clause does not suggest that district courts may review the SEC's proceedings.

The saving clause preserves only "rights and remedies," 15 U.S.C. 78bb(a)(2)—but a court's jurisdiction is neither. Jurisdiction concerns "the power of the court" rather than "the rights * * * of the parties." *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 161 (2010) (citation omitted). And a court's authority to grant a "particular remedy" differs from its "subject matter jurisdiction." *Biden* v. *Texas*, 142 S. Ct. 2528, 2540 (2022). When Congress means to save a court's jurisdiction, it says so. See, *e.g.*, 7 U.S.C. 2 ("Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.").

The saving clause also preserves only rights and remedies that already "exist at law or in equity." 15 U.S.C. 78bb(a)(2). But a cause of action that enables a party to challenge non-final agency conduct does not already "exist" "in equity." The default rule, as shown above, is that a party may *not* seek judicial review of non-final agency action. See pp. 23-25, *supra*.

This Court has indicated, moreover, that the saving clause applies only to rights and remedies under other federal and state "*securities* laws." *Credit Suisse Secu-*

rities (USA) LLC v. *Billing*, 551 U.S. 264, 275 (2007). The Court has held, for example, that despite the saving clause, the Exchange Act can preclude a plaintiff's remedies under federal antitrust law. See *ibid.* And Section 78bb(a)(2)'s placement immediately following a statutory limitation on the amount of damages recoverable in private suits, see 15 U.S.C. 78bb(a)(1), suggests that Section 78bb(a)(2) preserves alternative remedies against private violators, not against the SEC in its administration of the Exchange Act. Cf. *Bennett*, 520 U.S. at 173 (holding that statutory provision authorizing citizen suits against persons who are "alleged to be in violation" of the Endangered Species Act did not encompass suits against government officials who were alleged to have erred in administering or enforcing that statute). The saving clause thus has no relevance here, because Cochran does not assert a right or remedy under a securities law or against another private party.

Taken to its logical conclusion, Cochran's interpretation of the saving clause would mean that the Acts' review provisions are not exclusive at all, and that district courts may review even the SEC's final orders. Even Cochran (Br. 28-29) does not go that far. Yet Cochran offers no reading of the saving clause that would allow district courts to review the preliminary actions at issue here, but not the final orders issued at the end of the Commission proceedings.

6. Free Enterprise Fund *does not support Axon's and Cochran's requests for district-court review*

Axon (Br. 2) and Cochran (Br. 3) rely substantially on this Court's decision in *Free Enterprise Fund* v. *PCAOB*, 561 U.S. 477 (2010). The Fifth Circuit likewise viewed that decision as "squarely on point." *Cochran* Pet. App. 10a. In *Free Enterprise Fund*, the Public

Company Accounting Oversight Board (PCAOB or Board), an entity overseen by the SEC, inspected an accounting firm, issued a report criticizing the firm's procedures, and opened a formal investigation. *Id.* at 487. The firm sued the PCAOB in district court, arguing that the Board's structure conflicted with the Appointments Clause and the President's removal power. *Ibid.* The Court held that the Exchange Act's review provision (the same provision that is at issue in *Cochran*) did not preclude the district court from resolving the constitutional challenge. *Ibid.*

Contrary to Axon's and Cochran's suggestions, *Free Enterprise Fund* does not establish any categorical rule that structural constitutional challenges to an agency's existence or mode of operations may always be brought immediately in district court. And contrary to the Fifth Circuit's assessment, the Court's reasoning in *Free Enterprise Fund* is largely inapplicable to the present cases. Rather, the Court's disposition of the case turned on idiosyncratic factors that are absent here.

a. In finding district-court review permissible in *Free Enterprise Fund*, this Court first emphasized that the accounting firm's challenge was collateral to the Exchange Act's review scheme. 561 U.S. at 490. As explained above, the Exchange Act authorizes court-of-appeals review of the SEC's final orders, and the court in conducting that review can determine the propriety of antecedent steps taken during the administrative proceedings leading up to such orders. See pp. 23-25, *supra*. The firm in *Free Enterprise Fund*, however, did not challenge an SEC final order or any steps taken during an SEC proceeding; indeed, it did not challenge any SEC action at all. Instead, the firm challenged a *Board* "investigation" and a *Board* "inspection report."

561 U.S. at 490. The Court concluded that the firm could not "meaningfully pursue [its] constitutional claims" if the Exchange Act's review mechanism was treated as exclusive, since the Exchange Act "provides only for judicial review of *Commission* action, and not every Board action is encapsulated in a final Commission order or rule." *Ibid.* Axon and Cochran, by contrast, direct their constitutional challenges at ongoing *Commission* proceedings, and those challenges will indisputably be reviewable in courts of appeals if the Commissions issue adverse final orders. See *Cochran* Pet. App. 104a (Costa, J., dissenting) ("Unlike the *Free Enterprise Fund* claim * * *, Cochran's claim arises out of an SEC proceeding that is subject to the review scheme in" the Exchange Act.).

b. The Court in *Free Enterprise Fund* also emphasized that finding district-court review precluded could compel the firm to risk significant penalties in order to obtain judicial review. 561 U.S. at 490. Because the firm was not involved in any SEC proceeding, it would have been required to "manufacture a dispute" in order to bring itself within the review scheme. *Jarkesy I*, 803 F.3d at 20. Specifically, it would have had to violate a Board order, trigger an enforcement proceeding, incur a sanction, and ultimately seek judicial review if the SEC affirmed that sanction. *Free Enterprise Fund*, 561 U.S. at 490. In finding that route to judicial review inadequate, the Court explained that the company would face "severe punishment" if its challenge ultimately failed, and that the Court "normally do[es] not require plaintiffs to 'bet the farm by taking the violative action' before 'testing the validity of the law.'" *Id.* at 490 (citation and ellipsis omitted).

Free Enterprise Fund thus echoes other decisions in which this Court has refused to require parties to risk punishment in order to obtain judicial review. In *Ex parte Young*, for example, the Court allowed parties to bring pre-enforcement challenges to state laws, so that those parties could obtain judicial review without violating state law and thus risking "enormous penalties." 209 U.S. at 145. In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), the Court similarly allowed parties to bring pre-enforcement challenges to federal regulations so that parties could obtain a judicial determination of the rules' validity without first violating the regulations and potentially incurring "serious penalties." *Id.* at 153; cf. *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 128-129 (2007) (discussing prior decisions holding that, "where threatened action by government is concerned, [the Court does] not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced") (emphasis omitted).

Those concerns are not implicated here. Unlike the firm in *Free Enterprise Fund*, Axon and Cochran need not take artificial or counterintuitive steps to trigger Commission adjudications; they are *already* parties to such proceedings. Axon and Cochran have already engaged in the conduct that exposes them to possible liability under the FTC Act and Exchange Act, and they need not expose themselves to additional liability in order to obtain judicial review of their constitutional challenges. See *Jarkesy I*, 803 F.3d at 20 (noting that Jarkesy would not need to "'bet the farm' by subjecting himself to unnecessary sanction under the securities laws" because he was "already properly before the

Commission by virtue of his alleged violations of those laws"); *Cochran* Pet. App. 99a-100a (Costa, J., dissenting). Axon and Cochran need only await the end of the proceedings that are currently pending and, if the Commissions rule against them, seek judicial review of the Commissions' final orders. See *Axon* Pet. App. 19. And while Axon and Cochran will incur expenses during the administrative proceedings, the same is true in the wide range of circumstances where judicial (or appellate) review becomes available only after an initial adjudicator renders his decision. Congress typically does not require parties to violate the law in order to obtain judicial review, but it often requires them to await the completion of ongoing legal proceedings. See pp. 23-25, *supra*.

c. Finally, the APA's provisions concerning judicial review did not apply in *Free Enterprise Fund*, and the Court did not discuss that statute. The APA's review provisions apply only to agencies. See 5 U.S.C. 701(b); *Franklin* v. *Massachusetts*, 505 U.S. 788, 801 (1992). And Congress has provided that the PCAOB "shall be a body corporate" and "shall not be an agency." 15 U.S.C. 7211(a)-(b).

The FTC and SEC, by contrast, are agencies to which the APA's framework for equitable relief applies. See 5 U.S.C. 551(1), 701(b)(2). As discussed above, the APA confirms that the actions challenged here are subject to judicial review only as part of the courts of appeals' review of the Commissions' final orders. See pp. 23-25, *supra*.

C. The Nature Of Axon's And Cochran's Claims Does Not Entitle Those Parties To District-Court Review While Agency Proceedings Are Ongoing

For the reasons discussed above, parties may not obtain judicial review of ongoing Commission proceedings

in district court. There is no sound reason to exempt Axon's and Cochran's constitutional claims from that general rule.

1. The Acts' review schemes encompass the removal-power claims that Axon and Cochran have asserted

As discussed above, the FTC Act and Exchange Act authorize courts of appeals to review the Commissions' final orders, and in the course of that review those courts may evaluate any "preliminary" actions taken during the administrative proceedings. 5 U.S.C. 704; see pp. 23-25, *supra*. Although Axon and Cochran do not challenge final Commission orders, they do challenge preliminary actions that precede such orders. Specifically, Axon challenges the FTC administrative proceeding as a whole, arguing that Congress has improperly insulated the FTC's Commissioners from presidential oversight. And Axon and Cochran both challenge the Commissions' assignment of the initial stages of their cases to ALJs, arguing that ALJs enjoy an unconstitutional degree of tenure protection. The challenges that Axon and Cochran have brought to the Commissions' proceedings, and to actions taken in those proceedings, fall within the court of appeals' authority to review the final orders that terminate Commission proceedings.

In particular, petitions for review filed at the conclusion of agency proceedings have repeatedly raised, and reviewing courts have repeatedly decided, the types of claims raised here—namely, claims that an agency adjudication violated Article II. In reviewing a final written decision of the Patent Trial and Appeal Board, this Court held that the Board's structure violated the Appointments Clause. *United States* v. *Arthrex, Inc.*, 141 S. Ct. 1970, 1978-1986 (2021). In reviewing a final order

of the SEC, the Court held that the ALJ who had conducted the hearing that led to the order had been appointed in violation of the Appointments Clause. *Lucia*, 138 S. Ct. at 2051-2055. And in reviewing an order of the National Labor Relations Board, the Court held that the Board's members had been appointed in violation of the Recess Appointments Clause. *NLRB* v. *Noel Canning*, 573 U.S. 513, 549-556 (2014).

The Fifth Circuit's recent decision in *Jarkesy* v. *SEC*, 34 F.4th 446 (2022) (*Jarkesy II*), illustrates the same point. The party seeking review in that case had first asserted a district-court challenge to an ongoing SEC proceeding. See *Jarkesy I*, 803 F.3d at 12. The D.C. Circuit held that the district court lacked the power to hear that suit. See *ibid.* After the administrative proceeding ended and the SEC issued a final order, the respondent filed a petition for review in the Fifth Circuit. See *Jarkesy II*, 34 F.4th at 449. That petition raised, and the Fifth Circuit decided, several constitutional claims—including the claim that the ALJ's tenure protection violated Article II. See *id.* at 449-450. *Arthrex*, *Lucia*, *Noel Canning*, and *Jarkesy II* all show that the types of claims that Axon and Cochran raise have traditionally been reviewed at the conclusion of agency adjudications, pursuant to the statutory mechanisms that Congress has established for review of the agencies' final orders.

This Court has previously refused to exempt constitutional challenges from statutes that channel review to courts of appeals. In *Thunder Basin*, the Court determined that "constitutional claims" were covered by an exclusive scheme for reviewing the orders of a mine safety commission. 510 U.S. at 215. And in *Elgin*, the Court refused to "carve out an exception" to an exclu-

sive civil-service review scheme for "facial or as-applied challenges to federal statutes." 567 U.S. at 12.

A special carveout for the challenges in these cases would also undermine Congress's effort to minimize "duplicative judicial review" and avoid "parallel litigation." *Elgin*, 567 U.S. at 14. On the government's approach, the respondent in a Commission adjudication can file a single petition for review raising all of its challenges both to the agency's final order and to the antecedent Commission proceedings. See *Jarkesy I*, 803 F.3d at 29-30. Under the approach that Axon and Cochran advocate, in contrast, a respondent could file a district-court suit at the outset of the proceeding and a petition for review at the end. "Then, instead of the one court Congress authorized, three courts would have devoted time to the agency matter: (1) the district court pre-enforcement; (2) the court of appeals in its review of the pre-enforcement challenge, and (3) another court of appeals panel in the traditional postenforcement review." *Cochran* Pet. App. 109a (Costa, J., dissenting). That system would not only waste judicial resources, but also bifurcate judicial review of the same agency proceeding—a result that this Court has previously described as "'irrational'" and "implausible." *Florida Power*, 470 U.S. at 742-743 (citation omitted).[2]

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[2] By itself, a holding that structural constitutional challenges to an agency's adjudicative mechanisms are immediately reviewable in district court would not prevent the agency adjudications from proceeding contemporaneously with the district-court challenges. Rather, the administrative adjudications at issue in these cases have been deferred only because the Fifth and Ninth Circuits issued orders staying or enjoining those proceedings. See pp. 5, 7, *supra*; cf. *Cochran* Pet. App. 80a (Oldham, J., concurring) (stating that "district courts will enjoin agency proceedings only if they conclude that a plaintiff's constitutional claims are likely to succeed on the mer-

Accelerating judicial consideration of Axon's and Cochran's constitutional claims also "gets constitutional avoidance backwards." *Cochran* Pet. App. 107a (Costa, J., dissenting). "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication," it is that a federal court should decide constitutional questions only if "such adjudication is unavoidable." *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944). Under the scheme that Axon and Cochran advocate, however, district courts would be required to adjudicate (some) constitutional claims at the start of the agency proceeding, before it is clear whether resolution of those claims is actually necessary to the proper disposition of the case.

A special exception for constitutional claims would also be difficult to administer. Axon, Cochran, and the judges who endorsed their positions below all agree that certain constitutional claims fall outside the scope of the Acts' review schemes, but they disagree on how far that exception extends. Axon (Br. 20) would exempt "constitutional challenge[s] to an agency's structure, procedures, or very existence." Cochran (Br. 33 n.7) would exempt "constitutional claims challenging the inherent nature of the proceedings." She also argues that, at a minimum, district courts may hear claims that "SEC ALJs are unconstitutionally insulated from the President's removal power." *Ibid.* (citation omitted).

Judge Bumatay, who dissented in part from the Ninth Circuit's decision in *Axon*, would have allowed the district court to hear Axon's Article II claim and one

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its"). Although rigorous enforcement of the likelihood-of-success requirement would reduce the potential for delay to Commission adjudications, the prospect of interlocutory stay litigation exacerbates the risk of multifarious judicial proceedings described in the text.

aspect of its due-process claim, but not another aspect of its due-process claim. See *Axon* Pet. App. 35-46. Judge Haynes, who dissented from the Fifth Circuit panel's decision in *Cochran*, would have allowed the district court to hear Cochran's Article II claim, but would not have allowed it to hear her due-process claim. See *Cochran* Pet. App. 132a n.1. And the en banc Fifth Circuit limited its holding to "removal power claims," while expressing no view on whether district courts could hear challenges based on the Due Process Clause or other constitutional provisions. *Id.* at 7a.

The approach that Axon and Cochran advocate thus would invite "unpredictable litigation at the threshold about whether the particular challenges at issue fall within or without an indistinct category of constitutional claims." *Jarkesy I*, 803 F.3d at 25. It deprives private parties, the Commissions, and courts of "clear guidance about the proper forum for the * * * claim at the outset of the case." *Elgin*, 567 U.S. at 15.

Finally, the Exchange Act expressly exempts the SEC's temporary cease-and-desist orders from the Act's exclusive review scheme and authorizes immediate review of those orders in district court. See pp. 21-22, *supra*. The absence of any comparable exception covering the type of claim asserted here "indicates that Congress intended no such exception." *Elgin*, 567 U.S. at 13. And because the express statutory exception is limited to temporary SEC orders that impose immediate legal consequences on regulated parties, separate and apart from the requirement that they participate in the administrative proceedings themselves, it would be especially anomalous to recognize an additional judge-made exception that extends beyond those circumstances. See pp. 21-22, *supra*.

2. Axon and Cochran cannot secure immediate review by framing their claims as challenges to the agency proceedings themselves

a. Axon (Br. 36) and Cochran (Br. 33 n.7) argue that their claims lie outside the Acts' review schemes because they are challenging the lawfulness of the Commission proceedings themselves. They assert that the proceedings impose significant burdens on them and that reviewing courts cannot undo those burdens once the proceedings conclude.[3]

Axon and Cochran are far from the first litigants to make such arguments. In a variety of contexts where Congress has deferred judicial or appellate review until the conclusion of a proceeding, litigants have sought to evade that timing requirement by asserting that the proceeding itself violates the law or the Constitution

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[3] Both Axon (*e.g.*, Br. 6) and Cochran (*e.g.*, Br. 21) invoke this Court's statement that an unconstitutional removal restriction "inflicts a 'here-and-now' injury on affected third parties that can be remedied by a court." *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2196 (2020) (citation omitted). The Court made that observation, however, in the course of rejecting the appointed amicus's argument that the only "proper context for assessing the constitutionality of an officer's removal restriction is a contested removal." *Ibid.* In *Seila Law*, the CFPB commenced the court proceedings by seeking judicial enforcement of its civil investigative demand, and Seila Law asserted as a defense to that suit that a statutory restriction on the CFPB Director's removal was unconstitutional. See *id.* at 2194. The Court therefore had no occasion to address the proper time or forum for filing suit *against* the government; it held only that Seila Law could raise its constitutional challenge in the course of *defending* against a suit that implicated its concrete interests. Cf. *id.* at 2196. Here, the government does not dispute that Axon and Cochran can raise their Article II arguments in any eventual court of appeals challenges to final orders of the Commissions.

and inflicts irreparable harm. This Court has consistently rejected those arguments.

In *Standard Oil*, *supra*, for example, this Court rejected an effort to enjoin an FTC enforcement proceeding that had allegedly been commenced unlawfully, holding that the FTC's threshold "reason to believe" determination was not "final agency action" reviewable under the APA. See 449 U.S. at 239-243; pp. 24-25, *supra*. The respondent in the FTC proceeding argued that it would "be irreparably harmed unless the issuance of the complaint is judicially reviewable immediately," and that post-final-order review would not protect it from "the expense and disruption of defending itself in protracted adjudicatory proceedings." *Standard Oil*, 449 U.S. at 244. In rejecting that argument, the Court explained that the "expense and annoyance of litigation is part of the social burden of living under government," and that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Ibid.* (citations omitted); see *Axon* Pet. App. 12 & n.4.

Many agency-specific statutes likewise defer judicial review until agency action becomes final. See, *e.g.*, *Bell*, 461 U.S. at 778. This Court has enforced those finality requirements even when regulated parties challenged the lawfulness of the agency proceedings themselves or argued that the proceedings inflicted irreparable harm. The Court has explained that a statute deferring judicial review until the entry of a final order "cannot be circumvented by asserting * * * that the mere holding of the prescribed administrative hearing would result in irreparable damage." *Myers*, 303 U.S. at 51. The Court has likewise held that "attempts to enjoin administrative hearings" are "at war with [a] long-settled rule of

judicial administration," *FPC* v. *Metropolitan Edison Co.*, 304 U.S. 375, 385 (1938); that "a litigant cannot enjoin" agency hearings even if they are "inconvenient or embarrassing," *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 540 (1954); and that "litigation expense," even if "substantial," cannot justify "judicial intervention in the agency process," *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974).

In civil and criminal litigation as well, a party usually may appeal as of right only after final judgment. See 28 U.S.C. 1291. This Court has enforced that rule even when the defendant asserts a "right not to stand trial altogether." *Digital Equipment Corp.*, 511 U.S. at 869. Indeed, the Court has generally enforced that rule even when the defendant argues that the trial violates the Constitution. A civil defendant thus generally must wait until final judgment to appeal on the ground that the district court lacked subject-matter jurisdiction, see *Catlin* v. *United States*, 324 U.S. 229, 236 (1945), or that the court's exercise of personal jurisdiction violated the Due Process Clause, see *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 526-527 (1988). And a criminal defendant must wait until final judgment to appeal on the ground that the trial violates the Speedy Trial Clause, see *United States* v. *MacDonald*, 435 U.S. 850, 857 (1978); that the court has denied him counsel of choice in violation of the Sixth Amendment, see *Flanagan* v. *United States*, 465 U.S. 259, 266-267 (1984); or that the appointment of the prosecutor violated Article II, see *Deaver* v. *United States*, 483 U.S. 1301, 1302-1303 (1987) (Rehnquist, J., in chambers).[4]

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[4] Under the collateral-order doctrine, a narrow class of district-court rulings may be immediately appealed as of right even though they do not terminate the litigation. See *Cohen* v. *Beneficial Indus-*

In reaching those results, this Court has accepted that the burden of going through agency proceedings, civil suits, and criminal trials can be "substantial." *Standard Oil*, 449 U.S. at 242. The Court also has accepted that harm inflicted by unlawful proceedings often is "only imperfectly reparable by appellate reversal" of a final decision. *Digital Equipment*, 511 U.S. at 872. The Court has explained, however, that allowing widespread interlocutory review would create its own, countervailing costs: it would impede the functioning of the agency or lower court, burden reviewing courts, and subject parties and courts alike to the inefficiency of piecemeal review. See *Standard Oil*, 449 U.S. at 242. Finality requirements—whether for judicial review of agency action or for appellate review of district-court decisions—reflect Congress's judgment that the costs of interlocutory review usually outweigh the benefits. See *Digital Equipment*, 511 U.S. at 872.

b. In exceptional cases, a court of appeals may halt an ongoing Commission proceeding by issuing a writ of mandamus under the All Writs Act. See 28 U.S.C. 1651; *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 604 (1966); *Telecommunications Research & Action Center* v. *FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984). To be sure, the bar for mandamus is high. See *Cheney* v. *United States District Court*, 542 U.S. 367, 381 (2004). But that standard is an integral feature of the balance among competing

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trial Loan Corp., 337 U.S. 541, 546 (1949). In *Standard Oil*, Socal invoked *Cohen* and argued that the FTC's "reason to believe" determination should be immediately reviewable on a collateral-order rationale. See 449 U.S. at 246. The Court rejected that argument, concluding that "review of this preliminary step should abide review of the final order" because "the issuance of the complaint averring reason to believe is a step toward, and will merge in, the Commission's decision on the merits." *Ibid.* The same is true here.

interests discussed above. Interlocutory review of agency action carries significant costs, see pp. 15-16, *supra*, and the high bar for mandamus ensures that the legal system incurs those costs only in unusual cases where prompt relief is both clearly appropriate and practically essential. Again, appellate review of district-court decisions works the same way; a party generally may appeal as of right only at the conclusion of the district-court proceedings, but mandamus provides a safety valve through which a court of appeals can promptly correct serious errors. See *Mohawk Industries* v. *Carpenter*, 558 U.S. 100, 111 (2009).

3. The factors this Court identified in* Thunder Basin *do not support district-court review here

Axon invokes (Br. 33-38) this Court's presumption that a claim falls outside the scope of a review scheme when it would not receive "meaningful judicial review" in that scheme, it is "wholly 'collateral'" to the scheme, and it lies outside the agency's "expertise." *Thunder Basin*, 510 U.S. at 212-213 (citation omitted); see *Elgin*, 567 U.S. at 15. Cochran derides that presumption as "extra-textual" (Br. 33), but proceeds to rely on it anyway (Br. 34-46). Contrary to Axon's and Cochran's contentions, none of those factors supports district-court review of the Article II claims in these cases.

a. Cases like *Arthrex*, *Lucia*, *Noel Canning*, and *Jarkesy II* show that courts often review constitutional challenges to agency proceedings (including challenges to rules governing the appointment or removal of agency adjudicators) in the course of reviewing an agency's final order. See pp. 42-43, *supra*. And this Court has previously determined that a party has a meaningful opportunity for judicial review if it can raise its constitutional challenges in an Article III court at

the end of agency proceedings. See *Elgin*, 567 U.S. at 15; *Thunder Basin*, 510 U.S. at 215.

Axon (Br. 36-37) and Cochran (Br. 37-41) nevertheless contend that such review is not "meaningful" because a court might never address their constitutional claims if they prevail before the Commissions on other grounds. But one of the "principal reasons" to defer judicial review until the end of administrative proceedings is to ensure that review is actually necessary. *Standard Oil*, 449 U.S. at 244 n.11 (citation omitted). If the party is "successful in vindicating his rights in the administrative process," "the courts may never have to intervene." *McKart* v. *United States*, 395 U.S. 185, 195 (1969). The possibility that the respective Commission decisions might "moot" the constitutional challenges that Axon and Cochran have asserted thus is a reason to defer judicial review until the end of the administrative proceedings, not a reason to accelerate judicial intervention. See *Standard Oil*, 449 U.S. at 244 n.11.

b. Axon and Cochran argue that their claims are collateral to the Acts' review schemes because the review schemes focus on particular proceedings, while the claims here "transcend any particular dispute or proceeding," Axon Br. 34, and are "not limited to the circumstances in any case," Cochran Br. 33 n.7. But their own filings belie that characterization. Axon's complaint asked the district court to "[e]njoin the FTC and its Commissioners from pursuing an administrative enforcement action against Axon." *Axon* Compl. 28. Its motion for a preliminary injunction asked the court to "issue an order preliminarily enjoining the administrative hearing commenced at the [FTC]." *Axon* D. Ct. Doc. 15, at 1 (Jan. 9, 2020). Cochran's complaint similarly alleged that Cochran had been "required to submit

to an unconstitutional proceeding" before the SEC. *Cochran* J.A. 60. And her motion for a preliminary injunction sought an order "preventing the [SEC] from subjecting her to an unconstitutional enforcement proceeding." *Cochran* D. Ct. Doc. 13, at 1 (Feb. 11, 2019). More generally, Axon and Cochran have Article III standing to pursue their current constitutional challenges precisely because the Commissions have entered orders designating Axon and Cochran as respondents in Commission adjudications and instituting proceedings before ALJs. These cases concern specific administrative proceedings—matters within, not collateral to, the Acts' review schemes.

The nature of the challenges that Axon and Cochran have asserted likewise shows that those challenges concern specific actions taken by the Commissions in specific proceedings. Each Commission usually assigns the initial stages of a proceeding to an ALJ, but it is not required to do so; it may instead assign those stages to individual Commissioners or to the Commission as a whole. See pp. 3-4, *supra*. If the Commissions had assigned the proceedings in these particular cases to individual Commissioners or to the entire Commissions, Axon and Cochran would have no basis for raising their present challenges to the ALJs' removal protections.

To be sure, a judicial decision endorsing the constitutional arguments that Axon and Cochran assert would cast doubt on many other Commission adjudications, not just on the two that are directly at issue here. But the same was true in *Arthrex*, *Lucia*, *Noel Canning*, and *Jarkesy II*, where this Court and the Fifth Circuit resolved systemic challenges to various administrative-review schemes in appeals from final agency orders issued in individual adjudications. Distinguishing for

these purposes between systemic and case-specific constitutional challenges would further complicate the threshold justiciability inquiry and increase the risk of duplicative litigation. Cf. pp 45-46, *supra*. And giving first priority to systemic constitutional challenges would reflect an especially stark departure from traditional avoidance principles, under which facial constitutional challenges are "disfavored." *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 450 (2008).

c. Axon (Br. 34) and Cochran (Br. 36) argue that they are entitled to pursue their constitutional claims outside the Acts' review schemes because those claims lie outside the Commissions' expertise. That argument lacks merit.

Even when an agency lacks expertise in interpreting the Constitution, it can still "apply its expertise" by deciding other issues that "may obviate the need to address the constitutional challenge." *Elgin*, 567 U.S. at 22-23. The *Elgin* Court noted, for example, that if the MSPB rules in favor of a federal employee on statutory grounds within its expertise, its decision "would avoid the need to reach [the employee's] constitutional claims." *Id.* at 23. Similarly here, if the Commissions rule in favor of Axon and Cochran on statutory, regulatory, or factual grounds, their decisions will avoid the need for judicial resolution of any constitutional issue.

Axon (Br. 48) and Cochran (Br. 49) argue that it would make little sense to require the Commission or an ALJ to resolve a challenge to the Commission's or ALJ's own constitutional status. That argument conflates finality (which is at issue here) with issue exhaustion (which is not). A finality requirement prevents a party from obtaining judicial review before the conclu-

sion of an agency proceeding. See *Standard Oil*, 449 U.S. at 246. An issue-exhaustion requirement, in contrast, does not govern the *timing* of judicial review, but instead limits such review (whenever it occurs) to those issues that were first presented to the agency. See *Sims* v. *Apfel*, 530 U.S. 103, 107 (2000). The question presented here is whether Axon and Cochran can obtain judicial review before the agency proceedings conclude (finality), not whether they must present their challenges to the Commissions in order to preserve them for judicial review (issue exhaustion).

For that reason, Axon's (Br. 34) and Cochran's (Br. 30) reliance on *Carr* v. *Saul*, 141 S. Ct. 1352 (2021), is misplaced. The private parties in *Carr* had received unfavorable decisions on their claims for disability benefits and had then "followed the prescribed steps for seeking administrative review." *Id.* at 1356; see *id.* at 1356-1357. The Court held that, on judicial review of the agency's final benefits decisions, those claimants could raise constitutional challenges to the appointments of the ALJs who had ruled in their cases, despite the claimants' failure to assert those challenges during the agency proceedings. See *id.* at 1362. Although the Court based that holding in part on its determination that "structural constitutional challenges * * * usually fall outside [agency] adjudicators' areas of technical expertise," *id.* at 1360, it did not suggest that the claimants could have invoked that lack of expertise as a ground for seeking judicial intervention before the agency had made its final decision. To the contrary, the Court observed that the claimants had "proceeded through each step of the SSA's administrative review scheme and received a 'final decision' before seeking judicial review." *Id.* at 1358 n.2 (quoting 42 U.S.C.

405(g)). Thus, whether or not Axon and Cochran are required to present their constitutional arguments to the Commissions in order to preserve those arguments for later judicial review, they cannot invoke the constitutional nature of their claims as a basis for circumventing the statutory review mechanisms.[5]

D. Axon's And Cochran's Objections To The Commissions' Proceedings Lack Merit

Axon (Br. 46-50) and Cochran (Br. 46-50) deploy extraordinary rhetoric in criticizing the Commissions' conduct of administrative proceedings. But Axon's and Cochran's disagreement with Congress's decision to authorize such proceedings has no bearing on the legal issue presented here. In any event, their objections lack merit.

Axon (Br. 48) and Cochran (Br. 2) appear to fault the Commissions for the ALJs' tenure protections. But it was Congress, not the Commissions, that made ALJs

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[5] The Exchange Act establishes a general issue-exhaustion requirement, providing that "[n]o objection to an order * * * of the [SEC], for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so." 15 U.S.C. 78y(c)(1). Courts of appeals have held that the constitutional nature of a respondent's objection does not categorically establish "reasonable ground" for failing to assert that objection during an agency adjudication. See, *e.g.*, *Springsteen-Abbott* v. *SEC*, 989 F.3d 4, 8-9 (D.C. Cir. 2021); *Gonnella* v. *SEC*, 954 F.3d 536, 545-546 (2d Cir. 2020). But even in circumstances where a respondent *can* establish "reasonable ground" for failing to present a particular objection to the agency, the Exchange Act does not suggest that the objection may be asserted immediately in district court. Rather, consistent with the outcome of *Carr*, the Act simply makes clear that such a challenge "may be considered by the court" of appeals on review of the Commission's final order. 15 U.S.C. 78y(c)(1).

removable only for cause. See 5 U.S.C. 7521. And this Court has never questioned the constitutionality of that congressional choice. Although the Court in *Free Enterprise Fund* held that Congress could not grant two layers of removal protection to the members of the PCAOB, it specifically reserved the question whether the same principle would apply to ALJs. See 561 U.S. at 507 n.10; cf. *Wiener* v. *United States*, 357 U.S. 349, 356 (1958) (distinguishing between the removal of adjudicators and the removal of other officers).

Axon's and Cochran's objections to ALJs' tenure protections also clash with their stated concerns (*e.g.*, Axon Br. 48; Cochran Br. 48) about agency impartiality. The purpose of insulating ALJs from at-will removal is to enable the ALJ to provide a "genuinely impartial hearing," free from concerns that her agency employer will fire her for ruling against the agency. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 44 (1950) (citation omitted). Eliminating ALJs' tenure protections, as Axon and Cochran propose, would undermine that objective.

Axon also contends (Br. 47) that the FTC "has not lost a fight on its home turf" in years, but that claim is incorrect. A study conducted in 2016 shows that the FTC had dismissed "29 percent" of administrative complaints brought over the preceding four decades, "contradict[ing] recurring claims that the FTC always rules for complaint counsel." Maureen K. Ohlhausen, *Administrative Litigation at the FTC*, 12 J. Comp. L. & Econ. 623, 630-631 (2016). Similarly, Cochran contends (Br. 48) that the SEC is a "distinctly hostile forum" for private parties. But an "empirical investigation" of a "large dataset" of SEC proceedings found "no robust correlation between the selected forum and case outcome." Urska Velikonja, *Are the SEC's Administrative*

Law Judges Biased? An Empirical Investigation, 92 Wash. L. Rev. 315, 336 (2017).

Cochran also suggests (Br. 4) that James Landis, the Chairman of the SEC from 1935 to 1937, drafted the language of the Exchange Act's review provisions as part of an effort to shield the SEC from judicial scrutiny. But Congress copied the review provision of the Exchange Act from the review provision of the FTC Act—which was enacted 20 years earlier, when Landis was 15 years old. Compare FTC Act, § 5, 38 Stat. 719, with Exchange Act, § 25(a), 48 Stat. 901. In addition, Cochran's account of Landis's motives is inaccurate. See Charles H. Koch, Jr., *James Landis: The Administrative Process*, 48 Admin. L. Rev. 419, 428-429 (1996) (observing that Landis "conceded a significant role for the courts in monitoring the administrative efforts"); James M. Landis, *The Administrative Process* 100 (1938) (explaining that the "ultimate check is, of course, the right to judicial review"). In any event, Cochran's speculation about the motives of an SEC chairman in the 1930s has no bearing on the meaning of statutory provisions enacted by Congress.

Axon (Br. 46) and Cochran (Br. 46) end their briefs by emphasizing the importance of the Constitution's separation of powers. But the separation of powers imposes limits on the courts too. One such limit is that Congress has primary responsibility for fashioning causes of action, and more generally for determining the proper mode and timing of judicial review. Yet Axon and Cochran ask the courts to impose an equitable remedy that would subvert congressional policy choices reflected in the FTC Act, the Exchange Act, and the APA. This Court should decline to take that step.

CONCLUSION

The judgment of the court of appeals in *Axon* should be affirmed. The judgment of the court of appeals in *Cochran* should be reversed.

Respectfully submitted.

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APPENDIX

1. 5 U.S.C. 703 provides:

Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

2. 5 U.S.C. 704 provides:

Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule

and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

3. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

4. 15 U.S.C. 45(c)-(d) provides:

Unfair methods of competition unlawful; prevention by Commission

(c) Review of order; rehearing

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying,

or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgement to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28.

(d) Jurisdiction of court

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm,

enforce, modify, or set aside orders of the Commission shall be exclusive.

5. 15 U.S.C. 78u-3(d)

(d) Review of temporary orders

(1) Commission review

At any time after the respondent has been served with a temporary cease-and-desist order pursuant to subsection (c), the respondent may apply to the Commission to have the order set aside, limited, or suspended. If the respondent has been served with a temporary cease-and-desist order entered without a prior Commission hearing, the respondent may, within 10 days after the date on which the order was served, request a hearing on such application and the Commission shall hold a hearing and render a decision on such application at the earliest possible time.

(2) Judicial review

Within—

(A) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or

(B) 10 days after the Commission renders a decision on an application and hearing under paragraph (1), with respect to any temporary cease-and-desist order entered without a prior Commission hearing,

the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the

District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under paragraph (1) of this subsection.

(3) No automatic stay of temporary order

The commencement of proceedings under paragraph (2) of this subsection shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(4) Exclusive review

Section 78y of this title shall not apply to a temporary order entered pursuant to this section.

6. 15 U.S.C. 78y provides in pertinent part:

Court review of orders and rules

(a) Final Commission orders; persons aggrieved; petition; record; findings; affirmance, modification, enforcement, or setting aside of orders; remand to adduce additional evidence

(1) A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry

of the order, a written petition requesting that the order be modified or set aside in whole or in part.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated by the Commission for that purpose. Thereupon the Commission shall file in the court the record on which the order complained of is entered, as provided in section 2112 of title 28 and the Federal Rules of Appellate Procedure.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.

(4) The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.

(5) If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there was reasonable ground for failure to adduce it before the Commission, the court may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers appropriate. If the case is remanded to the Commission, it shall file in the court a supplemental record containing any new evidence, any further or modified findings, and any new order.

* * * * *

(c) Objections not urged before Commission; stay of orders and rules; transfer of enforcement or review proceedings

(1) No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.

(2) The filing of a petition under this section does not operate as a stay of the Commission's order or rule. Until the court's jurisdiction becomes exclusive, the Commission may stay its order or rule pending judicial review if it finds that justice so requires. After the filing of a petition under this section, the court, on whatever conditions may be required and to the extent necessary to prevent irreparable injury, may issue all necessary and appropriate process to stay the order or rule or to preserve status or rights pending its review; but (notwithstanding section 705 of title 5) no such process may be issued by the court before the filing of the record or the materials set forth in subsection (b)(2) of this section unless: (A) the Commission has denied a stay or failed to grant requested relief, (B) a reasonable period has expired since the filing of an application for a stay without a decision by the Commission, or (C) there was reasonable ground for failure to apply to the Commission.

(3) When the same order or rule is the subject of one or more petitions for review filed under this section and an action for enforcement filed in a district court of the United States under section 78u(d) or (e) of this title, that court in which the petition or the action is first filed has jurisdiction with respect to the order or rule to the

exclusion of any other court, and thereupon all such proceedings shall be transferred to that court; but, for the convenience of the parties in the interest of justice, that court may thereafter transfer all the proceedings to any other court of appeals or district court of the United States, whether or not a petition for review or an action for enforcement was originally filed in the transferee court. The scope of review by a district court under section 78u(d) or (e) of this title is in all cases the same as by a court of appeals under this section.

* * * * *

7. 15 U.S.C. 78bb(a)(2) provides:

Effect on existing law

(a) Limitation on judgments

(2) Rule of construction

Except as provided in subsection (f), the rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

8. 28 U.S.C. 1331 provides:

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.