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SECURITIES REGULATION

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Chapter 7 — Due Diligence and Securities Act Liability in Registered and Public Offerings

§ 7.02 The Registered Offering — Framework of Section 11

[B] Elements of the § 11 Right of Action

On page 392, delete the Ninth Circuit's decision in Pirani v. Slack Technologies, Inc. and add:

Slack Technologies, LLC v. Pirani

United States Supreme Court
143 S. Ct. 1433 (2023)

JUSTICE GORSUCH delivered the opinion of the Court.

This case concerns the meaning of one provision of the federal securities laws. For many years, lower federal courts have held that liability under §11 of the Securities Act of 1933 attaches only when a buyer can trace the shares he has purchased to a false or misleading registration statement. Recently, the Ninth Circuit parted ways with these decisions, holding that a plaintiff may sometimes recover under §11 even when the shares he owns are not traceable to a defective registration statement. The question we face is which of these approaches best conforms to the statute's terms.

I

Together, the Securities Act of 1933 and the Securities Exchange Act of 1934 form the backbone of American securities law. The first is "narrower" and focused "primarily" on the regulation of new offerings. Generally speaking, the 1933 Act requires a company to register the securities it intends to offer to the public with the Securities and Exchange Commission (SEC). As part of that process, a company must prepare a registration statement that includes detailed information about the firm's business and financial health so prospective buyers may fairly assess whether to invest. The law imposes strict liability on issuing companies when their registration statements contain material misstatements or misleading omissions.

The 1934 Act sweeps more broadly. Among other things, it requires publicly traded companies to provide ongoing disclosures and regulates trading on secondary markets. This law's main liability provision [§10(b)] sweeps more broadly too. It allows suits in connection with the purchase or sale of "any security," whether registered or not. But to prevail under this provision [namely, §10(b)], a plaintiff must prove that any material misleading statement or omission was made "with scienter, *i.e.*, with intent to deceive, manipulate, or defraud."

This case arises from a public offering governed by the 1933 Act. Typically, when a company goes public it issues new shares pursuant to a registration statement. That registration

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statement is filed with the SEC and made available to the public. Investment banks underwrite the offering, usually by buying these new registered shares at a negotiated price and then selling them to investors at a higher price. In this way, underwriters often carry the risk of loss should they fail to sell the shares at a profit.

Of course, a company's early investors and employees may own preexisting shares. Often, too, these shares are not subject to registration requirements…. To prevent the stock price from falling once public trading begins, underwriters may require insiders to consent to a "lockup agreement"—a commitment to hold their unregistered shares for a period of time before selling them on the new public market.

Initial public offerings (IPOs) are an effective way of raising capital, but they also have drawbacks. Among other things, they can involve significant transaction costs. Nor is raising capital the only reason firms might wish to go public; some may simply wish to afford their shareholders (whether investors, employees, or others) the convenience of being able to sell their existing shares on a public exchange. Several years ago, a number of companies approached the New York Stock Exchange (NYSE) about the possibility of selling shares publicly on that exchange without an IPO. Ultimately, the NYSE proposed rules to facilitate and regulate these "direct listings," which the SEC approved with modifications ….

Slack is a technology company that offers a platform for instant messaging. It conducted a direct listing on the NYSE in 2019. As part of that process, Slack filed a registration statement for a specified number of registered shares it intended to offer in its direct listing. But because Slack employed a direct listing rather than an IPO, there was no underwriter and no lockup agreement. Accordingly, holders of preexisting unregistered shares were free to sell them to the public right away. All told, Slack's direct listing offered for purchase 118 million registered shares and 165 million unregistered shares.

Fiyyaz Pirani bought 30,000 Slack shares on the day Slack went public. He bought 220,000 additional shares over the next few months. When the stock price later dropped, Mr. Pirani filed a class-action lawsuit against Slack. In that suit, he alleged that Slack had violated §§11 and 12 of the 1933 Act by filing a materially misleading registration statement.

Slack moved to dismiss the complaint for failure to state a claim. Sections 11 and 12, Slack argued, authorized suit only for those who hold shares issued pursuant to a false or misleading registration statement. And this feature of the law, the company said, was dispositive in this case because Mr. Pirani had not alleged that he purchased shares traceable to the allegedly misleading registration statement. For all anyone could tell, he may have purchased unregistered shares unconnected to the registration statement and its representations about the firm's business and financial health. Of course, Slack would go on to acknowledge that the 1934 Act allows investors to recover for fraud in the sale of unregistered shares upon proof of scienter [pursuant to §10(b)]. But, the company emphasized, Mr. Pirani had not sought to sue under that law.

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Ultimately, the district court denied the motion to dismiss but certified its ruling for interlocutory appeal. The Ninth Circuit accepted the appeal and a divided panel affirmed. 13 F. 4th, at 945, 950 [(9th Cir. 2021)]. In dissent, Judge Miller argued that §§11 and 12 of the 1933 Act require a plaintiff to plead and prove that he purchased securities registered under a materially misleading registration statement, something Mr. Pirani had not done. Judge Miller pointed out that a long line of lower court cases have interpreted §11 as applying only to shares purchased pursuant to a registration statement. Because the Ninth Circuit's decision created a split of authority in the courts of appeals about §11's scope, we granted certiorari.[1]

II

We begin with the relevant language of §11(a) of the 1933 Act. It provides:

> "In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue [certain enumerated parties]."

The statute authorizes an individual to sue for a material misstatement or omission in a registration statement when he has acquired "such security." The question we face is what this means. Does the term "such security" refer to a security issued pursuant to the allegedly misleading registration statement? Or can the term also sometimes encompass a security that was not issued pursuant to the allegedly misleading registration statement? Slack advances the first interpretation; Mr. Pirani defends the second.

Immediately, we face a bit of a challenge. The word "such" usually refers to something that has already been "described" or that is "implied or intelligible from the context or circumstances." Concise Oxford Dictionary of Current English 1218 (1931); see also Webster's New International Dictionary 2518 (2d ed. 1954). But there is no clear referent in §11(a) telling us what "such security" means. As a result, we must ascertain the statute's critical referent "from the context or circumstances."

As it turns out, context provides several clues. For one thing, the statute imposes liability for false statements or misleading omissions in "*the* registration statement." §77k (emphasis added). Not just a registration statement or any registration statement. The statute uses the

[1] The parties have litigated this case on the premise that Slack was not required to register all of the shares sold in its direct listing. For the first time before this Court, Mr. Pirani challenges that premise, suggesting that it was incumbent on Slack to register all the securities sold in its direct listings on the NYSE. Brief for Respondent 11-12, n. 7. As he acknowledges, however, this issue is not properly presented for decision, and so we do not pass upon it.

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definite article to reference the particular registration statement alleged to be misleading, and in this way seems to suggest the plaintiff must "acquire[e] such security" under that document's terms.

For another thing, the statute repeatedly uses the word "such" to narrow the law's focus. The statute directs us to "such part" of the registration statement that contains a misstatement or misleading omission. It speaks of "such acquisition" when a person has acquired securities pursuant to the registration statement. And it points to "such untruth or omission" found in the registration statement. Each time, the law trains our view on particular things or statements. All of which suggests that, when it comes to "such security," the law speaks to a security registered under the particular registration statement alleged to contain a falsehood or misleading omission.

Other provisions in the 1933 Act follow suit. Under § 5, for example, "[u]nless a registration statement is in effect as to a security," it is unlawful "to sell such security." Here, the term "such security" clearly refers to shares subject to registration. Meanwhile, § 6 provides that a "registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered." It's an instruction that would seem hard to square with Mr. Pirani's broader reading of §11(a)—after all, adopting that reading would give the registration statement effect (in the sense of creating liability) for securities that are not "specified" in the registration statement "as proposed to be offered."

Beyond these clues lies still another. Section 11(e) caps damages against an underwriter in a §11 suit to the "total price at which the securities underwritten by him and distributed to the public were offered to the public." This provision thus ties the maximum available recovery to the value of the registered shares alone. It's another feature that makes little sense on Mr. Pirani's account, for if §11(a) liability extended beyond registered shares presumably available damages would too.

Collectively, these contextual clues persuade us that Slack's reading of the law is the better one. Nor is anything we say here particularly novel. For while direct listings are new, the question how far §11(a) liability extends is not. More than half a century ago, Judge Friendly addressed the question in an opinion for the Second Circuit in *Barnes* and concluded that "the narrower reading" we adopt today is the more "natural" one. 373 F.2d, at 271, 273 [(2d Cir. 1967)]. Since *Barnes*, every court of appeals to consider the issue has reached the same conclusion: To bring a claim under §11, the securities held by the plaintiff must be traceable to the particular registration statement alleged to be false or misleading. Until this decision, even the Ninth Circuit seemed to take the same view. *Hertzberg v. Dignity Partners, Inc.*, 191 F. 3d 1076, 1080, and n. 4 (1999).

Resisting this conclusion, Mr. Pirani argues that we should read the phrase "such security" to include not only securities traceable to a defective registration statement. We should also read the phrase to include other securities that bear some sort of minimal relationship to a defective registration statement. And, he argues, a reading like that would allow his case to

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proceed because, but for the existence of Slack's registration statement for the registered shares, its unregistered shares would not have been eligible for sale to the public. Beyond assuring us that the rule he proposes would save his case, however, Mr. Pirani does not offer much more. He does not explain what the limits of his rule would be, how we might derive them from §11, or how any of this can be squared with the various contextual clues we have encountered suggesting that liability runs with registered shares alone.

Perhaps the closest Mr. Pirani comes to answering these questions comes when he directs us to § 5. If Congress wanted liability under §11(a) to attach only to securities issued pursuant to a particular registration statement, he observes, it could have simply borrowed similar language from § 5. That provision, he stresses, speaks of "any security with respect to which a registration statement has been filed." But even taken on its own terms, this argument does not prove much. If Mr. Pirani's example shows that Congress could have written §11(a) to explain more clearly that liability attaches only to securities issued pursuant to a particular registration statement, it also shows that Congress could have written §11(a) to explain more clearly that liability attaches to "any security" or "any security" bearing some specified relationship to a registration statement. That Congress could have been clearer, no one disputes. But none of this proves it adopted anything like the rule Mr. Pirani proposes.

Finally, Mr. Pirani argues from policy and purpose. Adopting a broader reading of "such security" would, he says, expand liability for falsehoods and misleading omissions and thus better accomplish the purpose of the 1933 Act. We cannot endorse this line of reasoning. This Court does not "presume . . . that any result consistent with [one party's] account of the statute's overarching goal must be the law." Nor, for that matter, is Mr. Pirani's account of the law's purpose altogether obvious. As we have seen, the 1933 Act is "limited in scope." Its main liability provision imposes strict liability on issuers for material falsehoods or misleading omissions in the registration statement. Meanwhile, the 1934 Act requires ongoing disclosures for publicly traded companies and its main liability provision [§10(b)] allows suits involving any sale of a security but only on proof of scienter. Given this design, it seems equally possible that Congress sought a balanced liability regime that allows a narrow class of claims to proceed on lesser proof but requires a higher standard of proof to sustain a broader set of claims.

III

Naturally, Congress remains free to revise the securities laws at any time, whether to address the rise of direct listings or any other development. Our only function lies in discerning and applying the law as we find it. And because we think the better reading of the particular provision before us requires a plaintiff to plead and prove that he purchased shares traceable to the allegedly defective registration statement, we vacate the Ninth Circuit's judgment holding

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otherwise. Whether Mr. Pirani's pleadings can satisfy §11(a) as properly construed, we leave for that court to decide in the first instance on remand.[2]

It is so ordered.

Note

Thus, the Supreme Court in *Slack Industries* adhered to the longstanding "tracing" requirement. Plaintiffs therefore must prove that they purchased shares that were registered under the allegedly deficient registration statement in order to sue under Section 11. From a historical perspective, the tracing requirement signifies that secondary market purchasers often find this barrier insurmountable to hurdle when the secondary market includes both shares that were sold in the subject registered offering as well as other shares (that were registered in prior offerings or entered the secondary market by private resales, such as pursuant to Rule 144). Nonetheless, as a brief filed in *Slack Industries* explains, the tracing requirement no longer may be a showstopper precluding the bringing of Section 11 claims:

> The decades-old folk wisdom is that tracing securities to a newly issued registration statement is "often impossible" because "most trading is done through brokers who neither know nor care whether they are getting newly registered or old shares," and "many brokerage houses do not identify specific shares with particular accounts but instead treat the account as having an undivided interest in the house's position."….
>
> These pronouncements were, at one time, reasonable. But today they rest on antiquated assumptions. Modern computing power makes it technologically feasible to trace the purchase of securities to an allegedly misleading registration statement. Broker-dealers, exchanges and FINRA [The Financial Industry Regulatory Authority] are required by law to maintain detailed, time-stamped transactional records which can be obtained through discovery…. These records show exactly when securities in one account are transferred to another account, whether within the same broker-dealer or between different broker-dealers. Moreover, today all these records are contained in a central repository known as

[2] As we noted at the outset, the parties do not just spar over the best interpretation of §11 and its application to this case. They do the same when it comes to §12. But we have no need to reach the merits of that particular dispute. The Ninth Circuit said that its decision to permit Mr. Pirani's §12 claim to proceed "follow[ed] from" its analysis of his §11 claim. 13 F. 4th 940, 949 (2021). And because we find that court's §11 analysis flawed, we think the best course is to vacate its judgment with respect to Mr. Pirani's §12 claim as well for reconsideration in the light of our holding today about the meaning of §11. In doing so, we express no views about the proper interpretation of §12 or its application to this case. Nor do we endorse the Ninth Circuit's apparent belief that §11 and §12 necessarily travel together, but instead caution that the two provisions contain distinct language that warrants careful consideration.

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the Consolidated Audit Trail (CAT), such that there is no need for plaintiffs to subpoena individual broker-dealers. This makes it possible to reconstruct a reliable "chain of title," … using standard accounting methods like first in-first out (FIFO) or last in-last out (LILO).

Brief for Amici Curiae Law and Business Professors in Support of Respondent, at pages 5-6 (citations omitted).

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§ 8.02 Standing: The Purchaser-Seller Requirement

On page 507, add:

Menora Mivtachim Insurance Ltd. v. Frutarom Industries Ltd.

United States Court of Appeals, Second Circuit

54 F.4th 82 (2022)

Park, Circuit Judge:

International Flavors & Fragrances Inc. ("IFF"), a U.S.- based seller of flavoring and fragrance products, acquired Frutarom Industries Ltd. ("Frutarom"), an Israeli firm in the same industry. Leading up to the merger, Frutarom allegedly made material misstatements about its compliance with anti-bribery laws and the source of its business growth. Plaintiffs, who bought stock in IFF, sued Frutarom, alleging that those misstatements violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder. We conclude that Plaintiffs lack statutory standing to sue. Under the purchaser-seller rule, standing to bring a claim under Section 10(b) is limited to purchasers or sellers of securities issued by the company about which a misstatement was made. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). Plaintiffs here lack standing to sue based on alleged misstatements that Frutarom made about itself because they never bought or sold shares of Frutarom. We thus affirm the district court's dismissal of the complaint.

I. BACKGROUND

A. Factual Background

Plaintiffs are a putative class of investors who acquired IFF securities between May 7, 2018 and August 12, 2019. They allege that from 2002 to 2018, Frutarom's executives engaged in a "long-running bribery scheme" by which they bribed key employees of important clients in order to "generate continued and increased business with the customer[s]." They also bribed customs officials and quality assurance officials in Russia and Ukraine in order to import Frutarom products into those countries and to pass local certifications of product fitness.

On May 7, 2018, Frutarom and IFF announced an anticipated merger. Plaintiffs allege that leading up to the consummation of the merger, Frutarom made materially misleading statements about its compliance with anti-bribery laws and the sources of its business growth, most of which were incorporated into IFF's Form S-4 Registration Statement….

IFF's acquisition of Frutarom closed in October 2018, after which Frutarom became a wholly-owned subsidiary of IFF. On August 5, 2019, IFF acknowledged that Frutarom had "made improper payments to representatives of a number of customers" in Russia and Ukraine. The following day, IFF's share price dropped nearly 16%.

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B. Procedural History

Plaintiffs sued IFF and two of its officers as well as Frutarom and five of its officers. Plaintiffs alleged that Defendants' materially misleading misstatements violated Sections 10(b) and 20(a) of the Exchange Act; and Securities and Exchange Commission ("SEC") Rule 10b-5.

The district court granted Defendants' motion to dismiss….

II. DISCUSSION

A. Standard of Review

We review a district court's dismissal of a complaint under [Federal Rule of Civil Procedure] 12(b)(6) de novo….

B. The Purchaser-Seller Rule

Neither Section 10(b) of the Exchange Act nor Rule 10b-5 provides an express private right of action, but the Supreme Court has long held that one is implied… Recognizing the advantages of limitations to this judicially created private right of action, the Court in *Blue Chip Stamps* adopted the rule from *Birnbaum v. Newport Steel Corp.,* 193 F.2d 461 (2d Cir. 1952), which limited the class of plaintiffs who could sue under Rule 10b-5 to those who purchased or sold the securities of an issuer about which a material misstatement was made….

The Court observed in *Blue Chip Stamps* that "[a]vailable evidence from the texts of the [Securities Act of 1933 and the Exchange Act] … supports the result reached by the *Birnbaum* court." It also noted the fact that the purchaser-seller rule had gained widespread acceptance across the country and that Congress had "fail[ed] to reject *Birnbaum's* reasonable interpretation of the wording of § 10(b)" despite two attempts to amend the statute….

The Court expressed concern about "the danger of vexatious litigation which could result from a widely expanded class of plaintiffs under Rule 10b-5." And it warned against an "endless case-by-case erosion" of the purchaser-seller rule by creating exceptions, concluding that "such a shifting and highly fact-oriented disposition" of statutory standing is not a "satisfactory basis for a rule of liability imposed on the conduct of business transactions."

C. Application

The purchaser-seller rule requires plaintiffs to have bought or sold a security of the issuer about which a misstatement was made in order to have standing to sue under Section 10(b). Plaintiffs here lack statutory standing to sue Frutarom based on alleged misstatements that the company made about itself because they bought shares of IFF, not Frutarom.

As IFF shareholders, Plaintiffs argue that they have standing because there was a sufficiently "direct relationship" between Frutarom's misstatements about itself and the price of IFF's shares. This argument is meritless.

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First, judicially created private rights of action should be construed narrowly. Plaintiffs urge us to read Section 10(b) "flexibly to effectuate its remedial purposes." *Blue Chip Stamps*, however, recognized the need to limit this judicially created private right of action. We thus apply the purchaser-seller rule as adopted by the Supreme Court in *Blue Chip Stamps.*

Second, adopting Plaintiffs' "direct relationship" test for standing would begin exactly the "endless case-by-case erosion" of the purchaser-seller rule about which *Blue Chip Stamps* warned. Under Plaintiffs' "direct relationship" test, standing would be a "shifting and highly fact-oriented" inquiry, requiring courts to determine whether there was a sufficiently direct link between one company's misstatements and another company's stock price. For example, Plaintiffs point to joint press releases, IFF's SEC filings and investor presentations, and investment bank reports about IFF's acquisition of Frutarom to show a direct relationship between Frutarom's misstatements and IFF's stock. *Blue Chip Stamps* cautioned against adding further uncertainty to Section 10(b)'s "rule of liability imposed on the conduct of business transactions." …

Third, Plaintiffs' reliance on dicta in *Nortel* [*Ontario Public Service Employees Union Pension Trust Fund v. Nortel Networks Corp.*, 369 F.3d 27 (2d Cir. 2004)] is misplaced. In *Nortel*, JDS Uniphase Corporation ("JDS") sold one of its business units to its largest customer, Nortel Networks Corporation ("Nortel") in exchange for Nortel stock. Plaintiffs, who were JDS shareholders, sued Nortel for allegedly misleading statements it made about itself leading up to the transaction. We held that plaintiffs lacked standing because "[s]tockholders do not have standing to sue under Section 10(b) and Rule 10b-5 when the company whose stock they purchased is negatively impacted by the material misstatement of another company, whose stock they do not purchase."

Notwithstanding the holding of the case, Plaintiffs argue that *Nortel* would have found standing if there had been a sufficiently "direct relationship" between Nortel's statements and JDS's stock price. They point to dicta noting that because "a merger creates a far more significant relationship between two companies than does the sale of a business unit," "a potential merger might require a different outcome." But we said that was "a question that we leave for another day and about which we express no opinion." For the reasons explained above, we now answer that question by holding that purchasers of a security of an acquiring company do not have standing under Section 10(b) to sue the target company for alleged misstatements the target company made about itself prior to the merger between the two companies.

Nor does our subsequent decision *In re NYSE Specialists Securities Litigation*, 503 F.3d 89 (2d Cir. 2007) ("*NYSE Specialists*"), change this result. In that case, we clarified that *Nortel* did not preclude purchasers of a stock from suing "underwriters, brokers, bankers, and non-issuer sellers" under Rule 10b-5. That is entirely consistent with the purchaser-seller rule: Plaintiffs may be able to sue entities other than the issuer of a security if those entities made material misstatements about the issuer, as long as the plaintiffs purchased or sold the securities of the issuer about which the misstatements were made.

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ln short, Section 10(b) standing does not depend on the significance or directness of the relationship between two companies. Rather, the question is whether the plaintiff bought or sold shares of the company about which the misstatements were made. *See Nortel* 369 F. 3d at 32 (stating that the plaintiffs' argument that they had standing was "entirely at odds with the purchaser-seller requirement in *Blue Chip Stamps* that 'limits the class of plaintiffs to those who have at least dealt in the security to which the prospectus, representation, or omission relates.' " Our conclusion follows directly from our decision in *Nortel*. In both cases, a company whose stock the plaintiffs did not purchase made material misstatements about itself that negatively impacted another company's stock, which plaintiffs did purchase. The fact that this case involved a merger instead of the sale of a business unit and that IFF incorporated some of Frutarom's misstatements in its SEC filings and investor presentations does not change the analysis here. Plaintiffs did not purchase securities of the issuer about which misstatements were made, so they did not have standing to sue under Section 10(b) or Rule 10b-5.

III. CONCLUSION

For the reasons set forth above, the district court's judgment is affirmed.

***Pérez, Circuit Judge, concurring in the judgment*:**

I respectfully submit that this Court need not have created new law to dispose of this case and could have resolved the question presented by applying this Circuit's reasoning in *Ontario Public Service Employees Union Pension Trust Fund v. Nortel Networks Corp.,* 369 F.3d 27 (2d Cir. 2004) ("*Nortel"*). Because I, however, agree with the majority opinion that plaintiff IFF investors ("Plaintiffs") lack statutory standing to sue Frutarom and its former executives based on the alleged misstatements that Frutarom made about itself, I concur in the judgment.

….

Today this Court also makes a choice. It holds that standing to bring a claim under Section 10(b) and Rule 10b-5 is limited to purchasers or sellers of securities issued by the company about which a misstatement was made. This holding is unsurprising given the Supreme Court and our Court's historically "restrictive view of standing under Rule 10b-5." It is also a defensible answer to the question left open by *Nortel.*

But this Court need not have created new law to resolve this case. We have twice interpreted or applied *Nortel's* holding and analysis regarding statutory standing. *See In re NYSE Specialists Sec. Litig.*, 503 F.3d 89 (2d Cir. 2007) ("*NYSE Specialists*"); *Harbinger Cap. Partners LLC v. Deere & Co.*, 632 F. App'x 653 (2d Cir. 2015) (*"Harbinger"*) (summary order). And as in *Nortel* and *Harbinger*, Plaintiffs lack standing because, under the circumstances of the case, the relationship between one company's material misstatements about itself and another company's stock price was "too remote to sustain an action" under Section 10(b) and Rule 10b-5. We could have decided this case on an application of *Nortel* (as happened in *Harbinger*), thus leaving open the question *Nortel* raised and allowing for future consideration of other fact patterns by this Court and the trial courts.

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….

It is important to acknowledge today's holding is an example of judicial policymaking.

Of course, the Supreme Court has endorsed judicial policymaking in this securities context. *See Blue Chip Stamps*, 421 U.S. at 749 ("Given the peculiar blend of legislative, administrative, and judicial history which now surrounds Rule 10b-5, we believe that practical factors … are entitled to a good deal of weight.") ….

Indeed, this Court has previously relied on these "policy considerations," among other factors, to define the scope of this private right of action.…

By rejecting *Nortel*'s "direct relationship" test here, the majority opinion similarly reflects a policy choice. The advantages of formalism in the law of business transactions are sensibly described in the majority opinion, but, as noted in *Blue Chip Stamps*, there are disadvantages to such rigidity …. Openly acknowledging the value judgments behind judicial decisions benefits all stakeholders to the judicial process, including the other branches of government and the public.

Given the Court's decision today, Congress can choose to ratify this Court's holding if it has the inclination and occasion to do so.… And Congress also can amend the Exchange Act, if in its view, this Court erred today.

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§ 10.03 Distinguishing Primary from Secondary Liability

[C] Reinvigorating "Scheme" Liability Under Rule 10b-5(a) and (c)

On page 714, add:

Securities and Exchange Commission v. Rio Tinto PLC

United States Court of Appeals, Second Circuit

41 F.4th 47 (2022)

Dennis Jacobs, Circuit Judge:

The Securities and Exchange Commission ("SEC") brought scheme liability claims in a 2017 enforcement action against Rio Tinto plc, Rio Tinto Limited, and its CEO and CFO, pursuant to Rule 10b-5(a) and (c), promulgated under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and pursuant to Section 17(a)(1) and (3) of the Securities Act of 1933 ("Securities Act"). Citing *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir. 2005) ("*Lentell*"), the United States District Court for the Southern District of New York dismissed the scheme liability claims in a March 2019 order on the ground that the conduct alleged constituted misstatements and omissions only, and is therefore an insufficient basis for scheme liability.

In 2020, the SEC urged the district court to reconsider the dismissal in light of the Supreme Court's intervening decision in *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019) ("*Lorenzo*"), which held that an individual who disseminated a false statement (but did not make it) could be liable under the scheme subsections. In the SEC's view, *Lorenzo* expanded the scope of scheme liability so that allegations of misstatements and omissions alone are sufficient to state a scheme liability claim. The district court denied reconsideration. *Lorenzo* observes that the subsections of Rule 10b-5 and Section 17(a) are not hermetically sealed. On this interlocutory appeal, the SEC contends that *Lorenzo* thereby abrogates *Lentell.* We disagree. While *Lorenzo* acknowledges that there is leakage between and among the three subsections of each provision, the divisions between the subsections remain distinct. Until further guidance from the Supreme Court (or in banc consideration here), *Lentell* binds: misstatements and omissions can form part of a scheme liability claim, but an actionable scheme liability claim also requires something beyond misstatements and omissions, such as dissemination. Accordingly, we affirm.

I

The question presented on appeal is whether misstatements and omissions — without more — can support scheme liability pursuant to Section 10(b) of the Exchange Act and Rule 10b-5(a) and (c) promulgated thereunder, and Securities Act Section 17(a)(1) and (3). The answer lies in the interplay of the three subsections of Rule 10b-5, and the interplay of the three

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subsections of Section 17(a). Rule 10b-5 and Section 17(a), which largely mirror each other, both consist of a "misstatement subsection" that is sandwiched between two "scheme subsections."

> Rule 10b-5 provides:
>
> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

As clarified in *Janus Capital Group, Inc. v. First Derivative Traders,* 564 U.S. 135 (2011) (*"Janus"*), only the "maker" of a misstatement, i.e., the person with ultimate authority over the statement, can have primary liability under Rule 10b-5(b).

> Section 17(a) provides:
>
> It shall be unlawful for any person in the offer or sale of any securities... by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

II

The following background is based on the district court's recitation of the facts, as supplemented by allegations in the complaint.

In April 2011, defendants Rio Tinto plc and Rio Tinto Limited (together, "Rio Tinto") acquired an exploratory coal mine in Mozambique (the "Mine"). The Mine's $3.7 billion purchase price was premised on assumptions that the Mine would produce a certain volume and

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quality of coal, that the majority of the coal could be barged down the Zambezi River, and that the rest could be transported by existing rail infrastructure.

Over the ensuing months, the defendants learned that the coal quality was poorer than expected; that the Mozambican government would not permit transport of the coal by barge; and that the transport of coal by rail would require infrastructure costing upwards of $16 billion--and might not be permitted in any event. At a meeting in Brisbane on May 11, 2012, management from the Mine informed CEO Thomas Albanese and CFO Guy Robert Elliott that, based on the various emerging obstacles, the Mine's net present value was negative $680 million. (Albanese and Elliott are defendants in this action, along with Rio Tinto.)

In the months before and after the Brisbane meeting, Rio Tinto was issuing financial statements and preparing auditing papers. The complaint alleges that these documents contained false statements and omissions, including representations about transportation options and the amount and quality of coal reserves. Importantly, the SEC alleges that none of the documents disclosed that the Mine's valuation was impaired:

- The 2011 Annual Report, signed by Albanese and Elliott and filed with the SEC in March 2012, valued the Mine at its $3.7 billion acquisition price.

- A bond offering floated on the New York Stock Exchange that same month incorporated the 2011 Annual Report by reference.

- Rio Tinto's Controller's Group (“Controller”) consolidated the information from the Mine for review during Audit Committee meetings, which were attended by Rio Tinto's independent auditors, as well as by Albanese and Elliott. Neither the First Controller's Paper (generated in advance of the June 18, 2012 Audit Committee meeting) nor the Second Controller's Paper (generated in advance of the July 30, 2012 Audit Committee meeting) identified impairment indicators or recorded an impairment.

- Rio Tinto submitted an “Impairment Paper” directly to its independent auditors, which likewise did not record an impairment or identify an impairment indicator.

- The Audit Committee and the independent auditors relied on the Controller's Papers and the Impairment Paper to decide whether to impair the Mine. Thus the Half Year 2012 Report (“HY2012 Report”), filed with the SEC on August 9, 2012, and signed by Albanese and Elliott, carried the Mine at a value of over $3 billion.

- Rio Tinto issued $3 billion in bonds a few days later, and the offerings incorporated the HY2012 Report and the 2011 Annual Report.

- The Third Controller's Paper (together with the First and Second Controller's Papers and the Impairment Paper, the “Papers”), which was prepared in advance of the

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November 26, 2012 Audit Committee meeting, likewise indicated a recoverable value of $4 to $5 billion (which meant that no impairment was likely to be required).

For their part, Rio Tinto's in-house valuation team disagreed with the over-$3 billion valuation. In August 2012, the team initiated a review that valued the Mine in the range of *negative* “$4.9 billion to $300 million.” In late 2012, the head of the valuation team informed Albanese and Elliott about the shrunken valuation, and then informed the Chairman of Rio Tinto's Board. Following an investigation, at a meeting on January 15, 2013, the Board approved an 80 percent impairment, valuing the Mine at $611 million. In 2014, Rio Tinto again impaired the Mine, this time to $119 million. In October 2014, the Mine was sold for $50 million.

III

A

The SEC brought this twelve-count enforcement action on October 17, 2017, alleging that Rio Tinto should have taken an impairment on the Mine earlier than it did, and that the Papers, SEC filings, and the defendants failed to disclose the setbacks, or timely correct the valuation. At issue now are counts one and three, which allege that the defendants violated Rule 10b-5 and Section 17(a), respectively, by making fraudulent misstatements and omissions and by engaging in a scheme to defraud.

With respect to the misstatements and omissions claims, the SEC cited the 2011 Annual Report, the HY2012 Report, the Papers, the bond offerings, and statements made during various meetings and investor calls. With respect to the claims of scheme liability, the SEC cited corruption of the auditing process—specifically, the failure to correct statements made to the Audit Committee and auditors. The defendants moved to dismiss counts one and three for failure to state a claim on which relief can be granted.

Relevant to this appeal is the dismissal of the scheme liability claims. Citing *Lentell*, the Dismissal Order ruled that scheme liability does not exist when “the sole basis for such claims is alleged misrepresentations or omissions,” and that here, all of the alleged “actions” and “conduct” forming the basis for scheme liability were misstatements or omissions. The district court pointed to certain examples of these misstatements and omissions, which included the 2011 Annual Report, statements in the bond offerings, false statements to shareholders, and the failure to disclose information learned at the Brisbane meeting.

About a week after the Dismissal Order issued, the Supreme Court held in *Lorenzo* that an individual who disseminated a false statement, but who did not make it, could be liable under the scheme subsections. The SEC moved to reconsider the dismissal of the scheme liability claims, arguing that *Lorenzo* expanded the scope of the scheme

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subsections such that misstatements and omissions alone could form the basis for scheme liability.

The district court declined to reconsider, ruling that *Lorenzo* held that the dissemination of false information provides a basis for scheme liability--not that "misstatements alone are sufficient to trigger scheme liability." There is no allegation that the Rio Tinto defendants disseminated false statements; the SEC alleged "only that [the defendants] failed to prevent misleading statements from being disseminated by others."

B

As the procedural history shows, the SEC has exerted substantial effort to shoehorn its allegations into a claim for scheme liability. The SEC's position, however, would undermine two key features of Rule 10b-5(b).

For one, *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135, (2011), limits primary liability under Rule 10b-5(b) to the "maker" of a statement; as neither Albanese nor Elliott made the statements in the Papers or the SEC filings, they cannot be primarily liable under Rule 10b-5(b). But with an expanded conception of scheme liability, the SEC might seek to prove that Albanese and Elliott are primarily liable under the scheme subsections for participation in the making of the misstatements.

Second, misstatements and omissions claims brought by private plaintiffs under Rule 10b-5(b) are subject to the heightened pleading standard of the Private Securities Litigation Reform Act ("PSLRA"). See 15 U.S.C. § 78u-4(b)(1) (a complaint alleging misleading statements or omissions "shall specify each statement alleged to have been misleading, [and] the reason or reasons why the statement is misleading"). But this heightened standard does not apply to allegations of scheme liability "[b]ecause scheme liability does not require an allegation that the defendant made a statement."

Expanding the scope of scheme liability would thereby lower the bar for primary liability for securities fraud, along with the pleading standard in cases involving private plaintiffs.

After the district court denied the SEC's motion for reconsideration, it certified the issue for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). This Court granted the petition for leave to appeal an interlocutory order. We are therefore called upon to determine whether, post- *Lorenzo*, misstatements and omissions alone can form the basis for scheme liability.

IV

The facts of *Lorenzo* bear upon whether reconsideration of the Dismissal Order is warranted.

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As director of investment banking at an SEC-registered brokerage firm, *Lorenzo* sent two emails to prospective investors; the content of the emails was supplied by *Lorenzo's* boss and described a potential investment in a company that had "confirmed assets" of $10 million. *Lorenzo* knew, however, that the company recently disclosed that its total assets were worth under $400,000, and *Lorenzo* conceded scienter. The SEC brought enforcement proceedings against *Lorenzo* (among others).

Lorenzo held that the transmission of emails, or "dissemination," could sustain a claim under the scheme subsections that prohibit a "device," "scheme," "artifice to defraud," and/or fraudulent "practice." This language was held sufficiently broad to include dissemination.

Lorenzo further observed that there is "considerable overlap" between the subsections of Rule 10b-5 (and, similarly, between the subsections of Section 17(a)). *Lorenzo* rejected the view that only subsection (b) of Rule 10b-5 can regulate conduct involving false or misleading statements. So, even though *Lorenzo* did not make the false statement and his conduct was beyond the reach of Rule 10b-5(b), scheme liability was not precluded. Accordingly, the scheme subsections can cover conduct that involves a misstatement even if the defendant was not the maker of it.

V

This interlocutory appeal is limited to the legal issue raised in the SEC's motion for reconsideration: can misstatements and omissions *alone* form the basis for scheme liability? In our Circuit, this boils down to whether *Lorenzo* abrogated *Lentell*.

We rule that it did not. *Lentell* held that misstatements and omissions cannot form the "sole basis" for liability under the scheme subsections. 396 F.3d at 171. *Lorenzo* held that the "dissemination of false or misleading statements with intent to defraud" does come within the scheme subsections. But misstatements or omissions were not the sole basis for scheme liability in *Lorenzo*. The dissemination of those misstatements was key. Since the holdings of *Lentell* and *Lorenzo* are consistent with one another, *Lentell* remains vital.

On this narrow interlocutory appeal, we have no occasion to determine for ourselves whether the scheme liability claims in this complaint allege something beyond misstatements and omissions. Our analysis is premised on the district court's ruling in the Dismissal Order, which characterized the scheme liability claims as a collection of misstatements and omissions. Because *Lentell* withstands *Lorenzo*, and because the Dismissal Order ruled that the complaint alleges misstatements and omissions only, the district court did not abuse its discretion in declining to reconsider the dismissal of the scheme liability claims.

Whether there are ramifications or inferences from *Lorenzo* that blur the distinctions between the misstatement subsections and the scheme subsections is a matter

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that awaits further development…. As our opinion today is limited to the legal issue, we make no ruling about the ultimate impact of *Lorenzo* on this case. We do not consider, for example, whether corruption of an auditing process is sufficient for scheme liability under *Lorenzo*, or allegations that a corporate officer concealed information from auditors. For now, *Lentell* tells us that misstatements and omissions alone are not enough for scheme liability, and *Lorenzo* tells us that dissemination is one example of something extra that makes a violation a scheme.

We reject the SEC's argument that *Lentell* applies only in cases brought by private litigants. The SEC advances no credible basis for this argument; and courts have applied the principle of *Lentell* in enforcement actions….

VI

Maintaining distinctions between the subsections of Rule 10b-5 and between the subsections of Section 17(a) is consistent with the text of each. "One of the most basic interpretive canons is that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."… Were misstatements and omissions alone sufficient to constitute a scheme, the scheme subsections would swallow the misstatement subsections. And though *Lorenzo* ruled that there was "considerable overlap" between the misstatement subsections and the scheme subsections, it did not announce that the misstatement subsections were subsumed. In concluding that *Lentell* remains vital, we are respecting the structure that Congress designed.

We know that *Lorenzo* preserved the lines between the subsections because *Lorenzo* emphasized the continued vitality of *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011). *Janus* limits primary liability under Rule 10b-5(b) to the "maker" of a statement, i.e., the person with authority over a false statement; individuals who helped draft, research, print, or wordsmith the statement at some point in time, but who lacked ultimate control, cannot be primarily liable. Using *Janus* as a backstop, *Lorenzo* signaled that it was not giving the SEC license to characterize every misstatement or omission as a scheme. While *Lorenzo* "may have carved out of *Janus*" liability for disseminating false statements, it did not go so far as to create primary liability for "participation in the preparation" of misstatements….

Preserving distinctions between the subsections also assures that private plaintiffs remain subject to the heightened pleading requirements for Rule 10b-5(b) claims. Section b(1) of the PSLRA requires a complaint alleging misstatements or omissions to "specify each statement alleged to have been misleading, [and] the reason or reasons why the statement is misleading," whereas "claims brought under Rule 10b-5(a) and (c) need not comport with provision (b)(1) of the PSLRA" because they do not require that a misstatement be made. An overreading of *Lorenzo* might allow private litigants to repackage their misstatement claims as scheme liability claims to "evade the pleading

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requirements imposed in misrepresentation cases."… But courts have prohibited plaintiffs from recasting their pleadings in this way…. *Lorenzo* did not announce a rule contravening this principle.

Finally, overreading *Lorenzo* would muddle primary and secondary liability. This matters because "[a]iding and abetting liability is authorized in actions brought by the SEC but not by private parties." To respect the line that Congress has drawn between primary and secondary liability, subsections (a) and (c) have been used historically only "to state a claim against a defendant for the underlying deceptive devices or frauds themselves, and not as a short cut to circumvent *Central Bank's* limitations on liability for a secondary actor's involvement in making misleading statements."…

The SEC's reading of *Lorenzo* would likely "revive in substance the implied cause of action against all aiders and abettors," thereby "undermin[ing] Congress' determination that this class of defendants should be pursued by the SEC and not private litigants…." In sum, a widened scope of scheme liability would defeat the congressional limitation on the enforcement of secondary liability, multiply the number of defendants subject to private securities actions, and render the statutory provision for secondary liability superfluous. It is telling that *Lorenzo* preserves the distinction between primary and secondary liability. See *Lorenzo*, 139 S. Ct. at 1103 ("We do not believe ... that our decision ... weakens the distinction between primary and secondary liability."); id. at 1104 ("The line we adopt today is just as administrable" as the " 'clean line' between conduct that constitutes a primary violation of Rule 10b-5 and conduct that amounts to a secondary violation" under *Central Bank* and *Janus*).

CONCLUSION

For the foregoing reasons, we conclude that the district court did not abuse its discretion when it declined to reconsider the dismissal of the scheme liability claims in light of *Lorenzo*. Accordingly, we affirm.

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Chapter 12 — Insider Trading

§ 12.07 "Possession" versus "Use"

On page 818, add:

Rule 10b5-1 Amendments

Due to concerns that Rule 10b5-1 plans were being abused, the SEC in 2022 amended the Rule. As set forth by the Commission in the Fact Sheet, the 2022 amendments require additional conditions to establish an affirmative defense under Rule 10b5-1. These additional conditions include:

> [1] A cooling-off period for directors and officers of the *later of:* (1) 90 days following plan adoption or modification; or (2) two business days following the disclosure in certain periodic reports of the issuer's financial results in the fiscal quarter in which the plan was adopted or modified (but not to exceed 120 days following plan adoption or modification) before any trading can commence under the trading arrangement [*note that issuers engaged in share repurchases are not subject to a cooling-off period*].
>
> [2] A cooling-off period of 30 days for persons other than issuers or directors and officers before any trading can commence under the trading arrangement or modification.
>
> [3] A condition for directors and officers to include a representation in their Rule 10b5-1 plan certifying, at the time of the adoption of a new or modified plan, that (1) they are not aware of material nonpublic information about the issuer or its securities; and (2) they are adopting the plan in good faith and not part of a plan or scheme to evade the prohibitions of Rule 10b-5.
>
> [4] A limitation on the ability of anyone other than issuers to use multiple overlapping Rule 10b5-1 plans.
>
> [5] A limitation on the ability of anyone other than issuers to rely on the affirmative defense to a single-trade plan to *one such plan during any consecutive 12-month period;* and
>
> [6] A condition that all persons entering into a Rule 10b5-1 plan must act in good faith with respect to that plan.

The 2022 amendments also require new disclosure mandates outside the parameters of Rule 10b5-1. As set forth in the SEC's Fact Sheet, these new disclosure requirements include:

> [1] Quarterly disclosure by registrants regarding the use of Rule 10b5-1 plans and certain other written trading arrangements by a registrant's directors and officers for the trading of its securities.

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> [2] Annual disclosure of a registrant's insider trading policies and procedures.
>
> [3] Certain tabular and narrative disclosures regarding awards of options close in time to the release of material nonpublic information and related policies and procedures. [And]
>
> [4] A requirement that Form 4 and 5 filers [for the reporting of specified securities transactions by insiders, including officers and directors] indicate by checkbox that a reported transaction was intended to satisfy the affirmative defense conditions of Rule 10b5-1(c).

Rule 10b5-1 provides another affirmative defense for trading parties that are entities. This defense is available as an alternative to the defense discussed above. Under the provisions of this defense, an entity will not be liable if it demonstrates that the individual responsible for the investment decision on behalf of the entity was not aware of the material inside information, and that the entity had implemented reasonable policies and procedures to prevent insider trading.

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Chapter 15 — Securities Law Enforcement

§15.04 SEC Administrative Enforcement Remedies

On page 977, add

Axon Enterprise, Inc. v. Federal Trade Commission

Securities and Exchange Commission v. Cochran

United States Supreme Court
143 S. Ct. 890 (2023)

JUSTICE KAGAN delivered the opinion of the Court.

In each of these two cases, the respondent in an administrative enforcement action challenges the constitutional authority of the agency to proceed. Both respondents claim that the agencies' administrative law judges (ALJs) are insufficiently accountable to the President, in violation of separation-of-powers principles. And one respondent attacks as well the combination of prosecutorial and adjudicatory functions in a single agency. They maintain in essence that the agencies, as currently structured, are unconstitutional in much of their work.

Our task today is not to resolve those challenges; rather, it is to decide where they may be heard. The enforcement actions at issue were initiated in the Securities and Exchange Commission (SEC) and the Federal Trade Commission (FTC). Most objections to those Commissions' proceedings follow a well-trod path. As prescribed by statute, a party makes its claims first within the Commission itself, and then (if needed) in a federal court of appeals. The parties here, however, sidestepped that review scheme. Seeking to stop the administrative proceedings, they instead brought their claims in federal district court. The question presented is whether the district courts have jurisdiction to hear those suits—and so to resolve the parties' constitutional challenges to the Commissions' structure. The answer is yes. The ordinary statutory review scheme does not preclude a district court from entertaining these extraordinary claims.

I

Congress established the SEC to protect investors in securities markets and created the FTC to promote fair competition. The Commissions enforce, respectively, the Securities Exchange Act and the FTC Act (among other laws). Those Acts authorize the Commissions to address statutory violations either by bringing civil suits in federal district court or by instituting their own administrative proceedings.

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When a Commission elects the latter option—as in these two cases—it typically delegates the initial adjudication to an ALJ. To foster independence, each Commission's ALJs are removable "only for good cause" as determined by the Merit Systems Protection Board (MSPB)—a separate agency whose members are themselves removable by the President only for cause, such as "neglect of duty" or "malfeasance." An ALJ assigned to hear an SEC or FTC enforcement action has authority, much like a regular trial judge, to resolve motions, hold a hearing, and then issue a decision.

A losing party may appeal the ALJ's ruling to the Commission; alternatively, the Commission may undertake review on its own initiative. Upon completion of internal review, the Commission enters a final decision. Or if no such review has occurred, the ALJ's ruling itself becomes the decision of the Commission.

The Exchange Act and FTC Act both provide for review of a final Commission decision in a court of appeals, rather than a district court….

The cases before us, though, did not take the above-described course. In each, the respondent in an administrative enforcement action sued in district court prior to an ALJ decision, seeking to enjoin the Commission's proceeding. Each suit charged that some fundamental aspect of the Commission's structure violates the Constitution; that the violation made the entire proceeding unlawful; and that being subjected to such an illegitimate proceeding causes legal injury (independent of any rulings the ALJ might make). Finally, each suit premised jurisdiction on district courts' ordinary federal-question authority—their power, under 28 U. S. C. §1331, to resolve "civil actions arising under the Constitution, laws, or treaties of the United States." …

II

A

A special statutory review scheme, this Court has recognized, may preclude district courts from exercising jurisdiction over challenges to federal agency action. District courts may ordinarily hear those challenges by way of 28 U. S. C. §1331's grant of jurisdiction for claims "arising under" federal law. Congress, though, may substitute for that district court authority an alternative scheme of review. Congress of course may do so explicitly, providing in so many words that district court jurisdiction will yield. But Congress also may do so implicitly, by specifying a different method to resolve claims about agency action. The method Congress typically chooses is the one used in both the Exchange Act and the FTC Act: review in a court of appeals following the agency's own review process. We have several times held that the creation of such a review scheme for agency action divests district courts of their ordinary jurisdiction over the covered cases…. The agency effectively fills in for the district court, with the court of appeals providing judicial review.

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But a statutory review scheme of that kind does not necessarily extend to every claim concerning agency action. Our decision in *Thunder Basin* [510 U. S. 200 (1994)] made that point clear. After finding that Congress's creation of a "comprehensive review process" like the ones here ousted district courts of jurisdiction, the Court asked another question: whether the particular claims brought were "of the type Congress intended to be reviewed within this statutory structure." The Court identified three considerations designed to aid in that inquiry, commonly known now as the *Thunder Basin* factors. First, could precluding district court jurisdiction "foreclose all meaningful judicial review" of the claim? Next, is the claim "wholly collateral to [the] statute's review provisions"? And last, is the claim "outside the agency's expertise"? When the answer to all three questions is yes, "we presume that Congress does not intend to limit jurisdiction." But the same conclusion might follow if the factors point in different directions. The ultimate question is how best to understand what Congress has done—whether the statutory review scheme, though exclusive where it applies, reaches the claim in question. The first *Thunder Basin* factor recognizes that Congress rarely allows claims about agency action to escape effective judicial review. The second and third reflect in related ways the point of special review provisions—to give the agency a heightened role in the matters it customarily handles, and can apply distinctive knowledge to.

….

B

… Each of the three Thunder Basin factors signals that a district court has jurisdiction to adjudicate Axon's and Cochran's … sweeping constitutional claims.

We begin with the factor whose application here is least straightforward: whether preclusion of district court jurisdiction "could foreclose all meaningful judicial review." [Our decisions] make clear that adequate judicial review does not usually demand a district court's involvement. Review of agency action in a court of appeals can alone "meaningfully address[]" a party's claims.... Cochran and Axon are parties in ongoing SEC and FTC proceedings, and the statutes at issue provide for judicial review of SEC and FTC action. Under those statutes, Axon and Cochran can (eventually) obtain review of their constitutional claims through an appeal from an adverse agency action to a court of appeals….

Yet a problem remains, stemming from the interaction between the alleged injury and the timing of review…. The harm Axon and Cochran allege is "being subjected" to "unconstitutional agency authority"—a "proceeding by an unaccountable ALJ." That harm may sound a bit abstract; but this Court has made clear that it is "a here-and-now injury." And—here is the rub—it is impossible to remedy once the proceeding is over, which is when appellate review kicks in. Suppose a court of appeals agrees with Axon, on review of an adverse FTC decision, that ALJ-led proceedings violate the separation of powers. The court could of course vacate the FTC's order. But Axon's separation-of-powers claim is not about that order; indeed, Axon would have the same claim had it *won* before the agency. The claim, again, is about subjection to an illegitimate proceeding, led by an illegitimate decisionmaker. And as to that grievance, the court

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of appeals can do nothing: A proceeding that has already happened cannot be undone. Judicial review of Axon's (and Cochran's) structural constitutional claims would come too late to be meaningful.

The limits of that conclusion are important to emphasize. The Government, in disputing our position, notes that many review schemes—involving not only agency action but also civil and criminal litigation—require parties to wait before appealing, even when doing so subjects them to "significant burdens." That is true, and will remain so: Nothing we say today portends newfound enthusiasm for interlocutory review…. We have made clear, just as the Government says, that "the expense and disruption" of "protracted adjudicatory proceedings" on a claim do not justify immediate review. What makes the difference here is the nature of the claims and accompanying harms that the parties are asserting. Again, Axon and Cochran protest the "here-and-now" injury of subjection to an unconstitutionally structured decisionmaking process. And more, subjection to that process irrespective of its outcome, or of other decisions made within it. … [Here,] Axon and Cochran will lose their rights not to undergo the complained-of agency proceedings if they cannot assert those rights until the proceedings are over.

The collateralism factor favors Axon and Cochran for much the same reason—because they are challenging the Commissions' power to proceed at all, rather than actions taken in the agency proceedings…. Here, both parties object to the Commission's power generally, not to anything particular about how that power was wielded. The parties' separation-of-powers claims do not relate to the subject of the enforcement actions—in the one case auditing practices, in the other a business merger. Nor do the parties' claims address the sorts of procedural or evidentiary matters an agency often resolves on its way to a merits decision. The claims, in sum, have nothing to do with the enforcement-related matters the Commissions "regularly adjudicate[]"—and nothing to do with those they would adjudicate in assessing the charges against Axon and Cochran. Because that is so, the parties' claims are "'collateral' to any Commission orders or rules from which review might be sought."

....

Third and finally, Cochran's and Axon's claims are "outside the [Commissions'] expertise." On that issue, *Free Enterprise Fund* [561 U. S. 477 (2010)] could hardly be clearer. Claims that tenure protections violate Article II, the Court there determined, raise "standard questions of administrative" and constitutional law, detached from "considerations of agency policy." That statement covers Axon's and Cochran's claims that ALJs are too far insulated from the President's supervision. And Axon's constitutional challenge to the combination of prosecutorial and adjudicative functions is of a piece—similarly distant from the FTC's "competence and expertise." The Commission knows a good deal about competition policy, but nothing special about the separation of powers....

....

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All three *Thunder Basin* factors thus point in the same direction—toward allowing district court review of Axon's and Cochran's claims that the structure, or even existence, of an agency violates the Constitution. For the reasons given above, those claims cannot receive meaningful judicial review through the FTC Act or [Securities] Exchange Act. They are collateral to any decisions the Commissions could make in individual enforcement proceedings. And they fall outside the Commissions' sphere of expertise. Our conclusion follows: The claims are not "of the type" the statutory review schemes reach. A district court can therefore review them.