**No. 19-10396**

**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

MICHELLE COCHRAN,
*Plaintiff - Appellant*

v.

SECURITIES AND EXCHANGE COMMISSION; JAY CLAYTON, in his official capacity as Chairman of the U.S. Securities and Exchange Commission; WILLIAM P. BARR, U.S. ATTORNEY GENERAL, in his official capacity,
*Defendants - Appellees*

On Appeal from the United States District Court, Northern District of Texas, No. 4:19-CV-66-A, Honorable John McBryde, Presiding

# BRIEF OF PHILLIP GOLDSTEIN, MARK CUBAN, AND NELSON OBUS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL OF THE DISTRICT COURT'S ORDER

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Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record for *amici curiae* Phillip Goldstein, Mark Cuban, and Nelson Obus certifies that the following listed persons and entities, in addition to those already listed in the appellant's principal brief, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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## INTEREST OF THE AMICI CURIAE[1]

Michelle Cochran's ("Cochran" or "Ms. Cochran") appeal challenges the United States Securities and Exchange Commission's (the "SEC" or "Commission") use of administrative law judges ("ALJs") in enforcement proceedings. *See generally Lucia v. SEC*, 138 S. Ct. 2044 (2018) (finding that SEC ALJs were unconstitutionally appointed). Unlike defendants in federal court proceedings, respondents in SEC administrative proceedings are not afforded the right to a jury trial or the benefits and protections of the federal rules of evidence and procedure. Instead, when the SEC elects to use an administrative proceeding, whether before an ALJ or the Commissioners of the SEC (the "Commissioners"), the SEC determines a respondent's liability and punishment without the involvement of a jury. Such proceedings disregard the protections guaranteed to litigants by the United States Constitution, and lead to unequal and unjust results.

Phillip Goldstein is a sophisticated investor and leading authority in the investment adviser field. Mr. Goldstein has successfully challenged the SEC's overreach of its authority regarding the regulation of private investment funds before the U.S. Court of Appeals in the District of Columbia Circuit. *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006). Mr. Goldstein has an interest in ensuring that

[1] This brief is submitted under Federal Rule of Appellate Procedure 29(a) with the consent of all parties. Undersigned counsel for *amici curiae* certify that this brief was not authored in whole or part by counsel for any of the parties; no party or party's counsel contributed money for the brief; and no one other than *amici* and their counsel have contributed money for this brief.

every person subject to an enforcement action by the SEC is afforded the opportunity to argue the case before an Article III judge and a jury of his or her peers.

Mark Cuban is a successful businessman and investor. In October 2013, a jury in the Northern District of Texas found him not liable for claims brought against him by the SEC. *See* Court's Charge to the Jury, *SEC v. Cuban*, No. 3:08-cv-02050-D (N.D. Tex. Oct. 16, 2013), ECF No. 278. Mr. Cuban successfully argued that the SEC was attempting to sanction him based on a defective legal theory and incorrect facts. As an individual who achieved exoneration before a jury, Mr. Cuban has an interest in supporting Appellant's appeal in this case and in ensuring that future litigants are not forced into administrative proceedings that both favor the SEC and infringe on individuals' constitutional rights.

Nelson Obus is a prominent hedge-fund manager and has served on the board of directors of a number of public companies. In 2014, twelve years after originally being accused by the SEC of insider trading, Mr. Obus was found not liable of securities law violations by a jury of his peers. *See* Jury Verdict Form, *SEC v. Obus*, No. 1:06-CV-3150 (S.D.N.Y. June 2, 2014), ECF No. 163. After this protracted litigation, Mr. Obus has an interest in ensuring that defendants in SEC enforcement actions are able to vigorously defend themselves with the full

protections granted defendants in federal courts, including the right to a jury trial.

## INTRODUCTION

The SEC wants to have its cake and eat it too. The Commission has instituted an enforcement action against Ms. Cochran based on purported violations of the Securities Exchange Act of 1934 and seeks to impose a monetary penalty and to bar her from practicing as an accountant before the SEC. Yet, despite these serious allegations and the potential punishments they carry, the SEC has denied Ms. Cochran the constitutional protections she is entitled to—such as the Seventh Amendment right to a trial by jury in an Article III court—and intends instead to proceed in front of its own ALJ. The SEC's choice is both unconstitutional and leads to bizarre and unequal results for similarly situated defendants in SEC enforcement actions.

Consider the circumstances of Ms. Cochran compared to those of David Martin.[2] They are both certified public accountants in Texas. They both practiced before the SEC as accountants preparing or auditing public company financial statements. The SEC alleged that both Ms. Cochran and Mr. Martin aided and abetted a public company's failure to file accurate periodic reports. The SEC imposed monetary penalties against both of them. The SEC barred both of them

[2] David Martin was a defendant in *SEC v. Life Partners Holdings, Inc.*, No. 1:12-CV-00033-RP (W.D. Tex.), which was appealed by his co-defendants in *SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 781-82 (5th Cir. 2017)

from practicing before the Commission as accountants.

However, a critical difference between the two CPAs is that the SEC first brought suit against Mr. Martin in federal court—thus affording him a right to have a jury determine whether he had violated the federal securities laws—and only then did the SEC ask its ALJ to bar him from practicing as an accountant. Because the SEC elected to bring suit against Ms. Cochran in front of its own ALJ—bypassing federal court altogether—Ms. Cochran will be deprived of her constitutional right to have a jury determine whether she violated the federal securities laws unless this Court intervenes. The same would be true if the SEC had elected to hold a hearing in front of the Commissioners. No defendant's constitutional right to a jury should be trumped by the whim of a government plaintiff attempting to tip the scales in its favor by unilateral choice of forum.

This Court should ensure that the SEC does not overstep its authority and deny Ms. Cochran's constitutional right to a jury trial.

## ARGUMENT

### I. The Seventh Amendment to the United States Constitution Guarantees SEC Defendants the Right to a Jury

The Seventh Amendment guarantees defendants the right to a jury trial on the merits in those actions that "are analogous to '[s]uits at common law[,]'" like civil enforcement actions. *Tull v. United States*, 481 U.S. 412, 417 (1987). In *Tull*, the seminal case establishing a right to a jury trial in civil enforcement actions, the

defendant/petitioner, a real estate developer, was sued by the federal government for purported violations of the Clean Water Act. *Id.* at 414. After denying the defendant's request for a jury trial, the district court found the defendant guilty of violating the Clean Water Act and imposed a monetary penalty. *Id.* at 415, 420. On appeal, the Fourth Circuit affirmed the judgment. *Id.* at 416. The Supreme Court granted certiorari on the question of "whether the Seventh Amendment guaranteed [the defendant] a right to a jury trial on both liability and amount of penalty in an action instituted by the Federal Government seeking civil [monetary] penalties and injunctive relief . . . ." *Id.* at 414 (citation omitted). The Supreme Court reversed, holding that while the defendant was not entitled to a jury determination of the penalty, he had a "constitutional right to a jury trial to determine his liability on the legal claims." *Id.* at 425. The Court was unanimous on this point. *Id.*; *Id.* at 427 (Scalia, J., concurring in part and dissenting in part).[3]

The right to a jury determination of liability for civil penalties has been applied to SEC enforcement actions by several Circuit Courts, including this one. *See SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 781-82 (5th Cir. 2017) (accepting SEC's position that defendant was entitled to a jury determination of liability for aiding and abetting Securities Exchange Act of 1934 ("Exchange Act")

[3] The Supreme Court confirmed this holding in *Feltner v. Columbia Pictures Television, Inc.*, stating, "[i]n *Tull*, we held that the Seventh Amendment grants a right to a jury trial on all issues relating to liability for civil penalties . . . ." 523 U.S. 340, 354 (1998).

section 13(a) violation); *SEC v. Capital Sols. Monthly Income Fund, LP*, 818 F.3d 346, 354-55 (8th Cir. 2016) (recognizing defendant's right to a jury trial on liability in SEC enforcement action); *SEC v. Lipson*, 278 F.3d 656, 662 (7th Cir. 2002) (holding defendant was entitled to jury determination of liability).

*Life Partners Holdings* is particularly instructive here. 854 F.3d at 765. The SEC originally filed suit against Life Partners Holdings, Inc. ("Life Partners") and three of its executives (including David Martin, the accountant referenced above) in United States District Court alleging various violations of the Securities Act of 1933 and the Exchange Act. *See* Complaint, *SEC v. Life Partners Holdings, Inc.*, No. 1:12-CV-00033-RP (W.D. Tex. Jan. 3, 2012), ECF No. 1. While Martin settled the case against him before trial, *see* Final Judgment as to Defendant David M. Martin, *SEC v. Life Partners Holdings, Inc.*, No. 1:12-CV-00033-RP (W.D. Tex. Jan. 9, 2014), ECF No. 201, a jury in the Western District of Texas found the other two Life Partners executives liable. *See Life Partners Holdings*, 854 F.3d at 772. After the jury found the pair liable, the court imposed a civil monetary penalty against each of the executives and enjoined each from committing further securities law violations. *Id.* The two liable executives appealed both the jury's verdict and the district court's penalty determination to the Fifth Circuit, arguing, *inter alia*, that the court's imposition of civil monetary penalties violated their Seventh Amendment rights to a jury. *Id.* at 781. The SEC took the position that,

because a jury determined the underlying liability of the defendants, the district court was within its discretion to determine the amount of the civil monetary penalty. *Id.* The Fifth Circuit, relying on *Tull*, agreed with the SEC that a jury trial to determine liability was sufficient to meet the *Tull* requirements for complying with the Seventh Amendment, even if a jury did not determine the penalty. *Id.* at 782. Thus, based at least in part on the SEC's own arguments, this very Circuit has determined that those charged with aiding and abetting a violation of Exchange Act section 13(a) have a constitutional right to a jury trial on the issue of liability.

Yet here, the SEC has accused Ms. Cochran of the same conduct—aiding and abetting a violation of Exchange Act section 13(a)—but has decided to bring the case in its own administrative proceeding before one of its own ALJs. In so doing, the SEC denies Ms. Cochran the very same constitutional protection of a right to a jury determination of liability that it conceded was owed to the defendants in *Life Partners Holdings. See Life Partners Holdings*, 854 F.3d at 781. Indeed, if the SEC is permitted to go forward with an administrative proceeding, Ms. Cochran will never have the opportunity to argue her case in front of a panel of her peers. This is not a just—or constitutional—result.

## II. The SEC's Forum Shopping Leads to Unconstitutionally Unequal Protection

Under the scheme the SEC would have this Court bless, the prosecutor in civil enforcement actions, in this case the Commission, would have complete

discretion to choose to pursue two identical defendants in such disparate ways that one defendant would receive constitutional protections and the other would not. Such unfettered discretion will result in disfavored forum shopping and unequal application of the law.

Courts have long voiced concerns over both private litigants' and the government's use of impermissible forum shopping.[4] While it is not atypical—or even necessarily impermissible—for a party to seek a forum it believes may be more sympathetic, when a government agency unilaterally selects a forum that deprives—with no rational basis—a defendant of constitutional protections afforded to other similarly situated defendants, such disparate outcomes are not permissible under the Equal Protection Clause of the Constitution. *See Gupta v. SEC*, 796 F. Supp. 2d 503, 513-14 (S.D.N.Y. 2011) (denying SEC's motion to dismiss Equal Protection challenge to SEC administrative proceeding).[5]

In *Gupta*, the SEC brought an administrative proceeding against one individual despite having filed federal court actions against other individuals and entities based on related allegations. In denying the SEC's motion to dismiss

[4] *See, e.g.*, *Commodity Futures Trading Comm'n v. First Nat'l Monetary Corp.*, 565 F. Supp. 30, 33 (N.D. Ill. 1983) (noting that the government should be held to the same standard as private litigants and should not be allowed to choose a forum based merely on its convenience).

[5] While the Supreme Court has noted that discretionary decisions by agencies regarding similarly situated individuals do not inherently violate the Equal Protection Clause, *see Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 601-02 (2008), where, as here, there is "no rational basis for the difference in treatment," such decisions violate the Equal Protection Clause. *See Village of Willowbrook v. Olech,* 528 U.S. 562, 564-66 (2000).

Gupta's complaint challenging the administrative proceedings on Equal Protection grounds, the court observed, "[a] funny thing happened on the way to this forum. On March 1, 2011, the Securities and Exchange Commission . . . decided it preferred its home turf." *Gupta*, 796 F. Supp. 2d at 506. The court further noted that the complaint "alleges that the SEC intentionally, irrationally, and illegally singled Gupta out for unequal treatment" and that "[t]hese allegations . . . would state a claim even if Gupta were entirely guilty of the charges made against him . . . [and] even if the SEC were acting within its discretion when it imposed disparate treatment on Gupta, that would not necessarily exculpate it from a claim of unequal protection if the unequal treatment was still arbitrary and irrational." *Gupta*, 796 F. Supp. 2d at 513 (citing *Olech*, 528 U.S. at 564–66).

The court denied the SEC's motion to dismiss Gupta's Equal Protection claim, finding that "the selective prosecution/equal protection claim will turn entirely on extrinsic evidence of whether the SEC's decision to treat Gupta differently from the other Galleon-related defendants was irrational, arbitrary, and discriminatory." *Gupta*, 796 F. Supp. 2d at 514. The SEC would have to overcome the fact that Gupta was "being treated substantially disparately from 28 essentially identical defendants, with not even a hint from the SEC, even in their instant papers, as to why that should be so." *Id.*

As was the situation in *Gupta*, so it is here regarding Ms. Cochran. Forum

shopping by itself may not be impermissible. But forum shopping by the federal government to pursue the same claims and penalties against similarly situated individuals so that one individual has access to a jury and the other does not violates the Equal Protection Clause of the Constitution.

## III. Congress Has Not Assigned the SEC a Function Incompatible with the Seventh Amendment Right to a Jury

Even if the Constitution permitted the SEC to by-pass a defendant's Seventh Amendment rights—which it does not—Congress has not determined that SEC administrative proceedings require fact-finding activities incompatible with the Seventh Amendment right to a jury trial and therefore mandated that the SEC pursue federal securities law liability determinations in administrative proceedings. Accordingly, SEC administrative proceedings are not like those addressed by the Supreme Court decision in *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977).

In *Atlas Roofing*, the Supreme Court took up the question of whether Congress was empowered to create a cause of action by statute that included civil penalties enforceable in an administrative agency where there is no jury trial. *Id.* at 444. The petitioners in *Atlas Roofing* were cited for violations of the Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 651 *et seq.*, which specifically provided that all appeals of citations were to be made to the Secretary of Labor and then heard by an administrative law judge. 430 U.S. at 445-46.

Petitioners contested these citations and, per statute, were afforded hearings before ALJs, who affirmed the citations. *Id.* at 447-48. After the Fifth Circuit affirmed, the Supreme Court took up the case and found that the Seventh Amendment "does not prohibit Congress from assigning the factfinding function . . . to an administrative forum with which the jury would be incompatible" and that where the function of deciding whether a violation of a statutory obligation has occurred has been "committed exclusively to an administrative agency . . ." the statutory scheme survives Seventh Amendment scrutiny. *Id*. at 450 (emphases added).

But that is not the case here. Congress did not "exclusively" commit the fact-finding function in SEC enforcement actions seeking monetary penalties to an administrative agency. Quite the contrary: the SEC is permitted—if not explicitly obligated—to bring such actions in the district courts of the United States. *See* Exchange Act, 15 U. S. C. §78aa ("The district courts of the United States . . . shall have exclusive jurisdiction of violations of [the Exchange Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by [the Exchange Act] or [the] rules or regulations thereunder . . . ."). Beyond that grant of exclusive federal court jurisdiction, the SEC has statutory discretion to bring enforcement actions in federal court. *See* 15 U.S.C. § 78u(d)(3)(A) ("Whenever it shall appear to the Commission that any person has violated any provision of this chapter [or] the

rules or regulations thereunder . . . the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid . . . .").[6] In short, and as the SEC itself has acknowledged by bringing enforcement actions such as *Life Partners Holdings* in federal court, there is nothing about the sorts of claims presented against Ms. Cochran that requires an ALJ, or the Commissioners, to conduct specialized fact-findings or make determinations of liability. *Life Partners Holdings*, 854 F.3d at 781-82. Thus, the holding of *Atlas Roofing* does not provide the SEC with legal authority to deprive Ms. Cochran of her constitutional right to a jury determination of whether she violated the Exchange Act.

## IV. The SEC Regularly Employs a Constitutional Method For Federal Securities Law Liability Determinations

To be sure, Congress has authorized the SEC both to impose civil penalties and to bar individuals from practicing before the Commission. *See* 15 U.S.C. § 78u-2(a)(1) and 15 U.S.C. § 78d-3(a)(3). However, nothing in either statute requires the Commission to impose such punishments prior to a federal court determination of liability, and, in fact, the SEC regularly imposes punishments administratively after liability has been determined in federal court.

[6] By contrast, the statute at issue in *Atlas Roofing* provided that where a citation was contested, the Occupational Safety and Health Review "Commission shall afford an opportunity for a hearing" and "shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating . . ." the citation. 29 U.S.C. § 659(c).

The SEC itself refers to these oft-employed proceedings as "follow-on administrative proceedings" ("Follow-on APs"). In its most recent annual report, the SEC's Division of Enforcement noted that in FY 2018 alone the SEC brought two hundred ten (210) "'follow-on' proceedings seeking bars based on the outcome of Commission actions or actions by criminal authorities or other regulators . . . ." (U.S. Securities and Exchange Commission Division of Enforcement Annual Report FY 2018, https://www.sec.gov/files/enforcement-annual-report-2018.pdf).

The case against David Martin discussed above is a representative example of a Follow-on AP. The SEC first sued Mr. Martin in federal court, affording him constitutional protections and giving him the opportunity to have liability determined by a jury. *See* Complaint, *Life Partners Holdings*, No. 1:12-CV-00033-RP, ECF No. 1. Mr. Martin settled his federal court case with the SEC, and the court entered a final judgment against him. *See* Final Judgment as to Defendant David M. Martin, *Life Partners Holdings*, No. 1:12-CV-00033-RP, ECF No. 201. Following conclusion of the federal court case, the SEC conducted a Follow-on AP in which the SEC suspended Mr. Martin's ability to practice as an accountant before the SEC. *See* Order Instituting Administrative Proceedings Pursuant To Rule 102(e)(3), Securities Exchange Act Release No. 71523, Administrative Proceeding File No. 3-15747 (Feb. 11, 2014),

https://www.sec.gov/litigation/admin/2014/34-71523.pdf. The SEC's administrative order against Mr. Martin explicitly cites the federal court judgment as a "finding" that formed the basis for the administrative proceeding and suspension. *Id.*

The SEC's widespread practice of using Follow-on APs to impose penalties after the conclusion of a federal court action may in fact *reduce* the SEC's administrative burden because the SEC often uses the federal court findings to resolve the Follow-on APs by summary disposition without hearing. *See Seghers v. SEC*, 548 F.3d 129, 133 (D.C. Cir. 2008). In *Seghers*, the SEC brought an action in federal court in the Northern District of Texas alleging violations of the federal securities laws. A jury returned a verdict against Seghers, who then filed a motion for judgment as a matter of law, which the district court denied. This Court affirmed the district court's judgment. *SEC v. Seghers*, 298 F. App'x 319, 324 (5th Cir. 2008) (finding in part "the jury's findings that Seghers violated the relevant securities laws are supported by legally sufficient evidence"). The SEC's Division of Enforcement then instituted a Follow-on AP against Seghers, and the SEC's ALJ imposed by summary disposition a bar against Seghers from associating with any investment adviser. *Seghers*, 548 F.3d at 132.

This very common sequencing by the SEC—liability established in federal court with remedies imposed in a Follow-on AP—both protects defendants'

constitutional rights and allows the SEC to engage in its mission without undue burden. Sequencing liability and remedies determinations in a constitutional manner is neither untested nor burdensome.

## CONCLUSION

For the reasons set forth herein, the Court should find that an administrative hearing to determine Ms. Cochran's liability for alleged securities law violations without providing her with access to a jury in federal court would violate Ms. Cochran's Seventh Amendment and Equal Protection rights and should not be permitted.

Dated: June 17, 2019

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 17, 2019, I caused the foregoing Brief to be electronically filed with the Clerk of Court using the CM/ECF filing system, which will send notice of such filing to all registered CM/ECF users.

*/s/ Samuel W. Cooper*
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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(d) because it contains 3952 words according to Microsoft Word, excluding the parts exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it is in Times New Roman 14-point font.

June 17, 2019

*/s/ Samuel W. Cooper*
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