No. 19-10396

In the United States Court of Appeals for the Fifth Circuit

MICHELLE COCHRAN,

Plaintiff – Appellant,

v.

U.S. 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 for the Northern District of Texas, Case No. 4:19-CV-66-A

BRIEF OF TEXAS PUBLIC POLICY FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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INTEREST OF *AMICUS CURIAE*[*]

The Texas Public Policy Foundation (TPPF) is a non-profit, non-partisan research institute dedicated to promoting and defending liberty, personal responsibility, and free enterprise throughout Texas and the nation. For decades, TPPF has worked to advance these goals through research, policy advocacy, and impact litigation.

The principle of separation of powers lies at the core of TPPF's mission. This case—which hinges on whether a citizen must run a gauntlet of extended, demanding, and constitutionally fraught administrative proceedings before challenging an executive-branch official's authority to adjudicate her claim—implicates that principle and will affect all citizens—in Texas or elsewhere—facing such proceedings. Given these considerations, TPPF has an important interest in the Court's resolution of this case.

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[*] Both parties have consented to the filing of this *amicus* brief. This brief was not authored in whole or in part by counsel for any party. No party, party's counsel, or person—other than *amicus curiae* or its counsel—contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

ARGUMENT

Separation of powers is the genius of our Constitution—and one of its most important liberty-protecting structures. But its vitality depends upon the judiciary carrying out its unique responsibility to keep the elected branches within their assigned roles. That responsibility is especially important when it comes to safeguarding the rights of ordinary citizens vis-à-vis the vast administrative state.

A separation-of-powers challenge to the authority of an administrative law judge to adjudicate an enforcement proceeding is, by its very nature, properly brought to an Article III court—not raised in an administrative proceeding before the very decision-maker whose authority is in question.

Such a challenge, like a request for judicial recusal or a challenge to judicial neutrality, reflects concerns not only about fairness in individual cases but also about the structural integrity of the justice system as a whole. And it has nothing to do with the merits of the case but is, to use the legal jargon, entirely "collateral" to them. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212–13 (1994) (jurisdiction to

review agency action will lie if, among other things, the suit is "wholly collateral" to a statute's review provision).

If anything, analogizing a structural challenge to the constitutional authority of an administrative law judge to judicial recusal makes it even clearer that there is jurisdiction over Ms. Cochran's separation-of-powers challenge. Unlike a request for recusal, at issue here are not particularized objections to a specific arbiter, but structural concerns that sweep across the entire system of adjudication.

Some courts that have mistakenly concluded that jurisdiction is lacking over challenges to the constitutionality of an agency decision-maker have erroneously analogized such challenges to an affirmative defense, but the two are nothing alike. *E.g.*, *Tilton v. SEC*, 824 F.3d 276, 288 (2d Cir. 2016). Indeed, that line of reasoning reflects a fundamental and deeply problematic misunderstanding of separation of powers itself, which is a *structural* protection of individual liberty.

The federal courts must be open for Ms. Cochran's separation-of-powers challenge, and the district court's contrary conclusion cannot stand.

I. Structural Challenges Like Ms. Cochran's Resemble Challenges To Judicial Partiality And Bias.

Ms. Cochran's constitutional challenge, like a challenge to the impartiality of an adjudicator, is a structural argument that is collateral to the merits of her case—and that similarity confirms that the federal courts have jurisdiction over her challenge.

Since 1792, judges have been required to recuse themselves when they have "an interest in the suit." *Liteky v. United States*, 510 U.S. 540, 543–44 (1994). This recusal requirement was broadened in 1821, when "the basis of recusal was expanded to include all judicial relationship or connection with a party that would in the judge's opinion make it improper to sit." *Id.* And in 1911, the recusal requirement was expanded further still to include bias in general. *Id.*

The current recusal requirement enshrined in the U.S. Code provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Disqualification should also occur where a judge "has a financial interest in the subject matter in controversy or in a party to the proceeding, or

any other interest that could be substantially affected by the outcome of the proceeding." *Id.* § 455(b)(4).

Like separation-of-powers concerns, recusal doctrines raise structural, not substantive, considerations. They serve "to protect the parties' basic right to a fair trial in a fair tribunal." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 887 (2009). In keeping with that weighty interest, arguments for recusal are not (or at least should not be) deployed to obtain a litigation advantage. As this Court has long recognized, "a litigant should not be permitted to utilize a disqualification issue as part of his trial strategy." *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1115 (5th Cir. 1980).

Like Ms. Cochran's challenge here, the recusal of a judge does not defeat a cause of action; rather, after recusal, "the case [is] transferred to another judge." *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 457 (5th Cir. 1996). That reassignment takes place "because of the necessity to preserve the appearance of impartiality, fairness, and justice." *Johnson v. Sawyer*, 120 F.3d 1307, 1334 (5th Cir. 1997). Those same types of concerns are implicated here, where Ms. Cochran seeks to vindicate her right to have her claims adjudicated by an arbiter appointed in

accordance with proper constitutional protections. As with recusal, Ms. Cochran's challenge does not go to the merits of the underlying proceeding. Her claim does not implicate the Securities Exchange Act or any other SEC-administered law: She does not challenge the constitutionality of the statute that governs the merits determination of the claims brought against her.

As a result, her constitutional challenge does not resemble those that courts have found can be properly considered in conjunction with the merits of a case. *Cf. Elgin v. Department of Treasury*, 567 U.S. 1, 22–23 (2012); *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 632–33 (4th Cir. 2018) (claims not wholly collateral where litigant challenged constitutionality of underlying statute); *Bank of Louisiana v. FDIC*, 919 F.3d 916, 921 & n.9 (5th Cir. 2019) (challenge to due process afforded in proceeding but not to the authority of the administrative law judge presiding over the enforcement proceeding).

Instead, Ms. Cochran's challenge goes to the *structure* and constitutional legitimacy of the adjudicatory body established to pass judgment on those claims. Her challenge is wholly collateral to the underlying merits and need not be addressed by the administrative law

judge before a court can consider it. Such a claim does not implicate the agency's expertise as it requires no understanding of the industry and no considerations of agency policy. *See Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 (2010). The administrative law judge is not being asked to interpret or apply a statute underlying the merits of the proceeding, but to determine the propriety of his own appointment under the Constitution. There is no basis for treating this constitutional claim as an inextricable part of the underlying merits, given that it stands entirely apart from them.

If anything, the limits of the recusal analogy highlight how far Ms. Cochran's challenge is from the expertise of an administrative law judge. While judicial recusal motions likewise implicate structural concerns of impartiality and independence, they typically involve concerns unique to a particular judge, such as a direct financial interest in a case or the interest of a family member. *See Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1029 (5th Cir. 1998) (collecting cases). As those particularized concerns are often rooted in facts best known to an individual judge, it makes sense for that judge to have the opportunity to pass upon those concerns in the first instance.

But Ms. Cochran's challenge is wholly structural—it is not specific to any particular administrative law judge, but to the appointment process of the agency as a whole. There is thus even *less* reason for individual administrative law judges to adjudicate broad structural claims like Ms. Cochran's—because the issues are even less properly within their expertise, and because there are no adjudicator-specific facts involved that the administrative law judge must adduce. There are no facts at all that could be solicited during this proceeding to cure the alleged defect—so agency expertise need not be invoked at all.

Under these circumstances, the federal courts have jurisdiction over Ms. Cochran's structural challenge. A contrary conclusion would undermine the separation of powers and the vital protections it affords to citizens like Ms. Cochran.

II. A Separation-Of-Powers Challenge To The Authority of An Administrative Law Judge Is Nothing Like An Affirmative Defense.

Despite the similarities between Ms. Cochran's separation-of-powers challenge to the authority of an administrative law judge and a challenge to the impartiality of an adjudicator, some courts have analogized challenges like Ms. Cochran's to something very different—

an affirmative defense. Properly understood, however, a challenge to the authority of an administrative law judge on separation-of-powers grounds bears no resemblance to an affirmative defense. The analogy is not merely flawed but also badly misunderstands the nature of separation of powers as a structural protection of individual liberty.

At common law, defendants pled "by way of 'confession and avoidance' which permitted a defendant *who was willing to admit that the plaintiff's declaration demonstrated a prima facie case* to then go on and allege additional new material that *would defeat the plaintiff's otherwise valid cause of action*." 5 Charles Alan Wright et al., Federal Practice and Procedure § 1270 (3d ed. 2002) (emphases added). A defendant was prevented from denying the elements of a plaintiff's claim while simultaneously asserting "confession and avoidance" because "confession and avoidance" required a defendant to "*admit* the truth of the matter set forth in the complaint." *Id.* (emphasis added); s*ee also Ingraham v. United States*, 808 F.2d 1075, 1079 (5th Cir. 1987) (evaluating whether a claim was an affirmative defense by relying, in part, on the definition of "avoidance").

Federal Rule of Civil Procedure 8(c) "is a lineal descendant" of that common law plea, 5 Charles Alan Wright et al., Federal Practice and Procedure § 1270,[1] requiring a defendant to "affirmatively state any avoidance or affirmative defense." Fed. R. Civ. P. 8(c).[2] Rule 8 of the Federal Rules of Civil Procedure lists eighteen affirmative defenses—all of which *defeat* a cause of action even when the plaintiff proves the elements of his or her claim. Fed. R. Civ. P. 8(c) (listing, for example, statute of limitations, laches, and estoppel).

Indeed, Black's Law Dictionary defines an affirmative defense as an "assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." *Defense*, Black's Law Dictionary (11th ed. 2019) ("Also termed *plea in avoidance*"). *Cf. Simon v. United States*, 891 F.2d 1154, 1157 (5th Cir. 1990) ("An avoidance in pleadings is an 'allegation

[1] *See* Hon. Amy St. Eve & Michael A. Zuckerman, *The Forgotten Pleading*, 7 FED. CTS. L. REV. 152, 162 (2013) (The "modern concept of the affirmative defense is derived from the common law plea of 'confession and avoidance.' This means that an affirmative defense should accept, rather than contradict, well-pleaded allegations of the complaint (the 'confession') and then state why the pleader is nonetheless entitled to prevail (the 'avoidance')." (internal quotation marks omitted)).

[2] The modern federal rules, however, allow for alternative pleading, thereby eliminating the common law requirement that a defendant could not both deny the allegations *and* assert an affirmative defense. *See* Fed. R. Civ. P. 8(d).

or statement of new matter, in opposition to a former pleading, which, admitting the facts alleged in such former pleading, shows cause why they should not have their ordinary legal effect.'" (quoting *Ingraham*, 808 F.2d at 1079)).

Challenging the constitutionality of an administrative law judge on separation-of-powers grounds is thus quite different from pleading an affirmative defense, because the former does not "share the common characteristic of a bar to the right of recovery even if the general complaint were more or less admitted to." *Emergency One, Inc. v. Am. Fire Eagle Engine Co.*, 332 F.3d 264, 271 (4th Cir. 2003) (internal quotation marks and alteration omitted); *accord United States v. Scully*, 877 F.3d 464, 476 (2d Cir. 2017) (holding in a fraud case that the advice-of-counsel defense was not an affirmative defense because it did not "defeat[ ] liability even if the jury accept[ed] the government's allegations as true").

Ms. Cochran does not admit that the allegations are true, or even assume the fact for the sake of argument. Nor would ruling in her favor on her constitutional argument necessarily end the proceedings against her. As in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), her claim can be

remanded for "the Commission itself[] [to] hold the new hearing." *Id.* at 2055.

In contrast, a constitutional claim must be brought in an administrative proceeding if the constitutional claim is "the vehicle by which [petitioners] seek to reverse [substantive] decisions of the agency," such as through a constitutional challenge to an aspect of the statute the agency seeks to apply. *See, e.g., Elgin*, 567 U.S. at 22. In *Elgin*, prevailing on the constitutional argument would have dictated the outcome of the agency's proceeding; here, it would simply require that the SEC carry out that proceeding in a constitutional manner.

Comparing Ms. Cochran's constitutional challenge to an affirmative defense is thus inapt and unhelpful in deciding whether that challenge is "wholly collateral" because it does not and cannot "function[] as an alternative defense." *Tilton*, 824 F.3d at 287. Indeed, discussing this issue in terms of a "defense" or a "denial" at all is forcing a square peg into a round hole.

Nonetheless, some courts have concluded that structural challenges to the authority of administrative law judges are or should be raised as affirmative defenses—but these courts have reached that conclusion

cursorily, with little reasoning, and without considering the analogy to judicial recusal. *See Bennett v. SEC*, 844 F.3d 174, 187 (4th Cir. 2016) ("Here, by contrast, Bennett's claim arises out of the enforcement proceeding and provides an affirmative defense. If she succeeds, Bennett will invalidate a Commission Order."); *Tilton,* 824 F.3d at 287 (agreeing with district court's decision "that the claim did not qualify as 'wholly collateral' because it was procedurally intertwined with the SEC's ongoing proceeding, where it functioned as an affirmative defense"); *Bebo v. SEC*, 799 F.3d 765, 767 (7th Cir. 2015) (implicitly concluding that the respondent's Article II challenge did not qualify as wholly collateral to the ongoing administrative proceeding because it was raised there as an affirmative defense).

This Court's recent decision citing the SEC ALJ cases confirms why the affirmative-defense analogy does not work in the context of structural constitutional challenges like this one. In *Bank of Louisiana*, the plaintiff alleged violations of the Equal Protection and Due Process Clauses. 919 F.3d at 921, 928. Those arguments *did* act as affirmative defenses: the equal-protection challenge could result in the termination of the

proceedings, and the due-process challenge could result in the final order being overturned.

But here, there is neither a proceeding nor an order that Ms. Cochran is attempting to defeat, which is the ultimate goal of any affirmative defense—and an analogy to an affirmative defense therefore does not work. *Bank of Louisiana* thus illustrates the circumstances where an affirmative-defense analogy *is* appropriate, and why that analogy does not hold where, as here, a litigant is bringing a structural challenge to the arbiter's authority to preside over a proceeding.

CONCLUSION

The judgment should be reversed and the case remanded for further proceedings.

Dated: June 17, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief answer complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because this brief was prepared in 14-point New Century Schoolbook, a proportionally spaced typeface, using Microsoft Word 2016. *See* Fed. R. App. P. 29(a)(4), (b)(4), 32(g)(1). This brief complies with the type-volume limitation of Rule 29(b)(4) because it contains 2,640 words, excluding the parts exempted from under Rule 32(f).

/s/ *Allyson N. Ho*
Allyson N. Ho

CERTIFICATE OF SERVICE

I hereby certify that, on June 17, 2019, a true and correct copy of the foregoing answer was served via the Court's CM/ECF system on all counsel of record.

/s/ *Allyson N. Ho*
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