No. 19-10396

IN THE 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

PETITION FOR REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant Michelle Cochran certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case.

Appellant

Michelle Cochran

Appellees

Securities and Exchange Commission; Jay Clayton, in his official capacity as Chairman of the U.S. Securities and Exchange Commission; William Barr, U.S. Attorney General, in his official capacity.

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RULE 35(b)(1) STATEMENT

The petition raises an issue of exceptional importance: whether federal securities laws implicitly bar federal district courts from hearing claims that the Securities and Exchange Commission (SEC) is conducting administrative proceedings in an unconstitutional manner. Petitioner contends that SEC is violating separation-of-powers principles because the administrative law judge (ALJ) conducting the proceeding is insulated from control by the President by multiple layers of for-cause removal restrictions. The jurisdictional issue has arisen with increasing frequency in federal appeals courts—particularly in the wake of three recent Supreme Court decisions, *Free Enterprise Fund v. Pub. Co. Accounting Oversight Board*, 561 U.S. 477 (2010) (*FEF*), *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020)—that call into serious question the constitutionality of these removal restrictions. But the divided panel's holding—that the targets of these controversial SEC proceedings may raise their constitutional objections only after a final SEC order—makes it exceedingly difficult for those individuals ever to bring their claims in federal court.

The panel decision conflicts with at least two Supreme Court decisions: *FEF* and *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). Under *Thunder Basin*, whether a federal court has jurisdiction to hear challenges to ongoing administrative proceedings is an agency-specific question of statutory law. But the panel majority

erroneously held that it was bound by a prior decision of this Court interpreting the FDIC's statutory scheme. *Bank of Louisiana v. FDIC*, 919 F.3d 916 (5th Cir. 2019). The Supreme Court, however, has already held that district courts have jurisdiction to hear separation-of-powers challenges to the SEC's administrative proceedings. *FEF*, 561 U.S. at 489-90.

/s/ Margaret A. Little
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STATEMENT OF ISSUES MERITING *EN BANC* REVIEW

Congress has granted federal district courts original jurisdiction over "all civil actions" arising under the U.S. Constitution. The panel held, however, that Congress impliedly stripped district courts of jurisdiction over constitutional challenges to SEC enforcement actions when it adopted 15 U.S.C. § 78y, which authorizes "[a] person aggrieved by a final order of the [SEC]" to obtain review of the order in the federal appeals courts. Even though the statute is silent regarding the rights of persons, like Appellant Michelle Cochran, who are aggrieved by ongoing, unconstitutional SEC proceedings, the panel held that it was "fairly discernible" from the language of § 78y that Congress intended to preclude district court jurisdiction over such claims.

That jurisdictional issue merits *en banc* review because it is "a question of exceptional importance." Fed. R. App. P. 35(a). Although the issue has arisen recently in federal appeals courts, this case marks the first time it has come before this Court. But rather than giving the issue the *de novo* consideration it deserved, the panel majority erroneously concluded that it had already been decided in an earlier case, *Bank of Louisiana v. FDIC*, 919 F.3d 916 (2019). But *Bank of Louisiana* addressed the jurisdictional impact of an entirely different statute, 12 U.S.C. § 1818(h), which vests "exclusive" jurisdiction to review final orders of the FDIC Board in the federal appeals courts. Needless to say, Congress's purpose in

adopting § 1818(h) has no bearing on whether it intended § 78y to restrict district court jurisdiction over constitutional claims against SEC.

The § 78y jurisdictional issue is exceptionally important because there are substantial grounds for concluding that SEC enforcement proceedings are unconstitutionally structured. Recent Supreme Court decisions have established a "general rule" that "the President possesses 'the authority to remove those who assist him in carrying out his duties,'" and that statutes restricting that authority violate separation-of-powers principles (subject to exceptions not applicable here). *Seila Law*, 140 S. Ct. at 2198 (quoting *FEF*, 561 U.S. at 513-14). SEC ALJs possess multiple layers of for-cause removal protection, and thus there are substantial grounds for concluding those proceedings are unconstitutionally structured.[1]

Early resolution of that constitutional issue is of utmost importance to avoid subjecting Americans to unconstitutional proceedings—and to prevent their having to endure multiple, voidable administrative adjudications. Early resolution may occur if the Court grants *en banc* review and determines that the district courts possess jurisdiction over the constitutional claims of Cochran and others targeted by SEC enforcement actions brought in unlawful administrative proceedings.

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[1] In *Lucia*, the United States asked the Court to address the constitutionality of SEC ALJ removal restrictions. The Court declined, explaining that as lower courts have not yet addressed removal, it "ordinarily await[s] lower court opinions to guide our analysis of the merits." *Lucia*, 138 S. Ct. at 2050 n.1.

If the Court allows the panel decision to stand, the separation-of-powers issue likely will not reach the federal courts any time soon. Individuals subject to SEC enforcement proceedings can, theoretically, present such claims to a federal appeals court after they have endured the constitutional harm of a hearing before an ALJ unlawfully protected from removal. But given the high cost of defending lengthy enforcement proceedings, SEC's phenomenal success rate (the Commission almost always rules for itself)[2], and the immediate crippling impact of SEC industry bars and fines, the vast majority of SEC targets feel compelled to settle long before a final order is issued.

Raymond Lucia, the successful petitioner in *Lucia v. SEC*, well illustrates the problem. Throughout many years of enforcement proceedings, Lucia argued that the proceedings were unconstitutional—both because ALJs had not been properly appointed under the Appointments Clause and because their multiple-layered for-cause removal protection violated the separation of powers. Lucia finally prevailed on the Appointments Clause issue in the Supreme Court. But then SEC re-instituted administrative enforcement proceedings in front of an SEC ALJ who still had embedded multiple removal protections. After a federal district court ruled that

[2] Between October 2010 and March 2015, the Commission won more than 90% of cases before SEC ALJs, a rate markedly higher than its 69% success rate in federal court over the same period. Jean Eaglesham, *SEC Wins With In-House Judges*, Wall St. J. (May 6, 2015).

Lucia—like Cochran—must await an SEC final order before pursuing his constitutional claims in federal court, *Lucia v. SEC*, U.S. Dist. LEXIS 143906 (S.D. Cal, Aug. 21, 2019), Lucia threw in the towel and negotiated settlement with SEC. Unlike Cochran, Lucia was unable to obtain a stay pending appeal from the circuit court of appeals. *Lucia v. SEC*, U.S. App. LEXIS 2228 (9th Cir. Jan. 23, 2020).

The jurisdictional issue also merits *en banc* review because it conflicts with at least two Supreme Court decisions: *FEF* and *Thunder Basin*. Those decisions make clear that agency-specific statutes do not strip district courts of jurisdiction over claims challenging the constitutionality of an agency's enforcement action when, as here, those claims are "collateral" to the subject matter of the enforcement action, do not fall within the agency's competence or expertise and deny meaningful judicial review. *FEF* held that district courts have jurisdiction to hear separation-of-powers challenges to SEC's administrative regimes under § 78y.

STATEMENT OF FACTS AND DISPOSITION OF CASE

Michelle Cochran, a CPA licensed in Texas, worked on audits at a small accounting firm, The Hall Group CPAs, until she resigned in July 2013 due to difficult working conditions. ROA.137-38. Almost three years later, SEC filed an Order Instituting Proceedings under the Exchange Act against David Hall (the firm's 100% owner), Cochran, and another accountant, alleging non-compliance with

certain auditing standards from 2010 to 2013.[3] ROA.22 ¶15. Unable to afford counsel, Ms. Cochran proceeded *pro se*. ALJ Cameron Elliot found for SEC, fined Cochran $22,500, and barred her from practicing as an accountant for publicly listed companies for five years (a devastating penalty for a single mom and sole breadwinner). ROA.32. SEC adopted the ALJ decision, and Cochran appealed. Cochran's administrative appeal remained unresolved for over a year.

Meanwhile, in *Lucia*, the Supreme Court held that SEC ALJs were improperly appointed inferior officers, 138 S. Ct. at 2055, vacating Cochran's proceedings. Although the *Lucia* Court declined to address the embedded removal question, the government confessed that the status of ALJs as inferior officers meant they were unconstitutionally protected from removal and urged the Court to address removal to "avoid needlessly prolonging the period of uncertainty and turmoil caused by litigation of these issues." *Lucia*, Brief for Resp't at 21. Citing *FEF*, the government asserted SEC's "statutory scheme provides for at least two, and potentially three, levels of protection against presidential removal authority." *Id.*

In October 2018, eight years after Cochran's charged events, SEC reinstituted enforcement proceedings. ROA.50. Ms. Cochran moved to dismiss the administrative proceedings and then filed this action in district court to resolve the

[3] Cochran's enforcement proceeding is available at https://www.sec.gov/litigation/apdocuments/ap-3-17228.xml.

structural removal question. ROA.6-28. On March 25, 2019, the district court dismissed her case for lack of subject-matter jurisdiction, noting:

> The court is deeply concerned with the fact that plaintiff already has been subjected to extensive proceedings before an ALJ who was not constitutionally appointed … She should not have been put to the stress of the first proceedings, and, if she is correct in her contentions, she again will be put to further proceedings, undoubtedly at considerable expense and stress, before another unconstitutionally appointed administrative law judge.

ROA.14.

Ms. Cochran timely appealed to this court. Meanwhile, the ALJ denied her motion to dismiss, instituting the very constitutional harm Cochran seeks to prevent via this lawsuit. In August 2019, Cochran asked this court to enjoin the administrative proceedings pending appeal. After argument on September 24, 2019, a unanimous panel of this court (Jones, Higginson, and Oldham, JJ.) issued a stay pending hearing on the merits and expedited the appeal.

On August 11, 2020, the panel majority (Owen, Costa, JJ.) affirmed the district court's judgment, concluding that 1) it was "fairly discernible" that Congress intended to make SEC's scheme exclusive; and 2) an earlier panel decision, *Bank of Louisiana*, "has already done our *Thunder Basin* work for us[;] … *stare decisis* requires we follow today." *Cochran v. SEC*, 969 F.3d 507, 511-12, 514 (5th Cir. 2020). Judge Haynes dissented on both 1) whether *Bank of Louisiana* controlled; and 2) whether Congress intended to limit federal court jurisdiction of structural

constitutional questions. She concluded that all three *Thunder Basin* factors supported federal jurisdiction. *Id.* at 518 (Haynes, J., dissenting in part). Ms. Cochran now moves for rehearing *en banc.*

ARGUMENT

I. *FEF*'S JURISDICTIONAL DECISION CONTROLS

A. The Supreme Court Decided This Question in *FEF*

The Supreme Court unanimously held in *FEF* that nothing in 15 U.S.C. § 78y deprives federal courts of jurisdiction to hear removal questions:

> The Government reads § 78y as an exclusive route to review. But the text does not expressly limit the jurisdiction that other statutes confer on district courts. *See, e.g.,* 28 U.S.C. §§ 1331, 2201. *Nor does it do so implicitly*. … Petitioners' constitutional claims are also outside the Commission's *competence* and expertise. … We therefore conclude that § 78y did not strip the District Court of jurisdiction over these claims[.]

561 U.S. at 489–91 (emphases added). The *FEF* Court also noted:

> [E]quitable relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally[.]"[4] [I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution[.][5] … If the Government's point is that an Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim, it offers no reason and cites no authority why that might be so.

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4 *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001).

5 *Bell v. Hood*, 327 U.S. 678, 684 (1946).

Id. at 491 n.2.[6]

B. The Panel Decision Conflicts with Binding Supreme Court Precedent—and Flips the Presumption of Jurisdiction.

Several federal judges, in well-reasoned and comprehensive opinions, have found Article III jurisdiction for claims like this one. *See, e.g., Tilton v. SEC*, 824 F.3d 276, 292-99 (2d Cir. 2016) (Droney, J., dissenting); *Gupta v. SEC*, 796 F. Supp. 2d 503 (S.D.N.Y. 2011), and *Duka v. SEC*, 103 F. Supp. 3d 382 (S.D.N.Y. 2015) (both abrogated by *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016)); *Hill v. SEC*, 114 F. Supp. 3d 1297 (N.D. Ga. 2015), and *Ironridge Global IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294 (N.D. Ga. 2015) (both vacated and remanded by *Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016)). They are now joined by Judge Haynes's persuasive dissent.

The panel majority's reasoning turns the presumption in favor of jurisdiction on its head, flipping *Thunder Basin* by insisting on proof that the claim is of the type "Congress intended to *exempt* from the statutory review scheme." *See, e.g.*, *Hill*, 825 F.3d at 1245 (emphasis added). The effect of this reasoning is a presumption *against* jurisdiction, which has no basis in *Thunder Basin*—or law. *Thunder Basin* instructs that where a claim cannot be meaningfully reviewed, is collateral, and is outside agency competence and expertise, it should be heard in court. 510 U.S. at

[6] A federal court "properly appealed to in a case over which it has by law jurisdiction" is duty-bound to take jurisdiction. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358 (1989).

215-20. A panel decision that upends something as fundamental as the presumption in favor of jurisdiction calls for *en banc* review.

C. The Panel Decision Conflicts with *Thunder Basin*

The panel decision conflicts with *Thunder Basin* in several ways. First, it disregards two-thirds of the factors that must exist to find that Congress impliedly stripped § 1331 jurisdiction. In both *Thunder Basin* and *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012), *all three* of the *Thunder Basin* factors supported stripping jurisdiction. The panel majority treated the wholly collateral question as disposable and ducked the agency-expertise prong—a "close call"—in the name of constitutional avoidance. *See* 969 F.3d at 516. But as the three-Justice dissent in *Elgin* stressed (without dispute from the majority), *Thunder Basin* "emphasized *two* important factors"—the "agency's expertise" and "wholly collateral." 567 U.S. at 26 (Alito, Ginsburg and Kagan, JJ., dissenting) (emphasis added). The possibility of eventual judicial review in the future "is not the only consideration." *Id.* at 33. For the panel majority, however, it is just that.

In addition, the *SEC ALJ Cases*[7] upon which the majority relied were all decided before *Lucia* and, therefore, did not consider that SEC ALJs are federal

[7] *Bennett v. SEC*, 844 F.3d 174 (4th Cir. 2016); *Hill*, 825 F.3d 1236; *Tilton*, 824 F.3d 276; *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015) [together as, *SEC ALJ Cases*]. The D.C. Circuit also found no jurisdiction in *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015), but *Jarkesy* did not involve structural appointment or removal claims.

officers whose tenure protections are in question *and* that the remedy for trial before an unconstitutional officer is vacatur of the entire administrative proceeding. Neither *Thunder Basin*[8] nor *Elgin* involved a constitutional claim that would render the administrative proceeding void *ab initio.*

1. Meaningful Judicial Review

Forcing Cochran "to await a final Commission order before she may assert her constitutional claim in a federal court means that by the time the day for judicial review comes, she will have already suffered the injury that she is attempting to prevent." *Tilton*, 824 F.3d at 298 (Droney, J., dissenting). The hollow promise of eventual judicial review at some future point "excises the 'meaningful' from 'meaningful judicial review.'" Adam M. Katz, Note, *Eventual Judicial Review*, 118 Colum. L. Rev. 1139, 1142-43 (2018). *Cf. Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) (delayed review of prolonged detention not meaningful).

The panel opinion analogizes Cochran's plight to the final judgment rule. *Cochran*, 969 F.3d at 516. Gone is any pretense of ascertaining what "Congress intended" with respect to "this statutory structure." *Thunder Basin*, 510 U.S. at 212. Moreover, the analogy is inapt. A party waiting to appeal a district court's final decision has already enjoyed what Cochran lacks—a constitutional Article III

[8] Notably, in *Thunder Basin*, the "petitioner expressly disavow[ed] any abstract challenge to the Mine Act's statutory review scheme." 510 U.S. at 218 n.22.

decisionmaker whose entire proceeding is not bound for *vacatur* because of the status of that adjudicator. The separation-of-powers claim here, by contrast, "transcends any particular proceeding" and challenges the very "'existence'" of the adjudicators "within their current structure." *Cochran*, 969 F.3d at 520 (Haynes, J., dissenting in part) (quoting *FEF*, 561 U.S. at 490).

For Cochran, far "more is at stake." *Cochran*, 969 F.3d at 519 (Haynes, J., dissenting in part). Trial before an unconstitutionally insulated ALJ "is an executive act that allegedly exceeds the official's authority" and "inflicts a 'here-and-now' injury." *Seila Law*, 140 S. Ct. at 2196 (citation omitted). Such injury is irreparable; no post-agency relief can undo suffering through an unconstitutional proceeding. So review delayed is review denied.

Moreover, the harms imposed by an unconstitutional ALJ—including industry bars and penalties—are enforceable pending judicial review. A securities-industry employment bar imposed by an unauthorized officer is "the securities industry equivalent of capital punishment," *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013) (citation omitted), and remains in place pending review. *See* 15 U.S.C. § 80b-13(b). The same goes for monetary sanctions, which Cochran must pay *before* she ever reaches an Article III court.[9]

[9] SEC and courts generally insist that "financial losses" alone do not warrant a stay of penalties pending appeal. *In re Clifton*, Exchange Act Release No. 70639, 2013 WL 5553865, at *4 & n.27 (Oct. 9, 2013) (citing *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

For these reasons, the panel decision also conflicts with *Thunder Basin* itself. In *Thunder Basin*, the Supreme Court held that meaningful review was available because the agency's "penalty assessments became final and payable only *after* full review by both the Commission *and the appropriate court of appeals*." 510 U.S. at 218 (emphasis added), in stark contrast to the SEC's lose-now-review-later regime. This difference alone should be dispositive.

2. Wholly Collateral

FEF held a separation-of-powers challenge like the one at issue here is "collateral to any Commission orders or rules" because it was a "general challenge to the Board" itself, plainly "outside the Commission's competence and expertise" because it implicated "standard questions of administrative [and constitutional] law," requiring no "agency fact-bound inquiries" or "'technical considerations of [agency] policy.'" 561 U.S. at 490-91 (alteration in original). The majority disregarded this precedential decision.

Cochran's separation-of-powers claim "has no relation to the securities laws entrusted to the SEC and the requested remedy of disallowing the proceedings before the ALJ is obviously not a routine outcome." *Tilton*, 824 F.3d at 295 (Droney, J., dissenting). Some SEC Commissioners comprehend that SEC can decide only whether the securities laws have been violated. *Cf.* Dissent in *Lucia*, Comm'rs Gallagher & Piwowar (Oct. 2, 2015) ("Even though the Commission is free to

express its views on Constitutional issues, we recognize and believe it is appropriate that Article III federal judges ultimately resolve this [appointments] issue.").

3. Agency Expertise

The majority decision eviscerates the "agency expertise" factor. *FEF* held that a separation-of-powers challenge to a regulator's authority is a "constitutional claim[]" that is "outside the Commission's *competence* and expertise." 561 U.S. at 491 (emphasis added). Nevertheless, the panel majority found this factor supports precluding jurisdiction because SEC might have expertise in resolving *other* issues unrelated to Cochran's constitutional claim. 969 F.3d at 516. This rationale, of course, says nothing about whether the agency can resolve Cochran's removal challenge.

Reading *Thunder Basin* and *Elgin* as broadly as the panel did "would mean that as long as a proceeding is ongoing, the 'outside the agency's expertise' factor *must* weigh against jurisdiction—because any time a proceeding has commenced there is of course some possibility that a plaintiff may prevail on the merits." *Tilton*, 824 F.3d at 296 (Droney, J., dissenting) (emphasis added). Moreover, a Cochran win on the merits is "lose-lose:" "she will lose the opportunity to have a court consider her now-moot removal challenge, all while having been subject to a potentially unconstitutional proceeding." *Cochran*, 969 F.3d at 519 (Haynes, J., dissenting in part).

D. The Securities Laws Preserve Existing District Court Jurisdiction

The Exchange Act explicitly preserves existing jurisdiction. *See* 15 U.S.C. §§ 78aa ("The district courts … shall have exclusive jurisdiction of violations of" the Exchange Act) and 78bb(a)(2) ("[T]he rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or equity"). The panel decision omitted these key provisions of the Exchange Act when asserting that the "text and structure" of the Exchange Act "reveal[s] the necessary intent to limit district court jurisdiction." 969 F.3d at 511. It instead erroneously cited provisions for exclusivity and for adducing additional evidence on administrative appeal, 15 U.S.C. §§ 78y(a)(3)–(5), (c)(1), which apply *only* to an appeal of a final order, *only* if the litigant invokes the *permissive* review, and *only* once SEC has filed its record—*none* of which applies here. The panel's statutory ruling should be reviewed *en banc* because it conflicts with *FEF*'s conclusion that nothing in § 78y either explicitly or implicitly ousts jurisdiction to hear removal challenges.

II. *BANK OF LOUISIANA* DOES NOT CONTROL

This *en banc* petition seeks full court correction of the majority's overly expansive conferral of *stare decisis* effect on *Bank of Louisiana*. First, the FDIC scheme at issue in *Bank of Louisiana* explicitly stripped jurisdiction: "[N]o court shall have jurisdiction to affect by injunction or otherwise…" 12 U.S.C. § 1818(i)(1).

Although the panel majority acknowledged the FDIC statute's explicit jurisdiction-stripping, it swiftly pivoted to conferring preclusive weight on *Bank of Louisiana*'s alternate holding, as if the statutory distinction had no significance. These critical statutory distinctions between the FDIC and SEC schemes were not briefed, considered, or decided at any stage of *Bank of Louisiana*. As the dissent ably discerned, "jurisdictional issues addressed *sub silentio* are generally not … binding precedent." *Cochran*, 969 F.3d at 518 (Haynes, J., dissenting in part) (quoting *Pennhurst State Sch. & Hosp. v. Holderman*, 465 U.S. 89, 119 (1984)). Moreover, *Bank of Louisiana* did not rule on any structural constitutional question. Such freewheeling extension of *Bank of Louisiana* to divergent agency statutory schemes should be examined by the full court—especially considering the decision is in direct conflict with the Supreme Court's unanimous decision in *FEF*.

III. THE ENORMOUS PRACTICAL IMPORTANCE OF THIS QUESTION CALLS FOR *EN BANC* REHEARING

The problem of repeated, to-be-vacated, unconstitutional hearings is a recurring one of vital importance to anyone forced to defend themselves in SEC administrative proceedings. Rather than promoting judicial efficiency, the panel majority's approach clogs courts and agencies with to-be-vacated proceedings and eviscerates the promise of rapid review that was the administrative scheme's *sine qua non*. This regime exacts a personal and financial toll so high that 98% of respondents settle—before they can ever present their constitutional claims to a

federal court. *See Tilton*, 824 F.3d at 298 n.5 (Droney, J., dissenting). The SEC has exploited this vulnerability in "a number of cases" by "threaten[ing] administrative proceedings" before ALJs in a calculated effort to compel a settlement. *Id.* (citation omitted).

Denying rehearing would perpetuate the SEC's systematic violation of a structural safeguard that "'[t]he Framers recognized'" as "'critical to preserving liberty.'" *FEF*, 561 U.S. at 501.

CONCLUSION

This Court should grant rehearing *en banc*.

September 24, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this document complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(ii). It is printed in Times New Roman, a proportionately spaced font, and includes 3,895 words, excluding items enumerated in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Fifth Circuit Rule 32.2. I relied on my word processor, Microsoft Word, to obtain the count.

/s/ Margaret A. Little

CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that in the foregoing brief, filed using the Fifth Circuit CM/EFC filing system, all required privacy redactions have been made pursuant to Fifth Circuit Rule 25.2.13, any required paper copies to be submitted to the Court are exact copies of the version submitted electronically, and the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

/s/ Margaret A. Little

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2020, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/EFC filing system and that service will be accomplished using the appellate CM/ECF system.

/s/ Margaret A. Little