No. 19-10396

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

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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*.

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

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# BRIEF OF *AMICI CURIAE* CATO INSTITUTE AND COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING *EN BANC*

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October 1, 2020

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for *amici curiae* certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1, in addition to those listed in the Plaintiff-Appellants' Certificate of Interested Persons, 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.

***Amici*:** The Cato Institute and the Competitive Enterprise Institute are both not-for-profit corporations exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). Neither has a parent corporation and no publicly held company has a 10% or greater ownership interest in any of them.

***Counsel for Amici***: Ashley C. Parrish and Russell G. Ryan, both of King & Spalding LLP; Ilya Shapiro of the Cato Institute

/s/ *Ashley C. Parrish*
Ashley C. Parrish

*Counsel for Amici*

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## INTEREST OF AMICI[1]

***The Cato Institute***. Cato was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Cato publishes books and studies, conducts conferences, issues the annual *Cato Supreme Court Review*, and files *amicus* briefs with courts.

***The Competitive Enterprise Institute***. CEI, founded in 1984, is a non-profit public policy organization dedicated to advancing the principles of free enterprise, limited government, and individual liberty. CEI frequently publishes original research and commentary on government financial policies and regulations. It also regularly participates in litigation concerning the scope and application of financial rulings and the federal agencies that promulgate them. CEI served as

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[1] The parties have consented to the filing of this brief. No part of the brief was authored by counsel for a party, and no person other than the *amici*, their members, or or their counsel contributed money that was intended to fund the preparation or submission of this brief.

co-counsel to the successful petitioners in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010).

This case is important to *amici* because it involves core separation-of-powers issues, the democratic accountability of executive officers, and threats to federal court access when citizens have legitimate complaints about unconstitutional governmental action.

## SUMMARY OF ARGUMENT

This case presents a recurring, exceptionally important issue concerning citizens' access to federal court when personal liberty is threatened by ongoing executive-branch action that violates the Constitution's separation of powers. It also highlights the intolerable predicament faced by citizens when structural constitutional violations are allowed to persist until any meaningful remedy evaporates.

The panel majority affirmed the district court's decision denying Cochran access to federal court to challenge what she credibly alleges is an ongoing constitutional injury — being forced to defend a Securities and Exchange Commission ("SEC") proceeding in which the presiding administrative law judge ("ALJ") is unconstitutionally protected by at least two levels of protection from presidential removal. That denial ensures that Cochran will never obtain a meaningful remedy for her constitutional injury.

*Amici* respectfully urge the Court to grant *en banc* reconsideration. The panel based its decision on at least two mistaken premises — first, that the SEC has formally accused Cochran of wrongdoing and, second, that Cochran will be afforded a meaningful opportunity to obtain relief.

Based on these mistaken premises, the panel declined to apply controlling Supreme Court precedent. Instead, it followed an earlier Fifth Circuit panel decision interpreting an inapposite and differently worded statute.

In *Free Enterprise Fund v. PCAOB*, the Supreme Court held that Section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78y(a) — the same statute at issue here — "does not expressly limit the jurisdiction that other statutes confer on district courts. *Nor does it do so implicitly*." 561 U.S. 477, 489 (2010) (citations omitted; emphasis added). Directly at odds with that controlling precedent, the panel here concluded that Section 25(a) *does* implicitly strip district courts of jurisdiction over cases like Cochran's. *But see Hollis v. Lynch,* 827 F.3d 436, 448 (5th Cir. 2016) (noting that even Supreme Court dicta is generally binding). To reach that conclusion, the panel relied on *Bank of Louisiana v. FDIC*, 919 F.3d 916 (5th Cir. 2019), which interpreted a different statute, and held that Cochran must run the entire gauntlet of the SEC administrative process before seeking judicial review.

This case is materially similar to *Free Enterprise Fund* and materially distinguishable from *Bank of Louisiana*. The Court should

grant *en banc* rehearing to correct this contravention of Supreme Court precedent. Doing so is necessary to protect litigants subject to executive branch action that infringes on their liberty and violates constitutional separation of powers.

## ARGUMENT

### I. *Free Enterprise Fund* Controls and *Bank of Louisiana* Is Distinguishable.

The panel opinion starts from the premise that in the administrative proceeding against Cochran, "[the SEC] alleged that Cochran, a CPA, failed to comply with auditing standards in violation of the Securities Exchange Act [of 1934]." Op. 2. That premise is incorrect.

The SEC — the presidentially-appointed and Senate-confirmed Commissioners empowered to issue final orders and impose sanctions — has *not* alleged wrongdoing by Cochran. The SEC's April 2014 order instituting the proceeding merely acknowledged allegations made by staff-level employees within the agency's Division of Enforcement and commenced a proceeding to determine *whether* those allegations are true. *See In re Hall*, Order Instituting Public Administrative and Cease-and-Desist Proceedings, Exchange Act Release No. 77,718, 113 SEC Docket 5946, at 2, 10-11 (Apr. 26, 2016). The order also required an ALJ to hold

hearings and issue an "initial" decision with which the Commissioners ultimately may or may not agree. *Id.* at 11. The SEC thus remains in "wait and see" mode, allowing subordinate actors to make a preliminary determination whether the agency should someday issue a final order imposing sanctions.

The SEC had the choice of initiating its enforcement action either in federal district court, before the Commissioners themselves, or before an ALJ. Op. 2. By choosing the third option, the SEC obliged itself to *refrain* from taking any position regarding whether Cochran violated any law or deserves to be sanctioned. Instead, it placed itself in the prospective role of impartial final adjudicator — essentially the administrative equivalent of a court of appeals. The SEC could not perform that impartial role if it had already publicly accused Cochran of wrongdoing. *Cf. Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) ("an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case"); *United States v. Brown*, 539 F.2d 467, 469-70 (5th Cir. 1976) ("[f]airness of course requires an absence of actual bias in the trial of cases") (citation omitted); *Withrow v. Larkin*, 421 U.S. 35, 46-58 (1975) (agencies may investigate and later

adjudicate proceedings, but "substantial due process question would be raised" if the agency did not act impartially).[2]

Cochran's predicament is thus materially similar to that of the petitioners in *Free Enterprise Fund* and different from that of the appellant in *Bank of Louisiana*. As in *Free Enterprise Fund*, Cochran is enduring the administrative accusations and commands of SEC-subordinate personnel who are still determining *whether* she violated any law, yet she does not know if or when those proceedings might ever result in a final SEC order. In theory she could prematurely invite such an order and expedite her ticket to a federal appeals court by "betting the farm" on her constitutional claim — for example, by refusing to participate in the SEC process (and thereby incurring sanctions by default), or by confessing to a violation she does not believe she committed. But *Free Enterprise Fund* makes clear that she is not required to take that gamble. 561 U.S. at 490-91.

[2] Had the SEC chosen to litigate in federal district court, it would have been the named plaintiff, with its enforcement staff acting as counsel. If that had occurred, Cochran would not have been forced to endure the past four years in an administrative forum that she contends is constitutionally invalid.

The appellant in *Bank of Louisiana* was in a materially different posture. The bank not only was formally accused of wrongdoing by the FDIC, it was subjected to two separate final agency orders that imposed sanctions against it. *See* 919 F.3d at 920-22. Indeed, by the time the district court determined that it lacked jurisdiction, the bank had already filed petitions with this Court to challenge both final agency orders, triggering the "exclusive" appellate-court jurisdiction conferred by the relevant statute. And by the time this Court affirmed the district court's dismissal, it had already disposed of the bank's petitions for review. *See id.* As the panels in both that case and this one noted, the proverbial farm was "already on the table." Op. 10 (quoting *Bank of La.*, 919 F.3d. at 927). Final agency orders had already been issued; petitions for review had already been filed, triggering this Court's exclusive jurisdiction; and neither the district court nor this Court had any practical ability to protect the bank from an allegedly tainted administrative process that had already concluded.

By contrast, the "farm" in this case is nowhere near the table and Cochran cannot be forced to bet it. There is no final agency order and, as in *Free Enterprise Fund*, the SEC-subordinate actors administering

Cochran's case lack any legal power to issue final orders. Even if Cochran's proceeding someday ends with a final SEC order, it will likely be many months if not years from now. Just like the petitioners in *Free Enterprise Fund*, Cochran seeks to *avoid* the *fait accompli* posture of *Bank of Louisiana*, not to duplicate it.

*Bank of Louisiana* was also evaluated under a materially different statute. The statute there, in additional to providing for "exclusive" appellate court jurisdiction over petitions challenging final agency orders, explicitly provided that "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order . . . or to review, modify, suspend, terminate, or set aside any such notice or order." 12 U.S.C. § 1818(i)(1). Although *Bank of Louisiana* declined to interpret that "jurisdictional bar" as stripping district courts of jurisdiction, it found that the provision "ices the cake" in demonstrating that Congress "'intended to deny the District Court jurisdiction to review and enjoin [FDIC] administrative proceedings.'" *Bank of La.*, 919 F.3d at 924 (quoting *Rhoades v. Casey*, 196 F.3d 592, 597 (1999)).

The Exchange Act contains no similar "jurisdictional bar." To the contrary, it provides that "the rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity." 15 U.S.C. § 78bb(a)(2). Post-agency appellate review under Exchange Act Section 25(a) is also explicitly permissive and not mandatory. *See id.* § 78y(a)(1) (aggrieved party "may" seek post-agency review in a court of appeals). And appellate court jurisdiction becomes "exclusive" only if and after the SEC issues a final order, an aggrieved litigant chooses to seek review, and the SEC files its administrative record with the court. *See id.* § 78y(a)(3).

Read together, these statutory provisions negate any reasonable inference that Congress intended to divest district courts of their presumptive jurisdiction to adjudicate colorable constitutional challenges raised long before any final order is issued.

## II. The Panel Opinion Precludes a Meaningful Remedy for the Injury Alleged.

The panel opinion also relies on the mistaken premise that "Cochran will have the opportunity to press her separation of powers claim [in an Article III court]." Op. 3. In fact, most SEC administrative respondents are never afforded *any* opportunity to seek post-agency

review under Section 25(a). Even when they are, that review comes too late to provide meaningful relief for the type of constitutional injury Cochran alleges.

First, post-agency appellate review is categorically unavailable to litigants who prevail in the administrative process because they are not "aggrieved" by any final order. 15 U.S.C. § 78y(a)(1). According to published empirical analyses, SEC administrative litigants prevail in at least ten percent of adjudicated cases. Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315, 346-53 (2017); Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015). Although these litigants undoubtedly welcome their escape from sanctions, Section 25(a) provides no remedy for the constitutional injury they have suffered by being forced to endure an *ultra vires* process. By that point this *constitutional* injury cannot be undone or meaningfully remedied by any court. A successful defense on the underlying merits thus does nothing to remedy or moot the injury already suffered; it renders the injury permanent and irreversible.

Post-agency appellate review is also unavailable to the large portion of litigants who, facing the specter of an expensive, years-long administrative process, settle their cases with an agreed-on final SEC order. *See* Velikonja, 92 WASH. L. REV. at 340, 346, 364-65 (noting that "willingness to settle may be affected by their perception that ALJs are less fair," and that "[t]he SEC has reportedly threatened investigated parties with litigation before ALJs if they are unwilling to settle"); Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. Pa. J. Const. L. 45, 57 (2016) (noting that between 2002 and 2014, the SEC settled "about 98%" of cases). None of these litigants have any chance of obtaining appellate review under Section 25(a) because SEC rules and policy require settling litigants to waive their right to "judicial review by any court." SEC R. of Prac. 240, 17 C.F.R. § 201.240(c)(4)(v). Section 25(a) thus offers no more help to settling litigants than it does to prevailing litigants; in both instances, the SEC essentially gets away with that constitutional violation, scot-free.

Nor is it a practical option for litigants to stand on principle and refuse to participate in what they believe to be *ultra vires* proceedings under the control of a federal officer who lacks lawful authority to conduct

those proceedings. Even if a litigant nominally preserved the constitutional objection for later appeal, otherwise declining to participate in the proceeding would be "betting the farm" on the constitutional objection, because it would inevitably lead to a default on the merits of the underlying securities law claims. *See generally* SEC R. of Prac. 155, 17 C.F.R. § 201.155 (default if litigant fails to appear, fails to answer or respond to a motion, or fails to timely cure a deficient filing); SEC R. of Prac. 180, 17 C.F.R. § 201.180 (default if litigant fails to make a required filing); SEC R. of Prac. 220, 17 C.F.R. § 201.220(f) (default if litigant fails to answer); SEC R. of Prac. 221, 17 C.F.R. § 201.221(f) (default if litigant fails to appear at prehearing conference); SEC R. of Prac. 310, 17 C.F.R. § 201.310 (default if litigant fails to appear). And that default would be virtually impossible to undo on post-agency judicial review because "[n]o objection to an order or rule of the Commission, for which review is sought under [Section 25(a)], may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so." 15 U.S.C. § 78y(c)(1); *see also id.* § 78y(a)(4) (SEC factual findings are "conclusive" as long as supported by "substantial evidence").

All of which leaves the relatively few litigants with the resources and fortitude to endure the entire SEC administrative process (in Cochran's case for a second time) who ultimately lose on the merits. *See* Velikonja, 92 WASH L. REV. at 340 (only a "sliver" of cases is ever decided after hearing). Then and only then can litigants seek the limited appellate relief promised by Section 25(a). But even if they eventually prevail on their constitutional claim, the injury has already been suffered and cannot be meaningfully remediated. Indeed, the most likely outcome would be the Pyrrhic victory of a remand to the SEC to start all over again before another ALJ purporting to be cleansed of constitutional infirmity, as happened when the Supreme Court held that the SEC's ALJs were unconstitutionally appointed. *See Lucia v. SEC*, 138 S. Ct. 2044, 2055-56 (2018).

In sum, far from guaranteeing a meaningful remedy for the type of constitutional injury alleged by Cochran, post-agency appellate review under Section 25(a) is a largely empty promise for most SEC administrative litigants.

## CONCLUSION

The panel decision should be reconsidered *en banc*.

Respectfully submitted,

/s/ *Ashley C. Parrish*

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*Counsel for Amici Curiae*

October 1, 2020

## CERTIFICATE OF SERVICE

I certify that on October 1, 2020, I caused the foregoing amicus brief to be filed with the Court electronically using the CM/ECF system, which will send a notification to all counsel of record.

/s/ *Ashley C. Parrish*
Ashley Parrish

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because it contains 2,590 words, as counted by Microsoft Word, excluding the parts of the brief excluded by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word in Century Schoolbook 14-point font.

I further certify that (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of McAfee VirusScan and is free of viruses.

/s/ *Ashley C. Parrish*
Ashley Parrish

Dated: October 1, 2020