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 for the Northern District of Texas, Fort Worth Division, Case No. 4:19-cv-66

BRIEF OF TEXAS PUBLIC POLICY FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF REHEARING *EN BANC*

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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).

INTRODUCTION AND SUMMARY OF 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 enforce that separation and 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. Indeed, this Court has recently granted *en banc* rehearing in two cases raising separation-of-powers concerns like those in this case. *See CFPB v. All Am. Check Cashing, Inc.*, 953 F.3d 381, 382 (5th Cir. 2020); *Collins v. Mnuchin*, 908 F.3d 151, 152 (5th Cir. 2018).

Rehearing *en banc* is particularly warranted because the panel majority believed itself bound by this Court's prior decision in *Bank of Louisiana v. FDIC*, 919 F.3d 916 (5th Cir. 2019), to *reject* the separation-of-powers challenge at the threshold. If, as the panel dissent explained, *Bank of Louisiana* doesn't require that result, then rehearing is needed to dispel the confusion. Unless rehearing is granted, the panel majority decision will "likely foreclose all meaningful judicial review" in

separation-of-powers challenges like this one. *See* Op. 18 (Haynes, J., dissenting). Rehearing *en banc* should be granted.

I. Rehearing *En Banc* Is Needed To Ensure Timely Judicial Review Of Separation-Of-Powers Challenges To Agency Enforcement Actions.

The panel majority recognized that its decision reached the "seemingly anomalous result" that while "a party subject to the less onerous agency action of investigation may run to federal court" under the Supreme Court's decision in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), "a party that has been charged" by the agency "must wait." Op. 10.

So a separation-of-powers challenger "must continue to participate in an adjudicative system that may well be constitutionally illegitimate" because "the ALJ who oversees the proceeding against her enjoys unconstitutional removal protection." *See* Op. 18 (Haynes, J., dissenting). That the panel majority construed the Court's precedent to require this outcome means rehearing should be granted to reconsider or clarify that precedent.

Challenges to the structural impartiality of agency adjudicators like ALJs simply aren't remediable after enforcement proceedings are

already over. This point is underscored by way of comparison to judicial recusal decisions, which parties may challenge immediately without waiting for review after final judgment.

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, 544 (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.*

Congress later enacted "two federal statutory provisions . . . intended to ensure litigants a trial before an unbiased judge." 13D Charles Alan Wright et al., *Federal Practice and Procedure* § 3551 (3d ed. 2002) (citing 28 U.S.C. §§ 144, 455). In 1911, section 144 expanded recusal requirements to include bias in general. *See Liteky*, 510 U.S. at 544. And since 1974, section 455 has required that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Id.* at 546–47 (quoting 28 U.S.C. § 455(a)). Disqualification "shall" 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." 28 U.S.C. § 455(b)(4).

Like separation-of-powers concerns, disqualification 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).

Just as the separation-of-powers challenge in this case calls into question the constitutional legitimacy of the SEC's adjudicative system, "the adjudication of a case by a judge with an actual *or* apparent bias is . . . a threat to the integrity of the judicial system." *In re Sch. Asbestos Litig.*, 977 F.2d 764, 778 (3d Cir. 1992). That is why "virtually every circuit" agrees that "[i]nterlocutory review of disqualification issues on petitions for mandamus is both necessary and appropriate to ensure that judges do not adjudicate cases that they have no statutory power to hear." *Id*. (citing cases).[1]

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[1] *See also In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997) ("mandamus is an appropriate legal vehicle for challenging the denial of a disqualification motion"); *In re Faulkner*, 856 F.2d 716, 717 (5th Cir. 1988) (per curiam) (granting writ); *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, 961 n.4 (5th Cir. 1980) ("Courts not infrequently reach the merits of disqualification issues on a consideration of whether

Claims of judicial bias "strike[] at the integrity of the judicial process, and it would be intolerable to hold that the disclaimer of prejudice by the very jurist who is accused of harboring it should itself terminate the inquiry until an ultimate appeal on the merits." *In re Int'l Bus. Machs. Corp.*, 618 F.2d 923, 926–27 (2d Cir. 1980). Interlocutory review of disqualification decisions is warranted precisely because "the public's confidence in the judiciary . . . may be irreparably harmed if a case is allowed to proceed before a judge who appears to be tainted." *Sch. Asbestos Litig.*, 977 F.2d at 776. "While review after final judgment can (at a cost) cure the harm to a litigant, it cannot cure the additional, separable harm to public confidence that section 455 is designed to prevent." *Id.*

So too here. The separation-of-powers challenger in this case seeks to vindicate her right not "to be subjected to an adjudicative process in front of an officer who may not have constitutional authority to decide her case." Op. 19 (Haynes, J., dissenting). Forcing her "to await a final

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mandamus will issue.") (citing cases); *Davis v. Bd. of Sch. Comm'rs of Mobile Cty.*, 517 F.2d 1044, 1051–52 (5th Cir. 1975) (denial of recusal challengeable "by interlocutory appeal" or "by mandamus").

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 already have suffered the injury that [she is] attempting to prevent." *Tilton v. SEC*, 824 F.3d 276, 298 (2d Cir. 2016) (Droney, J., dissenting).

Further, the separation-of-powers challenge here is independent of the merits not only of the underlying proceeding, but also of the Exchange Act, the Dodd-Frank Act, or any other SEC-administered provision for that matter. It goes to the very "structure undergirding the SEC's administrative system"—a challenge "which transcends any particular proceeding." Op. 20 (Haynes, J., dissenting). The ALJ won't be asked to interpret or apply a statute relevant to the merits of the underlying proceeding, but instead to determine the propriety of his own removal protections under Article II. *See Free Enter. Fund*, 561 U.S. at 491 (explaining that separation-of-powers challenges are "outside the Commission's competence and expertise").

If anything, the limits of the recusal analogy highlight how far the separation-of-powers challenge here is from the expertise of an ALJ. 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—as, indeed, Congress directed. *See* 28 U.S.C. § 455(a).

But the challenge in this case is wholly structural—it is not specific to any particular ALJ, but to the removal protections enjoyed by every SEC-appointed ALJ. Accordingly, there is even *less* reason for an individual ALJ to adjudicate structural challenges like the one here. The issues are even less properly within their expertise, and there are no arbiter-specific facts involved. Indeed, there are *no* facts that could be solicited during this proceeding to cure the alleged defect—so agency expertise need not be invoked at all.

Forcing a separation-of-powers challenger to present that challenge to the same agency adjudicator whose constitutional legitimacy is under scrutiny will inflict precisely the harm that the challenger seeks to

prevent—adjudication before a constitutionally illegitimate arbiter. Neither that harm nor the harm to the public's confidence in our system can be cured by appellate review of the Commission's final decision. Rehearing *en banc* is needed to avoid that result and vindicate the fundamental separation-of-powers principles at stake.

II. Rehearing *En Banc* Is Needed To Dispel Confusion Over The Scope Of This Court's Prior Precedent.

The decision below effectively eliminates meaningful judicial review of structural challenges to agency enforcement proceedings by requiring challengers to run the gauntlet of the same proceedings that are under challenge. A divided panel held that this Orwellian result was compelled by this Court's prior decision in *Bank of Louisiana*. It is not, and rehearing *en banc* is needed to dispel the confusion and remove the barrier to meaningful judicial review.

As an initial matter, *Bank of Louisiana* addressed a different statute and a different type of claim—it didn't address (much less decide) whether a district court lacks jurisdiction over a separation-of-powers claim like the one here. In fact, "[t]he only argument the Bank seriously presse[d] on appeal [wa]s that the ALJ 'barred [it] from developing the factual record necessary' to support its constitutional claims." 919 F.3d

at 927 (third alteration in original). Here, by contrast, the challenge is to the ALJ's authority even to adjudicate this dispute at all. Rehearing is needed to clarify that *Bank of Louisiana* is no barrier to meaningful judicial review.

The stakes are high. Since Dodd-Frank's enactment, the SEC has brought an increasing percentage of its enforcement actions in-house—topping 75 percent last year. *See*, *e.g.*, Div. of Enf't, SEC, *2019 Annual Report* 29 (2019).[2] There, parties do not enjoy the right to a jury trial, the protections of the Federal Rules of Evidence or Civil Procedure, or opportunities for discovery available in judicial proceedings. *See Bebo v. SEC*, 799 F.3d 765, 768 (7th Cir. 2015).

Unsurprisingly, the SEC benefits from this home-field advantage, winning nearly 20 percent more frequently before its own ALJs than in federal court. Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. Pa. J. Const. L. 45, 47 (2016). And the Commission rules for the SEC in over 95 percent of cases. *Id*. at 48.

[2] https://www.sec.gov/files/enforcement-annual-report-2019.pdf.

Faced with the daunting prospect of navigating a years-long enforcement action before an inhospitable adjudicatory body, the overwhelming majority of individuals opt to settle without ever obtaining judicial review. Mark, 19 U. Pa. J. Const. L. at 57 (over 97 percent of SEC actions settle); *see also Tilton*, 824 F.3d at 298 & n.5 (Droney, J., dissenting) ("Given that the vast majority of all SEC administrative proceedings end in settlements rather than in actual decisions, it might well be that choosing to litigate is, in fact, equivalent to 'betting the farm.' ").

The prospects for those who don't settle aren't much better. *See* Op. 18 (Haynes, J., dissenting) ("Cochran finds herself in a lose–lose situation in front of the SEC."). Those who wish to appeal an ALJ's decision may not go straight to court; they must first petition the Commission for discretionary review. *See* 15 U.S.C. § 78d-1(b). Even if the Commission grants review, it overwhelmingly defers to the ALJ's factual findings and affirms the ALJ's decision. *See* Mark, 19 U. Pa. J. Const. L. at 48 (95 percent affirmance).

Only then—after undergoing proceedings before constitutionally questionable agency adjudicators—are the doors to an Article III court

finally open. 15 U.S.C. § 78y(a)(1); *see Tilton*, 824 F.3d at 298 (Droney, J., dissenting) ("by the time the day for judicial review comes, [separation-of-powers challengers] will already have suffered the injury that they are attempting to prevent"). The punishment meted out by the ALJs—including stiff monetary penalties and licensure suspension—does not await judicial review, however. It is immediately enforceable, and stays pending appeal are exceedingly rare. *E.g*, *In re Se. Invs., N.C., Inc.*, 2019 WL 2448245, at *2 (June 12, 2019); 15 U.S.C. §§ 78y(c)(2), 80b-13(b).

Even for the fortunate few who prevail before the SEC, the underlying separation-of-powers violation isn't ameliorated. If anything, it's a heads-the-agency wins, tails-the-challenger loses situation because prevailing before the SEC all but guarantees that an Article III court will never address the underlying constitutional issue. If the challenger "wins in front of the SEC and no sanction is imposed, 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." Op. 18 (Haynes, J., dissenting); *see also Tilton*, 824 F.3d at 298 (Droney,

J., dissenting) (judicial review available "only if the [party] had continued litigating before the SEC ALJ and lost on the merits").

Bank of Louisiana doesn't require this state of affairs, and separation of powers doesn't permit it. The fact that an agency investigation has matured into an enforcement proceeding is more reason—not less—to ensure meaningful judicial review of the agency adjudicator's legitimacy under the Constitution. Just as "[i]nterlocutory review of disqualification issues . . . is both necessary and appropriate to ensure that judges do not adjudicate cases that they have no statutory power to hear," *Sch. Asbestos Litig.*, 977 F.2d at 778, so too is judicial review of separation-of-powers challenges in pending agency enforcement actions both necessary and appropriate to ensure that agencies don't adjudicate matters over which they lack constitutional power.

CONCLUSION

The petition for rehearing *en banc* should be granted, the judgment should be reversed, and the case should be remanded for further proceedings.

Dated: October 1, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on October 1, 2020, a true and correct copy of this brief was served via the Court's CM/ECF system on all counsel of record.

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

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because this motion was prepared in 14-point New Century Schoolbook, a proportionally spaced typeface, using Microsoft Word 2019. *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 2,486 words, excluding the parts exempted under Rule 32(f).

I further certify that (1) all required privacy redactions have been made, (2) the electronic submission is an exact copy of the paper version, and (3) the brief has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses. *See* 5th Cir. R. 25.2.1, 25.2.13.

/s/ *Allyson N. Ho*
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