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

UNOPPOSED MOTION OF THE CATO INSTITUTE AND THE COMPETITIVE ENTERPRISE INSTITUTE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT ON REHEARING *EN BANC*

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December 7, 2020

The Cato Institute ("Cato") and the Competitive Enterprise Institute ("CEI") jointly move for leave to file the attached brief as *amici curiae* in support of plaintiff-appellant to assist the Court in its consideration of this case *en banc*. Pursuant to Fed. R. App. 29, counsel for *amici* state that all parties have consented to the filing of the brief. Further, no party's counsel authored any part of the brief and no person other than *amici* made a monetary contribution to fund its preparation or submission.

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. Toward those ends, Cato publishes books and studies, conducts conferences, issues the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts.

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, as both a party and an *amicus curiae*, concerning the scope and application of financial rulings and the federal agencies which promulgate them. For example, and particularly relevant to the instant petition, CEI served as co-counsel to the successful petitioners in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), a case that *amici* cite herein as controlling precedent.

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. The proposed brief addresses 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 points out the intolerable predicament faced by citizens when structural constitutional violations are allowed to persist until any meaningful remedy evaporates. Finally, it highlights the danger to constitutional liberties when courts curtail and discourage private citizens and businesses from promptly seeking judicial relief to remedy

structural separation-of-powers violations that infringe upon their personal liberties.

Amici respectfully request that the Court grant leave to file their attached brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 7, 2020, I caused the foregoing motion 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 C. Parrish

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation of Federal Rules of Appellate Procedure 27(d)(2), 32(g)(1) because it contains 393 words, as counted by Microsoft Word, excluding the parts of the brief excluded by Fed. R. App. P. 32(f). This motion 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 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 C. Parrish

Dated: December 7, 2020

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BRIEF OF *AMICI CURIAE* CATO INSTITUTE AND COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT ON REHEARING *EN BANC*

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December 7, 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

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INTEREST OF AMICI[1]

The Cato Institute ("Cato"). 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.

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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 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: the rights of citizens to access federal courts when personal liberty is threatened by executive-branch action that violates essential separation-of-powers principles. It also highlights the intolerable predicament faced by aggrieved citizens when structural constitutional violations are allowed to persist until any meaningful remedy evaporates.

While acknowledging that it was "deeply concerned," the district court denied Plaintiff-Appellant Cochran access to federal court to challenge what she credibly alleges to be an ongoing constitutional injury—being forced to defend a Securities and Exchange Commission proceeding in which the presiding administrative law judge ("ALJ") is unconstitutionally protected from presidential removal. That denial, in line with several non-binding decisions from other circuits, rests on a flawed interpretation of *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), and virtually ensures that Cochran will never obtain a meaningful remedy for her constitutional injury. It also contravenes the Supreme Court's controlling decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010).

Amici recognize that the district court's decision is consistent with the prevailing view of courts that have thus far addressed the issue presented. *Cf.* Cochran Br. on R'hrg at 5 n.1, 22-23, and 29 n.10 (identifying federal judges and commentators who have persuasively dissented). But *amici* strongly believe that this is a case where "the parade is marching in the wrong direction." *United States v. Smith*, 440 F.2d 521, 527 (7th Cir. 1971) (Stevens, J., dissenting). They accordingly urge the *en banc* Court to reverse the district court's decision below.

ARGUMENT

I. The Decision Below Curtails and Discourages an Essential Means of Challenging Structural Separation-of-Powers Violations.

Federal district courts are generally presumed to have plenary jurisdiction when private citizens and businesses allege colorable claims that federal executive-branch agencies and officials are pursuing punitive governmental action against them without legitimate constitutional authority. Such claims present quintessential federal questions falling squarely within the jurisdictional grant of 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution … of the United States"); *see also* 5 U.S.C. § 702 (authorizing judicial relief, including injunctive relief,

when a person is "suffering legal wrong because of agency action, or [is] adversely affected or aggrieved by agency action"). The exercise of federal court jurisdiction over these claims is necessary to protect constitutional commitments to the rule of law, separation of powers, due process, individual liberty, and political accountability. *See generally Bell v. Hood*, 327 U.S. 678, 684 (1946) ("it is established practice for [the Supreme Court] to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution"); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) ("injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally").

These principles apply in full force when, as here, a private party alleges a structural constitutional defect that violates the Constitution's separation of powers. Indeed, because the political branches cannot always be relied on to guard their constitutionally defined roles when structuring government agencies, challenges by private parties often serve as the most effective vehicles to enforce separation of powers. *See, e.g., Seila Law LLC v. Consumer Fin. Prot. Bd.*, 140 S. Ct. 2183 (2020); *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Free Enter. Fund*, 561 U.S. 477.

Allowing these challenges is therefore vital to our constitutional order. Absent compelling evidence, courts should not infer congressional intent to strip courts of jurisdiction to consider them.

The approach taken by the district court, like that taken by courts in other circuits, severely curtails and discourages private challenges to structural separation of powers violations. As relevant here, it requires private citizens and businesses to endure the entire, multi-year gauntlet of the SEC's administrative enforcement process before they are afforded an opportunity to convince a court that the process itself is unconstitutional. This delays vital private challenges to structural constitutional defects in the agency's process until years after injury is suffered, leaving challengers with no timely or meaningful remedy. More troubling, it dramatically shrinks the universe of potential private challenges because, as explained below, the vast majority of SEC administrative respondents are never afforded the chance to challenge the constitutionality of the SEC's process after it has run its course.

II. *Free Enterprise Fund* is the Controlling Precedent.

Notwithstanding the general presumption of district court jurisdiction over constitutional claims, in certain cases—most notably

Thunder Basin Coal Co., 510 U.S. 200, *Free Enterprise Fund*, 561 U.S. 477, and *Elgin v. Department of Treasury*, 567 U.S. 1 (2012)—the Supreme Court has recognized a limited exception in the administrative law context. These cases hold that if Congress has enacted a statute providing for delayed, post-agency appellate review of adverse agency action, and if Congress's intent to strip district courts of their presumptive jurisdiction over challenges to agency action is either explicit or "fairly discernible," then district courts may lack jurisdiction to adjudicate at least some kinds of challenges to agency action. *See Free Enter. Fund*, 561 U.S. at 489.

In applying these principles to the Securities Exchange Act of 1934 (the "Exchange Act"), *Free Enterprise Fund* is controlling. The Court there held that Exchange Act Section 25(a), 15 U.S.C. § 78y(a)—the same statute at issue here—evidences *no* "fairly discernable" congressional intent to strip district courts of jurisdiction over structural constitutional challenges they would otherwise be empowered to entertain.

> [T]he text [of Section 25(a)] 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*.

561 U.S. at 489 (emphasis added).

Beyond analyzing the statutory text, *Free Enterprise Fund* gave significant weight to the fact that the SEC had not yet issued a final order against the petitioners who were seeking relief from an administrative process that might (or might not) eventually culminate in one. The Court held that individuals who assert structural constitutional objections to the administrative process they are being forced to endure need not wait to find out whether a final order will ultimately materialize against them, nor do they need to "bet the farm" by taking action that would ensure or expedite issuance of such an order. *Id*. at 490-91 (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007)); *cf. Sackett v. EPA*, 566 U.S. 120, 130-31 (2012) (regulated parties need not choose "voluntary compliance" in order to obtain judicial review of agency action).

Cochran's predicament is materially similar to that of the petitioners in *Free Enterprise Fund*. The SEC has not issued a final order against her and there is no assurance that it will ever do so. 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 incur 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.

The district court's significant departure from *Free Enterprise Fund* should be corrected by the *en banc* Court. In attempting to justify the district court's decision, the now-vacated panel opinion suggested that, unlike in *Free Enterprise Fund*, the farm is "already on the table" whenever the SEC initiates an administrative enforcement proceeding like the one now pending against Cochran. *See Cochran v. SEC*, 969 F.3d 507, 515 (5th Cir. 2020), *op. vacated on r'hrg en banc*, 978 F.3d 975 (Oct. 30, 2020) (quoting *Bank of La. v. FDIC*, 919 F.3d 916, 927 (5th Cir. 2019)). But that misunderstands the SEC's administrative enforcement process. SEC orders instituting administrative enforcement proceedings are not final orders. They are preliminary orders that merely initiate proceedings to determine *whether* a final order should someday be issued against the respondent. *See In re Hall*, Order Instituting Public Administrative and Cease-and-Desist Proceedings, Exchange Act Release No. 77,718, 113 SEC Docket 5946, at 1, 10 (Apr. 26, 2016) (SEC order instituting proceedings against Cochran and others). Allegations recited against a respondent at this stage are explicitly those of SEC-

subordinate staff-level employees, not of the statutorily empowered Commissioners. *Id.* The Commissioners place themselves in the prospective role of final adjudicators—the administrative equivalent of a court of appeals—and they thus must remain strictly neutral and unbiased unless and until called upon to adjudicate the staff's allegations. For relevant purposes, the SEC's role in Cochran's proceeding is materially similar to its prospective adjudicative role in *Free Enterprise Fund*, because in neither case had the SEC yet adjudicated the matter or issued any final order that could have been appealed under Exchange Act Section 25(a).[2]

Even if *Free Enterprise Fund* were not directly controlling, there is no evidence that Congress even thought about stripping district courts of

[2] The appellant bank in *Bank of Louisiana* was in a materially different posture with its regulator. It was not only formally accused of wrongdoing by the FDIC but also subjected to two separate final agency orders imposing sanctions against it. *See* 919 F.3d at 920-22. By the time the district court determined 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.* In short, neither the district court nor this Court had any practical ability to protect the bank from the allegedly tainted administrative process that had already concluded.

jurisdiction over cases filed before the SEC issues a final order, much less intended to do so. The available textual evidence suggests the opposite. For example, post-agency appellate review under Section 25(a) is explicitly permissive rather than mandatory. *See* 15 U.S.C. § 78y(a)(1) (an aggrieved litigant "may" seek post-agency review in a court of appeals). This permissive language must also be read in conjunction with a nearby provision that explicitly preserves "any and all" other avenues of relief. *See id.* § 78bb(a)(2); *cf. Sackett*, 566 U.S. at 129 ("if the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the [Administrative Procedure Act's] presumption of reviewability for all final agency action, it would not be much of a presumption at all"). In addition, Section 25(a) makes clear that appellate court jurisdiction becomes exclusive only *after* the SEC issues a final order, only *if* an aggrieved litigant chooses to seek review of the final order and, even then, only *when* 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 even to limit, much less to divest, district court jurisdiction under 28 U.S.C. § 1331 to adjudicate colorable

constitutional challenges raised months or even years before any final order is issued.[3]

III. The Decision Below Precludes a Meaningful Remedy.

The decision below rests on the mistaken premise that the kind of here-and-now constitutional injury suffered by Cochran can be meaningfully remedied on post-agency review under Exchange Act Section 25(a). That is plainly not the case. Most SEC administrative respondents never get any opportunity to seek post-agency review under Section 25(a), and even for the relatively few who do, that review comes

[3] In this respect, Exchange Act Section 25(a) is materially different from the statute at issue in *Bank of Louisiana*, which the now-vacated panel opinion found controlling. The statute in that case, in addition 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 said 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 comparable "jurisdictional bar" language.

too late to provide meaningful relief for the type of constitutional injury suffered.

For example, post-agency review in a court of appeals under Section 25(a) is categorically unavailable to SEC litigants who ultimately prevail in the administrative process, because the statute allows review only to litigants who are "aggrieved" by the SEC's "final order." 15 U.S.C. § 78y(a)(1). According to published empirical analyses, SEC administrative litigants prevail in at least ten percent of fully adjudicated cases. *See* 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).

Indeed, this was the fate of at least two SEC litigants in cases that were relied on by the district court—that is, after those litigants were denied district court access to press their structural constitutional challenges, they endured the objectionable SEC administrative process and ultimately prevailed on the merits. *See In re Tilton*, SEC Initial Decision No. 1182, 2017 SEC LEXIS 3051 (ALJ Sept. 27, 2017) (ALJ initial decision dismissing charges) and Exchange Act Release No. 4815,

2017 SEC LEXIS 3707 (Nov. 28, 2017) (SEC Finality Notice); *In re Hill*, SEC Initial Decision No. 1123, 116 SEC Docket 2709 (ALJ Apr. 18, 2017) (ALJ initial decision dismissing charges) and Exchange Act Release No. 34-80953, 116 SEC Docket 5022 (June 16, 2017) (SEC Finality Notice). Likewise, after the Supreme Court upheld their structural constitutional challenge, the petitioners in *Free Enterprise Fund* ultimately reached a resolution with the Public Company Accounting Oversight Board in which their matter was closed without any final order being issued. *See Beckstead and Watts Settles Inspection Case with PCAOB*, ACCT. TODAY (Feb. 23, 2011).

Although successful litigants undoubtedly welcome their escape from the threat of punitive sanctions, Section 25(a) provides no remedy for the constitutional injury they have already endured from having been forced for many months (and perhaps years) to obey the *ultra vires* commands of a federal officer. Nor do they have any incentive to devote additional time and expense to pressing ahead with their constitutional claims, because by that point the constitutional injury cannot be undone or meaningfully remedied by any court. Accordingly, under the approach taken by the court below, a successful defense on the underlying merits

of the SEC charges does nothing to remedy the constitutional injury already suffered. Nor does it "moot" that injury; to the contrary, success on the merits renders the *constitutional* injury permanent, irreversible, and entirely unreviewable.

Section 25(a) likewise offers no remedy to the disproportionate majority of SEC administrative litigants who agree to a consent order with the SEC in settlement of their administrative case. Although many litigants settle before an ALJ is even assigned to their case, others settle during or after the ALJ phase of the proceeding. *See* Velikonja, 92 WASH. L. REV. at 340, 346, 364-65.[4] Indeed, this was the fate of another SEC litigant denied access to federal court to press the same structural constitutional claim that Cochran seeks to litigate here. *See In re Lucia*, Exchange Act Release No. 34-89078 (June 16, 2020) (SEC settlement order); *accord In re Timbervest, LLC*, Exchange Act Release No. 40-5093,

[4] At least some administrative litigants who settle immediately—that is, before an ALJ is appointed—reportedly do so partially out of concern over the perceived unfairness of ALJ proceedings and the knowledge that independent oversight by any Article III judicial officer is unlikely to occur for years, if ever. *See* Velikonja, 92 WASH. L. REV. at 365 (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").

2018 SEC LEXIS 3633 (Dec. 21, 2018) (SEC settlement order without fraud finding issued more than five years after initiation of administrative proceeding and more than four years after an unconstitutional ALJ, following a hearing, had imposed fraud-based penalties that were initially upheld by the SEC).

Regardless of when they settle, however, no settling administrative litigant has any hope of obtaining court of appeals review of their case under Section 25(a) because SEC rules and policy require them to expressly waive their right to "judicial review by any court." SEC R. of Prac. 240(c)(4)(v), 17 C.F.R. § 201.240(c)(4)(v). Section 25(a) thus offers no more help to these settling litigants than it does to prevailing litigants, because in either case their constitutional injury becomes permanent, irreversible, and unreviewable. Stated another way, if a litigant settles after enduring proceedings before an unconstitutional ALJ, the SEC essentially gets away with that constitutional violation, scot-free.

Nor is it a practical option for SEC administrative 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 the proceeding or to issue commands. Even if a

litigant nominally preserves the constitutional objection for later appeal, otherwise declining to participate in the proceeding would mean "betting the farm" on that constitutional objection, because refusing to obey the ALJ would invariably lead to a default on the merits of the SEC's underlying securities law claims, with associated punitive sanctions imposed. *See generally* SEC R. of Prac. 155, 17 C.F.R. § 201.155 (default if litigant fails to appear at a hearing or conference, 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 or to timely cure a deficient filing), SEC R. of Prac. 220(f), 17 C.F.R. § 201.220(f) (default if litigant fails to file an answer), SEC R. of Prac. 221(f), 17 C.F.R. § 201.221(f) (default if litigant fails to appear at a prehearing conference), and SEC R. of Prac. 310, 17 C.F.R. § 201.310 (default if litigant fails to appear at a hearing).

Moreover, that default would be virtually impossible to undo later without ultimately winning the constitutional argument, because the SEC would almost certainly affirm the default if appealed, and unless the court of appeals ultimately sustained the constitutional objection, the court would likely be required by Section 25 to uphold the default on the

merits. *See* 15 U.S.C. § 78y(c)(1) ("No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so"); *id.* § 78y(a)(4) (SEC factual findings are "conclusive" as long as supported by "substantial evidence").

All of which leaves the relatively few SEC litigants who have the resources and fortitude to endure the entire, years-long SEC administrative process but ultimately lose on the merits. Then and only then can they finally seek the limited appellate relief promised by Section 25(a). But even if they eventually prevail on their constitutional claim in the appeals court, by that point their constitutional injury has already been suffered and is effectively irreversible. The court of appeals cannot undo or meaningfully remediate it at that point. Indeed, ironically, 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 all constitutional infirmity, as happened when the Supreme Court held that SEC ALJs were unconstitutionally appointed. *See Lucia*, 138 S. Ct. at 2055-56 ("the appropriate remedy for an adjudication tainted with an

appointments violation is a new hearing before a properly appointed official" (quotation marks omitted)); *In re Pending Admin. Proceedings*, Exchange Act Release No. 33-10536, 2018 SEC LEXIS 2058 (Aug. 22, 2018) (reassigning more than 100 then-pending administrative proceedings pursuant to *Lucia*).

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 All those who settle with the SEC or prevail on the merits are denied any opportunity to seek such review and, even for those who lose on the merits or by default, review comes far too late or carries far too much litigation risk to be meaningful. To effectively protect private citizens from the irreparable constitutional harm inflicted by a constitutionally illegitimate law-enforcement proceeding launched against them, district courts must be available and stand ready to intervene before the injury becomes effectively irremediable.

CONCLUSION

The decision of the district court should be reversed.

Respectfully submitted,

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December 7, 2020

CERTIFICATE OF SERVICE

I certify that on December 7, 2020, I caused the foregoing motion and 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 C. Parrish

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because it contains 3,740 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 type-style 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.

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Dated: December 7, 2020