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

APPELLANT'S OPENING BRIEF ON REHEARING *EN BANC*

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INTRODUCTION

This case presents a question of exceptional importance: Do the securities laws implicitly deprive federal courts of jurisdiction to hear a structural challenge to the Securities and Exchange Commission's (SEC) conducting administrative proceedings before administrative law judges (ALJs) who are unconstitutionally insulated from removal by the President by multiple layers of tenure protection? This question was answered already by the Supreme Court in *Free Enterprise Fund v. Pub. Co. Accounting Oversight Board*, 561 U.S. 477 (2010) (*FEF*), when it unanimously concluded that the relevant federal statute, 15 U.S.C. § 78y, neither explicitly nor implicitly strips federal district courts of jurisdiction to decide Article II removal questions.

The district court sought to distinguish *FEF*, but the Supreme Court's determination in *FEF* was clear: district courts possess jurisdiction over structural constitutional claims like the one at issue here. The *FEF* Court held that "[i]t is presumed that Congress does not intend to limit jurisdiction if a finding of preclusion could foreclose all 'meaningful judicial review'; if the suit is 'wholly collateral' to a statute's review provisions; and if the claims are 'outside the agency's expertise.'" 561 U.S. at 489. The Supreme Court recently affirmed the right of district courts to hear Article II challenges to federal officers' wielding of authority while insulated from removal by the President, holding in *Seila Law LLC*

v. CFPB, 140 S. Ct. 2183 (2020), that such illicit exercise of authority "inflicts a 'here-and-now' injury on affected third parties that can be remedied by a court." *Id.* at 2196.

Plaintiff-Appellant Michelle Cochran faces the same dilemma as the plaintiff in *FEF*. Worse yet, she is faced with enduring a series of unconstitutional administrative proceedings before ever having her day in court. Ms. Cochran's serial, to-be-vacated SEC proceedings began in 2014, after a protracted investigation beginning in 2010 that imposed crushing personal, reputational, occupational and financial burdens that have jeopardized her livelihood. That administrative proceeding was vacated in 2018 because SEC had failed to properly appoint her first ALJ. The process started anew in late 2018, nearly a decade after the investigation began, when SEC subjected Ms. Cochran to a second administrative proceeding for the same events before an ALJ that the government itself has recognized enjoys multiple layers of tenure protection in violation of the Constitution. Yet, SEC maintains that Article III courts are powerless to vindicate Ms. Cochran's structural constitutional claim until she goes through yet another unconstitutional administrative proceeding.

These repeated and lengthy administrative ordeals leave most respondents in Ms. Cochran's position, who maintain their innocence, with virtually no choice but to settle before any judicial review occurs. Consequently, ALJs are often the only

adjudicators who ever rule on respondents' claims, wielding extensive powers as "Officers of the United States." *Lucia*, at 2044, 2049-52. Although the ALJs' multiple layers of tenure protection are "incompatible with the Constitution's separation of powers," *FEF*, 561 U.S. at 497-98, SEC would force Ms. Cochran to submit herself, her reputation, and her livelihood to the authority of these primary decisionmakers despite the blatant structural constitutional violation they embody. Only after yet another level of administrative review before the Commission would SEC permit Ms. Cochran to finally have a competent Article III court rule on her threshold constitutional claims. And then, if she prevails before an Article III court, her reward would be a *third* successive administrative proceeding. This is a recipe for death by a thousand administrative cuts.

Federal courts have long been the front-line protector of "rights safeguarded by the Constitution." *FEF*, 561 U.S. at 491 n.2. But five circuits have nevertheless held—over disagreement by several federal judges in well-reasoned decisions and dissents—that Americans such as Ms. Cochran cannot obtain judicial review of the threshold question that the most significant decider of their case lacks constitutional authority to preside. For virtually all Americans, this requirement that they first run a grueling, years-long gauntlet of enforcement proceedings and administrative review means that persons charged by SEC never obtain any judicial review. Such administrative attrition drives both the innocent and the

guilty to surrender. And even should Cochran have the resources and stamina to undergo a hearing and the agency rule in Ms. Cochran's favor, that only renders her constitutional injury permanent, irremediable, and unreviewable.

No rational—or constitutional—system of justice would operate in this fashion. And in fact, ours does not. SEC's position conflicts with *FEF* and *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), which recognized that "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Id.* at 215. *Thunder Basin* holds that whether a federal court has jurisdiction to hear challenges to ongoing administrative proceedings is an agency-specific question of statutory law. In a directly analogous challenge to unconstitutionally insulated officers, *FEF* applied the *Thunder Basin* test and squarely rejected the government's claim that SEC's administrative review scheme "implicitly" stripped federal courts' presumptive jurisdiction to adjudicate "an Appointments Clause or separation-of-powers claim." 561 U.S. at 489-91 & n.2. The circuits that have held to the contrary have misapplied the *Thunder Basin* test and disregarded *FEF*.

Stripping federal courts of their statutorily granted jurisdiction based on an inference of what "Congress intended" through its enactment of general statutory schemes sits uneasily with the Supreme Court's usual reluctance to engage in "'speculation about what Congress might have' intended," *Wisconsin Cent. Ltd. v.*

United States, 138 S. Ct. 2067, 2073 (2018) (citation omitted). Implied jurisdiction-stripping collides with "the 'stron[g] presump[tion]' that … 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (alterations in original) (citation omitted); *cf. Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 10 (2000) (statute expressly provided that "'[n]o action … shall be brought under section 1331'" (alteration in original) (citation omitted)).

Numerous federal judges, including a dissenting circuit judge in the Second Circuit and one who dissented from the vacated panel decision below, have compellingly shown that there is no basis to depart from *FEF*'s jurisdictional holding, and furthermore that reasoned application of the *Thunder Basin* factors permit respondents like Ms. Cochran to bring this kind of threshold constitutional challenge in federal district court.[1] Litigants such as Ms. Cochran facing an in-house tribunal should not be denied a federal forum, competent to rule on their

[1] *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) (Rakoff, J.); *Duka v. SEC*, 103 F. Supp. 3d 382 (S.D.N.Y. 2015) (Berman, J.); *Hill v. SEC*, 114 F. Supp. 3d 1297 (N.D. Ga. 2015) (May, J.), *vacated and remanded*, 825 F.3d 1236 (11th Cir. 2016); *Ironridge Global IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294 (N.D. Ga. 2015) (May, J.).

claims, *before* they suffer the constitutional injury of trial before an unconstitutionally insulated agency official who works for the prosecuting agency.

After the Supreme Court decided in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), that Mr. Lucia was required to have a hearing before a new, properly appointed ALJ or before the Commission itself, SEC vacated over one hundred proceedings, including Michelle Cochran's. SEC has persisted in prosecuting Ms. Cochran before an ALJ who is just as unconstitutional as the first one—and SEC knows it. SEC ALJs are protected by multiple layers of tenure protection, which insulate them, like Matryoshka dolls, from removal by the President in violation of Article II. *FEF*, 561 U.S. at 497. The government admitted this unconstitutionality in its brief in *Lucia*, and Justice Breyer called it the "embedded" constitutional infirmity in his concurring opinion. 138 S. Ct. at 2057. Despite that concession, SEC proceeded before an ALJ rather than file suit in federal court or hear Ms. Cochran's case itself, as it is empowered to do and as the Supreme Court in *Lucia* twice stated that it could do.[2]

[2] In a related context, the Third Circuit recently recognized administrative agencies' inhospitable incentives and incapacity to address such constitutional error. The court noted "the likely futility of claimants raising such concerns" in administrative proceedings, noting that although "the SSA was aware that the ALJ appointments might be rendered unconstitutional by the Supreme Court yet declined to take corrective action until well after *Lucia* was decided." *Cirko v. Comm'r of Soc. Sec.*, 948 F.3d 148, 159 n.12 (3d Cir. 2020).

Ms. Cochran instituted this challenge in the district court so that she would not have to endure a second—and ultimately a third—administrative enforcement proceeding when the second, like the first, will inevitably be deemed void. The mere recitation of that convoluted state of affairs demonstrates the grave and protracted injustice that flows from SEC's intransigence.

This case also presents this Court with the question of how a constitutional—to say nothing of rational—system of justice must operate. Should Ms. Cochran have to endure a decade or more of unconstitutional proceedings before ALJs, pointless Commission review, review before a circuit court of appeals, or even the Supreme Court only to have the whole process end in serial vacatur, with inevitable retrials hovering as the pyrrhic reward for enduring this Sisyphean ordeal? Could Congress have possibly intended such a protracted process when it provided for administrative schemes for violations of the securities laws—and the securities laws alone—citing the speed and expedition of such due-process compromised review? And is it the role of the courts to infer that Congress implied such a system without saying so outright? The Supreme Court has long since renounced the "freewheeling approach" of implying legal rules which appear nowhere in the text of a statute but which are often vague and ahistorical speculation about congressional purpose by lower courts. *Hernandez v. Mesa*, 140 S. Ct. 735, 751 (2020) (Thomas, J., concurring). Because Section 78y

neither says nor implies that the administrative scheme is an exclusive path to judicial review, this Court should recognize that federal court jurisdiction over Ms. Cochran's claim is required by law—and by the Constitution.

STATEMENT OF THE CASE

Michelle Cochran, a CPA licensed in Texas, worked from 2007 to 2013 for a small accounting firm called The Hall Group, which did auditing work for non-profits, privately held companies and a few small, publicly traded companies. Initially hired as an hourly employee, Ms. Cochran (who is a single mom) became a non-equity partner of David Hall in 2012 when he made it a condition of her continued employment (so that his firm could take on more clients). Ms. Cochran clashed with Mr. Hall often, as he was difficult and unprofessional. In May of 2013, she notified Hall that she was resigning; her last day of work was July 1, 2013. ROA.137-38.

On April 26, 2016, almost three years after Ms. Cochran left the Hall Group, SEC filed an Order Instituting Proceedings (OIP) against David Hall, his firm, Ms. Cochran, and another accountant. SEC alleged various "paperwork" violations of the Securities Exchange Act, primarily failure to fill out checklists for audits which Ms. Cochran had performed or been involved. ROA.144-51, 153-55.

SEC convened a hearing on October 24, 2016, before SEC ALJ Cameron Elliot. That day, David Hall and his firm settled their charges and agreed to testify

on behalf of SEC. Ms. Cochran represented herself *pro se* before ALJ Elliot, who issued an Initial Decision on March 7, 2017, ruling in SEC's favor, fining her $22,500 and banning her from practicing before SEC for at least five years. ROA.32. SEC adopted the Initial Decision as final on June 15, 2017, and Ms. Cochran petitioned the Commission for review. ROA.139.

Before her objections could be heard, the Supreme Court handed down its decision in *Lucia*, holding that SEC ALJs were "Officers of the United States" who had not been properly appointed by a Head of Department under Art. II Sec. 2, as the Appointments Clause requires. In *Lucia*, the government not only agreed with Ray Lucia that SEC ALJs were unconstitutionally appointed, but affirmatively argued that their protections from removal raised serious constitutional concerns. Br. for Resp't, at 21, *Lucia*, 138 S. Ct. 2044 (No. 17-130), *available at* 2017 WL 5899983 [hereinafter, Gov't Cert. Pet. Br. in *Lucia*]. The government noted that *FEF* held that officers of the United States may not be insulated from presidential control by more than one layer of tenure protection, and it recognized that for SEC ALJs, "the statutory scheme provides for at least two, and potentially three, levels of protection against presidential removal authority." Gov't Cert. Pet. Br. in *Lucia*, at 20. "It is critically important," argued the government, that the Court address the removal issue along with the Appointments Clause issue. *Id*. at 21. "Addressing that issue now will avoid needlessly prolonging the period of uncertainty and

turmoil caused by litigation of these issues." *Id*. Although the government's merits brief again urged the *Lucia* court to address the removal question, the Court declined to do so saying, "we ordinarily await 'thorough lower court opinions to guide our analysis of the merits.'" *Lucia*, 138 S. Ct. at 2050 n.1.

On August 22, 2018, in response to the *Lucia* decision, SEC vacated all decisions in pending enforcement matters and assigned them to different ALJs, including Ms. Cochran's case, which it re-assigned to ALJ Carol Fox Foelak. Ms. Cochran moved to dismiss or stay that proceeding, raising a challenge to the ALJ's removal protections. Shortly thereafter, she filed the instant lawsuit in federal court claiming that SEC's enforcement proceeding violated the Constitution because the ALJ was unconstitutionally insulated from the President's power to remove her and because SEC was in violation of its own procedural rules and due process. She also moved for a preliminary injunction to halt the enforcement proceeding.

On March 25, 2019, the district court dismissed this case for lack of subject-matter jurisdiction, citing five circuit courts that had ruled that Congress impliedly intended to preclude such constitutional claims and to channel them through the administrative scheme. In so ruling, the court noted with disquiet:

> 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, and contends that the one she must now face for further, undoubtedly extended, proceedings likewise is unconstitutionally 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, undoubtably at considerable expense and stress, before another unconstitutionally appointed administrative law judge.

Cochran v. SEC, No. 4:19-CV-066-A, 2019 WL 1359252, at *2 (N.D. Tex. Mar. 25, 2019) (McBryde, J.).

Ms. Cochran timely appealed to this Court. After her SEC ALJ denied her motion to dismiss the administrative proceedings because of the ALJ removal protections, she sought an immediate injunction pending appeal in this Court. A panel of this circuit (Jones, Higginson and Oldham, JJ.) enjoined the administrative proceeding. Ms. Cochran's expedited appeal was argued on November 5, 2019. On August 11, 2020, a panel of this court (Owen, Haynes and Costa, JJ.) ruled 2-1 to affirm the decision of the district court over a dissent from Judge Haynes. Ms. Cochran timely moved for *en banc* rehearing, which this Court granted on October 30, 2020, vacating the panel decision.

ISSUE PRESENTED

Did the district court err in concluding that it lacked subject-matter jurisdiction to consider Ms. Cochran's structural constitutional challenge to SEC's enforcement proceeding before an ALJ who enjoys multiple layers of protection from removal in violation of Article II?

SUMMARY OF THE ARGUMENT

FEF provides the controlling rule of decision for this Court. A unanimous Supreme Court held that federal courts have jurisdiction to hear constitutional

questions regarding Art. II removal power, under the same securities law scheme at issue here. And a majority of the Court further decided that "Officers of the United States" may not be protected by more than one layer of tenure protection.

Administrative agencies and their ALJs lack power to right such constitutional wrongs, *see La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (agencies' powers limited to those conferred by Congress), so federal courts *must* exercise jurisdiction. Notably, the *Lucia* decision itself calls for lower *courts*, not ALJs, to address this question. 138 S. Ct. at 2050 n.1. Furthermore, the logic of the jurisdictional question requires that a court decide this issue before unconstitutional, to-be-vacated hearings take place—for a second time in this case.

The text and structure of the securities laws compel this Court to find jurisdiction, factors which were not considered by the errant circuit court opinions upon which the SEC has relied. Further, they misapplied the factors set forth by the Supreme Court in the decisions that control this case.

Requiring these questions to be delayed pending completion of a hearing by an ALJ and final Commission review—which both lack authority to decide them, and whose decision is institutionally biased and is preordained to be set aside—deprives appellant of due process and serves no legitimate purpose. Such pointless delay further denies appellant any effective remedy because the unconstitutional hearing *is* the harm. Prompt initial judicial review of the constitutionality of SEC's

reinstituted proceedings is required under the Constitution and precedents that bind this Court.

ARGUMENT

I. FEDERAL DISTRICT COURTS HAVE JURISDICTION AND MUST EXERCISE IT UNDER CONTROLLING SUPREME COURT AUTHORITY

A. Standard of Review

This court reviews a dismissal for lack of subject-matter jurisdiction de novo. *Doe v. United States*, 831 F.3d 309, 319 (5th Cir. 2016). When the district court's ruling rests solely on conclusions of law and the facts are established and undisputed, as they are here, the denial of injunctive relief is reviewed de novo. *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 871 (5th Cir. 1993).

B. *Free Enterprise Fund* and Other Controlling Supreme Court Cases Hold that Congress Established Jurisdiction Under 28 U.S.C. §§ 1331, 2201

District courts have original jurisdiction to resolve constitutional claims that "arise under" the Constitution and laws of the United States under 28 U.S.C. § 1331, and specifically jurisdiction to provide "equitable relief … for preventing entities from acting unconstitutionally.'" *FEF*, 561 U.S. at 491 n.2 (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)). Denials of jurisdiction by implication are particularly disfavored, because the federal courts have a "virtually unflagging" "obligation" to "hear and decide cases within [their]

jurisdiction." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (quotation marks omitted).

The Supreme Court in *FEF* unequivocally held that federal courts have jurisdiction over the exact same removal issue that Ms. Cochran raised in her complaint. And it held that nothing in 15 U.S.C. § 78y divests that jurisdiction, even implicitly. 561 U.S. at 489–90 (finding jurisdiction where "petitioners object to the Board's existence, not to any of its auditing standards"). Reviewing the identical statutory scheme at issue here, the Supreme Court in *FEF* concluded that Article III courts are not stripped of jurisdiction and therefore *must* decide structural questions of constitutional administrative law:

> The Government reads [15 U.S.C.] § 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 do not see how petitioners could meaningfully pursue their constitutional claims under the Government's theory [of exclusive jurisdiction]. [These] are instead standard questions of administrative law, which the courts are at no disadvantage in answering. … 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 Court then observed:

> [E]quitable relief 'has long been recognized as the proper means for preventing entities from acting unconstitutionally' … '[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' . . . . 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.

Id. at 491 n.2 (internal citations omitted).

Lucia established the necessary predicate for reaching the same conclusion about SEC ALJs that the Supreme Court already reached with respect to members of the PCAOB—that SEC ALJs are officers of the United States. *Id.* at 2055. As officers, ALJs may not be insulated from removal by multiple layers of tenure protection. Yet, current law only allows ALJs to be removed for "good cause" established and determined by the Merit Systems Protection Board (MSPB). 5 U.S.C. § 7521(a). The members of the MSPB, in turn, may not be removed by the President except for "good cause shown." *Id*. at § 7211(e)(6). Commissioners of the SEC cannot remove ALJs without approval from the MSPB, *id*. at § 7521, and may not themselves be removed except for "inefficiency, neglect of duty, or malfeasance in office." *See FEF*, 561 U.S. at 487; Gov't Cert Pet. Br. in *Lucia*, at 20. These multiple layers of tenure protection for SEC ALJs violate Article II. *FEF*, 561 U.S. at 492. *See also* Br. for Resp't Supporting Pet'r, at 47, 53, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130), *available at* 2018 WL 1251862 [hereinafter Gov't Merits Br. in *Lucia*].

Thus, the new ALJ assigned Ms. Cochran's enforcement proceeding on remand sits in violation of Article II, and the current enforcement proceeding is void. *See Lucia*, 138 S. Ct. at 2055. The government recognized this potential

outcome in *Lucia*. Referring to SEC's November 30, 2017 order "ratifying" its ALJ appointments, the government stated:

> Although the Commission (and some other agencies) have taken steps, following the government's filing of its response to the certiorari petition in this case, to ensure that future proceedings are overseen by properly appointed ALJs … those proceedings will satisfy Article II only if the ALJs' removal protections also comply with constitutional constraints.

Gov't Merits Br. in *Lucia*, at 46.

In his *Lucia* concurrence, Justice Breyer referred to the removal-protections issue as the "embedded constitutional question" in the case. 138 S. Ct. at 2060 (Breyer, J., concurring) ("Congress seems to have provided administrative law judges with two levels of protection from removal without cause—just what *Free Enterprise Fund* interpreted the Constitution to forbid[.]"). *FEF* had left open the question whether ALJs could enjoy more than one layer of removal protection. 591 U.S. at 507 n.10.

Unlike the statutory schemes at issue in *Thunder Basin*, *Elgin v. Department of Treasury*, 567 U.S. 1 (2012),[3] and *Bank of Louisiana v. FDIC*, 919 F.3d 916 (5th

[3] In the context of SSA administrative proceedings, the Third Circuit dismissed the government's argument that *Elgin* required that a petitioner first undergo administrative proceedings as a "patent misreading of *Elgin*, which neither dealt with exhaustion nor remarked upon the agency's competence to hear constitutional claims," and noted that exhaustion is required only if the relief sought is something the ALJ is capable of providing, *i.e.*, within its *competence*. *Cirko*, 948 F.3d 148 at 158 n.10. *FEF* tells us constitutional resolution of Art. II claims is not within an SEC ALJ's competence. *Cirko* also explained that the rationale of giving an agency first shot at error correction does not hold water:

Cir. 2019), which provide for exclusive agency review, the Exchange Act expressly contemplates retention of Article III jurisdiction. As *FEF* clearly held, nothing in § 78y precludes district court jurisdiction under §§ 1331 and 2201, even implicitly.

Where an administrative agency cannot adequately address constitutional claims that result from agency action, as is the case here, the Supreme Court has not hesitated to find that Congress did not intend to preclude district court jurisdiction over those claims. This is true even when the relevant statutes impose clear jurisdictional limits and have eventual judicial review. In *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 494, 497 (1991), for example, the Supreme Court permitted a constitutional challenge to immigration proceedings despite an *express* statutory limit on the court's jurisdiction, because Congress would have used "more expansive language" had it intended to preclude review. *Id.* at 494; *see*

> We need not give an agency the opportunity for error correction that it is incapable of providing—*i.e.*, where it is not "empowered to grant effective relief." See *McCarthy* [*v. Madigan*], 503 U.S. [146,] 147 [(1992)]. This case falls squarely in that category: At neither the trial nor the appellate levels could the SSA's administrative judges cure the constitutionality of their own appointments, whether by reappointing themselves, see *Lucia*, 138 S. Ct. at 2051 (explaining that "the President, a court of law, or a head of department" must appoint ALJs), or by transferring the case to a constitutionally appointed ALJ, see Appellant's Br. 6 (conceding that all SSA ALJs were unconstitutionally appointed prior to *Lucia*).

Id. at 158.

also Oestereich v. Selective Serv. Bd., 393 U.S. 233, 235, 237-38 (1968) (finding jurisdiction over a student's appeal of his Selective Service induction despite an express statutory bar because the bar as written would be "out of harmony … with constitutional requirements"); *Leedom v. Kyne*, 358 U.S. 184, 190 (1958) ("This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers.").

As recognized by an earlier panel of this Court in granting her injunction pending appeal, Ms. Cochran has no option but to apply to a federal court to stop this unconstitutional proceeding. The question, therefore, is not whether Congress intended to confer jurisdiction, but whether it intended to take away jurisdiction. *See Whitman v. Dep't of Transp.*, 547 U.S. 512, 514 (2006). By postponing competent review of constitutional questions, SEC could: 1) make the process the punishment; and/or 2) roll the dice that the respondent will settle, give up, or run out of funds for a defense before she can ever reach a forum that has the competence to rule on these constitutional infirmities. Constitutional rights—and federal jurisdiction—would then become mere options doled out at the agency's whim.

And in similar contexts, circuit courts have not required plaintiffs to exhaust the administrative process when the plaintiff's objection is to the structure, rather than the merits, of the administrative proceedings against her. *See, e.g.*, *Hammond v. Baldwin*, 866 F.2d 172, 176 (6th Cir. 1989) ("[I]f the injury is infirmity of the

process, neither a final judgment nor exhaustion is required."); *Finnerty v. Cowen*, 508 F.2d 979, 982-83 (2d Cir. 1974) ("[W]e agree with other recent opinions dispensing with the exhaustion requirement in situations where the very administrative procedure under attack is the one which the agency says must be exhausted."); *Marsh v. Cty. Sch. Bd.*, 305 F.2d 94, 98 (4th Cir. 1962) ("To insist, as a prerequisite to granting relief against discriminatory practices, that the plaintiffs first pass through the very procedures that are discriminatory would be to require an exercise in futility."); *Dragna v. Landon*, 209 F.2d 26, 28 (9th Cir. 1953) ("[W]here the action of an administrative body is void and *ultra vires*, it is unnecessary that a plaintiff seeking relief against such action should exhaust his administrative remedies.").[4]

C. Plain Application of the *Thunder Basin* Factors Requires This Court to Find Jurisdiction

The Supreme Court has recognized that in certain instances an administrative scheme may demonstrate that Congress intended the scheme to be

[4] Some courts have analogized the delay imposed by this scheme to having to wait for a final court judgment before filing an appeal. *Tilton*, 824 F.3d at 285. That approach abandons any pretense of ascertaining what "Congress intended" with respect to "*this* statutory structure." *Thunder Basin*, 510 U.S. at 212 (emphasis added). Moreover, the analogy is inapt. A party waiting to appeal a final decision from a federal district court has already enjoyed precisely what Ms. Cochran was lacking—an Article III decisionmaker who is, without question, constitutionally authorized to take actions against individuals in the first place. The separation-of-powers claim here, by contrast, "transcends any particular proceeding" and instead challenges the very "'existence'" of the adjudicators "within their current structure." *FEF*, 561 U.S. at 490.

"exclusive" even if it does not "facially" eliminate federal-question jurisdiction. *Thunder Basin*, 510 U.S. at 212-16. But this "implied" jurisdiction-stripping is "[g]enerally" confined to instances in which "agency expertise [will] be brought to bear on particular problems." *FEF*, 561 U.S. at 489; *Elgin*, 567 U.S. at 12. Every case in which the Supreme Court has found such implied jurisdiction-stripping has involved a challenge to the agency's *decision*, not to the constitutional legitimacy of the decisionmaker. 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. That is quite the opposite of the situation here.

Thunder Basin itself involved claims that fell "squarely within the Commission's expertise" that could be "meaningfully addressed" in post-agency review, and that were not "wholly collateral to a statute's review provisions." 510 U.S. at 212-13. Similarly, in *Elgin*, the Supreme Court held that the administrative review scheme under the Civil Service Reform Act (CSRA) precluded an adverse employment action challenge because "at bottom" the case involved a "challenge to CSRA-covered employment action brought by CSRA-covered employees requesting relief that the CSRA routinely affords." *Elgin*, 567 U.S. at 22-23. The plaintiffs in *Elgin* were seeking to "reverse the removal decisions, to return to federal employment, and to receive lost compensation." *Id.* at 4. In short, they wanted to win then and there on the merits. Whereas here, Ms. Cochran's

complaint has no bearing on the merits of her enforcement action. All she seeks is a fair shake—to secure a valid forum in which to be tried.

Neither the SEC ALJ nor the Commission has been granted any power by Congress to decide constitutional questions. 15 U.S.C. § 78w confers on the Commission power to make rules and regulations to implement the Exchange Act, but expressly acknowledges that it requires "judicial or other authority"—rather than authority belonging to the agency itself—to "amend[,] rescind[,] or determine" invalid agency actions. 15 U.S.C. § 78b includes among the Exchange Act's objectives "insur[ing] the maintenance of fair and honest markets" and providing "regulation and control of [securities] transactions and of practices" but makes no mention of constitutional interpretation. *See also* Sec. II, *infra*.

SEC also turns the presumption of jurisdiction on its head. Both the Supreme Court and this Circuit recognize that federal question jurisdiction is presumed. 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); *Elgin*, 567 U.S. at 35 (Alito, J., joined by Ginsburg and Kagan, JJ., dissenting) ("The presumptive power of the federal courts to hear constitutional challenges is well established."); *Am. Gen. Ins. Co. v. FTC*, 496 F.2d 197, 199-200 (5th Cir. 1974) (recognizing jurisdiction over constitutional questions); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nat'l*

Ass'n of Sec. Dealers, Inc., 616 F.2d 1363 (5th Cir. 1980) (same).[5] The reasoning urged on this Court by SEC turns the presumption in favor of jurisdiction on its head, flipping *Thunder Basin* by insisting on proof that the claim is of a 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 to create a presumption *against* jurisdiction, which has no basis in *Thunder Basin*—or elsewhere in federal law. *Thunder Basin* instructs that where (1) a claim cannot be meaningfully reviewed, (2) is collateral, and (3) is outside agency competence and expertise, Congress should not be presumed to have implicitly barred district court jurisdiction. 510 U.S. at 9.

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'

[5] *See also Fay v. Douds*, 172 F.2d 720, 723 (2d Cir. 1949) (L. Hand, J.) (finding federal-court jurisdiction lacking but noting "the result might be otherwise, if a constitutional question were raised"); *Coca-Cola Co. v. FTC*, 475 F.2d 299, 303 (5th Cir. 1973) (citing same).

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).

Post-agency review would offer Ms. Cochran no relief either. It is unavailable to charged parties who prevail before the agency, because they are not "aggrieved" by any final order. 15 U.S.C. § 78y(a)(1). By this time, their constitutional injury cannot be undone. It is rendered permanent and unreviewable by any agency or court. Post-agency relief is also blocked should she join the 98% of litigants who buckle under the weight of years-long, costly, reputation and occupation-destroying process and settle. SEC rules require settling defendants to waive their right to "judicial review by any court." 17 C.F.R. § 201.240(c)(4)(v).

Even if appellant does obtain review, it will be too late to undo or remedy the injury. *See Tilton*, 824 F.3d at 298 (Droney, J., dissenting) ("Forcing the [plaintiffs] to await a final Commission order before they may assert their constitutional claim in a federal court means that by the time the day for judicial review comes, they will already have suffered the injury that they are attempting to prevent."). This is what the Supreme Court meant when it said, "We do not see how petitioners could meaningfully pursue their constitutional claims under the Government's theory [of exclusive jurisdiction]." *FEF*, 561 U.S. at 490.

That leaves the minuscule remnant of respondents with the stamina, resources, fortitude, and reputational clout to endure the years-long journey into the administrative maw who lose on the merits before the ALJ as the only respondents who may press these claims. Even then, they must endure an administrative appeal to the Commission, which affirms the ALJ's factual findings 95% of the time,[6] and which also lacks competence to rule on the constitutional question. In the exceedingly unlikely event that the Commission reverses the ALJ, her judicial review is extinguished because she is no longer aggrieved. By that time, her constitutional injury has occurred years in the past and cannot be meaningfully reviewed because it, and all its attendant harms, have already fallen full force upon her. To add insult to injury, Ms. Cochran's pyrrhic victory would be a third trip before a Commission that has likely already accepted the ALJ's factual findings twice.

SEC's reading of *Thunder Basin* also omits a critical element that was essential to the concurrence in that case: judicial review was available to the regulated entities in that case under the Mine Act *before* fines or penalties could be imposed. 510 U.S. 200, 219-220 (Scalia and Thomas, JJ., concurring) (meaningful review was available because the agency's penalty assessments became final and

[6] Jean Eaglesham, *SEC Wins with In-House Judges*, Wall St. J. (May 6, 2015) https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803.

payable only *after* full review by both the Commission *and the appropriate court of appeals*). By contrast, here the harms imposed by an adverse ALJ decision—including industry bars and penalties—are enforceable pending judicial review. A securities-industry employment bar 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, even if imposed by an unauthorized officer. *See* 15 U.S.C. § 80b-13(b).[7] There is no pre-sanction review in SEC proceedings like that provided under the Mine Act in *Thunder Basin*. For Ms. Cochran, once the Commission ultimately affirms the ALJ's adverse decision, she could be barred from the industry and have to pay her monetary penalty before she could ever present her constitutional claim to a federal court. This pay-now-review-later regime also stands in stark contrast to *FTC v. Standard Oil*, 449 U.S. 232, 241 (1980).[8] This difference alone should be dispositive for the outcome of this case.

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[7] For the duration of an SEC administrative proceeding, the target of that proceeding is generally unemployable, and her chosen profession is out of the question. *See, e.g.*, FINRA Rule 1014(a)(3)(C) (judging application for membership in part on whether an "Associated Person is the subject of a pending … regulatory action or investigation by the SEC").

[8] Although the APA allows a party to seek a stay of penalties pending judicial review, 5 U.S.C. § 705, 15 U.S.C. §§ 78y(c)(2)m, 80b-13(b), both SEC and courts generally deny stays. *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)); *see Associated Sec. Corp. v. SEC*, 283 F.2d 773, 775 (10th Cir. 1960).

There is no meaningful judicial review here at all under SEC's approach—just a lose-lose dilemma for Ms. Cochran.

2. Wholly Collateral

FEF held that a separation-of-powers challenge like the one at issue here is "collateral to any Commission orders or rules" because it is a "general challenge to the Board" itself, plainly "outside the Commission's competence and expertise" and because it implicates "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 district court 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). Indeed, 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 [Art. II appointments] issue.").

3. Agency Expertise

SEC's position 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 (emphases added). Nevertheless, SEC argues that this factor supports precluding jurisdiction because SEC might have expertise in resolving *other* issues *unrelated* to Ms. Cochran's constitutional claim. This proffered rationale, of course, says nothing about whether the agency can resolve Ms. Cochran's removal challenge, a challenge that is antecedent to consideration of SEC's claims that Ms. Cochran violated the securities laws.

Reading *Thunder Basin* and *Elgin* as the SEC does, to impliedly strip federal jurisdiction whenever the merits of an SEC enforcement action involve securities-law issues, "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 have been deprived of any judicial review of her constitutional question, and that deprivation is permanent, irremediable and unreviewable. But that is not what *Thunder Basin*

intended or required. Cochran's wholly collateral, structural constitutional challenge is well outside the Commission's area of expertise.

Only the Article III judiciary has the power to decide the constitutionality of SEC ALJs and thereby keep the elected branches within their assigned roles. An SEC ALJ is not empowered to resolve this collateral constitutional question—nor to rule on her own authority to occupy her office.

SEC's insistence that administrative proceedings precede judicial review raises additional structural and due process problems. SEC chose to bring this case in an unconstitutional forum. Just as an ALJ cannot be expected to rule on her own authority to preside, neither the ALJ nor the Commission, even assuming the best of intentions, can be expected to slap herself or itself on the wrist and agree that the manner in which they have re-prosecuted this action also breaks the rules. Realistically speaking, a district court is the *only* forum in which appellant can seek and obtain a remedy.

D. The Logic of the Jurisdictional Question Requires Immediate Judicial Review

This Court must address the Article II question *before* Ms. Cochran undergoes another unconstitutional proceeding. Congress did not deprive the district courts of jurisdiction over constitutional challenges to an ALJ's removal protections. As set forth above, *FEF* unequivocally holds that federal district courts have jurisdiction to address structural constitutional claims identical to those at

issue here.[9] To nonetheless permit SEC to delay an inevitable ruling on its constitutional structure by requiring completion of an enforcement proceeding before an officer unconstitutionally protected from removal generates inefficiencies and poses a grave challenge to the rule of law. Every litigant before an SEC ALJ right now is enduring unconstitutional proceedings destined to be reversed eventually. There is no rational or statutorily-based reason to await a final agency order on an unrelated securities-law issue before ruling on the preliminary constitutional question. SEC's proffered approach clogs the courts and agencies with to-be-voided proceedings and eviscerates the promise of rapid review that was the administrative scheme's promise of rapid review.[10]

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[9] As one insightful article points out, "What's curious about [SEC's] argument is that the Supreme Court has already rejected it. (citing *FEF*) … Judge Christopher Droney's opinion dissenting in *Tilton* illuminates a way forward for other courts not yet bound by vertical stare decisis … to follow. So, too, does the logic of putting substance before procedure to prevent unnecessary and unconstitutional proceedings." Joel Nolette, *Post-Lucia, It's Déjà vu with the SEC*, Law 360 (April 22, 2019), *available at*: https://www.law360.com/articles/1151580/post-lucia-it-s-deja-vu-with-the-sec?copied=1.

[10] In 2014, then-Director of the SEC Enforcement Division Andrew Ceresney explained that the administrative scheme which denies jury trial, evidentiary and procedural protections afforded in Article III courts was meant to "produce prompt decisions" from hearings "held promptly." *Remarks to the American Bar Association's Business Law Section Fall Meeting* (Nov. 21, 2014), *available at* https://www.sec.gov/news/speech/2014-spch112114ac. This promptness was important to all the parties because "[p]roof at trial rarely gets better for either side with age; memories fade and the evidence becomes stale." *Id.*

Under SEC's logic, this plaintiff must defer resolution of her constitutional claim until she reaches a circuit court, which would mean that wasteful, to-be-vacated proceedings must be endured by Americans and the federal government alike at collective great cost to both. No rational system of justice would require that proceedings take place in this order. No constitutional system would defer structural constitutional questions to be decided by a qualified adjudicator until after extended administrative trials and appeals take place before unconstitutional tribunals.

To insist that the administrative review is exclusive in these circumstances—without an explicit requirement from Congress—is to ensure that SEC can deplete parties before them, financially and otherwise, before they ever reach a forum where they can vindicate their constitutional claims

II. THE TEXT AND STRUCTURE OF THE SECURITIES LAWS COMPEL THIS COURT TO FIND DISTRICT COURT JURISDICTION

Just as *FEF* and *Thunder Basin* require this Court to find jurisdiction, so too do the text and structure of the Exchange Act. Not only do they not limit district court jurisdiction, but, quite to the contrary, the text and structure of the act explicitly preserve such jurisdiction.

A. The Exchange Act's Text and Structure Must Be Read in Their Entirety

Congress did *not* exclusively commit SEC enforcement actions to administrative agency proceedings. The Exchange Act explicitly preserves existing jurisdiction: 15 U.S.C. § 78aa vests "[t]he district courts of the United States" with "*exclusive* jurisdiction of violations of [the Exchange Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by [the Exchange Act] or [the] rules or regulations thereunder." (Emphasis added). Similarly, 15 U.S.C. § 78u(d)(3)(A) authorizes SEC to bring enforcement actions in federal court.

Furthermore, 15 U.S.C. § 78y(a)(1), which governs review of final Commission orders, is permissive, not mandatory. That an aggrieved litigant "may" seek post-agency review of a final order in a court of appeals cannot support a construction of "exclusive" jurisdiction, particularly where, as here, the Commission has issued no "final order." Crucially, § 78y(a)(3) indicates that appellate court jurisdiction is exclusive only on appeal from an SEC "final order," and even then only when SEC files its administrative record with the court. Neither of those predicates applies here. Finally, 15 U.S.C. § 78bb(a)(2) expressly preserves "any and all" other avenues of relief in the courts.

These statutory provisions do not imply any intent by Congress to limit, much less to divest, district courts of their jurisdiction under 28 U.S.C. § 1331 to

adjudicate constitutional challenges raised well before any final order could ever be issued. The "*SEC ALJ Cases*"[11] all fail to acknowledge this statutory structure and accordingly provide a misleading road map to decision, which this Court should ignore.

B. Nothing in Dodd-Frank Constricted Federal Question Jurisdiction or Altered the Savings Clauses of the Securities Exchange Act

The Dodd-Frank Act does not change this statutory analysis. Dodd-Frank exists in conjunction with the Securities Act and the Securities Exchange Act and should be interpreted accordingly.[12] Sections 25 of the Exchange Act and Section 28(a) of the Securities Act, 15 U.S.C. §§ 78y & 77bb(a), are two savings clauses that expressly preserve regulated entities' alternate avenues to federal jurisdiction, the provision of which neither Dodd-Frank's text nor legislative history purports to alter.[13] Neither can Section 28 be fairly said to expressly or implicitly preclude

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[11] *Bennett v. SEC*, 844 F.3d 174 (4th Cir. 2016); *Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016); *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016); *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015); *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015).

[12] "Statutes *in pari materia* are to be interpreted together, as though they were one law." Antonin Scalia & Bryan A. Garner, READING LAW 252 (2012) (explaining what is also known as the "Related-Statutes Canon"). *See also Sivaraman v. Guizzetti & Assocs.*, 228 A.3d 1066, 1076 (D.C. 2020) ("[T]he doctrine of *in pari materia* simply means 'laws dealing with the same subject … should if possible be interpreted harmoniously.'") (citing Scalia & Garner, *supra*, at 252). This has been a rule of statutory construction for nearly two centuries. *United States v. Freeman*, 44 U.S. (3 How.) 556, 564-65 (1845).

[13] Though certain sections of the Dodd-Frank Act clearly delineate instances in which district court review is precluded, none of these clearly imply an intent to

district court jurisdiction. Congress amended Section 28(a) when it enacted Dodd-Frank, essentially for organizational clarity, using nearly verbatim statutory language and leaving intact the very provision that retained "*any and all* other rights and remedies that may exist at law or in equity."[14] Had Congress intended Dodd-Frank to limit Section 28(a)'s scope, one would logically presume it would have clearly expressed its intent *while amending* the very provision subject to question. *See Bd. of Govs. of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991) (when Congress intends to strip jurisdiction, it does so "clearly and directly"). It also logically follows that, if Congress consciously amended one savings clause during the enactment process, it could have amended the other. Its choice not to do so suggests Congress did not intend a substantive change in law

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apply those denials of judicial review to the Act generally. *See, e.g.,* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, Sec. 113 (providing judicial review after final determinations with respect to nonbank financial companies); Secs. 202, 210 (precluding judicial review of claims arising from commencement of orderly liquidation); Sec. 991 (precluding judicial review of Commission fee rate adjustments); Sec. 1023 (precluding judicial review of Bureau regulations). Moreover, neither the text nor legislative history even hints at any such preclusion of Article III jurisdiction over *constitutional* claims.

[14] 15 U.S.C. § 77bb(a) (emphasis added). Section 767 of Dodd-Frank amended the provision's formatting and organization, retained almost completely identical statutory language, and added two substantive provisions relating exclusively to State bucket shop laws. Dodd-Frank, Pub. L. No. 111-203, 124 Stat. 1376, Sec. 767 (codified as amended at 15 U.S.C. § 77bb(a) (2011)).

with respect to either. In short, a finding of jurisdiction flows directly from the principle that federal court jurisdiction is a matter of statute.

C. *Bank of Louisiana* Involved a Different Statutory Scheme

In its briefing to the district court and on appeal, SEC urged the Court to follow an earlier panel decision, *Bank of Louisiana*, which endorsed the reasoning of the *SEC ALJ Cases*. The court should not take up that invitation for several reasons. First, the inquiry to be undertaken under the controlling Supreme Court precedents is agency-specific, *i.e.*, does *this* statutory scheme explicitly or implicitly strip district court of jurisdiction. *FEF* holds that the securities laws do not. Further, the FDIC statutory scheme at issue in *Bank of Louisiana* explicitly stripped jurisdiction: "[N]o Court shall have jurisdiction to affect by injunction or otherwise" the administrative proceedings. 12 U.S.C. § 1818(1)(1). The Exchange Act contains no similar jurisdictional bar.

Ms. Cochran is also in a materially different posture from the respondents in *Bank of Louisiana*. Ms. Cochran is subject to being ordered into an administrative proceeding before an ALJ who has still not yet determined whether she has violated the law, just as were the petitioners in *FEF*. Although in theory she could refuse to participate in such an *ultra vires* proceeding, she would incur sanctions

by default,[15] and *FEF* makes clear that she is not required to bet the farm. 561 U.S. at 490-91. This stands in stark contrast to *Bank of Louisiana*, where by the time the bank filed its district court lawsuit alleging unconstitutional administrative proceedings, the FDIC's ALJ had considered and rejected those constitutional claims, FDIC had issued a final enforcement order against the bank, and the bank had petitioned this Court for review of that order. 919 F.3d at 920-21. Under those circumstances, it is no wonder that the Court concluded that "the Bank did not have to 'bet the farm' to challenge agency action" by having to delay its appeal until after issuance of a final agency order, because "the farm was already on the table." *Id.* at 927. The bank could hardly complain that being limited to court-of-appeals review denied it meaningful judicial review (by forcing it to endure an unconstitutional administrative proceeding before it could reach federal court), given that the administrative proceeding was over before it ever sought district court review.

[15] Even if Ms. Cochran formally raised her constitutional objection, and then refused to participate in the proceeding, that would empower SEC to enter a default against her on the merits of the securities law claims. 17 C.F.R. § 201.155 (Default if respondent fails to answer), §§ 201.221(f) and 301 (Default if she fails to appear). And because post-agency judicial review may not consider any objection "unless it was urged before the Commission or there was reasonable ground for failure to do so," §§ 78y(c)(1) and (a)(4), she likely would be unable to obtain review of her defenses on the merits in the court of appeals. In short, her claim cannot be judicially reviewed whether she wins, abstains, defaults or settles.

Here, the farm is not on the table, and *FEF* tells us that Ms. Cochran may not be forced to bet it. The vacatur of her prior proceedings means that SEC has issued no ruling or final agency order against her. In other words, Ms. Cochran is in a nearly identical posture as the petitioners in *FEF*, and nowhere near the posture of the respondents in *Bank of Louisiana*.

III. THE CASES CITED BY SEC DO NOT PRECLUDE JURISDICTION

Before proceeding to the analysis of the *SEC ALJ Cases* upon which SEC and the district court below rely, it is important to note that this Court cannot even consider these cases until it first applies controlling Supreme Court authority and its own precedent—which is lacking in this Circuit as to the securities laws. In determining what constitutes clearly established law, a circuit court first looks to Supreme Court precedent and then to its own. *See Tex. Democratic Party v. Abbott*, 961 F.3d 389, 406-06 (5th Cir. 2020) (citing *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989)). Further, the Supreme Court has recognized that while a circuit court may look to its own circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established, "it may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the federal circuits that it would, if presented to [the Supreme] Court, be accepted as correct." *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (holding that failure to abide by that limitation was

reversible error). The district court erred in failing to follow *FEF*'s controlling and unanimous jurisdictional holding, instead canvassing other circuits to rule in lockstep with the *SEC ALJ Cases.*

A. The *SEC ALJ Cases*' Attempts to Distinguish *FEF* Make No Sense

Rather than directly address the holding of *FEF* and the law of this circuit set forth above, SEC relies on five flawed, out-of-circuit court decisions. By ignoring the Supreme Court's dispositive holding in *FEF*, perhaps SEC hopes that the sheer volume of errant circuit court opinions will overcome the Supreme Court's inexorable command that federal courts hear constitutional questions—specifically this exact Article II question. But, even where numerous federal courts of appeals have adopted a position, neither the Supreme Court—nor this Court nor the Constitution—"resolve[s] questions such as the one before us by a show of hands." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 715 (2011).

Further, as argued above, the Eleventh Circuit's reasoning in *Hill*, for example, 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." *Hill*, 825 F.3d at 1245 (emphasis added). The presumption of Article III jurisdiction is rebutted only by proof that Congress intended to exempt that jurisdiction for a particular issue—not the other way around.

The *SEC ALJ Cases* also either discount, or disregard altogether, two-thirds of the factors that must exist to find that Congress impliedly stripped § 1331 jurisdiction. In both *Thunder Basin* and *Elgin*, *all three* of the *Thunder Basin* factors supported stripping jurisdiction. In contrast, the *SEC ALJ Cases* treat the "wholly collateral" question as disposable and limit discussion of the third factor (whether the claim is outside the agency's expertise) to consideration of whether (as could almost always be true) agency expertise might lead the ALJ to resolve the case against the agency. *See, e.g., Tilton,* 824 F.3d at 829. 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" in determining whether that review is "meaningful." *Id.* at 33.

The *SEC ALJ Cases* reason that the *FEF* plaintiffs were free to raise their constitutional challenge in district court *solely* because the SEC had not yet commenced an administrative proceeding against them. But it is no answer to claim that *FEF* is distinguishable because the petitioner there lacked any "guaranteed path to federal court." The petitioner accounting firm in *FEF* faced only a critical PCAOB inspection report when it brought its case. *See* 561 U.S. at 487, 490-91. If the petitioner had waited, PCAOB may not have found any

violations, in which case the matter would have ended. On the other hand, if PCAOB had brought charges in an administrative proceeding and prevailed, the petitioner would have had a "guaranteed path to federal court"—just as Ms. Cochran will have a path to federal court if and only if SEC prevails in its claims against her. Hence, it was not simply the less-than-guaranteed possibility of obtaining eventual circuit court review that led *FEF* to uphold district court jurisdiction, but the fact that the petitioners were challenging the very authority of the PCAOB to act. *See id*. at 490 ("[P]etitioners object to the Board's existence, not to any of its auditing standards.").

Thus, other circuit courts have gotten the analysis exactly backwards. Here, an ongoing administrative proceeding threatened serious and ongoing harm to Ms. Cochran sufficient to warrant a stay pending appeal. In *FEF*, the unconstitutionally appointed board had taken no significant action against the plaintiff. SEC would have *FEF* stand for the proposition that parties may bring constitutional claims against SEC in district court only if they have not yet suffered serious harm, while parties who are being *actively harmed* by being subjected to an unconstitutional proceeding must await § 78y judicial review. That rule defies logic—and precedent.

The *SEC ALJ Cases* also fall into the fallacy of treating the administrative dismissal of claims by an unconstitutional ALJ as constitutional avoidance. This is

wrong. First, Congress did not set up administrative schemes as mechanisms to obliterate constitutional rights. Allowing the ALJ to moot the constitutional question by finding against the Commission empowers the ALJ to protect her own position. Most important, such mooting would still subject the respondent to an unconstitutional proceeding, which *Lucia* held is a cognizable harm. The hearing *is* the harm. The process *is* the punishment, whether or not Ms. Cochran prevails. This is especially so when SEC's serial proceedings deliberately prolong the process and give new meaning to the term "administrative exhaustion." Even if Ms. Cochran were to prevail and thus "moot" her constitutional claim, that success on the merits would render the constitutional injury permanent, irreversible, and entirely unreviewable. This result would also prevent lower-court opinions on the removal question from reaching the Supreme Court.

The *SEC ALJ Cases* are thus unjust, illogical and unreasoned. This Court should adopt a just, logical and well-reasoned approach by recognizing that Ms. Cochran need not undergo a Sisyphean ordeal to vindicate her constitutional rights.

B. The *SEC ALJ Cases* Conflate Eventual Judicial Review with Meaningful Judicial Review

The *SEC ALJ Cases* conflate *eventual* judicial review with *meaningful* judicial review, contrary to law, experience and common sense. This Court should decline to follow that error-strewn path.

Article III courts exercise jurisdiction over constitutional claims that go to the legitimacy of the proceeding and enjoin administrative proceedings to prevent SEC from engaging in such unconstitutional behavior. *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[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.") By so doing, Article III courts properly discharge their constitutional duty to provide meaningful judicial review of legitimate constitutional violations and prevent important questions of administrative and constitutional law from being decided outside Article III courts.[16]

In *Jennings v. Rodriguez*, the Supreme Court recently held that channeling a noncitizen detainee's "prolonged detention" claim into a similar review scheme of a final removal order would "depriv[e] that detainee of any *meaningful* chance for judicial review" because, "[b]y the time a final order of removal was eventually entered, the allegedly excessive detention would have already taken

[16] *See, e.g.*, Katz, *Eventual Judicial Review*, 118 Colum. L. Rev. at 1162 ("[R]eading *Thunder Basin* to imply that 'meaningful' review is satisfied by any *eventual* review effectively reduces *Thunder Basin* to a binary analysis ('will review be available at some point?') without consideration of the coercive or constitutionally dubious elements of an administrative proceeding.… [G]iven the incentive for the parties to settle prior to reaching a trial … , this cabining of constitutional challenges constrains the ability of Article III courts to develop administrative and constitutional law … [and] runs counter to fairness intuitions, feeding suspicions of gamesmanship and undercutting the perceived legitimacy of the SEC.").

place." 138 S. Ct. 830, 840 (2018) (emphasis added). So too, Ms. Cochran's review will be delayed for years under SEC's logic delaying those challenges until review of a final agency order, which likewise deprives her of "any meaningful chance of judicial review."

In addition, review in the courts of appeals is limited to parties "aggrieved" by a "final order of the Commission." 15 U.S.C. § 78y(a)(1). As a result, the vast number of individuals who simply cannot afford protracted agency proceedings and are forced to settle have no remedy at all for the discrete "'here-and-now' injury" they suffered by each and every "executive act that allegedly exceeds the official's authority." *Seila Law*, 140 S. Ct. at 2196 (citation omitted); *see also Bond v. United States*, 564 U.S. 211, 222 (2011) ("[I]ndividuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations."). As the dissent in *Tilton* noted, the SEC's then-top enforcement official has boasted that he has been able to coerce settlements in the "vast majority of [the agency's] cases by "threaten[ing] administrative proceedings." 824 F.3d at 298 n.5 (Droney, J., dissenting) (quoting then-head of SEC Division of Enforcement); *see also* Brian Mahoney, *SEC Could Bring More Insider Trading Cases In-House*, Law360 (June 11, 2014) (quoting then-head of SEC Division of Enforcement: "we have threatened administrative proceedings, it was something we told the other side we were going to do and they settled."); Comments of Andrew N. Vollmer on Office

of Management & Budget Request for Information, OMB-2019-0006, at 4 (Mar. 9, 2020) (former SEC Deputy General Counsel answering whether administrative enforcement "proceedings coerce settlements": "Yes, they do.").

Bennett and *Tilton* also erred when they asserted that an Article II claim arising out of an enforcement proceeding is an "affirmative defense" to the proceeding and is therefore not wholly collateral. This assertion displays those courts' misunderstanding and misuse of a fundamental concept of pleading practice. An affirmative defense is an "assertion of facts and arguments that, if true, will defeat the … prosecution's claim, even if all the allegations in the complaint are true." *Black's Law Dictionary* (10th ed. 2014). Ms. Cochran claims only that the judge adjudicating her claims or defenses is unconstitutionally insulated from removal in deciding them. And she seeks relief only in the form of a properly removable ALJ, not the dismissal of the agency's substantive claims. There is no "affirmative defense" operating here.

C. The *SEC ALJ Cases* All Preceded *Lucia*—and That Matters

The out-of-circuit *SEC ALJ Cases* were all decided before the Supreme Court handed down its 2018 *Lucia* decision that SEC's ALJ appointments violated the Constitution. They thus were decided without the benefit of *Lucia*'s command that a challenge to an unconstitutionally appointed federal officer requires vacatur

of ongoing enforcement proceedings.[17] In short, the *SEC ALJ Cases* are of dubious persuasive weight because they were decided without the knowledge that ALJs are federal officers.

Federal courts post-*Lucia* have been readily asserting jurisdiction over claims that ALJs' appointments are invalid. *See, e.g.*, *Probst v. Berryhill*, 377 F. Supp. 3d 578, 586-88 (E.D.N.C. 2019) (considering the "merits of plaintiff's Appointments Clause claim" to "conclude[ ] that the ALJ who decided plaintiff's case was appointed in violation of the Appointments Clause."); *Bradshaw v. Berryhill*, 372 F. Supp. 3d 349 (E.D.N.C. 2019); *Am. Fed'n of Gov't Emps., AFL-CIO v. Trump*, 318 F. Supp. 3d 370 (D.D.C. 2018). The Fourth Circuit recently affirmed both *Probst* and *Bradshaw* in the context of issue-exhaustion, holding that claimants are not required to even raise Art. II separation of powers issues before agency ALJs who lack power, competence or expertise to decide them. *Probst v. Saul*, 2020 WL 6811986 (4th Cir. Nov. 20, 2020).

Both the public interest and the interests of the parties before the Court can only be served by a federal court ruling now on these important questions. This is especially so where a controlling Supreme Court case finds jurisdiction under the same statute, see *FEF*; where Ms. Cochran has already endured years of irreparable

[17] *FEF* involved no ongoing enforcement, so its ruling on unconstitutional Article II removal protections did not require vacatur of any proceedings.

harm of occupational displacement and reputational damage; and where the SEC could avoid the expense and futility of another vacated round of proceedings. Neither *Thunder Basin*[18] nor *Elgin* involved a constitutional claim that would render the administrative proceeding void *ab initio.*

D. *Standard Oil* Does Not Change the Analysis

SEC's and the district court's reliance on *FTC v. Standard Oil*, 449 U.S. 232 (1980), is misplaced. Standard Oil did not challenge the proceeding's constitutionality or raise any challenge wholly collateral to the FTC proceeding. By contrast, it was challenging the sufficiency of the allegations in the agency's administrative complaint. Further, as noted above, any agency-imposed sanctions there would not have been effective "until judicial review [was] complete." *Id.* at 241. Ms. Cochran, by contrast, is being denied a constitutional right to a lawful tribunal—a right that the Supreme Court has recently recognized, upheld, and vacated proceedings to vindicate. Being forced to defend oneself in an unconstitutional proceeding is a cognizable constitutional harm—even aside from cost. *See United Church of the Med. Ctr. v. Med. Ctr. Comm'n*, 689 F.2d 693, 701 (7th Cir. 1982) (being subjected to an "unconstitutionally constituted

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

decisionmaker" warranted injunctive relief).[19] As the Supreme Court recognized on this very point: "'[O]ne who makes a timely challenge to the constitutional validity of an officer who adjudicates his case' is entitled to relief." *Lucia*, 138 S. Ct. at 2055 (quoting *Ryder v. United States*, 515 U.S. 177, 182-83 (1995)). Congress has determined that this Court must provide it.

These concerns animated *FEF* and support Ms. Cochran's constitutional challenge. By exercising jurisdiction over and reviewing this claim for injunctive relief, Article III courts can check unconstitutional agency behavior, guarantee litigants that courts will hear their legitimate constitutional claims, and allow for the rational and sensible development of law governing agency enforcement proceedings.

Consider, too, the path SEC asks Ms. Cochran to retrace. When she challenged the lawfulness of her ALJ's removal protections, her claim was rejected at the administrative proceeding. Or consider the plight of Ray Lucia, denied relief by his ALJ, by the full Commission (over a dissent by two Commissioners), again by the D.C. Circuit, and denied by an evenly divided D.C. Circuit *en banc* panel on the point. *He only prevailed after reaching the United States Supreme Court* and

[19] *See also Seguin v. City of Sterling Heights*, 968 F.2d 584, 589 (6th Cir. 1992) (noting that a Due Process Clause violation is an injury "instantly cognizable in federal court, regardless of whether [there has been] a final decision on the merits[.]").

then had to face renewed SEC administrative proceedings before an unconstitutionally insulated ALJ. Knowing that it took six years and a trip to the highest court of the land to vindicate his first constitutional challenge, Mr. Lucia, now 70 years old, threw in the towel and settled with the SEC. Not only his case, but many others, were vacated and new hearings ordered years after the events.

After *Lucia*, SEC cannot lawfully demand that individuals like Ms. Cochran endure all of this illegitimate process again. Congress never contemplated that administrative agencies would decide the constitutionality of their own ALJs' appointments, and nothing in any of the relevant securities laws assigns constitutional questions to the Commission or its ALJs for resolution.

IV. POST-AGENCY JUDICIAL REVIEW VIOLATES DUE PROCESS

A. The ALJ Cannot Lawfully Hear Appellant's Constitutional Claim

Congress vested the power to hear constitutional claims in the federal district courts. *See* 28 U.S.C. § 1331. The Supreme Court has recognized that nothing in § 78y ousts that jurisdiction, even implicitly. *FEF*, 561 U.S at 489. "[A]n agency literally has no power to act … unless and until Congress confers power on it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Further, administrative law judges may only decide matters within their statutory grant of power. *Stark v. Wickard*, 321 U.S. 288, 310 (1944).

Congress's grant of power to SEC to hear cases, or to delegate that power to ALJs, applies only to claims asserting violations of the securities laws, not ones asserting structural constitutional claims that go to the very legitimacy of the tribunal. These undisputed—even axiomatic—principles of law require that this court find jurisdiction in the district court for Ms. Cochran.

B. When the ALJ Heard the Case, She Was Necessarily Institutionally Biased

The question of whether Ms. Cochran's adjudicator enjoys unconstitutional levels of protection from removal must also be decided by a court because, logically, the ALJ should be recused. It is difficult to imagine a scenario in which an adjudicator's personal interest—here, keeping her job—is more adverse to the litigant's. Further, if the ALJ were to rule that she enjoyed unconstitutional tenure protections, logically her decision would be effectively void because she has no power to issue that—or any—decision in the first place, an absurd result.

Thus Ms. Cochran's challenge implicates concerns about objectivity, logic, fairness, and impartiality. No assurances, however sincere or well meaning, by the administrative law judge could realistically "dissipate the doubts that a reasonable person would probably have about" the propriety of the adjudicator ruling on her

own qualifications. *Repub. of Panama v. Am. Tobacco Co. Inc.*, 217 F.3d 343, 347 (5th Cir. 2000).[20]

CONCLUSION

Good law, as recognized by Chief Justice Roberts in *McBride*, 564 U.S. at 715, is not made by totaling up temporary batting averages among the circuits, as SEC urges this court to do. Enduring law is made by examining the reasoning—and the consequences of that reasoning—on the development of law that is meant to serve the purpose of the fair administration of justice. And by this metric, the *SEC ALJ Cases* fail badly.

By haling Michelle Cochran before an unconstitutional ALJ in 2016, SEC required her to endure a proceeding that was later nullified; and now on remand, the Commission persists on retrying her yet again before another constitutionally defective ALJ. The injustice is palpable. SEC's assertions about the efficiency of administrative proceedings are insupportable.

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[20] SEC also presented ripeness arguments in the district court and on appeal. Neither the district court nor the now-vacated panel decision addressed those arguments. SEC further devoted a significant portion of its opposition to *en banc* review to this alleged alternate ground to affirm the district court. Normally, courts of appeal do not address arguments "without the benefit of a full record or lower court determination." *Cent. Sw. Tex. Dev., L.L.C. v. JPMorgan Chase Bank, Nat'l Ass'n*, 780 F.3d 296, 300-01 (5th Cir. 2015) (quoting *New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs*, 718 F.3d 384, 387-88 (5th Cir. 2013) (*en banc*) (quoting 19 JAMES W. MOORE *ET AL.*, MOORE'S FEDERAL PRACTICE § 205.05[1], at 205-57 (3d ed. 2011))).

This Court, unconstrained by any adverse precedent in the Fifth Circuit, should decline to follow this course of error. It should embrace the far superior reasoning of the many courts cited above, including controlling Supreme Court cases that have found jurisdiction, and course-correct a body of law that has led to such troubling outcomes. As the Supreme Court recognized in *Leedom v. Kyne*, federal courts "cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action take in excess of delegated powers." 358 U.S. 184, 190 (1958).

For the foregoing reasons, Ms. Cochran respectfully requests that this Court reverse the decision below and find jurisdiction in federal district court so that she may pursue her constitutional claim in a forum that can provide the relief to which she is entitled.

November 30, 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 12,082 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 November 30, 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