No. 19-10396

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHELLE COCHRAN,

Plaintiff – Appellant,

v.

SECURITIES AND EXCHANGE COMMISSION;
ELAD L. ROISMAN, in his official capacity as Acting Chairman of the U.S. Securities and Exchange Commission; JEFFREY A. ROSEN, in his official capacity as Acting U.S. Attorney General,
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 REPLY BRIEF ON REHEARING *EN BANC*

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OPENING STATEMENT ON REPLY

Appellant Michelle Cochran, a Texas accountant administratively charged with paperwork violations by the Securities and Exchange Commission in 2016, has had a sword of Damocles hanging over her personal reputation and career prospects ever since. Caught between her own professional responsibilities and an employer who the SEC recognized had created a toxic workplace,[1] she resigned in 2013 without having a new job in place rather than continue to work under such unprofessional conditions. Three years later she found herself charged by the SEC for incomplete audit checklists. Unable to afford a defense, and without access to key witnesses and documents, Ms. Cochran appeared pro se before SEC ALJ Cameron Elliot, who was reported at the time to have "found the defendants liable in every contested case he has heard" and to have told respondents that "they should be aware he had never ruled against the agency's enforcement division." ROA 10, Complaint ¶ 31. That trial ended in a $25,000 fine and a five-year industry bar despite the ALJ finding "no evidence of monetary harm to clients or investors."[2] This initial decision was vacated by the Supreme Court decision in

[1] Initial Decision of SEC ALJ Cameron Elliot, *available at* https://www.sec.gov/alj/aljdec/2017/id1114ce.pdf.

[2] Initial Decision of ALJ Elliot, at 28.

Lucia v. SEC, 138 S. Ct. 2044 (2018), because the SEC had failed to properly appoint ALJ Elliot (who has since left the agency).

Rather than retry Ms. Cochran before the Commission, SEC brought a second administrative proceeding that was just as unconstitutional as the first—before a new ALJ who unlawfully enjoyed multiple layers of for-cause tenure protection. All the while, Ms. Cochran's life, reputation, and employment prospects have suffered from continued uncertainty and disarray. If the SEC's approach prevails, she will have to endure a second, years-long administrative trial and appeal to the Commission, pay any fines and penalties assessed, and incur the professional damage of an industry bar before she can ever have a competent adjudicator hear her wholly collateral constitutional challenge. And if she prevails on that claim, she will likely have to face a *third* administrative proceeding years from now. Ms. Cochran's already compromised ability to defend herself in a future rehearing of events that occurred a decade ago will also be effectively extinguished due to unavailable witnesses and documents, and impaired memories.

Although one constitutional violation identified by *Lucia* has been corrected—a major constitutional deficiency remains. Because SEC ALJs are protected from removal by a dual for-cause limitation of the sort condemned as a violation of the separation of powers by *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) ("*FEF*"), the ALJ overseeing Ms.

Cochran's case lacks authority to proceed. Ms. Cochran raised that constitutional claim in federal district court, but it dismissed the case for lack of subject-matter jurisdiction. The district court erred; 28 U.S.C. § 1331 grants federal courts jurisdiction over all cases raising federal constitutional claims. SEC's argument that Congress should be deemed to have *impliedly* stripped district courts of their federal-question jurisdiction when it adopted 15 U.S.C. § 78y is unpersuasive and inconsistent with the Supreme Court's ruling in *FEF* and *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994).

ARGUMENT

I. SEC IGNORES AND MISCONSTRUES THE RELEVANT AND CONTROLLING SUPREME COURT AUTHORITY

A. *FEF* Unanimously Decided that Federal District Courts Have Jurisdiction Over this Precise Claim Under this Precise Statutory Scheme

SEC seems to argue that Congress impliedly strips district courts of federal-question jurisdiction whenever Congress creates an administrative review scheme that vests a circuit court of appeals with jurisdiction to review an agency action. SEC Br. p. 2. We know from *FEF*, 561 U.S. at 489-91, however, that SEC's theory of jurisdiction is unfounded and that persons raising separation-of-powers challenges to an agency's adjudicatory scheme may bring those challenges in a district court in the first instance.

By characterizing a district court's jurisdiction to hear separation of powers challenges as some novel notion, SEC turns *FEF*'s holding on its head. The Supreme Court rejected the government's attempt in 2010 to prevent assertion of such claims in district court:

> [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). SEC's position is novel, unfounded, inconsistent with the presumption of Article III jurisdiction for constitutional questions—and barred by the Supreme Court's holding in *FEF*.

B. Proper Application of the *Thunder Basin* Factors Requires this Court to Find Jurisdiction

When Congress restricts the jurisdiction of district courts, it does so under distinct statutory schemes. If Congress has not done so explicitly, a court applies *Thunder Basin* to determine whether the question can be meaningfully reviewed, calls upon the agency's expertise, and is wholly collateral to the proceeding. Congress, merely by setting up an administrative scheme to decide securities violations, did not confer upon SEC nor its ALJs any power to decide wholly collateral constitutional questions to the exclusion of district courts, particularly

questions that fail this three-factor test. Properly applied, the *Thunder Basin* factors require a finding that Congress did not *sub silentio* strip district courts of jurisdiction to hear Ms. Cochran's constitutional claim that is "collateral" to the subject matter of the enforcement action, does not fall within the agency's competence or expertise, and of which she would otherwise be denied meaningful judicial review.

1. Meaningful Judicial Review

Trial before an unconstitutionally insulated ALJ "is an executive act that allegedly exceeds the official's authority" and "inflicts a 'here-and-now' injury." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2196 (2019) (citation omitted). 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 v. SEC*, 824 F.3d 276, 298 (2d Cir. 2018) (Droney, J., dissenting). *Cf. Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) (delayed review of prolonged detention not meaningful). Such injury is irreparable; no post-agency relief can undo suffering through an unconstitutional proceeding.[3]

[3] As an alternative avenue of relief for those improperly targeted by SEC, the agency for the first time suggests the "extraordinary" writ of mandamus for aggrieved appellants. SEC Br. at 37. It failed to bring this argument before the district court, when contesting Cochran's motion for stay pending appeal, before the merits panel, or in opposition to the petition for rehearing en banc. As SEC

SEC's eventual-judicial-review-equals-meaningful-judicial-review sophistry fails to acknowledge that a court of appeals cannot enjoin a proceeding which has already occurred, nor can it remedy the personal, reputational, and occupational damage. Review delayed is meaningful review denied.

2. Wholly Collateral

SEC's discussion of the "wholly collateral" factor makes the flawed and illogical claim that a challenge to the constitutionality of an adjudicator is "inextricably intertwined" with the merits of the enforcement proceeding. SEC Br. at 24-25. It argues that Ms. Cochran's assertion of the removal challenge in an ongoing proceeding means that she effectively concedes that it must be decided there initially. This is nonsense. No capable lawyer would fail to raise the challenge in the administrative proceedings for fear of forfeiture at a later stage of the appeal. As Texas Public Policy Foundation (TPPF) showed in its *amicus* brief filed with the panel, lawyers have to shoehorn the point into an "affirmative defense" only because of the limitations of agency pleading practice. TPPF Br. at 12 ("forcing a square peg into a round hole"). But a challenge to the

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would be the first to concede, mandamus is a rarely granted remedy that's unavailable to all or virtually all targets of SEC enforcement actions. The theoretical availability of a mandamus remedy does nothing to detract from Cochran's argument that federal law permits her to raise her separation-of-powers arguments in district court.

constitutionality of an enforcement proceeding does not lose its wholly collateral status simply because the defendant preserves the constitutional claim. Ms. Cochran's constitutional challenge is "collateral" to the SEC enforcement action in the only meaningful sense: it raises an issue that is unrelated to the merits of SEC's claims and outside SEC's area of expertise.

No claim at issue in *Thunder Basin* challenged the lawfulness of the Commission or whether it had constitutional defects that would require vacatur, remand and rehearing of the constitutional question. Whereas, as the Supreme Court has recognized, 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. *FEF*, 561 U.S. at 490-91. And after *Lucia*, it is now clear that vacatur and a third trial would be required. 138 S. Ct. 2055. A claim that would vacate a proceeding's lawfulness is by definition wholly collateral to claims that might be properly decided within that proceeding.

3. Agency Expertise

SEC also distorts *Thunder Basin*'s "agency expertise" factor. The idea that if an agency can dispose of a case based on some issue within its core competency, then, the entire case falls within the agency's expertise means that literally every challenge to an administrative proceeding gets decided in the government's favor. This fallacious reasoning would preclude district-court jurisdiction in every case

and destroy the presumption of jurisdiction. *Cf. Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) (Courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."). Whether an agency has expertise about *some other* issue that is wholly collateral but might also be dispositive is not what *Thunder Basin* means by agency expertise. As Judge Droney's dissent in *Tilton* observed, "any time a proceeding has commenced there is of course some possibility that a plaintiff may prevail on the merits." 824 F.3d at 296. The exception thus swallows the rule.

It is no surprise, then, that SEC's discussion of *Thunder Basin* omits the Supreme Court's conclusion that the mine company's claims "at root required interpretation of the parties' rights and duties … under the Mine Act and fall squarely within the Commission's expertise," and its further observation that the Mine Commission had "extensive experience interpreting the walk-around rights … [having] recently addressed the precise NLRA claims presented here." 510 U.S. at 214. Because the petitioner's claim was expressly tied to adjudication of Mine Act walk-around rights, the Court determined the claim implicated the agency's expertise. *Id.*

Ms. Cochran's claims here fall fully outside of SEC's expertise. The Supreme Court unanimously held that constitutional challenges to an adjudicator's removal protection under § 78y are "outside the Commission's *competence* and

expertise, and the statutory questions do not require technical considerations of agency policy." *FEF*, 561 U.S. at 478 (emphasis added). No facts, technical questions of agency policy, or securities expertise has any bearing on Ms. Cochran's purely legal claims.

Further, Congress has granted to the SEC, and its ALJs, the limited power to decide whether respondents have violated the securities laws—not to decide structural constitutional questions. *FEF*'s holding that Ms. Cochran's constitutional removal challenge is beyond the agency's "*competence*" seals the question. *Id.*

Unable to link removal protections to SEC expertise, SEC and the other circuit decisions pivot to a mootness argument that is conceptually irrelevant to the question. Thus, constitutional avoidance masquerading as mootness shields and perpetuates these unconstitutional schemes.

The Commission deciding the case on other grounds would only render Ms. Cochran's constitutional injury permanent, irremediable, and unreviewable. Think, for example, how many respondents underwent invalid SEC adjudications before Raymond Lucia summoned up the courage, resources, and stamina to correct that. The Supreme Court has stressed that the Appointments Clause guards against congressional encroachment on the Executive and "preserves the Constitution's structural integrity by preventing the diffusion of appointment power." *Freytag v.*

C.I.R., 501 U.S. 868, 878-79 (1991). Article II's structural protections preserve individual liberty by ensuring the separation of powers, and breaches of those provisions "go to the validity of the [administrative] proceeding" that is the basis for this litigation. *Id.* at 879-80.

4. The Review Scheme at Issue in *Thunder Basin* Delayed Any Penalties Pending Judicial Review, but SEC's Does Not

SEC presents an inaccurate view of the Commission's practices pending judicial review, practices which stand in stark contrast with the Mine Act scheme on a key, dispositive point. SEC Br. at 16-17. Although SEC correctly notes that *Thunder Basin*'s concurrence hinged on the fact that the Mine Act precluded the imposition of penalties pending judicial review, *Thunder Basin*, 510 U.S. at 220 (Scalia & Thomas, JJ., concurring in part), SEC glosses over the practical consequences of the fact the Exchange Act makes a stay of any penalties imposed by the Commission permissive rather than mandatory. SEC Br. at 17 (observing that the Commission and courts of appeals "may" issue stays "when warranted") (citing 15 U.S.C. § 78y(c)(2)).

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 typically deny stays. *See, e.g.*, *In re Clifton*, Exchange Act Release No. 70639, 2013 WL 5553865, at *4 & n.27 (SEC Oct. 9, 2013) (citing *Wisc. Gas Co. v.*

FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)); *see also Assoc. Sec. Corp. v. SEC*, 283 F.2d 773, 775 (10th Cir. 1960). Furthermore, as noted in Cochran's opening brief, SEC industry employment bars—"the securities industry equivalent of capital punishment," *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013) (citation omitted)—remain in place pending review, even if imposed by an unauthorized officer. *See* 15 U.S.C. § 80b-13(b). Thus, because the SEC scheme does not ensure pre-sanction review, this scheme differs on the factor critical to securing the concurrence of two justices in *Thunder Basin*. *See also FTC v. Standard Oil*, 449 U.S. 232, 241 (1980) (explaining that any sanctions that FTC imposed would not become effective "until judicial review [was] complete").

Further, in this agency-specific scheme with its unique industry bars, the mere filing of an administrative charge effectively prevents Ms. Cochran from working in her industry. Even before there is any adjudication at all, for the duration of an SEC administrative proceeding, the target of that proceeding is generally unemployable, and her chosen profession is off limits. *See, e.g.*, FINRA Rule 1014(a)(3)(C) (considering whether an applicant "is the subject of a pending … regulatory action or investigation by the SEC").[4] The career stand-still and

[4] Reputational damage and litigation expenses caused by unconstitutional practices confer standing to invoke district-court jurisdiction. *See Mental Disability Law Clinic v. Hogan*, 519 Fed App'x 714, 717 (2d Cir. 2013) (citing *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011) (litigation expenses), and *Gully v. Nat'l Credit Union Admin. Bd.*, 341 F.3d 155, 161 (2d Cir. 2003) (injury to reputation)).

immediate and enduring reputational damage also distinguish Ms. Cochran from Standard Oil, which the Supreme Court noted, was able to continue in its operations unimpaired. 449 U.S. at 242. This distinction in how SEC penalizes respondents should alone be dispositive to find that Congress did not intend to strip district court jurisdiction in this case. This Court should not deny § 1331 jurisdiction under *Thunder Basin* when the statutory scheme at issue left to the SEC's discretion a factor that was critical to the *Thunder Basin* analysis—especially given the agency's demonstrably stingy track record of stays.

C. SEC's Misreading of Key Supreme Court Precedents Obscures Why those Cases Are Readily Distinguishable

1. *Elgin*

The administrative review scheme in the SEC is easily distinguishable from the statutory scheme at issue in *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012). The statutory scheme in *Elgin* was the Civil Service Reform Act (CSRA), 5 U.S.C. §1001, through which Congress created an *exclusive* administrative appeal scheme for fired employees, except for those who raise certain enumerated discrimination claims. 567 U.S. at 13. Because Elgin's claim did not fall into an expressly exempted category, the majority held that a constitutional challenge to a federal statute that required dismissal of employees who had willfully failed to register for the draft had to go proceed through the administrative scheme. *Id.* at 23.

By contrast, the SEC scheme expressly *preserves* existing jurisdiction under other statutes and confers adjudication powers on SEC to decide only charges of violations of the various *securities laws* over which SEC is charged with enforcement. 15 U.S.C. § 78w. This limitation is consistent with the Exchange Act's objectives, which include "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 substituting the SEC on issues of constitutional interpretation. *Id.* § 78b.

SEC and its ALJs, like all administrative agencies, are limited to the powers conferred by Congress. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act … unless and until Congress confers power on it.").[5] Courts must

> carefully scrutinize an agency's suggested interpretations of its mandates which have the effect of expanding its authority beyond the statutory bounds. If an agency was meant to have authority to do … a thing, Congress must say so. And when it has said, "Thus far and no farther," it is the Court's responsibility to blow the whistle and call the out-of-bounds.

FTC v. Hornbeam Special Situations, LLC, 2018 WL 6254580, at *6 (N.D. Ga. Oct 15, 2018) (citing *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013)). To put

[5] Two SEC Commissioners expressed this self-evident proposition in the administrative review process in *Lucia* as set forth in Appellant's opening brief at page 26.

it another way, the subject-matter limitation that Congress imposed on the SEC's adjudicatory scheme is organic to its power to operate at all—and does not extend to anything beyond deciding securities law violations.

Elgin is further distinguishable because 1) plaintiffs were not challenging the constitutional composition of their adjudicative body, and 2) no issue presented by their statutory challenge would result in vacating the actions of the MSPB and requiring a re-do.

SEC correctly notes that the *Elgin* court was also concerned about creating the "potential for inconsistent decision making and duplicative judicial review," which would result in the "odd notion that Congress intended to allow employees to pursue constitutional claims in district court at the cost of forgoing other, potentially meritorious claims" in the administrative proceedings. SEC Br. at 18 (quoting *Elgin*, 567 U.S. at 14). But no such concern attaches here. For one, this Court stayed the agency proceeding, negating any worry of duplicative decisions. Further, such separate proceedings would not be duplicative because Cochran has limited this appeal to the removal question which is not within the competence of the agency. Under either approach, the constitutional issue will eventually require a decision by the federal courts—whether in this case or one filed later. District-court jurisdiction under § 1331 provides efficient review in the order logic commands.

In fact, the risk of duplicative proceedings arises *only* under the illogical and duplicative order of proceedings that SEC urges this court to adopt. Such duplication—and potential for triplication—is not just theoretical. Ms. Cochran has already painstakingly laid out that of many of the 100 or so other respondents who were needlessly subjected to a proceeding now vacated following *Lucia*. Perpetuating this mad course of never-ending hearings exemplifies and exacerbates the policy concerns expressed in *Elgin.* This Court should forge a better way.

Finally, *Elgin* can further be distinguished because of the relief sought. As SEC notes, the "constitutional claims are the vehicle by which [the *Elgin* plaintiffs sought] to reverse" the decisions to fire them, "relief the agency and 'the Federal Circuit can provide.'" SEC Br. at 19 (quoting *Elgin*, 567 U.S. at 22). By contrast, Ms. Cochran is not asking a court to hear the merits of the SEC's charges against her. Having already been dragged through one unconstitutional proceeding, her only request is that she be tried just once more—this time in a constitutional adjudication.

2. *Standard Oil*

SEC also relies on a wholly inapposite decision in *Standard Oil*, 449 U.S. 232, throughout its brief. SEC Br. 10, 35-36, 39. Standard Oil asked the court to review the merits of the FTC's claim against it. *Standard Oil*, 449 U.S. at 235. It raised no constitutional objection to the only proceeding it faced, nor to the

qualifications of the tribunal. By contrast, Ms. Cochran is not asking the district court to hear the merits of her securities law charges—she only wants a fair shake in a lawful tribunal. [6]

Cochran's injury is also of a much more serious nature than that in *Standard Oil*—she is being repeatedly subjected to the authority of an illegitimate ALJ in violation of her constitutional rights. The injury to Ms. Cochran is not a matter of mere cost and annoyance. Just four years before *Standard Oil*, the Supreme Court held that, even for a "minimal time," any deprivation of constitutional rights "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 437 U.S. 347, 373 (1976). Ms. Cochran's protracted injury meets and exceeds the short-lived constitutional injury standard of *Elrod*. *Standard Oil*'s proposition that the annoyance and expense of litigation is part of the burden of living under government must not be extended to justify the government subjecting parties to serial unconstitutional proceedings. Such a reading of *Standard Oil* would mean Ms. Cochran's choice is to either win before the Commission and lose forever her right to have her claim heard, or lose before the Commission, only to later vindicate her rights at a circuit court that vacates the entire senseless proceeding—

[6] Despite the Government's suggestion that resolution of Ms. Cochran's constitutional claim is not urgent because this Court can decide the removal question in *Jarkesy*, SEC Br. at 1, this case presents a different but equally important structural question: which branch of government gets to decide separation-of-powers claims and when such claims should be resolved.

only to face a third round. This is a lose-lose (and lose again) proposition, as recognized by the panel dissent in *Cochran* (now vacated) and the dissent in *Tilton*, 824 F.3d at 298 (Droney, J.).

II. SEC'S PROPOSED RULE COLLAPSES UNDER REASONED ANALYSIS

SEC suggests a surprising, made-up "generally applicable rule: constitutional challenges directed at an enforcement proceeding (as in *Thunder Basin*) or to an adverse action that triggers an administrative proceeding (as in *Elgin*)" should be administratively channeled, "[but] … [t]hat rule does *not* apply when a prospective plaintiff is not involved in any pending administrative proceeding[.]" SEC Br. 19. This amounts to saying, effectively, that when Congress creates an administrative review scheme with appeals directly to the circuit courts, Congress has divested district court jurisdiction. But *FEF* presents an obvious flaw in SEC's expansive argument, so SEC tries to salvage its patchwork theory by declaring that preemptive challenges are treated differently. But a district court's subject-matter jurisdiction is statutorily based, and SEC points to no statute that divests § 1331 jurisdiction based on whether an agency has instituted its proceedings (unless, of course the statute actually says otherwise). Moreover, a generally applicable rule like the one SEC offers makes little sense considering each agency operates under a different statutory scheme. When the scheme at issue does not strip jurisdiction explicitly, we look to *Thunder Basin*.

And, as set forth above, those factors dictate that Congress did not imply jurisdiction stripping in this case.

Unsurprisingly, SEC's proffered rule produces a glaringly apparent "heads we win, tails you lose" consequence in the Government's favor. Limiting a district court's jurisdiction to cases in which "a prospective plaintiff is not involved in any pending administrative proceeding" conflicts with the SEC's own ripeness arguments set forth just a few pages later, SEC Br. at 38-39, as well as the final-agency-action defense it consistently wields. This absurdly broad rule has no basis in law.

Indeed, courts may well find that such prospective plaintiffs lack standing because they cannot demonstrate the requisite injury-in-fact. Taken on its face, the proposed rule would encourage prospective SEC targets to race to the courthouse to prevent feared constitutional injuries not yet incurred. In short, this is a bad "rule."

Moreover, although SEC touts its proffered rule as one of general application, government attorneys have not adhered to it consistently. SEC counsel in this case also represents FTC in a case they twice cite in their brief as directly relevant to this appeal, *Axon Enterprise, Inc. v. FTC*, No. 20-15662 (9th Cir.). SEC Br. at 2, 32. Axon filed its claims in federal district court shortly before FTC's administrative process began, and the Government has argued that Axon's

constitutional challenge to restrictions on removal of FTC Commissioners is barred by *Thunder Basin*—despite the pre-enforcement context in that case. FTC Answering Br. (*Axon*, ECF Dkt. No. 24) at 23, 34 (filed June 1, 2020) (arguing that the district court lacked jurisdiction over pre-investigation and pre-enforcement challenges). Government counsel thus proposes a "rule of general application" to this circuit while it takes an inconsistent position before the Ninth Circuit.

The Government's *actual* rule of general application is that respondents—even potential respondents in the agency's sights—have no recourse to the federal district courts in any instance: because all agency actions are subject to the APA, pre-enforcement jurisdiction is barred for lack of agency action, and jurisdiction is barred once an administrative proceeding begins because judicial review is then limited to circuit court review only after the agency issues a final order years later. SEC's proposed scheme effectively overrules *FEF*.

To rule that Congress has impliedly stripped federal district courts of jurisdiction to hear constitutional questions defies logic, particularly because an SEC target who endures a potentially unconstitutional administrative proceeding and ultimately prevails before the agency will never have an opportunity to remedy her constitutional injury. It is also inconsistent with the court's duty to interpret a federal statute based on the statute's text, 15 U.S.C. § 78bb(a)(2), as well as the presumption of jurisdiction over federal questions.

III. WHETHER CONGRESS HAS DIVESTED DISTRICT COURT JURISDICTION IS BOTH AN AGENCY- AND CASE-SPECIFIC QUESTION AND *BANK OF LOUISIANA* CONTAINS CRITICAL LEGAL AND POSTURAL DIFFERENCES

SEC's discussion of this Circuit's decision in *Bank of Louisiana v. FDIC*, 919 F.3d 916 (5th Cir. 2019), fails to appreciate that the question of whether Congress has stripped federal court jurisdiction is agency specific. SEC's repeated assertion that the FDIC statute is "materially the same" as the Exchange Act, SEC Br. at 23-26, is belied by the text and structure of the two schemes. SEC inexplicably fails to mention that the FDIC statute explicitly strips district court jurisdiction, 12 U.S.C. § 1818(i)(1) ("no Court shall have jurisdiction to affect by injunction or otherwise" FDIC administrative proceedings). The Exchange Act does not strip jurisdiction; to the contrary, it preserves jurisdiction.

SEC's brief also fails to address the significance of the wholly different procedural postures of the two cases. In *Bank of Louisiana*, the bank had already completed two administrative proceedings, and was on petition to this Circuit for review before it ever brought its district court challenge. *Id.* at 921. No wonder the panel in *Bank of Louisiana* concluded that, at that point, the Circuit could provide meaningful review. Because the bank was appealing final orders of the FDIC and had filed the record and petition for appeal—two factual predicates for exclusive jurisdiction not present here—it had triggered the "exclusive" review provisions within the FDIC statute. The bank had already undergone administrative

proceedings, so a district court had no need to step in to prevent any constitutional harm that had already occurred. Indeed, because the bank was already under the FDIC statute's exclusive review scheme, there was no need to even engage in a *Thunder Basin* inquiry, which only applies when the statute is silent.

Finally, although the bank included a separation-of-powers claim in its district court filings, by the time of appeal, "[t]he only argument it seriously pressed was that the ALJ 'barred it from developing the factual record necessary' to support its constitutional claims." *Bank of Louisiana*, 919 F.3d at 927. A claim that concerns how the FDIC ALJ conducted the proceedings by its nature falls into the administrative review scheme. Because no factual record is necessary or even relevant to a removal challenge under Article II, it is fair to say that the separation-of-powers claim in *Bank of Louisiana* had been abandoned by the time of the appeal.

These crucial distinctions mean that the Court need not reconsider its *Bank of Louisiana* decision in order to conclude that § 78y does not strip jurisdiction to hear constitutional challenges to SEC ALJs' multiple layers of removal protection.

IV. THE LOGIC OF THE QUESTION PRESENTED CALLS FOR DISTRICT COURT JURISDICTION

SEC's opening assertion that "[w]idespread application of plaintiff's theory conflicts with common sense" is unpersuasive. SEC Br. at 2. To the contrary, if you ask any layman whether a court should decide an agency's constitutional

qualifications to adjudicate a claim before that agency presides over proceedings that could later be set aside, the response will overwhelmingly favor deciding the qualifications first in a tribunal with authority to hear the question.

SEC asserts *ipse dixit* that "Congress would not have authorized agencies to initiate enforcement proceedings and vested review of those proceedings in the courts of appeals if a respondent could always sue in district court to enjoin those proceedings before they began." SEC Br. at 2-3. First, that assertion unfairly characterizes Ms. Cochran's appeal which makes no such sweeping claim. But the major flaw in SEC's argument is that there is a difference in vesting a circuit court with jurisdiction to review final administrative orders and stripping a district court of its jurisdiction to decide collateral constitutional questions. In other words, Ms. Cochran is not asking the district court to review any agency decision, let alone the type of administrative action that is within this Court's jurisdiction over administrative appeals. She is raising a wholly separate and collateral claim. The constitutionality of her adjudicator is just not part of the administrative review scheme.

As Judge McBryde noted in the decision now on appeal, Ms. Cochran "should not have been put to the stress of the first proceedings … and if she is correct in her contentions she again will be put to further proceedings, undoubtedly at considerable expense and stress, before another unconstitutionally appointed

administrative law judge." *Cochran v. SEC*, No. 4:19-CV-066-A, slip op. at 5 (N.D. Tex. Mar. 25, 2019) [ROA 276].

V. SEC'S MISCELLANY OF OTHER ARGUMENTS LACKS MERIT

A. Others Have Trod this Path, Why Shouldn't Ms. Cochran

SEC's brief is riddled with what may be called a "we do it all the time" argument. It opens with examples of respondents Jarkesy, Cochran, Bandimere, and Lucia in the jaws of the administrative maw while suggesting that the system serves them well because they might *eventually* receive relief.[7] Yet, SEC fails to appreciate the toll that years of unconstitutional administrative proceedings take on these respondents. Ray Lucia spent eight years in the administrative wasteland, including a costly six-year round trip to the Supreme Court that landed him back at the start of a new administrative proceeding—before he threw in the towel. Nor does SEC remark on the fact that this would be Ms. Cochran's *second* flawed ALJ proceeding and that the Commission's theory invites a third such proceeding.

By contrast, the average time from filing to resolution in the Northern District of Texas is 13 months.[8] Unlike courts, agencies appear to have no publicly

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[7] SEC notes that Ms. Cochran raised her removal claim in the administrative proceeding and the SEC ALJ—not surprisingly—denied it. SEC Br. at 9. The TPPF amicus in support of Cochran's rehearing petition powerfully argues that the ALJ should be recused from such a question. TPPF Brief at 3-9.

[8] For the 2019 term, the median time for civil cases from filing to disposition in the Northern District of Texas was 13.3 months. *See* National Judicial Caseload Profile, U.S. Dist. Ct., Fed. Court Mgmt. Statistics *available at*

reported discipline or oversight over the pace of their proceedings, which no doubt helps explain why 98% of SEC cases settle and why no litigant has yet been able to have a federal court decide the merits of this important constitutional question.

Reading into the Exchange Act an implied repeal of federal district court jurisdiction is particularly problematic in light of mounting evidence of high costs and senseless duplicated proceedings generated by adjudicators whose unconstitutional status is determined only after completion of protracted administrative proceedings. The structural violation in Ms. Cochran's appeal arises from multiple statutes that the agency can neither alter on its own nor ignore. For constitutional challenges arising from statutory "for cause" tenure protections, no futile exhaustion should be required.

B. Sweeping Consequences

SEC's brief also manufactures concern about the 'sweeping consequences' of a ruling in favor of Cochran, citing alleged effects on immigration appeals and other agency adjudications and generally stoking fears that an alphabet soup of trouble is brewing. SEC Br. 2-3, 29-37.

Judges are sworn to decide only the cases before them on the law and facts applicable to that action. *Daniel v. First Nat. Bank of Birmingham*, 228 F.2d 803,

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https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2019.pdf (last accessed Jan. 13, 2020).

805 (5th Cir. 1956) ("We can, of course, decide only the cases before us on their own facts."). The judicial officer's duty is to decide the case before her with careful attention to what the Constitution requires. Immigration decisions are adjudicated under an entirely different set of statutes that have no bearing on the case before this Court.

Each agency operates under unique congressional grants of authority both as to subject matter and powers conferred. Some agency enabling statutes strip district court jurisdiction and others, as here, preserve it. Some ALJs may have little authority and be subject to such complete *de novo* oversight that they are not even properly deemed "officers" of the United States. Speculation about agency schemes not before the Court and about facts and unbriefed questions of law should have no bearing on the decision in this case.

Moreover, district courts are fully competent to separate meritorious collateral claims from those that seek to simply disrupt administrative processes. Congress has vested district courts with jurisdiction over constitutional claims, and this Court should trust those courts to control their own floodgates rather than ceding to the Government's unsupported "slippery slope" argument.

Such slippery slope arguments are commonly invoked when a court acts to enforce constitutional safeguards protecting individual liberty. Concerns about sweeping consequences arose in *FEF*, *Freytag*, *Lucia*, and other Supreme Court

cases challenging administrative action, with no appreciable damage to administrative power. As Chief Judge Briscoe's concurrence noted in *Bandimere v. SEC*, 844 F. 3d 1168, 1188 (10th Cir. 2016), applying the Supreme Court's decision in *Freytag* "to the SEC's five ALJs does no 'mischief' to bedrock principles of constitutional law." SEC tacitly concedes that Ms. Cochran's removal question will eventually be decided by the federal courts. SEC Br. at 1. A grant of jurisdiction will begin to restore justice to respondents who have paid such a steep price for SEC's reluctance to imperil its asymmetric in-house home court advantage.

Finally, SEC's insistence that the Court must defer to Congress's imputed intentions—as divined by SEC, not by anything in the statutes—was explicitly rejected by the Supreme Court in *Freytag* when it recognized that "[t]he structural interests protected by the Appointments Clause are not those of any one branch of Government, but of the entire Republic." 501 U.S. at 880. Even if Congress decided to double-wall insulate all federal ALJs from executive control, *FEF* "holds that a court would be obliged to afford that decision *no* deference and instead to strike the unsound architecture." *Bandimere*, 844 F.3d at 1191 (Briscoe, C.J., concurring) (citing *FEF,* 561 U.S. at 497).

C. Ripeness

SEC's ripeness argument is also unpersuasive. Ripeness turns on two elements: (1) "fitness of issues for judicial determination" and (2) "hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). The Fifth Circuit additionally asks "whether the issues presented are purely legal" and "whether resolution of the issues will foster, rather than impede, effective enforcement and administration by the agency." *Energy Transfer Partners, L.P. v. FERC*, 567 F.3d 134, 139-40 (5th Cir. 2009) (citations omitted).

Ms. Cochran's claim checks all these boxes. The issue she raises is "purely legal," and challenges an agency action that eviscerates, for the second time, Ms. Cochran's right to be heard by a constitutionally appointed officer. And importantly, vindicating Ms. Cochran's claim "fosters," rather than inhibits, agency enforcement of SEC rules. *See id.* at 140.

In *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 671 n.2 (2010), the Supreme Court held that a claim was ripe where declining to hear petitioners "almost certainly" would subject them to "essentially an ultra vires proceeding." This Circuit has declared that it "must 'be especially sensitive' to irreparable injury 'where the Government seeks to require claimants to exhaust administrative remedies merely to enable them to receive the [rights] they should

have been afforded in the first place.'" *Family Rehab., Inc. v. Azar*, 886 F.3d 496, 504 (5th Cir. 2018) (quoting *Bowen v. New York*, 476 U.S. 467, 484 (1986)).[9]

Total Gas & Power N. Am., Inc v. FERC, 859 F.3d 325 (5th Cir. 2017), does not bear on Ms. Cochran's claim. Unlike the plaintiffs in *Total Gas*, Ms. Cochran is not challenging agency authority to adjudicate violations of the Exchange Act or to impose civil penalties on violators. She is challenging the lawfulness of the removal protections enjoyed by SEC ALJs. *Energy Transfer* is even less relevant because that case addressed no constitutional issues.

CONCLUSION

For all these reasons, the Court should decline to follow the out-of-circuit cases that have misconstrued the relevant statutes and Supreme Court precedents. It properly should confine *Bank of Louisiana* within the terms of its statutory scheme. 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.

January 13, 2021

[9] The Cato amicus cites an empirical study of SEC enforcement, appeal and settlement practices that demonstrates that the post-agency review is meaningless for the 98% of respondents who settle because they cannot afford to bet the farm. Cato Merits Br. at 19-26.

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 6,498 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 January 2021, 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