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

AMICUS BRIEF FOR THE CATO INSTITUTE, CAUSE OF ACTION INSTITUTE, AND THE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT

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July 17, 2019

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for *amici* certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1, in addition to those listed in the Plaintiff-Appellants' Certificate of Interested Persons, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

***Amici*:** The Cato Institute, Cause of Action Institute, and the Competitive Enterprise Institute are all not-for-profit corporations exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). None has a parent corporation and no publicly-held company has a 10% or greater ownership interest in any of them.

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/s/ *Ashley C. Parrish*
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INTEREST OF AMICI[1]

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

Cause of Action Institute ("CoA Institute"). CoA Institute is a 501(c)(3) nonpartisan, nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair. CoA Institute uses various investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity. As part of this mission, it works to expose and prevent government and agency misuse

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

of power by, among other things, representing third-party plaintiffs in actions against the federal government and appearing as *amicus curiae* before federal courts.

The Competitive Enterprise Institute ("CEI"). CEI, founded in 1984, is a non-profit public policy organization dedicated to advancing the principles of free enterprise, limited government, and individual liberty. CEI frequently publishes original research and commentary on business and finance, as well as related government policies and regulations. It also regularly participates in litigation, as both a party and an *amicus curiae*, concerning the scope and application of financial rulings and the federal agencies which promulgate them.

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

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal district courts are generally presumed to have plenary jurisdiction when private citizens allege colorable claims that federal executive-branch agencies and officials are pursuing punitive governmental action against them without legitimate constitutional authority. Such claims present quintessential federal questions falling squarely within the jurisdictional grant of 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution … of the United States"). *See also* 5 U.S.C. § 702 (authorizing judicial relief, including injunctive relief, when a person is "suffering legal wrong because of agency action, or [is] adversely affected or aggrieved by agency action"). The exercise of federal court jurisdiction over those claims is essential to protecting constitutional commitments to the rule of law, separation of powers, due process, individual liberty, and political accountability. *See generally Bell v. Hood*, 327 U.S. 678, 684 (1946) ("it is established practice for [the Supreme Court] to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution"); *Corr. Servs. Corp. v. Malesko*, 534 U.S.

61, 74 (2001) ("injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally").

In certain cases — most notably *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), and *Elgin v. Department of Treasury*, 567 U.S. 1 (2012) — the Supreme Court has recognized a limited exception to this presumption of federal question jurisdiction in the administrative law context. These cases hold that if Congress has enacted a statute providing for delayed, post-agency appellate review of adverse agency action, and if Congress's intent to strip district courts of their presumptive jurisdiction over challenges to agency action is either explicit or "fairly discernible," then district courts may lack jurisdiction to adjudicate at least some kinds of challenges to agency action notwithstanding Section 1331.

Explicitly acknowledging concern and reservations about the result in this case, the court below held that Section 25 of the Securities Exchange Act of 1934 (15 U.S.C. § 78y) is one of those jurisdiction-stripping statutes. It therefore found no jurisdiction to adjudicate plaintiff-appellant Michelle Cochran's complaint that the Securities and

Exchange Commission ("SEC") is pursuing her (for a second time) in an administrative law-enforcement proceeding overseen by an SEC administrative law judge ("ALJ") who lacks legitimate constitutional authority to conduct the proceeding or to issue binding orders and commands against her during the course of the proceeding.

The court below was right to harbor concerns and reservations. It cited the Supreme Court's decision in *Federal Trade Commission v. Standard Oil Co. of California*, 449 U.S. 232 (1980), as essentially binding authority and cited several appellate decisions outside the Fifth Circuit as persuasive authority. But the *Standard Oil* case is plainly distinguishable, and the non-binding decisions from other circuits suffer from at least two fundamental errors. First, as discussed below, they misconstrued (and thereby trivialized) the serious ongoing constitutional injury alleged in cases like this one by conflating that injury with the mere burden and expense of administrative litigation or the punitive statutory sanctions that might be imposed if securities law violations are ultimately proved. Second, they overlooked the practical reality that Ms. Cochran and similarly-situated victims of this type of constitutional injury, if limited to delayed post-agency appellate review under

Securities Exchange Act Section 25, may *never* get *any* opportunity to seek or obtain redress for their constitutional injury, and even if they do it will be too late to undo or remedy the injury.

Because this case alleges a colorable constitutional claim of ongoing *ultra vires* government action, and because Section 25 cannot reasonably be read to strip district courts of jurisdiction over such a claim, this Court should allow the case to proceed in the district court.

ARGUMENT

I. The Constitutional Injury Alleged Here Is a Serious Ongoing Harm That is Entirely Distinct from the Ordinary Burden of Litigation.

Ms. Cochran's complaint in this case asserts her right not to be forced, without her consent, to participate in adjudicative proceedings conducted by an ALJ who lacks proper constitutional authority. She is not challenging the SEC's general authority to prosecute her or to seek sanctions for the securities law violations she is alleged to have committed. Nor is she questioning in her complaint the merits of the SEC's claims or the severity of the sanctions that could be imposed against her, although she has asserted defenses to those claims in the pending SEC administrative proceeding.

For purposes of her complaint in the district court, it makes no difference whether Ms. Cochran ultimately wins or loses on the merits at the SEC administrative level — she suffers the same constitutional injury regardless of the outcome. Moroever, if she succeeds on her claims in the district court, the administrative process would not be thwarted. The relief she requests would only oblige the SEC to adjust its processes to comply with constitutional requirements, perhaps by adjudicating the administrative proceeding itself rather than relying on an administrative law judge.

The gravamen of the constitutional harm that Ms. Cochran's complaint seeks to avoid is thus entirely distinct from any sanctions that might be imposed against her in the administrative proceeding. In particular, she asserts that the executive-branch officer assigned by the SEC to oversee the administrative proceeding against her is essentially acting *ultra vires* — that is, she claims that the ALJ has no legitimate constitutional authority to conduct the proceeding at all, because the ALJ (like other SEC ALJs) is currently insulated by at least two layers of protection from removal by the president. If she is right, this constitutional injury is not only very serious but also occurring in each of

many dozens of other pending and future SEC administrative proceedings assigned to the SEC's ALJs.[2] Because she has lodged a colorable constitutional claim, federal courts have a duty to address it promptly rather than letting her injury persist until it is too late to provide meaningful relief. *Cf. New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358–59 (1989) (citing cases back to 1821 for the proposition that where federal jurisdiction is present, courts cannot "abdicate" it in favor of another jurisdiction).

McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991) is instructive. There, several pro-immigration groups and unsuccessful applicants for an amnesty program challenged as unconstitutional the practices and procedures used by the federal agency responsible for administering the program. Despite the availability of delayed, post-agency review of final determinations under the relevant statute, and despite an *explicit* statutory bar against other forms of judicial review of such final determinations (the kind of bar not found in the Securities

[2] This court recently discussed at length the essential role played by presidential removal power in preserving our constitutional separation of powers and ensuring executive-branch accountability. *See Collins v. Mnuchin*, 896 F.3d 640, *reh'g en banc granted*, 908 F.3d 75 (5th Cir. 2018).

Exchange Act's relevant provisions), the Supreme Court upheld the district court's jurisdiction to challenge the constitutionality of the "practices and policies" adopted by the agency in evaluating amnesty applications.

In doing so, the Court emphasized the crucial distinction between challenges to the overall *manner* in which an agency adjudicates claims and the individualized decisions reached on the *merits* of any particular adjudicated claim. It held that the post-agency appellate review provision in the relevant statute "applies only to review of denials of individual [amnesty] applications," and that because the district court complaint "[did] not seek review on the merits of a denial of a particular application, the District Court's general federal-question jurisdiction under 28 U.S.C. § 1331 to hear this action remain[d] unimpaired by [the relevant post-agency appellate review statute]." *McNary*, 498 U.S. at 494. As the Court explained:

> [T]he individual respondents in this action do not seek a substantive declaration that they are entitled to [amnesty] status. Nor would the fact that they prevail on the merits of their purportedly procedural objections [in the district court] have the effect of establishing their entitlement to [amnesty] status. Rather, if allowed to prevail in this action, respondents would only be entitled to have their case files

> reopened and their applications reconsidered in light of the newly prescribed [agency] procedures.

Id. at 495.

The Court also emphasized the singular focus of the applicable statutory provision authorizing post-agency appellate review, which applied only to "a determination respecting an [amnesty] application." *Id*. at 491–92. It held that "the reference to 'a determination' describes a single act rather than a group of decisions or a practice or procedure employed in making decisions," indicating Congress's intent that post-agency appellate review should apply only to "individual denials" of amnesty status and not to "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." *Id*. at 492; *cf*. *Jennings v. Rodriguez*, 138 S. Ct. 830, 839-41 (2018) (upholding jurisdiction, notwithstanding statutory limitations, in case challenging the extent of "the Government's detention authority under the 'statutory framework' as a whole," and "contesting the constitutionality of the entire statutory scheme under the Fifth Amendment").

The same logic applies here. Post-agency appellate review under Securities Exchange Act Section 25 is singularly focused on the "final

order" that is issued at the conclusion of a proceeding. 15 U.S.C. § 78y(a). The statutory language does not imply any intent to force litigants who object to the constitutional legitimacy of the proceeding itself to wait for a final order. Nor does it imply any intent to bar collateral challenges to the constitutionality of the practices and procedures used by the SEC to adjudicate its proceedings.

The Second Circuit's decision in *Touche Ross & Co. v. SEC*, 609 F.2d 570 (2d Cir. 1979), is also instructive. There, as in Ms. Cochran's case here, an accounting firm and several of its individual accountants were charged in an SEC administrative proceeding with alleged securities law violations arising from services they performed as auditors of corporate financial statements, and the respondents filed a complaint in district court challenging the legitimacy of the proceeding itself. After the district court dismissed the complaint for failure to exhaust administrative remedies, the Second Circuit affirmed in part and reversed in part, carefully distinguishing between those parts of the complaint that challenged the underlying merits of the SEC claims and the part that separately challenged the SEC's authority to conduct the proceeding at all.

Although affirming dismissal of the former parts of the complaint, the court concluded that the district court had jurisdiction to adjudicate the latter. *Id.* at 574-77 (citing *Leedom v. Kyne*, 358 U.S. 184 (1958) and other cases). It did so because, as to the challenge to the SEC's authority to conduct the proceeding: (1) "there is no need for further agency action to enable us to reach the merits of [that] challenge," *id.* at 574; (2) "to require appellants to exhaust their administrative remedies would be to require them to submit to the very procedures which they are attacking," *id.* at 577; (3) "the issue is one of purely statutory interpretation," *id.*; and (4) "[w]hile the Commission has the power to declare its own rule invalid, it is unlikely that further [administrative] proceedings would produce such a result," *id.* Each of these reasons is equally applicable to Ms. Cochran's case.[3]

Against this weight of authority, the district court relied on *Federal Trade Commission v. Standard Oil Co. of California*, 449 U.S. 232 (1980),

[3] Although the concurring opinion in *Touche Ross* focused on the separate and *additional* relief that might eventually become available under Section 25, it appears from the opinion that neither the SEC nor any judge on the panel ever considered the possibility that a future SEC might someday argue that Section 25 somehow stripped the district courts of jurisdiction to hear a complaint such as the one at issue there (and here).

but that case is plainly distinguishable. Standard Oil did not challenge the constitutionality of the FTC's *method* of adjudicating its administrative complaints, but rather raised a *case-specific* challenge to the sufficiency of the evidence supporting the particular administrative complaint filed against it. The company's complaint thus raised the quintessential type of challenge typically committed to the agency's discretion and competency to adjudicate, because it raised matters that were not only intertwined with the ongoing administrative proceeding but overlapped with it almost entirely. Standard Oil made no claim that the ALJ overseeing its administrative proceeding lacked legitimate constitutional authority to conduct the proceeding. Nor did it raise any other wholly-collateral challenge to the constitutionality of the proceeding or the method of adjudication.

Moreover, unlike Ms. Cochran, Standard Oil was attempting to shoehorn its preemptive strike into the rubric of "final agency action" under the relevant post-agency review statute, and had even convinced the court of appeals that the mere filing of the administrative complaint constituted "final agency action" subject to post-agency review. That is plainly not the case here. Ms. Cochran makes no claim that the SEC has

entered a "final order" against her for purposes of post-agency review under Securities Exchange Act Section 25. To the contrary, she seeks immediate collateral relief in the district court because she objects to being subjected to an unconstitutional proceeding before an ALJ who lacks constitutional authority to conduct it. She also realizes that it will be too late to obtain meaningful relief from her constitutional injury if she is forced to wait until after the SEC enters a final order, which is not likely to happen for many months if not years.

In short, the Supreme Court's characterization of Standard Oil's alleged harm — the mere "expense and disruption" to a multi-billion dollar corporate behemoth of having to litigate an administrative complaint before an adjudicator whose constitutional legitimacy the company did not dispute — has little or no relevance to the plight of individual litigants like Ms. Cochran, who have already endured one multi-year round of ALJ proceedings that were ultimately thrown out as constitutionally illegitimate and now face the specter of another.

II. The Sister-Circuit Rulings Followed by the District Court Erred in Applying *Thunder Basin* and its Progeny.

Numerous jurists have issued thoughtful and comprehensive opinions reaching essentially the same conclusions that *amici* urge here.

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.).[4] Instead of following these well-reasoned opinions, the district court largely followed, without substantive analysis, five cases from sister circuits that have held in various contexts that Securities Exchange Act Section 25 implicitly divests district courts of jurisdiction to adjudicate challenges to the constitutionality of SEC administrative proceedings.[5] Those cases purported to apply the reasoning of *Thunder Basin*, *Free Enterprise*, and *Elgin* to the kind of post-agency appellate review authorized by Section

[4] *Accord* Adam M. Katz, Note, *Eventual Judicial Review*, 118 COLUM. L. REV. 1139, 1162–72 (2018) (thoughtful analysis consistent with cases cite above and with positions taken in this brief); J. Nolette, "Post-Lucia, It's Déjà Vu With the SEC," Sec. Law 360, April 22, 2019, available at: https://www.law360.com/articles/1151580/post-lucia-it-s-deja-vu-with-the-sec (same).

[5] *Bennett v. SEC*, 844 F.3d 174, 188 (4th Cir. 2016); *Hill v. SEC*, 825 F.3d 1236, 1241 (11th Cir. 2016); *Tilton*, 824 F.3d at 291; *Bebo v. SEC*, 799 F.3d 765, 767 (7th Cir. 2015); *Jarkesy v. SEC*, 803 F.3d 9, 12 (D.C. Cir. 2015).

25, with each case largely following those that preceded it. Each of these out-of-circuit cases was wrongly decided for essentially the same reasons, and they should not be followed.

Thunder Basin, *Free Enterprise*, and *Elgin* collectively set forth a framework for determining whether and when a post-agency appellate review statute strips district courts of the jurisdiction they would otherwise possess under 28 U.S.C. § 1331 or elsewhere. The essential test is whether Congress's intent to divest jurisdiction is "fairly discernable" from the statutory review scheme and whether the claims at issue are of a type Congress intended to be exclusively channeled into post-agency review. In making this determination, courts consider the statute's language, structure, and purpose, along with whether the claims can be afforded "meaningful review" on post-agency review. Two important factors are whether the claim falls within the agency's area of expertise and whether it overlaps legally or factually with the type of dispute the agency is authorized to hear.

A. Securities Exchange Act Section 25 Evidences No Congressional Intent to Divest Jurisdiction.

When a private citizen colorably challenges the constitutional legitimacy of an executive-branch officer assigned to adjudicate a law-

enforcement proceeding that threatens to brand her a wrongdoer and impose punitive sanctions, the *Thunder Basin* analysis points decidedly against a conclusion that Congress intended to divest district courts of subject matter jurisdiction. Indeed, the Supreme Court has already specifically declared, in *Free Enterprise*, that *the very same statute* at issue in Ms. Cochran's case — Securities Exchange Act Section 25 — evidences *no* such congressional intent:

> [T]he text [of Section 25] does not expressly limit the jurisdiction that other statutes confer on district courts. *See, e.g.*, 28 U.S.C. § 1331. *Nor does it do so implicitly*.

Free Enterprise, 561 U.S. at 489 (emphasis added). The district court made no attempt to reconcile this unequivocal statement from *Free Enterprise* with its contrary conclusion that Section 25, in fact, *does* implicitly limit jurisdiction under 28 U.S.C. § 1331.

Beyond that discrepancy, the district court misconstrued the text of Section 25 and its surrounding statutory scheme. Post-agency appellate review under Section 25 is explicitly permissive rather than mandatory. *See* 15 U.S.C. § 78y(a)(1) (an aggrieved litigant "may" seek post-agency review in a court of appeals). This permissive language must also be read in conjunction with a nearby provision that explicitly preserves "any and

all" other avenues of relief. *See id.* § 78bb(a)(2) ("the rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity"). In addition, Section 25 makes clear that appellate court jurisdiction becomes exclusive only after the SEC issues a final order, only if an aggrieved litigant chooses to invoke it and, even then, only when the SEC files its administrative record with the court. *See id.* § 78y(a)(3). Read together, these statutory provisions negate any reasonable inference that Congress intended even to limit, much less to divest, district courts of jurisdiction under 28 U.S.C. § 1331 to adjudicate colorable constitutional challenges raised many months or even years before any final order could ever be issued.

B. The SEC Has No Specialized Expertise in Addressing the Stand-Alone Constitutional Claims Here.

As explained above, there is no factual or legal overlap between the complaint in this case and the underlying merits of the SEC claims against Ms. Cochran in the administrative proceeding. Nor does the SEC possess special expertise in resolving the constitutional removal question at the heart of this case. As to this lack of specialized expertise, the court need look no further than *Lucia v. SEC*, 138 S. Ct. 2044 (2018), in which the Solicitor General took the unusual step of confessing error in the

SEC's longstanding insistence that its ALJs were properly appointed, and the Supreme Court ultimately agreed that the SEC had gotten it wrong all along. *See also Free Enterprise*, 561 U.S. at 491 (noting that challenge to constitutional standing of executive officers requires no technical agency expertise and presents "standard questions of administrative law, which the courts are at no disadvantage in answering").[6]

C. Delayed Post-Agency Review Under Securities Exchange Act Section 25 Provides No Meaningful Remedy for the Ongoing Constitutional Injury Alleged Here.

In large part because it misconstrued the nature of the constitutional injury that Ms. Cochran asserts, the district court also erroneously concluded that her injury can be adequately remedied on post-agency review under Securities Exchange Act Section 25. That is plainly not the case. In the real world, most SEC administrative

[6] As one commentator has observed, the approach taken by the out-of-circuit cases relied upon by the district court erroneously treats these two important *Thunder Basin* factors — lack of factual overlap and lack of agency expertise — as essentially irrelevant whenever a statute provides any subsequent opportunity for judicial review, and then compounds that error by interpreting "meaningful judicial review" to require only some form of "*eventual* judicial review." Katz, *supra,* 118 COLUM. L. REV. at 1162-72 (2018) (emphasis in original).

respondents never get *any* opportunity to seek post-agency review under Section 25, and even for the relatively few who do, that review comes far too late to provide meaningful relief for the type of constitutional injury alleged in this case.

As the district court itself tacitly acknowledged, post-agency review under Section 25 is categorically unavailable to litigants who ultimately prevail in the administrative process, because the statute allows review only to litigants who are "aggrieved" by the SEC's "final order." 15 U.S.C. § 78y(a)(1). According to published empirical analyses, SEC administrative litigants prevail in at least ten percent of fully adjudicated cases. Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315, 346-53 (2017); Jean Eaglesham, "SEC Wins with In-House Judges," WALL ST. J. (May 6, 2015); *see, e.g., In re Tilton*, SEC Initial Dec. Rel. No. 1182, 2017 SEC LEXIS 3051 (Sept. 27, 2017) (ALJ Decision) and SEC Rel. No. 4815, 2017 SEC LEXIS 3707 (Nov. 28, 2017) (SEC Finality Notice) (litigant previously denied access to federal court to challenge constitutional authority of ALJ appointment ultimately prevailed after

ALJ hearing but before Supreme Court held in *Lucia* that SEC ALJs were not constitutionally appointed).

Although successful litigants undoubtedly welcome their escape from the threat of punitive sanctions, Section 25 provides no remedy for the constitutional injury they have already endured from having been forced for many months (and perhaps years) to obey the *ultra vires* commands of a federal officer. Nor do they have any incentive to devote additional time and expense to pressing ahead with their constitutional claims, because by that point the constitutional injury cannot be undone or meaningfully remedied by a court of appeals. Accordingly, under the district court's interpretation of Section 25, a successful defense on the underlying merits does nothing to remedy the constitutional injury already suffered or, as the SEC argued in the district court, to "moot" that injury; to the contrary, success on the merits renders the *constitutional* injury permanent, irreversible, and entirely unreviewable.

Section 25 likewise offers no relief to the large portion of SEC administrative litigants who agree to settle with the SEC before a final order is entered in their case. Although many litigants settle before an ALJ is even assigned to their case, others settle during or after the ALJ

phase of the proceeding. *E.g.*, *In re Timbervest, LLC*, SEC Rel. No. 40-5093, 2018 SEC LEXIS 3633 (Dec. 21, 2018) (Commission final settlement order dropping fraud charges more than five years after initiation of administrative proceeding and more than four years after an unconstitutional ALJ, following a hearing, had imposed fraud-based penalties that were then upheld on initial appeal to SEC); *see also* Urska Velikonja, *supra*, 92 WASH. L. REV. at 340, 346 and 364-65 (noting that many SEC litigants settle at some point after contested litigation is underway but before a final judgment or order is entered).[7]

Regardless of when they settle, however, none of these settling litigants have any hope of obtaining court of appeals review of their case under Section 25, because SEC rules and policy require all settling litigants to expressly waive their right to "judicial review by any court." SEC Rules of Practice, Rule 240, 17 C.F.R. § 201.240. Section 25 thus

[7] It is reasonable to conclude that at least some administrative litigants who settle immediately — that is, before an ALJ is appointed — do so partially out of concern about the perceived unfairness of ALJ proceedings and the knowledge that independent oversight by any Article III judicial officer is unlikely to occur for years, if ever. *See* Urska Velikonja, *supra*, 92 WASH. L. REV. at 365 (noting that "willingness to settle may be affected by their perception that ALJs are less fair," and that "[t]he SEC has reportedly threatened investigated parties with litigation before ALJs if they are unwilling to settle").

offers no more help to these settling litigants than it does to prevailing litigants, because in either case their constitutional injury becomes permanent, irreversible, and unreviewable. Stated another way, if a litigant settles after enduring proceedings before an unconstitutional ALJ, the SEC essentially gets away with that constitutional violation, scot-free.

Nor is it a practical option for SEC administrative litigants to stand on principle and refuse to participate in what they believe to be *ultra vires* proceedings under the control of a federal officer who lacks lawful authority to conduct the proceeding or to issue them commands. Even if a litigant nominally preserves the constitutional objection for later appeal, otherwise declining to participate in the proceeding would mean "betting the farm" on the constitutional objection, because refusing to obey the ALJ would inevitably lead to a default on the merits of the SEC's underlying securities law claims, with associated punitive sanctions imposed. *See generally* SEC Rules of Practice, Rule 155, 17 C.F.R. § 201.155 (default if litigant fails to appear at a hearing or conference, fails to answer or respond to a motion, or fails to timely cure a deficient filing), Rule 180, 17 C.F.R. § 201.180 (default if litigant fails to make a

required filing or to timely cure a deficient filing), Rule 220, 17 C.F.R. § 201.221 (default if litigant fails to file an answer), Rule 221 (default if litigant fails to appear at a prehearing conference), and Rule 310, 17 C.F.R. § 201.310 (default if litigant fails to appear at a hearing). And that default would be virtually impossible to undo later without ultimately winning the constitutional argument, because the SEC would almost certainly affirm the default if appealed, and unless the court of appeals ultimately sustained the constitutional objection, the court would likely be required by Section 25 to uphold the default on the underlying merits. *See* 15 U.S.C. § 78y(c)(1) ("No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so"); *id.* § 78y(a)(4) (SEC factual findings are "conclusive" as long as supported by "substantial evidence").[8]

[8] Arguing the constitutional issue to the SEC commissioners would plainly be futile considering the SEC's many adjudicative opinions already rejecting this argument. *See, e.g.*, *In re optionsXpress, Inc.*, SEC Rel. No. 33-10125, 2016 SEC LEXIS 2900 at 75-79 (Aug. 18, 2016) (Opinion of the Commission); *In re Timbervest, LLC*, SEC Rel. No. 40-
(Continued…)

All of which leaves the relatively few SEC litigants who have the resources and fortitude to endure the entire SEC administrative process (in Ms. Cochran's case for a second time) but ultimately lose on the merits.[9] Then and only then can they finally seek the limited appeallate relief promised by Section 25. But even if they eventually prevail on their constitutional claim in the appeals court, by that point the constitutional injury has already been suffered and is effectively irreversible. The court of appeals cannot undo or meaningfully remediate it at that point. Indeed, ironically, the most likely outcome would be the Pyrrhic victory of a remand to the SEC to start all over again from Square One, before another ALJ purporting to be cleansed of all constitutional infirmity, as happened when the Supreme Court held that SEC ALJs had not been

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4103, 2015 SEC LEXIS 3854 at 46-49 (Sept. 17, 2015) (Opinion of the Commission).

[9] As noted by one academic who has conducted exhaustive research on SEC enforcement case statistics: "Only a small minority of enforcement actions are contested to the end and ultimately decided by a dispositive motion or after trial. Of the cases that are not filed as settled, more than half ultimately settle. Of the remainder, most are decided by default or voluntarily dismissed because the defendant died, ceased to exist, could not be served, or some similar reason, and only a sliver are contested to the end and decided by a judge, a jury, or an ALJ." Urska Velikonja, *supra*, 92 WASH. L. REV. at 340.

constitutionally appointed. *See Lucia*, 138 S. Ct. at 2055-56 (2018) ("the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official" (citation omitted)); *In re Pending Administrative Proceedings*, SEC Rel. No. 33-10536, 2018 SEC LEXIS 2058 (Aug. 22, 2018) (reassigning more than 100 then-pending administrative proceedings pursuant to *Lucia*).

In sum, far from guaranteeing a meaningful remedy for the type of constitutional injury alleged by Ms. Cochran, post-agency appellate review under Section 25 is a largely empty promise for most SEC administrative litigants All those who settle with the SEC or prevail on the merits are completely denied any opportunity to seek such review and, even for those who lose on the merits or default, any review comes far too late or carries far too much litigation risk to be meaningful. To effectively protect private citizens from the irreparable constitutional harm inflicted by a constitutionally illegitimate law-enforcement proceeding launched against them, district courts must be available and stand ready to intervene before the injury becomes effectively irremediable. The district court's erroneous conclusion that Section 25

provides adequate or meaningful post-agency relief, and thus strips it of its presumptive subject-matter jurisdiction, should be reversed.

CONCLUSION

For these reasons, the Court should reverse the district court.

Respectfully submitted,

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June 17, 2019

CERTIFICATE OF SERVICE

I certify that on June 17, 2019, I caused the foregoing amicus brief to be filed with the Court electronically using the CM/ECF system, which will send a notification to all counsel of record.

/s/ *Ashley C. Parrish*
Ashley Parrish

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

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