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

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ARGUMENT

I. *FEF* PROVIDES THE CONTROLLING RULE OF DECISION ON JURISDICTION AND THE MERITS

A. There Must Be a "Fairly Discernable" Congressional Intent to Limit Jurisdiction to the Administrative Scheme

The U.S. Supreme Court reviewed the identical statutory scheme in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010) and emphatically 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 . . . . We do not see how petitioners could meaningfully pursue their constitutional claims under the Government's theory [of exclusive jurisdiction] . . . .
> . . . .
> Petitioner's constitutional claims are also outside the Commission's competence and expertise . . . . They 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. 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).

In short, the statutory schemes in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), *Elgin v. Department of Treasury*, 567 U.S. 1 (2012) and *Bank of Louisiana v. FDIC*, 919 F.3d 916 (5th Cir. 2019) do have such exclusive review, whereas the Exchange Act expressly contemplates retention of Article III jurisdiction. Add to that *FEF*'s clear holding that nothing in § 78y precludes district court jurisdiction under §§ 1331 and 2201, even implicitly, and SEC's arguments wither.[1]

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 also Oestereich v. Selective Service Bd.*, 393 U.S. 233, 235, 237–38 (1968)

[1] The Supreme Court has long presumed that parties may challenge agency action before they suffer any harm. *See*, *e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815–16 (2016); *Abbott Labs. v. Gardner*, 387 U.S. 136, 139–41, 152–53 (1967); *United States v. Nourse*, 34 U.S. 8, 28–29 (1835) (Marshall, C.J.).

(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.").

And in similar contexts, circuit courts have held that exhaustion is unnecessary when a plaintiff objects 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. County School 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.").

SEC asserts that the *Leedom* line of cases is distinguishable. This is wrong. Ms. Cochran must apply to a district court to stop this unconstitutional proceeding,

and the agency is acting in defiance of the rule prohibiting multiple layers of tenure protection for inferior officers announced in 2010 by *FEF* and made applicable by the holding in *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018) that SEC ALJs are inferior officers. Further, SEC's attempt to distinguish *Oestereich* only underscores how meaningless its version of judicial review would be. The Commission is not empowered to decide constitutional questions,[2] and circuit court review occurs long after the constitutional injury has been inflicted and compounded.

Without district court enforcement, the constitutional guarantee of due process for Michelle Cochran is just an empty promise. These precedents preclude such obliteration of individual rights.

B. The Government Misconstrues the Statutory Scheme and Structure of the Relevant Securities Laws

The claims against Michelle Cochran arise solely under the 1934 Exchange Act. SEC asserts that the Exchange Act provides "for exclusive review in the courts of appeal." Appellee Br. at 13. It does not.

Congress did *not* exclusively commit SEC enforcement actions to administrative agency proceedings. Quite to the contrary, 15 U.S.C. § 78aa vests

[2] 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 takes "judicial or other authority"—rather than 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.

"[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, employs permissive, not mandatory language. That an aggrieved litigant "may" seek post-agency review of a final order in a court of appeals cannot support a construction of "exclusive" administrative jurisdiction. Crucially, § 78y(a)(3) indicates that appellate court jurisdiction becomes exclusive only after SEC issues a "final order," only if an aggrieved litigant chooses to invoke the circuit court review, and even then only when SEC files its administrative record with the court. None 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.

Read together, these statutory provisions make it impossible to infer any intent by Congress whatsoever to limit, much less to divest, district courts of 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*[3] all fail to acknowledge this statutory structure and accordingly provide a misleading road map to decision.

Nowhere are SEC's misapprehensions about what statutory scheme it is under more apparent than in its misguided reliance upon *Bank of Louisiana v. FDIC*. The FDIC statute plainly states that "no court shall have jurisdiction to affect by injunction" FDIC proceedings. 12 U.S.C. § 1818(i)(1). But nothing in the Exchange Act remotely resembles this categorical jurisdictional bar. Absent "plain, preclusive language" that "provides [the Court] with clear and convincing evidence that Congress intended to deny the District Court jurisdiction to review and enjoin administrative proceedings," courts must presume valid jurisdiction over constitutional challenges like Ms. Cochran's. *Bank of Louisiana*, 919 F.3d at 920 (internal citations and quotation marks omitted). *See also FEF*, 561 U.S. at 489–91.

The relevant Fifth Circuit precedent is thus not *Bank of Louisiana* but *Coca-Cola Co. v. FTC*, 475 F.2d 299, 303 (5th Cir. 1973) where this court recognized that a nonfrivolous constitutional claim "gives the District Court jurisdiction" even when the plaintiff has not exhausted her administrative remedies. *Id.* at 303 (citing

[3] *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).

Fay v. Douds, 172 F.2d 720, 723 (2d Cir. 1949) (L. Hand, J.)) (internal marks omitted). *Touche Ross & Co. v. SEC*, 609 F.2d 570, 574, 577 (2d Cir. 1979) also concluded that a litigant is not required to submit to an administrative proceeding it contests, because such challenges need no "further agency action to enable [the court] to reach the merits of [the] challenge" and because conditioning appeal on exhaustion of administrative remedies would "require [plaintiffs] to submit to the very procedures which they are attacking."[4]

C. The Logic of the Jurisdictional Question Commands a Court Decision

This Court must address the Article II question *before* Ms. Cochran undergoes an unconstitutional proceeding. Congress did not intend to deprive the district courts of jurisdiction over constitutional challenges to an ALJ's claimed powers. To nonetheless permit the SEC to delay the inevitable by bringing an enforcement proceeding before an unconstitutionally appointed officer generates inefficiencies and poses a grave challenge to the rule of law. Potentially dozens of claimants are enduring unconstitutional proceedings that can be reversed, according to the SEC, only on review of a final order. This approach clogs the courts and agencies with to-be-voided proceedings and eviscerates the promise of

[4] In *Touche Ross*, "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" over claims challenging the SEC's authority to conduct proceedings. Cato Br. at 11–12.

rapid review that was the administrative scheme's sine qua non.[5] For all these reasons, this Court must intervene to enjoin the sustained, repeated, and life-altering violations of Ms. Cochran's right to a constitutional tribunal.

D. Neither the Commission Nor Its ALJs Are Empowered to Decide Constitutional Questions

Only the Article III judiciary has the power to decide the constitutionality of this ALJ and thereby keep the elected branches within their assigned roles. An ALJ is not empowered to resolve this collateral constitutional question or to decide on her own authority that she may occupy her office.

Whether Ms. Cochran's ALJ was unconstitutionally appointed has nothing to do with the merits of the securities law violations that the SEC alleges. Requiring SEC to reassign Ms. Cochran to a lawful tribunal says nothing about the constitutionality of the review of final orders under the Exchange Act. Ms. Cochran presents an entirely collateral question, which the district court has jurisdiction to review under *Thunder Basin*, 510 U.S. at 212–13.

[5] 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.*

SEC's dilatory insistence on administrative proceedings raises additional structural and due process problems. The administrative scheme contemplates a "final order" issued by the ALJ, which the Commission then reviews. Yet no final order is involved in this case. And neither the Commission nor the ALJ is an Article III court. Both lack the lawful power to rule on constitutional questions, because their statutory mandate is solely to enforce the securities laws. *See Lucia*, 138 S. Ct. at 2049.

SEC chose to bring this case in an unconstitutional forum. It cannot then avoid the consequences of the Court's clear directive in *Lucia* that the original hearing was a legal nullity. *See id.* at 2055. 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 it is breaking the rules in the manner in which it has re-prosecuted this action. Realistically speaking, a district court is the *only* forum in which Ms. Cochran can seek and obtain a remedy.

II. THE PRECEDENTS 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 consider these cases until it applies controlling Supreme Court authority and its

own precedent.[6] *FEF* and this circuit's decision in *Coca-Cola* control and require reversal.

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

Rather than directly addressing the holding of *FEF*, SEC relies on five flawed out-of-circuit court decisions. SEC has ignored the Supreme Court's contrary holding in *FEF*, perhaps hoping that the sheer volume of errant circuit court opinions will overcome the Supreme Court's 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 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).

The *SEC ALJ Cases* reason that because no administrative proceedings had commenced in *FEF*, plaintiffs were free to make their constitutional challenge in court. But it is no answer to claim that *FEF* is distinguishable because the petitioner there lacked any "guaranteed path to federal court." The petitioner 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

[6] "In determining what constitutes clearly established law, this court first looks to Supreme Court precedent and then to our own. If there is no directly controlling authority, this court may rely on decisions from other circuits to the extent that they constitute a robust 'consensus of cases of persuasive authority.'" *Shumpert v. City of Tupelo*, 905 F.3d 310, 320 (5th Cir. 2018).

any violations, in which case the matter would have ended. If the investigation had resulted in an alleged violation, PCAOB would have brought charges in an administrative proceeding, and the petitioner would have had its "guaranteed path to federal court." Clearly, it was not simply the possibility of obtaining eventual circuit court review that mattered to the Court in *FEF*, but the fact that the petitioner was 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, the circuit courts have gotten the analysis exactly backwards. Here, an ongoing administrative proceeding inflicts serious and ongoing harm on Ms. Cochran. In *FEF*, the unconstitutionally appointed board had taken no action against the plaintiff. Under SEC's flawed reading, *FEF* stands for the proposition that parties can bring constitutional claims against SEC in court without ever having been harmed while those who are being *actively* harmed by an unconstitutional proceeding must wait it out for § 78y judicial review.

The *SEC ALJ Cases* also fall into the fallacy of thinking that mooting of claims by an unconstitutional ALJ equals constitutional avoidance. This is wrong. First, Congress did not set up administrative schemes as mechanisms to obliterate constitutional rights. ALJs are empowered to hear securities laws cases, and those cases alone. Second, allowing the ALJ to moot the constitutional question by

finding for the respondent empowers the ALJ to protect her own position. And last, and most important, such mooting still subjects the respondent to an unconstitutional proceeding, which *Lucia* held there is a right to avoid. The hearing *is* the harm, whether or not Ms. Cochran prevails. This is especially so when SEC's repeated proceedings amount to making the process the punishment. And even if Ms. Cochran prevails and "moots" her constitutional claim, her success on the merits renders the constitutional injury permanent, irreversible, and entirely unreviewable.[7] The *SEC ALJ Cases* are unjust, illogical and unreasoned. This Court should adopt a more reasoned and logical approach and allow Ms. Cochran 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 should employ standard injunction analysis and exercise jurisdiction over constitutional claims that go to the legitimacy of the proceeding in order to prevent SEC from engaging in such unconstitutional behavior. By so doing, Article III courts properly discharge their constitutional duty to provide

[7] See Cato Br. at 8, 21.

meaningful judicial review of legitimate constitutional violations and prevent important questions of administrative and constitutional law from being decided outside Article III courts.[8]

The *SEC ALJ Cases* blur, conflate, and essentially eviscerate the *Thunder Basin* analysis. Why? Those courts are concerned that constitutional challenges could open the floodgates to dilatory and strategic use of constitutional claims to avoid the enforcement proceedings. But the approach advocated here—to review any constitutional challenge under the strict standards for injunctive relief—will fully address the underlying concerns about meritless constitutional claims, and at the same time protect the compelling constitutional rights of respondents such as Ms. Cochran. Otherwise, if such circuit rulings continue to accumulate, courts will forfeit their ability to provide a meaningful constitutional check on the gamesmanship and unconstitutional behavior of administrative agencies.

Dilatory or unmeritorious constitutional claims are easily screened out by use of preliminary injunction analysis described above. This is exactly what this

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[8] *See, e.g.*, Adam M. Katz, Note, *Eventual Judicial Review*, 118 Colum. L. Rev. 1139, 1162 (2018) ("[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.").

circuit did in *Coca-Cola* and is the same approach taken by the court in *Duka v. SEC*, 103 F. Supp. 3d 382 (S.D.N.Y. 2015), *abrogated by Tilton*, 824 F.3d at 279, where Judge Berman took the constitutional challenge seriously, and found jurisdiction to reach the question of whether a preliminary injunction should issue. By adopting this standard, this court can guard against gamesmanship by either party and put the "meaningful" back into "meaningful judicial review."

SEC also cites *Bennett* and *Tilton* to argue that when an Article II claim arises out of an enforcement proceeding, it is an "affirmative defense" and is therefore not wholly collateral. But 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 not constitutionally appointed to decide them. And she seeks relief only in the form of a properly appointed ALJ, not the dismissal of the agency's substantive claims. There is no "affirmative defense" here.[9]

[9] The Texas Public Policy Foundation's amicus brief in this case sets forth a comprehensive and scholarly rebuttal to SEC's and the *SEC ALJ Cases*' position that Ms. Cochran's case is an affirmative defense and thus not collateral under *Thunder Basin.* See TPPF Br. at 8–14.

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

The *SEC ALJ Cases* were all decided before the Supreme Court handed down its opinion in 2018 that SEC 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.[10] In short, the *SEC ALJ Cases* are of dubious precedential weight because they were decided without the knowledge that ALJs are federal officers.

District courts post-*Lucia* are 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).

D. The ALJ Cannot Properly Rule on the Constitutional Question

The question of whether Ms. Cochran's adjudicator enjoys unconstitutional levels of protection from removal must also be decided by a court because, logically,

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

the ALJ is recused. It is difficult to imagine a scenario in which an adjudicator's personal interest—here, keeping her job—is more obviously adverse to the litigant's. Ms. Cochran's challenge implicates concerns about objectivity, 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. *Republic of Panama v. Am. Tobacco Co. Inc.*, 217 F.3d 343, 347 (5th Cir. 2000).

E. Section 78y Review Effectively Denies Any Remedy

This misapplied reasoning of the *SEC ALJ Cases* also fails to acknowledge that, if limited to delayed post-agency appellate review, Ms. Cochran might *never* get *any* opportunity to seek or obtain redress for her constitutional injury because of the overwhelming incentive to settle SEC cases or the possibility that the ALJ finds no liability. *See* Katz, *Eventual Judicial Review*, *supra*, at 1183.

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.

F. *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 proceedings' constitutionality or raise any wholly collateral challenge to the proceeding. Ms. Cochran, by contrast, is being denied a constitutional right to a lawful tribunal 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 aside from cost. *See United Church of the Med. Ct. v. Med. Ctr. Comm'n*, 689 F.2d 693, 701 (7th Cir. 1982) (recognizing that being subjected to an "unconstitutionally constituted decisionmaker" warranted injunctive relief).[11] 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)). This Court must provide it.

These concerns animated *FEF* and support Ms. Cochran's constitutional challenge. By asserting jurisdiction over and reviewing this claim for injunctive

[11] *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 had been] a final decision on the merits …").

relief, Article III courts can check unconstitutional agency behavior, guarantee Americans that courts will hear their legitimate constitutional claims, and allow for the rational and sensible development of law governing agency enforcement proceedings.

III. THIS CLAIM IS RIPE AND MUST BE HEARD IN AN ARTICLE III COURT

Although the district court did not reach the question of ripeness, SEC argues that it presents an alternate ground on which this court could affirm. It does not. Ms. Cochran's claims are ripe for adjudication because the agency's decision to assign Ms. Cochran's case to an unconstitutionally appointed ALJ deprives her of constitutional protections to which she is entitled.

Ripeness turns on two elements: (1) "the fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration." *Abbott Labs*., 387 U.S. at 149. Ripeness doctrine aims to avoid "premature adjudication" by blocking "judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148–49. 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).

In *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 671 n.2 (2010), the Supreme Court determined that the petitioners' challenge to an arbitration panel's authority to require class arbitration was ripe because declining to hear the petitioners "almost certainly" would subject them to "essentially an ultra vires proceeding." *Id.* And with respect to hardship, 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)).

Ms. Cochran's claims check all these boxes. They are "purely legal" because they touch only the constitutionality of the ALJ's appointment, not the merits of SEC's underlying claims. They challenge an agency action that eviscerates, for the second time, Ms. Cochran's right to be heard by a constitutionally appointed officer. The harm suffered is as concrete as it can be, because Ms. Cochran has been haled before an ALJ whose appointment is unconstitutional. And importantly, vindicating Ms. Cochran's claims "foster[s]," rather than inhibits, agency enforcement of SEC rules. *See Energy Transfer Partners*, 567 F.3d at 140. Requiring SEC to place Ms. Cochran's claims before a properly constituted tribunal will quicken the resolution of her case. Moreover, by enforcing proper

appointment of ALJs here, this Court can reduce administrative burdens. Adjudicating the same underlying claims multiple times, as SEC proposes to do here, rather than using these resources to enforce the law elsewhere, wastes taxpayer dollars and inhibits effective regulation of the securities markets.

SEC's view that Ms. Cochran must wait for her claims to ripen is untenable. *See* SEC Br. at 26–27. For starters, it is merely SEC's "mootness" claim dressed up in ripeness clothing. This argument misconstrues ripeness law by conditioning ripeness on the whim of an ALJ who lacks the constitutional authority to find for or against Ms. Cochran—or anyone else, for that matter. An unconstitutional tribunal cannot and should not have the power to moot a challenge to its own authority, just as an Article III judge must be recused from a determination of the validity of her own appointment. But this perversity is precisely the outcome SEC urges here.

SEC's ripeness rule would produce disturbing incentives for agencies, too. If the rule of law is that constitutional challenges to an administrative adjudicator are not ripe until and unless a final *and adverse* decision issues from the agency, agencies have an incentive to make adjudication as costly as possible—reputationally, financially, and otherwise—to induce settlements that moot any future constitutional challenges. Worse, this rule may have serious distributional consequences by encouraging agencies to target for sanction easier marks—

individuals like Ms. Cochran or small corporations with limited resources—who alone cannot sustain a constitutional challenge to their adjudicators, while reserving district court or Commission hearings for wealthier targets with the cash and the heart to fight the agency. Finally, if the agency fears that it will lose a constitutional challenge, it could simply decide in the plaintiff's favor, blocking judicial review of the adjudicator's unconstitutional appointment. [12]

Energy Transfer Partners and *Total Gas & Power N. Am., Inc. v. FERC*, 859 F.3d 325 (5th Cir. 2017), the principal cases relied upon by SEC in making its ripeness argument, do not bear on Ms. Cochran's claim. The first sentence of *Total Gas* explains why. "We are presented with a challenge to the authority of the Federal Energy Regulatory Commission to adjudicate violations of the Natural Gas Act and to impose civil penalties on violators." 859 F.3d at 327. Ms. Cochran is not challenging SEC's authority to adjudicate violations of the Exchange Act or to impose civil penalties on violators. She is challenging the lawfulness of the appointment of her judge. *Energy Transfer* is even less relevant because that case raised no structural Article II constitutional issues.

[12] 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 vast majority of respondents who settle because they cannot afford to bet the farm. Further, such review is meaningless even for those who dare to make that bet. Cato Br. at 19–26. *See also id.* at 26 ("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.").

This court must also reexamine these cases in light of *Lucia*. The plaintiff in *Total Gas* challenged the validity of the ALJ's appointment on the same grounds as *Lucia* and was denied jurisdiction. Refusing to exercise jurisdiction now despite *FEF*'s clear ruling on more than one layer of tenure protection amounts to endorsing a flatly unconstitutional ALJ, in flagrant contravention of judicial duty.

Consider, too, the path SEC asks Ms. Cochran to retrace. When Mr. Lucia challenged the lawfulness of his ALJ's appointment, his claim was rejected at the administrative proceeding, by the full Commission (over a dissent by two Commissioners who correctly observed an Article III court should decide it), rejected by the DC Circuit, followed by an en banc panel evenly divided on the point, and *he only prevailed at the U.S. Supreme Court.* Not only his case, but Ms. Cochran's and many others, were vacated and new hearings ordered years after the events.

After *Lucia*, SEC cannot lawfully demand that Ms. Cochran endure all of this. 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. Thus SEC's ripeness cases are inapposite in their posture and their holdings.

IV. SEC'S PROPOSED CONSTRUCTION OF 5 U.S.C. § 7521 CANNOT AND DOES NOT SAVE THE DAY

Noting that the "merits of plaintiff's argument are not before the Court," SEC nonetheless proceeds to argue those merits. It urges a construction of 5 U.S.C. § 7521 that will save it from the fatal admission by the Solicitor General before the Supreme Court that the multiple layers of removal protections violate Article II.[13] It proposes that judges remodel the meaning of "good cause" for removal of ALJs under § 7521 and reinterpret the role the Merit Systems Protection Board plays in such determinations, to protect SEC from having to accord any respect to Ms. Cochran's constitutional rights.

The SEC's game of shifting positions shows the lengths the government will go to preserve its lawless power over Americans brought before administrative tribunals. But more to the point, the SEC's proposed construction undermines the SEC's claim that this court lacks jurisdiction. Excising removal protections for SEC ALJs would require a federal court first to exercise jurisdiction to perform the

[13] Indeed, SEC's first brief in this case below stated unequivocally that "[i]f the Court concludes that the interpretation of § 7521 advocated here cannot be reconciled with the statute, then the limitations on removal of SEC ALJs would be unconstitutional." Def. Resp. to Pl. Mot. for Prelim. Inj. at 21, n. 8. Apparently having second thoughts about this concession, the SEC on March 12, 2019 filed an amended response that tried to recast the government's position to: "If the Court concludes that the interpretation of § 7521 advocated here cannot be reconciled with the statute and that the limitations on removal of SEC ALJs are unconstitutional, then the Court should invalidate only the portion or portions of § 7521 that cannot be interpreted to accord agency heads appropriate supervision of ALJs as inferior officers within their agencies and leave the remaining portions of the statute fully operative." Def. Amended Resp. to Pl. Mot. for Prelim. Inj. at 21 n. 8.

statutory surgery. Yet, SEC has resisted court jurisdiction at every stage of this proceeding.

Here SEC does not propose an honest statutory construction. Instead, it urges this court to undertake freewheeling judicial reformation of all or part of three levels of impermissible tenure protection. It is implausible to construe these statutes to make the multiple layers of tenure protection vanish, to pretend that "good cause" doesn't mean what we all know it to mean. The Supreme Court has repeatedly told lower courts that they may not rewrite statutes based on policy concerns. *See, e.g.*, *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019).

This Court therefore cannot adopt the construction SEC advocates here. The statute provides that ALJs may be removed only "for good cause *established and determined* by" the MSPB, 5 U.S.C. § 7521 (emphasis added), so § 7521 does not grant the Commission the power to institute removal proceedings at all, because the MSPB has the independent and exclusive power to remove ALJs, and the board itself has its own removal protections." *Lucia*, 138 S. Ct. at 2016 (Breyer, J., concurring). *See also Chevron U.S.A. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). What's more, the government's proposed construction of § 7521 does nothing to address the second level of constitutional infirmity found in

the removal protections afforded the Commissioners. SEC's transparent attempts to walk back the Department of Justice's well-established position that SEC ALJs' removal protections were unconstitutional should not be countenanced. Br. for Resp't Supporting Pet'r (U.S. Solicitor General), *Lucia v. SEC*, 2018 WL 125162, at *52-53 (U.S. Feb. 21, 2018). And even if a future court were to rewrite the removal-protection statutes as SEC wishes, that would not avoid vacatur and remand, because Ms. Cochran's ALJ would still have been acting under the unconstitutional scheme.

The Solicitor General was right then, and Ms. Cochran should prevail now. The shifting positions advocated in SEC's briefs should be recognized as gamesmanship and dismissed.

Finally, because SEC has the power to retry this case directly before the Commission, there is no need for such judicial acrobatics. Article III courts were not established to retroactively tailor statutes at the bidding of administrative agencies, or to rewrite statutes to adopt the agency's bespoke solution to the constitutional mess made by the agency's own choice of tribunal. Taking that approach would be the antithesis of constitutional avoidance and would create constitutional moral hazard.

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.

The observations made by the district court below should raise grave concerns about the administration of justice if the conduct and reasoning of SEC goes unchecked:

> 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, undoubtedly 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.).

By haling Ms. Cochran before an unconstitutional ALJ in 2016, SEC required her to endure a proceeding that would be nullified, and now on remand, persists on retrying her before another constitutionally defective ALJ. The injustice

is palpable. SEC's assertions about the efficiency of administrative proceedings, risible.

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.

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

August 30, 2019

Respectfully submitted,

/s/ Margaret A. Little

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2019, 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

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 6468 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