ADMINISTRATIVE LAW — TIMING OF JUDICIAL REVIEW — FIFTH CIRCUIT CREATES CIRCUIT SPLIT BY ALLOWING PREFINAL JUDICIAL REVIEW OF SEC ENFORCEMENT PROCEEDING. — *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021).

In 2010, the Supreme Court decided *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[1] a landmark case that invalidated certain limitations on the President's removal power over executive branch officials.[2] *Free Enterprise*'s removal power discussion has been the focus of intense debate: its critics disparage its "rhetorical excesses";[3] its supporters predict that it will one day reach the canonical status of *Marbury v. Madison*.[4] An important aspect of the decision, however, has been ignored — namely, its implications for prefinal review of agency enforcement proceedings. To reach the removal power issue at stake in *Free Enterprise*, the Supreme Court quickly concluded that it had jurisdiction to review a challenge to the legitimacy of an ongoing Securities and Exchange Commission (SEC) investigation, even though that investigation had yet to result in a final order.[5] Ever since, the circuit courts have struggled to square *Free Enterprise* with § 78y of the Securities Exchange Act,[6] which provides that "[a] person aggrieved by a *final* [SEC] order . . . may obtain review of the order in the United States Court of Appeals."[7] Until recently, every circuit to have reviewed this provision concluded that § 78y implicitly strips jurisdiction over prefinal challenges to enforcement proceedings.[8] But in *Cochran v. SEC*,[9] the Fifth Circuit, sitting en banc, read *Free Enterprise* to require the opposite conclusion.[10] In the process, the Fifth Circuit brought to light a formerly overlooked implication of *Free Enterprise*: the idea that being subject to an administrative proceeding is, on its own, an injury sufficient to justify prefinal review. Yet this implication conflicts with other lines of cases where courts have expressly denied that the burden of legal proceedings constitutes an injury sufficient to

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[1] 561 U.S. 477 (2010).

[2] *Id.* at 492.

[3] Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 35 (2017).

[4] Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in* Free Enterprise Fund v. PCAOB, 79 FORDHAM L. REV. 2541, 2544 (2011).

[5] *See Free Enter.*, 561 U.S. at 489–91.

[6] 15 U.S.C. §§ 78a–78qq.

[7] *Id.* § 78y(a)(1) (emphasis added).

[8] *See* Bennett v. SEC, 844 F.3d 174, 188 (4th Cir. 2016); Hill v. SEC, 825 F.3d 1236, 1241 (11th Cir. 2016); Tilton v. SEC, 824 F.3d 276, 291 (2d Cir. 2016); Jarkesy v. SEC, 803 F.3d 9, 30 (D.C. Cir. 2015); Bebo v. SEC, 799 F.3d 765, 775 (7th Cir. 2015).

[9] 20 F.4th 194 (5th Cir. 2021) (en banc).

[10] *Id.* at 199.

justify prefinal review. In making this implication explicit, *Cochran* highlights a growing tension in the law.

In 2016, the SEC brought an enforcement action against accountant Michelle Cochran, alleging that she had "aid[ed] and abett[ed] the performance of audits that did not comply with [SEC] standards."[11] After an evidentiary hearing, an administrative law judge (ALJ) issued a ruling against Cochran, which the SEC then adopted as its final order.[12] Cochran objected, contending that she had not been given proper notice of the ALJ's initial decision.[13] Before the SEC had time to consider the objection,[14] however, the Supreme Court held that, under Article II of the Constitution, ALJs must be appointed by the President or another delegated officer of the United States.[15] The SEC subsequently remanded all pending cases, including Cochran's, to new, properly appointed ALJs.[16] But before the new ALJ could hear her case, Cochran filed a complaint in district court that challenged the constitutionality of SEC enforcement proceedings.[17] Cochran specifically alleged that ALJs enjoy "multiple layers of tenure protection" that unconstitutionally impede the President's removal authority.[18]

The district court dismissed Cochran's complaint, holding that it lacked jurisdiction over her claim.[19] In a brief opinion, the court concluded that § 78y of the Securities Exchange Act "implicitly divest[ed] district courts of jurisdiction . . . by creating a statutory scheme of administrative review followed by judicial review in a federal court of appeals."[20]

A Fifth Circuit panel initially affirmed.[21] Writing for the panel, Judge Costa[22] found that by explicitly granting jurisdiction only to some circuit courts, § 78y implicitly stripped jurisdiction from all district courts.[23] To determine whether Cochran's claim was of a type that Congress intended to exclude from prefinal judicial review, Judge Costa applied the three-pronged test established in *Thunder Basin Coal Co. v.*

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[11] Defendant's Response to Plaintiff's Motion for Preliminary Injunction at 4, Cochran v. SEC, No. 19-CV-066-A (N.D. Tex. Mar. 4, 2019).

[12] *Cochran*, 20 F.4th at 198.

[13] Complaint for Declaratory and Injunctive Relief para. 42, *Cochran*, No. 19-cv-066-A (N.D. Tex. Jan. 18, 2019).

[14] *Cochran*, 20 F.4th at 198.

[15] Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018).

[16] *Cochran*, 20 F.4th at 198.

[17] *Id.*

[18] Complaint for Declaratory and Injunctive Relief, *supra* note 13, para. 6.

[19] Cochran v. SEC, No. 19-CV-066-A, 2019 WL 1359252, at *1 (N.D. Tex. Mar. 25, 2019).

[20] *Id.*

[21] Cochran v. SEC, 969 F.3d 507, 518 (5th Cir. 2020).

[22] Judge Costa was joined by Chief Judge Owen.

[23] *See Cochran*, 969 F.3d at 511–12.

Reich.[24] Under *Thunder Basin*, courts assume that a claim is funneled through the relevant statutory scheme unless (1) doing so would "foreclose all meaningful judicial review"; (2) the claim is "wholly collateral" to the agency's review scheme; and (3) the claims are "outside the agency's expertise."[25] Judge Costa held that all three factors weighed against Cochran.[26] First, Cochran could appeal an adverse SEC ruling to a circuit court, allowing for "meaningful" review.[27] Second, Cochran's challenge to the constitutionality of ALJ hearings was closely related, rather than "wholly collateral," to the SEC's review scheme.[28] Finally, the possibility that the SEC might use its securities-related expertise to resolve the proceeding in Cochran's favor could "obviate the need to address the constitutional challenge."[29] Consequently, Judge Costa held that the district court lacked jurisdiction to hear the case.[30]

Judge Haynes dissented in part, contending that Cochran's claim fell outside of § 78y.[31] Considering the *Thunder Basin* factors, Judge Haynes found that all three counseled against limiting jurisdiction.[32]

The Fifth Circuit, sitting en banc, reversed,[33] with Judge Haynes this time writing for the majority.[34] The court began by analyzing the text of § 78y, which provides that "*only* 'person[s] aggrieved by a final order'" can seek review in a court of appeals.[35] The statute thus "sa[id] nothing about people, like Cochran, who ha[d] not yet received a final order."[36] Next, the majority looked to *Free Enterprise*, wherein the Supreme Court applied *Thunder Basin* to conclude that § 78y did not strip jurisdiction over collateral constitutional challenges to SEC investigations.[37] There, the Supreme Court emphasized that not every action the agency took during its investigation would be "encapsulated in a final Commission order or rule" that the petitioners could then challenge in court.[38] The Fifth Circuit extended this reasoning to SEC enforce-

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[24] 510 U.S. 200 (1994); *see Cochran*, 969 F.3d at 514–16 (applying *Thunder Basin* to § 78y).

[25] *Cochran*, 969 F.3d at 512 (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 489 (2010)).

[26] *Id.* at 514–16.

[27] *Id.* at 514.

[28] *Id.* at 515.

[29] *Id.* at 516 (quoting Elgin v. Dep't of the Treasury, 567 U.S. 1, 22–23 (2012) (Alito, J., dissenting)).

[30] *Id.* at 518.

[31] *Id.* at 518 (Haynes, J., dissenting in part).

[32] *Id.* at 519–21.

[33] *Cochran*, 20 F.4th at 198.

[34] Judges Jones, Smith, Elrod, Duncan, Engelhardt, Oldham, and Wilson joined Judge Haynes's opinion. Judge Willett concurred in the judgment.

[35] *Cochran*, 20 F.4th at 200 (alteration in original) (quoting 15 U.S.C. § 78y(a)(1)).

[36] *Id.*

[37] *See id.* at 201–04; Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 489 (2010).

[38] *Free Enter.*, 561 U.S. at 490.

ment proceedings. While an enforcement proceeding — unlike an investigation — was guaranteed to result in a final order, there was no guarantee that such an order would be adverse to Cochran.[39]

Lastly, even if Congress intended § 78y to have a "jurisdiction-stripping effect," the *Thunder Basin* test indicated that Cochran's constitutional claim nonetheless fell outside the statute's review scheme.[40] For one, a finding of preclusion could deprive Cochran of the opportunity for "meaningful judicial review."[41] Again invoking *Free Enterprise*, the court emphasized that the SEC may rule in Cochran's favor.[42] And because "a final adverse order is a prerequisite for judicial review," the court worried that Cochran would be "unable to seek redress for the injury of having to appear before the SEC."[43] The court acknowledged that the Supreme Court had previously characterized "[m]ere litigation expense" as "part of the social burden of living under government" rather than an "irreparable injury."[44] But "Cochran challeng[ed] the entire legitimacy of her proceedings, not simply the cost and annoyance."[45] Even assuming such a burden did not constitute an "irreparable harm,"[46] it was "sufficiently serious to justify pre-enforcement review."[47] Moreover, Cochran's challenge to the constitutionality of enforcement proceedings was "wholly collateral" to the Securities Exchange Act's review scheme and outside the SEC's expertise.[48] The majority thus remanded Cochran's claim.[49]

Judge Oldham wrote a concurring opinion,[50] explaining that because Cochran was not "aggrieved by a final order," she did not "fall within § 78y's purview."[51] Judge Oldham also offered a lengthy discussion of intellectual history, purporting to ground § 78y in an "anti-democratic" vision that he traced to Woodrow Wilson.[52]

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39 *Cochran*, 20 F.4th at 203.

40 *Id.* at 207.

41 *Id.* at 208.

42 *Id.* at 209.

43 *Id.*

44 *Id.* (alteration in original) (quoting FTC v. Standard Oil Co., 449 U.S. 232, 244 (1980)).

45 *Id.* at 209–10.

46 *Id.* at 210.

47 *Id.* at 210 n.16.

48 *Id.* at 207.

49 *Id.* at 213.

50 *Id.* (Oldham, J., concurring). Judges Smith, Willett, Duncan, Engelhardt, and Wilson joined the concurring opinion.

51 *Id.* at 227.

52 *Id.* at 214. Scholars have disputed Judge Oldham's retelling of history. *See* Julian Davis Mortenson (@jdmortenson), TWITTER (Dec. 16, 2021, 1:03 PM), https://twitter.com/jdmortenson/status/1471541528023601152 [https://perma.cc/N6WL-QDQE] (noting "objections on substance").

Judge Costa dissented,[53] reiterating that § 78y implicitly precludes district courts from reviewing preenforcement claims by "allocat[ing] initial review to an administrative body."[54] Judge Costa again balanced the *Thunder Basin* factors against Cochran, finding, first and foremost, that limiting the district court's jurisdiction would not "foreclose all meaningful judicial review."[55] Though Cochran's ability to secure postenforcement review was contingent on the SEC's ruling against her, the availability of meaningful judicial review matters only when the agency respondent loses and faces an irreparable injury.[56] In this vein, the dissent contested the majority's assertion that having to appear before the SEC constituted a cognizable injury.[57] Further, Judge Costa repeated his initial analysis of the "wholly collateral" and "agency expertise" prongs, finding that these too weighed against Cochran.[58]

The Fifth Circuit's conclusion that, without prefinal review, Cochran would have no ability to seek redress for the injury of having to participate in an enforcement proceeding is consistent with *Free Enterprise*. There, similar reasoning guided the Supreme Court's conclusion that the subjects of an investigation would be unable to pursue their claims meaningfully without prefinal review.[59] Yet the idea that having to participate in a legal proceeding is a redressable injury is inconsistent with other lines of Supreme Court precedent. In other contexts, the Court has in fact rejected claims that litigation-related burdens constitute injuries sufficient to justify prefinal review.[60] By bringing *Free Enterprise*'s implications for prefinal review to light, *Cochran* highlights a growing tension in the law.

In *Free Enterprise*, the Supreme Court considered whether a district court had jurisdiction over a prefinal challenge to the constitutionality of the Public Accounting Oversight Board ("the Board") — a body under the SEC's oversight — despite § 78y's review scheme.[61] The Board had initiated an investigation into an accounting firm, and the firm challenged the legitimacy of this investigation, arguing that the Board's structure rendered it unconstitutional.[62] The Supreme Court ultimately held that § 78y does not implicitly strip the district court of jurisdiction

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[53] *Cochran*, 20 F.4th at 236 (Costa, J., dissenting). Chief Judge Owen and Judges Stewart, Dennis, Southwick, Graves, and Higginson joined the dissenting opinion.

[54] *Id.*

[55] *Id.* at 242.

[56] *Id.* at 243.

[57] *Id.* at 243–44.

[58] *Id.* at 246–49.

[59] *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 490 (2010).

[60] *See, e.g.*, Lauro Lines SRL v. Chasser, 490 U.S. 495, 499 (1989); FTC v. Standard Oil Co., 449 U.S. 232, 244 (1980).

[61] *Free Enter.*, 561 U.S. at 489.

[62] *Id.* at 487.

over the constitutional challenge.[63] Crucially, the Board's investigation into the firm had "produced no sanction" that the petitioners could challenge,[64] depriving them of a vehicle to raise their constitutional claims in court. The Court rejected the argument that the firm could purposefully incur a sanction, noting that this would not provide a "'meaningful' avenue of relief."[65] Yet the Court did not explain why, in the absence of a sanction, the firm had any need to seek meaningful relief.[66]

The *Cochran* court, on the other hand, *did* explicitly address the idea that being subject to a proceeding constitutes a harm that is sufficient to justify prefinal review. The court started by interpreting *Free Enterprise* to compel a finding that § 78y does not strip district courts of jurisdiction over constitutional challenges to the legitimacy of SEC enforcement proceedings.[67] Of course, every other circuit to address the issue had found Board investigations to be distinguishable from ALJ hearings.[68] The distinction between the two proceedings is plausible — ALJ hearings are part of a continuous SEC enforcement scheme that inevitably results in a final order,[69] while Board investigations may never lead to an adjudication of any kind.[70] Nonetheless, *Cochran*'s interpretation of *Free Enterprise* is plausible too. Like the investigation of the firm in *Free Enterprise*, Cochran's administrative proceeding could conclude without a challengeable final order.[71] Should that happen, Cochran would have no avenue for "meaningful judicial review."[72]

The Fifth Circuit then attempted to explain something the Supreme Court left unaddressed in *Free Enterprise*: why a party would have any need for meaningful review in the absence of an adverse outcome. After all, if the SEC were ultimately to find in Cochran's favor, it is unclear that the allegedly unconstitutional proceeding would result in any type

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63 *Id.* at 489.

64 *Id.* at 490.

65 *Id.* at 491 (quoting Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212 (1994)).

66 At oral argument, the firm suggested that though it had incurred no sanctions, it had still suffered the harm of being "subject to a burdensome investigation." Transcript of Oral Argument at 12, *Free Enter.*, 561 U.S. 477 (No. 08-861). But the Court never clarified whether such a harm constituted a redressable injury.

67 *Cochran*, 20 F.4th at 209.

68 *See* Bennett v. SEC, 844 F.3d 174, 182 (4th Cir. 2016); Hill v. SEC, 825 F.3d 1236, 1243 (11th Cir. 2016); Tilton v. SEC, 824 F.3d 276, 284 (2d Cir. 2016); Jarkesy v. SEC, 803 F.3d 9, 20 (D.C. Cir. 2015); Bebo v. SEC, 799 F.3d 765, 767 (7th Cir. 2015). Several of these circuits also found *Elgin v. Department of the Treasury*, 567 U.S. 1 (2012) — a case where the Supreme Court read a statute to strip jurisdiction implicitly over a prefinal constitutional challenge to an agency action, *id.* at 8 — to be instructive. *See Hill*, 825 F.3d at 1249; *Jarkesy*, 803 F.3d at 22; *Bebo*, 799 F.3d at 771–72. But, as the Fifth Circuit noted, the constitutional claim at issue in *Elgin* did not involve a challenge to the legitimacy of an agency proceeding itself. *See Cochran*, 20 F.4th at 208–09.

69 *See Bennett*, 844 F.3d at 182.

70 *Id.*

71 *Cochran*, 20 F.4th at 209.

72 *Id.* (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 489 (2010)).

of redressable harm — unless, of course, having to participate in the enforcement proceeding itself is sufficient. That is precisely the position the Fifth Circuit adopted. To start, the court emphasized that Cochran "challenge[d] the entire legitimacy of her proceedings, not simply the cost and annoyance"[73] — though the court never clarified how, beyond the cost and annoyance of litigation, the alleged illegitimacy of the proceedings stood to harm Cochran. The court merely characterized this harm as "the injury of having to appear before the SEC."[74] The court further denied that Cochran needed to demonstrate that this injury would cause her "irreparable harm."[75] Without deciding just what level of harm Cochran needed to demonstrate, the court found that "the injury of having to appear before the SEC"[76] was "sufficiently serious to justify pre-enforcement review in federal court."[77] The Fifth Circuit thus made explicit a previously hidden implication of *Free Enterprise* — that being subject to a legal proceeding is, on its own, a redressable injury that warrants prefinal review.

Supreme Court precedent in other contexts challenges the validity of this implication. *Cochran* acknowledged as much in its discussion of the "irreparable harm" standard in administrative exhaustion cases.[78] These cases require claimants to complete internal agency review processes before challenging agency actions in court.[79] But when claimants can demonstrate that they "would be irreparably injured were the exhaustion requirement now enforced against them," they may seek immediate judicial review.[80] Immediate judicial review is not available, however, to those claimants who can point only to the "expense and disruption of defending [themselves] in protracted adjudicatory proceedings."[81] Such inconveniences are simply "part of the social burden of living under government."[82] While the Fifth Circuit attempted to distinguish *Cochran* from this line of cases, it did not offer much of an explanation as to how the injury of "having to appear before the SEC" differed from injuries related to "the cost and annoyance" of litigation.[83] Nor did it explain why this injury was "sufficient" to warrant prefinal review.[84]

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[73] *Id.* at 209–10.
[74] *Id.* at 209.
[75] *Id.* at 210.
[76] *Id.* at 209.
[77] *Id.* at 210 n.16.
[78] *See id.* at 209.
[79] *E.g.*, Reiter v. Cooper, 507 U.S. 258, 269 (1993).
[80] Bowen v. City of New York, 476 U.S. 467, 483–84 (1986).
[81] FTC v. Standard Oil Co., 449 U.S. 232, 244 (1980).
[82] *Id.* (quoting Petrol. Expl., Inc. v. Pub. Serv. Comm'n, 304 U.S. 209, 222 (1938)).
[83] *See Cochran*, 20 F.4th at 209–10.
[84] *Id.* at 210 n.16.

Limiting prefinal review is not unique to administrative law. The "final judgment rule" prevents the federal courts of appeals from reviewing most nonfinal orders that arise in the lower courts.[85] And while there are exceptions to this rule under the collateral order doctrine, these exceptions are "narrow."[86] The doctrine permits interlocutory review only for judgments that "have a final and irreparable effect on the rights of the parties."[87] But litigants who cite the collateral order doctrine are limited in their ability to invoke a general "right not to stand trial."[88] Indeed, the Supreme Court has "declined to find the costs associated with unnecessary litigation to be enough to warrant allowing the immediate appeal of a pretrial order."[89]

There are good reasons why courts seek to limit prefinal review. Doing so prevents piecemeal litigation, avoids overburdening appellate courts, and protects against the risk that a party will file multiple appeals in an attempt to delay the adjudication of meritorious claims.[90] But a finality rule that does not take certain exceptional circumstances into account would be unnecessarily harsh.[91] In *Free Enterprise*, the Supreme Court left open the possibility that the burden of being subject to an administrative proceeding was one such exceptional circumstance. The Fifth Circuit explicitly reached this conclusion[92] and set the stage for the Supreme Court to make a similar finding in an upcoming case involving a prefinal challenge to a Federal Trade Commission enforcement proceeding.[93] In that case, the petitioner has explicitly argued that having to participate in an unconstitutional proceeding is a redressable injury requiring immediate judicial review[94] — and has cited *Cochran* to do so.[95] Depending on how the Supreme Court rules, *Cochran* has the potential to crystallize a growing tension in the way courts understand prefinal review.

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[85] 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3905 (2d ed. 2021).

[86] Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 113 (2009) (quoting Will v. Hallock, 546 U.S. 345, 350 (2006)).

[87] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545 (1949).

[88] Michael E. Harriss, Note, *Rebutting the Roberts Court: Reinventing the Collateral Order Doctrine Through Judicial Decision-Making*, 91 WASH. U. L. REV. 721, 729 (2014).

[89] Lauro Lines SRL v. Chasser, 490 U.S. 495, 499 (1989).

[90] *See* Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 DRAKE L. REV. 539, 542 (1998).

[91] *See id.* at 543.

[92] *Cochran*, 20 F.4th at 210 n.16.

[93] *See* Carrie G. Amezcua et al., *Supreme Court Takes Up Challenge to FTC Administrative Process*, MONDAQ (Feb. 2, 2022), https://www.mondaq.com/unitedstates/antitrust-eu-competition-/1156692/supreme-court-takes-up-challenge-to-ftc-administrative-process [https://perma.cc/RXY3-FFJ3].

[94] Petition for Writ of Certiorari at 32–33, Axon Enter., Inc. v. FTC, No. 21-86 (July 20, 2021).

[95] Supplemental Brief for Petitioner at 2, *Axon*, No. 21-86 (Dec. 20, 2021).