No. 15-2103

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LYNN TILTON, PATRIARCH PARTNERS, LLC, PATRIARCH PARTNERS VIII, LLC, PATRIARCH PARTNERS XIV, LLC, PATRIARCH PARTNERS XV, LLC,

Plaintiffs-Appellants,

SECURITIES AND EXCHANGE COMMISSION,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York, No. 15-cv-2472 (Abrams, J.)

BRIEF FOR DEFENDANT-APPELLEE

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INTRODUCTION

The federal securities laws, including the Investment Advisers Act of 1940 (Advisers Act) and the Investment Company Act of 1940 (Investment Company Act), authorize the Securities and Exchange Commission (SEC) to address violations of the securities laws by filing an enforcement action in federal district court or, at the Commission's option, in proceedings before the agency. *See, e.g.*, 15 U.S.C. §§ 80a-9(b), 80a-41(d), 80b-3(e), (f), (k), 80b-9(d). If the Commission elects to proceed administratively, it may choose to have an administrative law judge (ALJ) act as a hearing officer and provide an initial decision. The initial decision is subject to de novo review by the Commission, and the Commission alone has the authority to issue the final decision of the agency in the proceeding. "[E]xclusive" jurisdiction to review final orders of the Commission is vested in the courts of appeals, which may "affirm, modify, or set aside such order, in whole or in part." *Id.* § 80b-13(a).

Applying governing precedent of the Supreme Court and this Court, the district court correctly held that it lacked jurisdiction to enjoin ongoing SEC administrative enforcement proceedings against Lynn Tilton, Patriarch Partners, LLC, and affiliated companies. A respondent in administrative proceedings may not circumvent the framework for administrative and judicial review established by Congress in a collateral district court action. The Supreme Court has made clear that a direct review scheme is exclusive whether a litigant asserts a facial or an as-applied challenge, and regardless of whether the reviewing agency has authority to pass on the

constitutional claims. *See Elgin v. Department of the Treasury*, 132 S. Ct. 2126 (2012) (challenge to Selective Service Act); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994) (due process challenge to agency procedures); *see also Altman v. U.S. SEC*, 687 F.3d 44 (2d Cir. 2012) (per curiam), *aff'g* 768 F. Supp. 2d 554 (S.D.N.Y. 2011) (challenge to SEC's constitutional authority to continue administrative proceedings and to issue the sanction resulting from those proceedings).

Plaintiffs nevertheless urge that they must be allowed to obtain judicial resolution of their constitutional claim at the outset of the proceedings rather than on review of an adverse final order. The district court correctly explained, however, that "[o]ftentimes in our system, a party challenging the legality of the very proceeding or forum in which she is litigating must 'endure' those proceedings before obtaining vindication." A-139 to A-140; *see also FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980) (plaintiff could not circumvent exclusive review scheme on the basis of harm entailed by participating in agency proceeding allegedly undertaken in response to political pressure).

It is undisputed that plaintiffs will be able to obtain review of their constitutional claims before a court of appeals in the event that they receive an adverse final order from the Commission. But they may not seek to enjoin the agency proceedings now through a collateral attack in the district court.

JURISDICTIONAL STATEMENT

Plaintiffs invoked the jurisdiction of the district court pursuant to 28 U.S.C. §§ 1331, 1337, 1346, 1651, 2201 and 5 U.S.C. §§ 702, 706. Dkt. 1, Compl. ¶ 7. The district court dismissed for lack of jurisdiction on June 30, 2015. Plaintiffs filed a timely notice of appeal on July 1, 2015. A-155 to A-156.

STATEMENT OF THE ISSUE

Whether the district court correctly held that it lacked jurisdiction to entertain plaintiffs' constitutional claims, which can be raised on direct review in the court of appeals if plaintiffs are aggrieved by a final order of the Commission.

STATEMENT OF THE CASE

A. The Appointments Clause

The Appointments Clause provides that the President shall appoint all "Officers of the United States" whose appointments are not otherwise provided for in the Constitution, "but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. The Appointments Clause speaks exclusively to "officers," a category that includes only persons who "exercis[e] significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976), and does not include "lesser functionaries subordinate to officers of the United States," *id.* at 126 n.162.

B. Statutory Background

The federal securities laws, including the Advisers Act and the Investment Company Act, authorize the Commission to address violations of the securities laws by filing an enforcement action in federal district court or, if the Commission chooses, by commencing enforcement proceedings before the agency. *See, e.g.*, 15 U.S.C. §§ 80a-9(b), 80a-41(d) (Investment Company Act); *id.* §§ 80b-3(e), (f), (k), 80b-9(d) (Advisers Act).[1]

When the Commission decides to proceed administratively, the SEC's Rules of Practice specify that each proceeding will be presided over by the Commission itself or, if the Commission so decides, a "hearing officer." 17 C.F.R. § 201.110. The Commission may designate an ALJ, a panel of Commissioners, an individual Commissioner, or a duly authorized person to be the hearing officer. *Id.*; *see also id.* § 201.101(a)(5). A hearing officer typically has 300 days from the date on which an action is instituted to issue an "initial decision." *Id.* § 201.360. The initial decision is subject to de novo review by the Commission, which may include the submission of

[1] Plaintiffs incorrectly assert (Pls. Br. 7 n.4) that prior to the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376 (2010), the Commission could only seek civil penalties against Ms. Tilton in district court. In fact, the Advisers Act defines the term "'person associated with an investment adviser'" to include "any person directly or indirectly controlling . . . such investment adviser," 15 U.S.C. § 80b-2(a)(17), and, as alleged in the order instituting proceedings, Ms. Tilton was a person who controlled entities that were investment advisers. Prior to the Dodd-Frank Act, the Commission could seek civil penalties against any person associated with an investment adviser in an administrative proceeding. *See id.* § 80b-3(i) (cross-referencing section 80b-3(f)).

additional evidence where appropriate. *See id.* §§ 201.410, 201.411(a), 201.452. Regardless of whether further review is sought, the Commission alone has the authority to issue the final decision of the agency in the proceeding. *See id.* § 201.360(d).

The federal securities laws provide for direct review in the courts of appeals of final orders of the Commission. The Advisers Act provides, in relevant part, that "[a]ny person or party aggrieved by an order issued by the Commission . . . may obtain a review of such order" in the D.C. Circuit or the appropriate regional circuit by filing a petition for review. 15 U.S.C. § 80b-13(a)(1); *see also id.* § 80a-42(a) (Investment Company Act).[2] The court of appeals has "exclusive" jurisdiction to "affirm, modify, or set aside such order, in whole or in part." *Id.* § 80b-13(a).

The appellate review provisions of the Investment Company Act and the Advisers Act also prescribe a comprehensive process for seeking such review, including: what constitutes the agency record, 15 U.S.C. §§ 80a-42(a), 80b-13(a), and the standard of review of the Commission's factual findings, §§ 80a-42(a), 80b-13(a).

[2] These judicial review schemes are essentially the same as the review scheme of the Securities Exchange Act of 1934, which also provides that "[a] person aggrieved by a final order of the Commission . . . may obtain review of the order" in the court of appeals. 15 U.S.C. § 78y(a)(1); *see also* 15 U.S.C. § 77i(a) (Securities Act of 1933). The district court correctly recognized the SEC initiated proceedings against plaintiffs pursuant to the Advisers Act and the Company Act (A-134), although it also cited the judicial review scheme of the Exchange Act (*see* A-134, A-136).

C. Prior Proceedings

1. On March 30, 2015, after several years of investigation (A-134), the SEC issued an Order Instituting Public Administrative and Cease-and-Desist Proceedings against plaintiffs Patriarch Partners, LLC, its CEO and founder Lynn Tilton, and affiliated companies (collectively, Tilton) alleging that they violated the federal securities laws (A-132, A-134). The order alleges that plaintiffs have defrauded three funds they manage—which raised more than $2.5 billion from investors—and the funds' investors, by providing false and misleading information and by engaging in a deceptive scheme, practice, and course of business relating to the values of assets in those funds. *See* A-15. The SEC has designated an administrative law judge as the hearing officer in the administrative proceeding.

Plaintiffs filed this suit on April 1 to enjoin the proceedings before an administrative law judge. A-5. They argued that ALJs are inferior officers for purposes of the Appointments Clause, urging that because "ALJs are not appointed by the SEC Commissioners themselves, *i.e.,* the head of a department, the ALJ appointments scheme is unconstitutional." A-135. Plaintiffs further argued that limitations on the President's authority to remove an ALJ from office violated the separation of powers, noting that "the ALJs cannot be removed except for 'good cause,' and that the SEC Commissioners themselves cannot be removed 'except for inefficiency, neglect of duty, or malfeasance in office.'" *Id.* (internal citation omitted).

On April 15, 2015, plaintiffs moved for a preliminary injunction, and the SEC opposed (*see* A-6 to A-7), urging that the district court lacked jurisdiction to enjoin the administrative proceeding and that plaintiffs have no likelihood of success on the merits of their constitutional claims.

2. The court dismissed the case on jurisdictional grounds and therefore did not reach the merits of plaintiffs' suit. The court explained that the federal securities laws provide for direct review of final Commission orders in the court of appeals and that this Court "has held that '[r]eview provisions such as this generally preclude de novo review in the district courts, requiring litigants to bring challenges in the Court of Appeals or not at all.'" A-136 (quoting *Altman v. U.S. SEC,* 687 F.3d 44, 45-46 (2d Cir. 2012) (per curiam) (citation omitted)). Congressional intent to make the regulatory scheme exclusive will be inferred if "the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" A-137 (alteration in original) (quoting *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 489 (2010)) (quoting, in turn, *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 207 (1994)).

The district court explained that the Supreme Court in *Thunder Basin* "established a framework to determine whether a statutory review scheme precludes district court jurisdiction over pre-enforcement challenges to an administrative action." A-137 (citing *Free Enter. Fund,* 561 U.S. at 489 and *Thunder Basin,* 510 U.S. at

212-13). The district court explained that in considering this issue, as "the court noted in *Altman v. U.S. SEC*," the availability of meaningful judicial review "seems most important; . . . that a plaintiff's 'constitutional claims . . . can be meaningfully addressed in the Court of Appeals' trumps other considerations such as that administrative review is conducted internally rather than independently and that the reviewing body lacks expertise in reviewing constitutional questions." A-137 (quoting *Altman v. U.S. SEC,* 768 F. Supp. 2d 554, 559 (S.D.N.Y. 2011), *aff'd,* 687 F.3d 44 (2d Cir. 2012)) (quoting, in turn, *Thunder Basin,* 510 U.S. at 215).

In concluding that the scheme governing SEC administrative proceedings provides for meaningful judicial review, the district court drew guidance from *Elgin v. Department of the Treasury,* in which the Supreme Court held that plaintiffs could not mount a collateral challenge to provisions of the Selective Service Act and were, instead, required to raise their claims before the Merit Systems Protection Board under the provisions of the Civil Service Reform Act. "[T]he Supreme Court held that where the statutory scheme provided for 'review in the Federal Circuit, an Article III court fully competent to adjudicate petitioners' [constitutional] claims,' meaningful judicial review existed." A-138 (quoting *Elgin v. Department of the Treasury,* 132 S. Ct. 2126, 2130, 2137 (2012)). "This was true, the Court stated, regardless of whether the administrative tribunal itself had the authority to consider the constitutional claims in the first instance." *Id.* Similarly, in *Thunder Basin,* the Supreme Court "held that even if the agency could not consider the petitioner's constitutional claims, they could still

be 'meaningfully addressed in the Court of Appeals,' in which the statutory scheme had vested judicial review." *Id.* (quoting *Thunder Basin,* 510 U.S. at 215).

The district court emphasized that "[i]t is undisputed that the statutory review scheme here similarly provides for review in a circuit court of appeals, and that Plaintiffs' claims may ultimately be heard in that forum. This case thus 'does not present the serious constitutional question that would arise if an agency statute were construed to preclude all judicial review of a constitutional claim.'" A-138 (quoting *Thunder Basin,* 510 U.S. at 215 n.20) (internal quotation marks omitted).

The court noted that "Plaintiffs' primary contention is that requiring them to litigate before the ALJ in the first instance will 'force[] [them] to endure the very proceeding that [they] allege[] is inherently unconstitutional.'" A-139 (alterations in original). The court explained that "[s]uch an exception to the enforceability of statutory review schemes could swallow the schemes themselves; indeed, any arguably plausible claim in district court that an administrative proceeding should be enjoined as unconstitutional could confer jurisdiction and thus thwart Congress' intent to the contrary." A-139. The court observed: "Indeed, in the very cases the parties rely on in their arguments on the merits, Appointments Clause challenges similar to Plaintiffs' were raised either for the first time before the court of appeals after an administrative proceeding or litigated before the agency and raised again on appeal—as Plaintiffs are authorized by statute to do here." A-141 to A-142 (citing *Freytag v. C.I.R.,* 501 U.S. 868, 871 (1991) (Appointments Clause challenge to proceedings before a Tax Court

Special Trial Judge), and *Landry v. FDIC,* 204 F.3d 1125, 1128 (D.C. Cir. 2000) (Appointments Clause challenge to proceedings before FDIC administrative law judges)).

The district court also rejected plaintiffs' related contention that "requiring them to pursue their claims within the administrative review process would subject . . . them to significant and irreparable injury because [e]ven a successful appeal to the Court of Appeals would be unable to remedy the harm alleged." A-143 (internal quotation marks omitted) (alteration in original). The court explained that "[i]f a court of appeals vacates an adverse decision by the Commission on the very constitutional grounds Plaintiffs advance, it will vindicate Plaintiffs' claim to a constitutionally sound proceeding." *Id.* The court further noted that "[t]o the extent Plaintiffs argue that being obliged to continue litigating before the ALJ and the Commission is itself so onerous that the statutory scheme should be thwarted" (*id.*), their arguments are foreclosed by *FTC v. Standard Oil Co. of California,* 449 U.S. 232 (1980), in which the Supreme Court held that a district court lacked authority to enjoin an administrative proceeding that was allegedly commenced in response to political pressure and emphasized that "the expense and annoyance of litigation is part of the social burden of living under government" (A-143) (quoting *Standard Oil,* 449 U.S. at 244).

The district court explained that plaintiffs likewise are not deprived of meaningful review on the theory that if the ALJ finds them liable, "they will be subject

to 'irreparable reputational and financial harm.'" A-144. The court declared: "If the mere possibility that a party may lose in an administrative proceeding could confer jurisdiction on a district court where jurisdiction would otherwise be absent, administrative review schemes would be nullified." *Id.*

The district court distinguished the circumstances presented here from those in *Free Enterprise Fund*, 561 U.S. at 484, 486, in which the plaintiffs challenged the constitutionality of the Public Company Accounting Oversight Board, an administrative body created by Congress and placed under the oversight of the SEC. The plaintiffs in *Free Enterprise Fund* were not the subject of an administrative proceeding and, "in order to obtain judicial review, petitioners would have had to either 'select and challenge a Board rule at random,' or '*incur* a sanction (such as a sizable fine) by ignoring Board requests for documents and testimony.'" A-145 (quoting *Free Enter. Fund*, 561 U.S. at 490). The Supreme Court "thus held that risking 'severe punishment' in order to obtain judicial review through the statutory scheme was not a 'meaningful avenue of relief,' and that this counseled in favor of finding district court jurisdiction over petitioners' claims." *Id.* (quoting *Free Enter. Fund*, 561 U.S. at 490-91 (citation omitted)). The district court stressed that "'[u]nlike in *Free Enterprise*, Plaintiffs here do not 'need to induce an administrative proceeding,' because the administrative proceeding has already commenced against them." A-145 to A-146 (internal citation omitted) (quoting *Bebo v. SEC*, No. 15-C-3, 2015 WL 905349, at *3 (E.D. Wis. Mar. 3, 2015), *appeal docketed*, No. 15-1511 (7th Cir. Mar. 10,

2015)). Here, "[m]eaningful judicial review is already available to Plaintiffs," who "may 'raise [their] arguments before the SEC ALJ and on appeal to the Commission'" and, "'if the Commission rules against [them], [they] can obtain judicial review in the court of appeals.'" A-145 (quoting *Bebo*, 2015 WL 905349, at *3) (second, third, and fourth alterations in original).

The court held that "Plaintiffs' argument that their constitutional claims 'cannot be raised effectively in an administrative proceeding' . . . ignores the fact that these claims may be effectively raised as affirmative defenses" (A-146), and further held that plaintiffs' "contention that they cannot effectively raise their claims administratively because SEC rules 'do not allow the kind of discovery of the SEC personnel necessary to elicit admissible evidence of such claims' is belied by their own admission that, as a purely legal matter, no discovery is necessary to adjudicate these claims" (A-147).

The court rejected plaintiffs' contention that their claims should be heard in district court on the ground that the claims did not depend on the facts of their case and were thus "collateral" (A-149), observing that the Supreme Court in *Elgin,* 132 S. Ct. at 2135, refused to carve out facial challenges from the exclusive administrative scheme at issue there (A-150), notwithstanding the fact that the Merit Systems Protection Board had no authority to rule on challenges to the constitutionality of the Selective Service Act.

Finally, the court rejected plaintiffs' argument that district-court review was appropriate because the SEC lacks "expertise" in adjudicating an Appointments Clause challenge. A-152 to A-153. The court explained that "even if an agency were 'powerless' to consider constitutional claims, *Thunder Basin* and *Elgin* counsel that this is not sufficient to bypass the statutory remedial scheme where meaningful judicial review is otherwise available." A-153 (citing *Thunder Basin,* 510 U.S. at 215; *Elgin,* 132 S. Ct. at 2137). "Thus, even if the SEC lacked the authority, competence, or expertise to adjudicate Plaintiffs' constitutional claims, because meaningful review of those claims in an Article III court of appeals is available, district court jurisdiction would still be precluded." *Id.*

SUMMARY OF ARGUMENT

Congress expressly authorized the Securities and Exchange Commission to enforce the nation's securities laws through administrative proceedings and stipulated that judicial review shall be available directly in the court of appeals. Lynn Tilton, Patriarch Partners and affiliated companies are currently respondents in such proceedings. It is not disputed that plaintiffs will be able to obtain review of their constitutional claims and any other contentions in this Court or in the Court of Appeals for the District of Columbia Circuit if they are aggrieved by the Commission's final order. They may not, however, invoke the jurisdiction of the district court to collaterally enjoin proceedings subject to direct review in the court of appeals.

The Supreme Court has stressed that, when Congress establishes an exclusive avenue for review in this manner, a district court has no authority to intrude on this review process, and that litigants must instead raise their constitutional claims before the agency. The Court has made clear that this rule applies even if the agency does not have the power to adjudicate the constitutional contentions. *See Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 215 (1994); *Elgin v. Department of the Treasury*, 132 S. Ct. 2126, 2136-37 (2012). Plaintiffs identify no respect in which the statutory scheme governing the SEC's administrative proceedings is meaningfully distinguishable from the statutory scheme in *Thunder Basin,* where the Court likewise found a "'fairly discernible' intent to preclude district court review" of agency enforcement proceedings, including the constitutional challenge raised in that case. 510 U.S. at 216.

Plaintiffs nevertheless urge that they will be deprived of meaningful judicial review because a court that considers their constitutional claims on appeal from an adverse order would be unable to enjoin the proceeding at the outset. *See* Pls. Br. 17-18. As the district court correctly recognized, "[s]uch an exception to the enforceability of statutory review schemes could swallow the schemes themselves." A-139; *see also In re al-Nashiri*, __ F.3d__, No. 14-1203, 2015 WL 3851966, at *7 (D.C. Cir. June 23, 2015) (holding that a trial before judges of the Court of Military Commission Review allegedly appointed in violation of the Appointments Clause does not cause irreparable harm). The Supreme Court has established, moreover, that

"the burden of responding to . . . charges," including "litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury," *FTC v. Standard Oil Co.*, 449 U.S. 232, 242, 244 (1980) (internal quotation marks omitted), and is not a ground for enjoining administrative proceedings.

The Supreme Court decisions on which plaintiffs rely—*Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), and *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991)—did not involve respondents in administrative proceedings that would be followed by judicial review. In *Free Enterprise*, where plaintiff challenged the constitutionality of the Public Company Accounting Oversight Board, the Supreme Court emphasized that the plaintiff could obtain judicial review only by challenging a "random" Board rule or refusing to comply with a Board request, 561 U.S. at 490, and stressed that courts "normally do not require plaintiffs to bet the farm . . . by taking the violative action before testing the validity of the law," *id.* (internal quotation marks omitted). In *McNary*, the plaintiffs could "ensure themselves review in courts of appeals only if they voluntarily surrender[ed] themselves for deportation," and, as the Court declared, "[q]uite obviously, that price is tantamount to a complete denial of judicial review for most undocumented aliens." 498 U.S. at 496-97. By contrast, in this case, as the district court explained, plaintiffs "do not 'need to induce an administrative proceeding,' because the administrative proceeding has already been commenced against them." A-144 to A-145 (quoting

Bebo v. SEC, No. 15-C-3, 2015 WL 905349, at *3 (E.D. Wis. Mar. 3, 2015), *appeal docketed*, No. 15-1511 (7th Cir. Mar. 10, 2015).

The Court should accordingly affirm the district court's dismissal for lack of jurisdiction. But if the Court were to disagree with the district court's jurisdictional analysis, it should remand to the district court, consistent with its usual practice, for that court to consider the merits of plaintiffs' claim in the first instance.

If the Court were to consider the merits of the case, it should reject plaintiffs' claim that the Commission cannot employ administrative law judges as hearing officers as it has done for decades. The SEC's administrative law judges are not constitutional officers exercising a portion of the sovereign authority of the United States. Rather, they are simply agency employees who act as the hearing officer and prepare an initial decision for the Commission's review. The Commission has complete discretion whether or not to use ALJs as hearing officers, and when it does, it is bound by neither the initial decision's findings of fact nor its conclusions of law. Indeed, the Commission may re-weigh the testimony, take new evidence, make new findings, and otherwise disregard or displace the ALJ's decision altogether.

Plaintiffs mistakenly argue that *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), which involved the special trial judges of the Tax Court, compels the conclusion that the Commission's ALJs are inferior officers. And plaintiffs urge this Court to reject the reasoning of the D.C. Circuit in *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), which held that the ALJs of the Federal Deposit Insurance

Corporation (FDIC) are employees and not constitutional officers. Like the FDIC's administrative law judges at issue in *Landry*—and unlike the special trial judges at issue in *Freytag*—the Commission's ALJs "can never render the decision of the [agency]." *Landry,* 204 F.3d at 1133. Moreover, as the D.C. Circuit observed in *Landry,* "even for the non-final decisions of the type made by the [special trial judges] in *Freytag,* the Tax Court was required to defer to the [special trial judge's] factual and credibility findings unless they were clearly erroneous." *Landry*, 204 F.3d at 1133 (citations omitted). By contrast, the Commission, like the FDIC Board, does not defer to an ALJs' factual findings.

STANDARD OF REVIEW

This Court "review[s] de novo a determination of subject matter jurisdiction as a matter of law." *Scelsa v. City Univ. of New York*, 76 F.3d 37, 40 (2d Cir. 1996).

ARGUMENT

I. THE DISTRICT COURT LACKS JURISDICTION OVER SEC ADMINISTRATIVE PROCEEDINGS, WHICH ARE SUBJECT TO DIRECT REVIEW IN THE COURT OF APPEALS

A. It Is "Fairly Discernible" In The Detailed Scheme Established By The Securities Laws That Judicial Review Of Plaintiffs' Claims Is Exclusive In The Courts Of Appeals

Congress has allocated the initial resolution of legal questions arising in Commission administrative enforcement proceedings to the Commission itself, followed by direct review in the court of appeals. The federal securities laws'

comprehensive and specialized scheme of judicial review leaves no room for collateral district court proceedings such as those plaintiffs have initiated here.

As the Supreme Court has explained, when a statute provides for direct appellate review "of final agency actions, we shall find that Congress has allocated initial review to an administrative body where such intent is 'fairly discernible in the statutory scheme.'" *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 207 (1994). "Whether a statute is intended to preclude initial judicial review [in district court] is determined from the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review." *Id.*; *see Elgin v. Department of the Treasury*, 132 S. Ct. 2126, 2132-33 (2012) ("[T]he appropriate inquiry is whether it is 'fairly discernible' from [the statute] that Congress intended covered employees . . . to proceed exclusively through the statutory review scheme, even in cases in which the employees raise constitutional challenges to federal statutes."); *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010) (statutory review provisions are exclusive if "the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure'" (alteration in original)).

In *Thunder Basin,* the Supreme Court held that a district court lacked authority to enjoin enforcement proceedings of the Mine Safety and Health Administration. The Court explained that the comprehensive review structure established by the statute, which called for direct review of final action in the court of appeals, implicitly

"demonstrate[d] that Congress intended to preclude challenges" prior to the completion of agency proceedings. 510 U.S. at 208. That preclusion, the Court held, extended to review of constitutional claims. *Id.* at 215. The Court reasoned that the Mine Act provided a "detailed structure," *id.* at 207, for review of enforcement actions and that, even if the petitioner's constitutional claim could not be addressed by the agency in the first instance, it could be "meaningfully addressed in the Court of Appeals," *id.* at 215.

The federal securities laws' comprehensive scheme for administrative and judicial review is "virtually identical" to that in *Thunder Basin*, entailing a four-step process in which "(1) charges are brought by the SEC's Enforcement Division before an ALJ; (2) the plaintiffs have the opportunity to be heard and present evidence challenging the charges; (3) the plaintiffs may appeal an adverse ALJ decision to the SEC Commissioners; and (4) if the plaintiffs are aggrieved by the resulting final order, the plaintiffs may appeal to a federal Court of Appeals." *Jarkesy v. U.S. SEC*, 48 F. Supp. 3d 32, 37-38 (D.D.C. 2014) (citing 15 U.S.C. §§ 78u–3, 78y(a)(1)), *appeal docketed*, No. 14-5196 (D.C. Cir. Aug. 12, 2014).

Accordingly, this Court concluded in *Altman v. U.S. SEC*, 687 F.3d 44, 45-46 (2d Cir. 2012) (per curiam), that the securities laws' comprehensive review scheme precluded district court review of plaintiff's claims that an SEC administrative proceeding violated due process and equal protection and that the Commission acted beyond its constitutional and statutory authority. *See also, e.g.*, *Spring Hill Capital*

Partners, LLC v. SEC, Dkt. 23, No. 15-4542 (S.D.N.Y June 29, 2015) (federal securities laws' comprehensive review scheme precluded district court jurisdiction to hear Appointments Clause challenge); *Bebo v. SEC*, No. 15-00003, 2015 WL 905349 (E.D. Wis. Mar. 3, 2015), *appeal docketed*, No. 15-1511 (7th Cir. Mar. 10, 2015) (same for Article II, equal protection, and due process challenges); *Chau v. U.S. SEC*, 72 F. Supp. 3d 417, 426 (S.D.N.Y. 2014) (same for due process and equal protection challenges), *appeal docketed*, No. 15-461 (2d Cir. Feb. 13, 2015); *Jarkesy*, 48 F. Supp. 3d at 34-35, 37 (same for, *inter alia*, due process challenge). *But see, e.g.*, *Duka v. SEC*, No. 15 Civ. 357, 2015 WL 1943245 (S.D.N.Y. Apr. 15, 2015) (finding jurisdiction to consider separation of powers challenge to SEC administrative enforcement proceeding); Dkt. 57, *Duka*, *supra*, at 3-5 (Aug. 3, 2015) (finding jurisdiction and holding that use of Commission administrative law judges as hearing officers violated the Appointments Clause); *Hill v. SEC*, Dkt. 28, No. 15-1801-LMM (N.D. Ga. June 8, 2015), *appeal docketed*, No. 15-12831 (11th Cir. June 25, 2015) (same); *Gray Financial Group, Inc. v. SEC*, Dkt. 56, No. 15-0492-LMM (N.D. Ga. Aug. 4, 2015) (same).

Courts have likewise repeatedly rejected other attempts to enjoin administrative proceedings on various constitutional grounds. For example, in *National Taxpayers Union v. United States Social Security Administration,* 376 F.3d 239, 242 (4th Cir. 2004), the court rejected an attempt by an advocacy group to bypass administrative proceedings in order to challenge a statutory prohibition on the use of the words "Social Security" in mailings on First Amendment grounds. Applying *Thunder Basin,* the Fourth Circuit

held that district court review was unavailable even though the agency had threatened enforcement action that could have resulted in penalties of up to $5,000 per violation. *Id.*; *see also Eastern Bridge, LLC v. Chao,* 320 F.3d 84, 90-91 (1st Cir. 2003) (affirming district court's dismissal of facial Fourth Amendment privacy right challenge to OSHA surveys); *Sturm, Ruger & Co. v. Chao,* 300 F.3d 867, 873-75 (D.C. Cir. 2002) (affirming district court's dismissal of pre-enforcement facial constitutional challenge to OSHA provision because plaintiff could obtain review in court of appeals).

2. A related but separate principle likewise precludes a district court from enjoining proceedings that are subject to direct oversight in the court of appeals. This Court and other courts have explained that "[w]here a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Court of Appeals." *In re Fed. Commc'ns Comm'n*, 217 F.3d 125, 140 n.10 (2d Cir. 2000) (quoting *Telecommunications Research & Action Ctr. (TRAC) v. FCC,* 750 F.2d 70, 78-79 (D.C. Cir. 1984)). Thus, relying on the *TRAC* analysis, the Ninth Circuit in *Public Utility Commissioner of Oregon v. Bonneville Power Administration*, 767 F.2d 622 (9th Cir. 1985) (Kennedy, J.), held that a district court lacked jurisdiction to consider a constitutional challenge to an agency proceeding based on the asserted bias of the agency decision maker. The court explained that because "disposition of petitioners' claim of bias could affect our future statutory review authority, we have exclusive jurisdiction to consider it." *Id.* at 627. The Ninth Circuit determined it would consider the challenge

to the fairness of the proceeding only on review of final action, noting that doing so would "avoid the disruption, delay, and piecemeal review that accompany interference with pending administrative proceedings." *Id.* at 629. The D.C. Circuit reached the same conclusion in *Air Line Pilots Ass'n, International v. Civil Aeronautics Board*, 750 F.2d 81 (D.C. Cir. 1984), and declined to exercise its own mandamus authority to address a claim of agency bias, observing that "[t]o stay the administrative processes while a court was engaged in an extended inquiry into the claimed disqualification of members of the administrative body could lead to a breakdown in the administrative process which has long been criticized for its slow pace." *Id.* at 88 (quoting *SEC v. R.A. Holman & Co.*, 323 F.2d 284, 287 (D.C. Cir. 1963)).

Likewise here, plaintiffs' various challenges to the Commission's authority to proceed against them through administrative proceedings affect the prospective jurisdiction of the court of appeals—either this Court or the D.C. Circuit—over the Commission's final order. Under *TRAC* principles, therefore, judicial review of plaintiffs' claims is exclusively vested in the courts of appeals. Nothing in the Advisers Act or the federal securities laws contemplates the district court entertaining collateral challenges to enjoin the Commission's enforcement proceedings.

B. Plaintiffs' Argument On The Asserted Absence Of Meaningful Judicial Review And The Facial Nature Of Their Challenge Cannot Be Squared With *Thunder Basin*, *Elgin*, And Other Precedents Of The Supreme Court And This Court

Plaintiffs nevertheless urge that they can pursue a district court action because judicial review following an administrative proceeding will not be meaningful, and because their constitutional challenge is unrelated to the merits of their case and presents a question outside the Commission's expertise. Pls. Br. 17-24.

1. The Supreme Court's application of *Thunder Basin* in *Elgin* makes clear that these assertions are without merit. Plaintiffs in *Elgin* were former federal competitive-service employees who failed to comply with the registration requirements of the Military Selective Service Act, and were thus barred from federal employment. *Elgin*, 132 S. Ct. at 2131. Their suit argued that the statutes were unconstitutional and sought declaratory and injunctive relief. *Id.*

Holding that the review scheme of the Civil Service Reform Act (CSRA) was exclusive, the Court rejected the view of dissenting Justices that would have "carve[d] out for district court adjudication only facial constitutional challenges to statutes." *Elgin*, 132 S. Ct. at 2135. The Court made clear that the district court lacked jurisdiction over both as-applied and facial challenges, *id.*, and reaffirmed *Thunder Basin*'s holding that it was immaterial that the agency would likely lack authority to determine the plaintiffs' constitutional claims, *id.* at 2136-37. *Compare id.* at 2141 (Alito, J., dissenting) ("Not only does the Board lack authority to adjudicate facial

constitutional challenges, but such challenges are wholly collateral to the type of claims that the Board is authorized to hear.").

The Court reaffirmed its long-standing view that "the appropriate inquiry is whether it is 'fairly discernible' from the CSRA that Congress intended covered employees appealing covered agency actions to proceed exclusively through the statutory review scheme, even in cases in which the employees raise constitutional challenges to federal statutes." *Elgin*, 132 S. Ct. at 2132-33 (quoting *Thunder Basin*, 510 U.S. at 207). "To determine whether it is 'fairly discernible' that Congress precluded district court jurisdiction over petitioners' claims," the Court examined the statute's "text, structure, and purpose." *Id.* (citing *Thunder Basin*, 510 U.S. at 207). The Court concluded that "the CSRA's 'elaborate' framework . . . indicates that extrastatutory review is not available to those employees to whom the CSRA grants administrative and judicial review." *Id.* at 2133 (emphasis omitted).

The Court in *Elgin* rejected plaintiffs' reliance on "three additional factors in arguing that their claims are not the type that Congress intended to be reviewed within the CSRA scheme," noting that plaintiffs invoked the "'presum[ption] that Congress does not intend to limit [district court] jurisdiction if "a finding of preclusion could foreclose all meaningful judicial review"; if the suit is "wholly collateral to a statute's review provisions"; and if the claims are "outside the agency's

expertise.""" 132 S. Ct. at 2136 (alteration in original) (quoting *Free Enter. Fund,* 561 U.S. at 489 (quoting, in turn, *Thunder Basin,* 510 U.S. at 212-13)).

The Court rejected plaintiffs' contention "that the CSRA review scheme provides no meaningful review of their claims because the [agency] lacks authority to declare a federal statute unconstitutional." *Elgin*, 132 S. Ct. at 2136. The Court found it unnecessary to resolve whether the agency had such authority, explaining that "[i]n *Thunder Basin,* we held that Congress' intent to preclude district court jurisdiction was fairly discernible in the statutory scheme '[e]ven if' the administrative body could not decide the constitutionality of a federal law," *id.* at 2136-37, because "[t]hat issue . . . could be 'meaningfully addressed in the Court of Appeals' that Congress had authorized to conduct judicial review," *id.* at 2137. The Court observed that "[l]ikewise, the CSRA provides review in the Federal Circuit, an Article III court fully competent to adjudicate petitioners' claims that [the challenged statute and Selective Service] registration requirement are unconstitutional." *Id.*

The Court likewise explained that there are "many threshold questions that may accompany a constitutional claim and to which the [agency] can apply its expertise." *Elgin*, 132 S. Ct. at 2140. Accordingly, it found unpersuasive plaintiffs' argument "that their constitutional claims are not the sort that Congress intended to channel through the [agency] because they are beyond the [agency's] expertise," observing that "preliminary questions unique to the employment context may obviate the need to

address the constitutional challenge," *id.*, and that the challenge to the application of the statutes was not "wholly collateral," *id.* at 2139-40.

2. As *Elgin* makes clear, and as the district court in this case and this Court in *Altman* recognized, the availability of direct review in the court of appeals provides meaningful judicial review. The two Supreme Court decisions on which Tilton relies (see Pls. Br. 13-15)—*Free Enterprise Fund* and *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991)—only serve to underscore that principle.

In *Free Enterprise Fund,* the Supreme Court considered whether Exchange Act Section 78y foreclosed review of an Article II challenge to the Public Company Accounting Oversight Board. An accounting firm that (unlike plaintiffs here) was not the subject of administrative proceedings sought a declaration that the Accounting Board was unconstitutional on the ground that the "Board's existence" violated the Appointments Clause and the separation of powers. 561 U.S. at 487, 490.

Emphasizing considerations not present here, the Court concluded that unless petitioners could proceed in district court, "[w]e do not see how petitioners could meaningfully pursue their constitutional claims." *Free Enter. Fund*, 561 U.S. at 490. The Court first noted that "Section 78y provides only for judicial review of *Commission* action, and not every Board action is encapsulated in a final Commission order or rule." *Id.* Here, by contrast, there is no dispute that the administrative proceedings against Tilton will result in "*Commission* action" that, if adverse to Tilton, will be subject to review in this Court or the Court of Appeals for the D.C. Circuit.

The Court then rejected the government's suggestion that there was a meaningful avenue of judicial review because the firm could generate a reviewable Commission order by seeking Commission review of a Board rule or incurring a sanction. *Free Enter. Fund*, 561 U.S. at 490. The Court explained that the firm could not properly be required "to select and challenge a Board rule at random" and—in that sense—the firm's challenge "to the Board's existence" was "'collateral' to any Commission orders or rules from which review might be sought." *Id.* The Court added that "[r]equiring petitioners to select and challenge a Board rule at random" would be "an odd procedure for Congress to choose," and would be especially odd "because only *new* rules, and not existing ones, are subject to challenge." *Id.*

The Court then rejected the alternative contention that petitioners could refuse to comply with a Board request and then "raise their claims by appealing a Board sanction." *Free Enter. Fund*, 561 U.S. at 490. The Court held that this did not constitute a "meaningful avenue of relief" because courts "normally do not require plaintiffs to bet the farm . . . by taking the violative action before testing the validity of the law." *Id.* at 490-91 (internal quotation marks omitted).

Here, by contrast, plaintiffs do not "'need to induce an administrative proceeding,' because the administrative proceeding has already been commenced against them." A-145 to A-146 (quoting *Bebo,* 2015 WL 905349, at *3). "They are not presented with a choice between risking 'severe punishment' in order to obtain judicial review or foregoing judicial review altogether." A-146. The administrative

proceedings will culminate in a Commission order subject to direct review in the court of appeals. There is no dispute that if plaintiffs are aggrieved by the Commission's final order, they can seek review of their constitutional claims and any other contentions in the appropriate appellate court. Tilton need not challenge a "random" rule or "bet the farm" by violating the law.

In *McNary*, the route to judicial review entailed even greater risks than those faced by the plaintiffs in *Free Enterprise Fund*. In that case, the Supreme Court held that a district court could exercise jurisdiction over a class-action challenge to agency procedures for applying for Special Agricultural Worker (SAW) status, notwithstanding a statutory provision that barred judicial review of all Immigration and Naturalization Service determinations other than deportation decisions. *McNary*, 498 U.S. at 491-94. The statute at issue contained "no provision for direct judicial review of the denial of SAW status unless the alien is later apprehended and deportation proceedings are initiated." *Id.* at 496. Thus, "most aliens denied SAW status [could] ensure themselves review in courts of appeals only if they voluntarily surrender themselves for deportation. Quite obviously, that price is tantamount to a complete denial of judicial review for most undocumented aliens." *Id.* at 496-97.

As the Supreme Court subsequently noted in *Thunder Basin*, it had concluded in *McNary* that "the statutory language" in that case "did not evidence an intent to preclude broad 'pattern and practice' challenges to the program and acknowledged that 'if not allowed to pursue their claims in the District Court, respondents would

not as a practical matter be able to obtain meaningful judicial review.'" *Thunder Basin*, 510 U.S. at 213 (citation omitted); *see also Daniels v. Union Pac. R.R.*, 530 F.3d 936, 943 (D.C. Cir. 2008) ("[T]he availability of effective judicial review is the touchstone of the *McNary* exception."). *McNary* provides no support to plaintiffs, who need not pay a "price [that] is tantamount to a complete denial of judicial review," 498 U.S. at 496-97, and need only await a final order in the administrative proceeding before they can bring their claims before a federal court.[3]

3. The district court likewise properly rejected plaintiffs' reliance on *Touche Ross & Co. v. SEC,* 609 F.2d 570 (2d Cir. 1979), in which this Court held that the district court had jurisdiction over a claim that the SEC had no statutory authority to enact attorney disciplinary rules. That decision issued before the guidance later provided by

[3] That the SEC can invoke the district court's jurisdiction at the outset of a case does not suggest that the district court can exercise jurisdiction when the SEC does *not* file suit in district court and instead initiates administrative proceedings. Indeed, in *Thunder Basin* the Mine Act "expressly . . . empower[ed] the *Secretary* . . . to coerce payment of civil penalties" by filing actions in district court. 510 U.S. at 209. As the Supreme Court recognized, authorization of district court jurisdiction over actions by "the *Secretary*" did not require finding jurisdiction for suits by mine operators, who "enjoy no corresponding right but are to complain to the Commission and then to the court of appeals." *Id.* Moreover, "Congress kn[ows] how to provide alternative forums for judicial review." *Elgin*, 132 S. Ct. at 2134. Indeed, Congress specifically provided limited instances in which plaintiffs could seek district court review related to ongoing administrative proceedings. *See* 15 U.S.C. § 80b-3(k)(4)(B), (D) (exempting from general court of appeals review scheme only challenges to the Commission's *temporary* cease and desist orders). Congress's decision not "to include an exemption from [court of appeals] review" for challenges such as those plaintiffs raise here "indicates that Congress intended no such exception." *Elgin*, 132 S. Ct. at 2134-35.

Thunder Basin and *Elgin,* and, as the district court explained, plaintiffs' reliance on that case cannot be squared with the district court's analysis in *Altman* which, as discussed further below, was explicitly endorsed by this Court on appeal. A-142 n.3.

Altman involved a claim not meaningfully distinguishable from those presented here: "Altman challenges the SEC's constitutional authority to continue administrative proceedings against him, and to issue the sanction resulting from those proceedings[.]" 768 F. Supp. 2d at 561. First rejecting Altman's reliance on *Free Enterprise Fund,* the district court explained that Altman thus "asks for the 'judicial review of *Commission* action,' which the Free Enterprise Court indicated would fall directly under Section 78y." *Id.* The court stressed that "any constitutional challenge raised in his administrative proceedings will be meaningfully addressed in the Court of Appeals should Altman appeal the SEC's sanction against him." *Id.* "Thus," the court declared, "Altman's reliance on *Free Enterprise* does not insulate him from the Exchange Act's procedural requirements." *Id.*

The district court then found Altman's "secondary reliance" on *Touche Ross* to be "equally misplaced." *Altman*, 768 F. Supp. 2d at 561. The court noted that "[c]ourts have read *Touche Ross* narrowly" and "found its application especially inappropriate when a litigant invokes it to avoid agency review procedures, or when the agency in question is not 'acting "plainly beyond its jurisdiction."'" *Id.* at 562 (quoting *ITT Continental Baking Co. v. United States,* 559 F. Supp. 454, 455–56 (S.D.N.Y. 1983) (quoting, in turn, *Touche Ross,* 609 F.2d at 576)).

On appeal in *Altman*, this Court held that the district court had correctly disposed of each of Altman's arguments, "holding that Section 25(a) does, under this Circuit's precedent, supply the jurisdictional route that Altman must follow to challenge the SEC action in this case" and "that the exception identified in *Touche Ross* did not apply, and that none of the factors in *Thunder Basin/Free Enterprise* militated in favor of district court jurisdiction." *Altman v. U.S. SEC*, 687 F.3d 44, 46 (2d Cir. 2012) (per curiam).

4. Plaintiffs nevertheless assert that review will not be meaningful because they will not be able to enjoin the administrative proceedings at the outset. *See* Pls. Br. 17-18 ("Exhausting this procedure would deprive Patriarch of meaningful judicial review because it . . . would be deprived of the opportunity to obtain the relief that it seeks[.]"). This circular reasoning does not demonstrate that review in the court of appeals following a final decision is not meaningful. As the district court explained, "[s]uch an exception to the enforceability of statutory review schemes could swallow the schemes themselves; indeed, any arguably plausible claim in district court that an administrative proceeding should be enjoined as unconstitutional could confer jurisdiction and thus thwart Congress' intent to the contrary." A-139. The court correctly noted that "[o]ftentimes in our system, a party challenging the legality of the very proceeding or forum in which she is litigating must 'endure' those proceedings before obtaining vindication." A-139 to A-140 (citing *Mohawk Indus., Inc. v. Carpenter,* 558 U.S. 100, 108-09 (2009) ("We routinely require litigants to wait until after final

judgment to vindicate valuable rights, including rights central to our adversarial system."), and *Germain v. Connecticut Nat'l Bank,* 930 F.2d 1038, 1040 (2d Cir. 1991) (order denying motion to strike jury demand not immediately appealable)).

That an ALJ's appointment is challenged on constitutional grounds does not render a litigant's appearance in the proceeding an irreparable injury. *See In re al-Nashiri*, __ F.3d__, No. 14-1203, 2015 WL 3851966, at *7 (D.C. Cir. June 23, 2015) (holding that a trial before judges of the Court of Military Commission Review allegedly appointed in violation of the Appointments Clause and separation-of-powers does not cause irreparable harm); *see also Fort v. American Fed'n of State, Cnty. & Mun. Emps.*, 375 F. App'x 109, 111 (2d Cir. 2010) (rejecting "plaintiffs' contention that trial itself constituted irreparable harm" where "appeals were available" and "the claimed injury of [an adverse decision] was both speculative and redressable"); *Aref v. United States*, 452 F.3d 202, 206 (2d Cir. 2006) (per curiam) (denying mandamus petition seeking to halt criminal proceeding that allegedly violated due process rights, as any such constitutional harms can be remedied by judicial review following an appeal, and a reversal of the decision below).

Every plaintiff seeking to enjoin administrative proceedings on constitutional grounds could make the kind of argument offered by plaintiffs here. But *Thunder Basin* made clear that it "would be inimical to the structure and the purposes of the [Act]" if a plaintiff could avoid an administrative proceeding by the simple expedient of filing a pre-enforcement constitutional challenge seeking to enjoin the proceeding.

510 U.S. at 215-16; *accord Sturm, Ruger & Co.*, 300 F.3d at 876 ("Our obligation to respect the review process established by Congress bars us from permitting [the plaintiff] to make this end run.").

Plaintiffs are on no firmer ground in relying on the "embarrassment, expense, . . . ordeal . . . [and] state of anxiety and insecurity" of litigating the administrative proceeding and, hypothetically, a district court enforcement proceeding against them, if they were to prevail on their constitutional claim following the administrative proceeding. Pls. Br. 19 (quoting *Green v. United States*, 355 U.S. 184, 187 (1957) (brackets in original)). The Supreme Court has made clear that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury," *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980) (internal quotation marks omitted), and does not provide a jurisdictional basis for enjoining administrative proceedings. The Court declared that it did not "doubt that the burden of defending this [FTC enforcement] proceeding will be substantial," but explained that "the expense and annoyance of litigation is part of the social burden of living under government." *Id.* (internal quotation marks omitted). *Cf. Deaver v. Seymour*, 822 F.2d 66, 70-71 (D.C. Cir. 1987) (rejecting argument that alleged violation of plaintiff's rights arising from prosecution by allegedly unconstitutional independent counsel could not be remedied); *id.* at 72 (D.H. Ginsburg, J., concurring) (noting that "continuing destruction of [plaintiff's] business," "injury to his reputation and dignity," and "the expenditure of substantial resources in his defense," do not "rise to

the level of irreparable injury" even where plaintiff "bases his challenge upon the alleged unconstitutionality of the office of independent counsel" (internal quotation marks omitted)); *Imperial Carpet Mills, Inc. v. Consumer Prods. Safety Comm'n*, 634 F.2d 871, 874 (5th Cir. 1981) (per curiam) (noting that asserted harm did not justify "intervention into administrative agency action" where harm was "nothing more than would accrue to any defendant to administrative action: the burden of defending against the complaint; the expense of complying with the Commission's anticipated final order; the resulting bad publicity; and the potential for a dangerous loss of credit").

Relying on *Free Enterprise Fund,* plaintiffs also urge that they should be able to proceed in district court because their claims are collateral to "any 'orders or rules from which review might be sought' under the purportedly exclusive review scheme." Pls. Br. 22 (quoting *Free Enter. Fund*, 561 U.S. at 490). As the district court correctly explained, however, "unlike in *Free Enterprise,* where the petitioners' claims were necessarily collateral to any administrative review scheme because they were not subject to an administrative proceeding at the time they filed their action, Plaintiffs here are already within the review mechanism." A-151. Therefore, plaintiffs' challenge "flows from the fact that they are the subject of the proceeding that they seek to enjoin, and any administrative ruling on their defense will be appealable." *Id.* The court observed that "it would be curious for Congress to have intended for a

claim that can be adequately raised within the administrative review procedures it created to also be considered 'wholly collateral' to them." *Id.*

Finally, plaintiffs assert that district court review is proper because their constitutional claims are outside the Commission's expertise. As discussed, in *Elgin* and *Thunder Basin,* the constitutional challenges were outside the agencies' expertise, but it was immaterial whether the agencies even had authority to consider the constitutional arguments. The Supreme Court in *Elgin* explained, moreover, that even if the Merit Systems Protection Board could not pass on the plaintiffs' constitutional claims, there were "many threshold questions that may accompany a constitutional claim and to which the [Merit Systems Protection Board] can apply its expertise," which "may obviate the need to address the constitutional challenge." 132 S. Ct. at 2140. That is equally true here, where the Commission can bring to bear its expertise on questions at the heart of this case relating to the SEC's rules and regulations, including the powers and duties of the Commission ALJs. The SEC's resolution of these issues "could alleviate constitutional concerns" about the administrative law judges, or the Commission could resolve the proceeding in plaintiffs' favor, thus avoiding the constitutional issues altogether. *Id.*; *see also Standard Oil*, 449 U.S. at 244 n.11 ("[T]he possibility that [the] challenge may be mooted in adjudication warrants the requirement that [the plaintiff] pursue adjudication, not shortcut it.").

II. IF THE COURT WERE TO REACH THE QUESTION, IT SHOULD CONCLUDE THAT THE SEC ALJS ARE EMPLOYEES, NOT INFERIOR OFFICERS

As an initial matter, because the district court correctly held that it was without jurisdiction, it did not consider plaintiffs' claims on the merits. For the same reason, the merits are not before this Court now. Plaintiffs urge, however, that if this Court were to reverse the district court's jurisdictional holding, it should proceed to address the merits of their Appointments Clause challenge. Pls. Br. 24-29.[4] This Court should decline to do so.

Plaintiffs offer no sound reason to depart from this Court's "settled practice to allow the district court to address arguments in the first instance." *Farricielli v. Holbrook*, 215 F.3d 241, 246 (2d Cir. 2000); *see also, e.g.*, *In re Air Crash Off Long Island, New York, on July 17, 1996*, 209 F.3d 200, 215 n.23 (2d Cir. 2000) ("We see no compelling need to depart from the standard practice of having the district court address this question of law in the first instance."); *Central Hudson Gas & Elec. Corp v. EPA*, 587 F.2d 549, 557 (2d Cir. 1978) ("The benefits which result from a system in which issues of law are resolved first by a district court and then by the Courts of Appeals are well known particularly to the judges on the Courts of Appeals. Whether or not the Court of Appeals agrees with a decision rendered by a district court in any given case, it is invariably true that the primary review of the case by the lower court is

[4] Plaintiffs do not ask the Court to address the arguments regarding the President's removal authority that they advanced in district court. *See* Pls. Br. 31 n.10.

of invaluable assistance."). In particular, the grant of an injunction is a matter of judicial discretion that the district court should decide in the first instance. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course."); *accord EEOC v. KarenKim, Inc.*, 698 F.3d 92, 99 (2d Cir. 2012) (reviewing district court decision for abuse of discretion).

Moreover, plaintiffs have not established that they would suffer irreparable harm from any delay resulting from a remand to the district court. Tilton asks this Court to presume irreparable harm, but Supreme Court and this Court's precedent make clear that "courts must not simply presume irreparable harm." *Salinger v. Colting*, 607 F.3d 68, 82 (2d Cir. 2010) (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393 (2006)).[5] Plaintiffs' litigation expense—"even substantial and unrecoupable cost, does not constitute irreparable injury," *Standard Oil*, 449 U.S. at 244—and the fact that plaintiffs challenge the ALJ's appointment on constitutional grounds do not render

[5] Plaintiffs rely (Pls. Br. 21) on language from this Court's decisions in *Statharos v. New York City Taxi & Limousine Comm'n*, 198 F.3d 317, 322 (2d Cir. 1999), and *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996), as support for their position that any allegation of a constitutional violation presumptively establishes irreparable harm. Yet to the extent that these cases are of continuing validity following the Supreme Court's decision in *eBay*, both cases are distinguishable, as they involve alleged deprivations of personal constitutional rights under the First and Eighth Amendments, *see, e.g., Siegel v. LePore*, 234 F.3d 1163, 1177-78 (11th Cir. 2000) (en banc) (rejecting proposition that a "violation of constitutional rights always constitutes irreparable harm" and instead holding that the presumption of irreparable harm only attaches to "the right of privacy and certain First Amendment claims"); *Public Serv. Co. of N.H. v. Town of W. Newbury*, 835 F.2d 380, 382 (1st Cir. 1987) (similar).

participation in the proceeding an irreparable injury, *In re al-Nashiri*, 2015 WL 3851966, at *7. Thus, if this Court were to overturn the district court's jurisdictional holding, it should remand to the district court to consider the merits of plaintiffs' constitutional claim in the first instance.

If this Court were to exercise its discretion to address merits issues not considered by the district court, plaintiffs provide no basis to set aside the Commission's employment of ALJs as hearing officers.

1. Article II, § 2, clause 2 of the Constitution provides that the President

> shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

"Inferior officers," like principal officers, are persons who "exercis[e] significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976), a category that does not include "lesser functionaries subordinate to officers of the United States," *id.* at 126 n.162. All relevant considerations demonstrate that the Commission's administrative law judges are "lesser functionaries subordinate to officers of the United States."

The SEC has made use of employees as hearing examiners throughout its existence. *See Charles Hughes & Co. v. SEC*, 139 F.2d 434 (2d Cir. 1943) (reviewing Commission order revoking broker-dealer registration following proceedings before

hearing examiner). Hearing examiners were originally subject to the Classification Act of 1923 and dependent on their agency's ratings for compensation and promotion. *Ramspeck v. Federal Trial Exam'rs Conference*, 345 U.S. 128, 130 (1953). When Congress enacted the APA in 1946, it "separat[ed] adjudicatory functions and personnel from investigative and prosecution personnel in the agencies," by placing hearing examiners under the jurisdiction of the Civil Service Commission in a merit-based civil service system for federal employees, and by vesting the Civil Service Commission with control of the ALJs' compensation, promotion, and tenure. *See id.* at 131-32. Congress gave no indication that it meant to elevate ALJs' status above that of the investigative and prosecution personnel of the agency, and, instead, explicitly "retained the examiners as classified Civil Service employees." *Id.* at 133. Indeed, in enacting the APA, Congress envisioned that an ALJ's "initial decision" would be "advisory in nature" and preserved for the agency "complete freedom of decision—as though it had heard the evidence itself." U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 83-84 (1947) (Manual).[6] Thus, as this Court has recognized, in reviewing an ALJ's initial decision, the agency "retains 'all the

[6] The Manual, as "a contemporaneous interpretation [of the APA]," *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978), is "give[n] 'considerable weight,'" *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537 (D.C. Cir. 1986) (citation omitted); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (Scalia, J., concurring) (noting that the Manual "repeatedly" has been given "great weight").

powers which it would have in making the initial decision[.]'" *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989) (quoting 5 U.S.C. § 557(b)).

At the SEC, as throughout the federal government, ALJs are civil service employees in the "competitive service." 5 C.F.R. § 930.201(b). As such they are subject to the provisions of the Civil Service Reform Act of 1978, 5 U.S.C. § 1101 *et seq.*, which, among other things, establishes merit systems principles to guide agency personnel management, 5 U.S.C. § 2301, and specifies the administrative and judicial remedies available in response to prohibited personnel practices described in the statute, *id.* §§ 1204, 1212, 1214, 1215, 1221.

The Office of Personnel Management (OPM), which oversees federal employment for ALJs and other civil servants, administers a detailed civil service system for selecting ALJs that includes examinations for ALJ candidates, *see* 5 U.S.C. §§ 1104, 1302; 5 C.F.R. §§ 930.201(d)-(e), 930.203; ranking ALJ applicants for placement on a register of eligible candidates according to their qualifications and numerical ratings, 5 U.S.C. § 3313; 5 C.F.R. § 332.401; and issuing "certificate[s] of eligibles" from which federal agencies—including the SEC—may select individuals to fill ALJ vacancies, 5 U.S.C. §§ 3317, 3318; 5 C.F.R. §§ 332.402, 332.404. OPM oversees each agency's "decisions concerning the appointment, pay, and tenure" of ALJs, 5 C.F.R. § 930.201(e)(2), and establishes classification and qualification standards for the ALJ positions, *id.* § 930.201(e)(3).

Government agencies employ a total of approximately 1,600 administrative law judges, *see Free Enter. Fund,* 561 U.S. at 586 (appendix to dissent of Breyer, J.), and the SEC currently employs five ALJs.

2. The SEC's regulations and governing statutes make clear that administrative law judges are simply employees of the Commission, which has retained its decision-making authority in every respect.

The Commission employs ALJs in its discretion, and all final agency determinations are those of the Commission, not of its ALJs. Congress has not required the SEC to use its ALJs to conduct its administrative proceedings, and SEC regulations provide that a "[h]earing officer" can be an ALJ, a panel of Commissioners, an individual Commissioner, or any other person duly authorized to preside at a hearing. 17 C.F.R. § 201.101(a)(5). The Commission may at any time during the administrative process "direct that any matter be submitted to it for review." *Id.* § 201.400(a). An ALJ serving as a hearing officer prepares only an "initial decision." *Id.* § 201.360(a)(1). If no further review is sought or otherwise ordered by the Commission, then the Commission issues an order of finality, specifying "the date on which sanctions, if any, take effect." *Id.* § 201.360(d)(2).[7]

[7] Plaintiffs argue that the characterization of the SEC ALJs in the federal securities laws and the Commission's regulations as "'officers' rather than employees, reflect[s] their significant role within the SEC's regulatory structure." Pls. Br. 32. There is no indication, however, that Congress or the Commission intended "officers" or "hearing officer" (*see id.* at 32-33) to be synonymous with "Officers of

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Plaintiffs quote at length from the SEC's description of its ALJs on its website (Pls. Br. 33-34), but that description is consistent with the role of the ALJs set forth in the regulations. While the ALJs "*may order sanctions*" (Pls. Br. 34), any such sanction takes effect only upon issuance of an order of finality by the Commission, 17 C.F.R. § 201.360(d)(2). The website further specifies that an aggrieved party may appeal and that the Commission "performs a de novo review" of the ALJs' initial decision and "can affirm, reverse, modify, set aside, or remand for further proceedings." SEC, *Office of the Administrative Law Judges: About the Office*, http://www.sec.gov/alj (last visited Aug. 6, 2015).

Indeed, the regulations make clear that Commission review of the ALJ's initial decision is de novo. The Commission "may affirm, reverse, modify, [or] set aside" the initial decision, "in whole or in part," and it "may make any findings or conclusions that in its judgment are proper and on the basis of the record." 17 C.F.R. § 201.411(a). The Commission may also "remand for further proceedings," *id.*, "remand . . . for the taking of additional evidence," or "hear additional evidence" itself, *id.* § 201.452. And if "a majority of participating Commissioners do not agree

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the United States," U.S. Const. art. II, § 2, cl. 2; *cf. Free Enterprise*, 561 U.S. at 484, 510 (holding that members of the Public Company Accounting Oversight Board are inferior officers even though they were "not considered Government 'officer[s] or employee[s]' for statutory purposes" (brackets in original)). Indeed, the APA "consistently uses the term 'officer' or the term 'officer, employee, or agent'" to "refer to [agency] staff members." Kenneth Culp Davis, *Separation of Functions in Administrative Agencies*, 61 Harv. L. Rev. 612, 615 & n.11 (1948).

to a disposition on the merits," the ALJ's "initial decision shall be of no effect." *Id.* § 201.411(f).

For these reasons, the D.C. Circuit's conclusion in *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), with respect to ALJs of the Federal Deposit Insurance Corporation applies equally here: the Commission's ALJs are not constitutional officers but employees, whose appointments do not implicate Article II, because they "can never render the decision of the [agency]." *Id.* at 1133; *see also Tucker v. Commissioner of Internal Revenue*, 676 F.3d 1129, 1134 (D.C. Cir. 2012) (explaining that in *Landry*, "we found the absence of any authority to render final decisions fatal to the claim that the administrative law judges at issue there were Officers rather than employees").

3. Plaintiffs ask the Court (Pls. Br. 41-42) to reject the D.C. Circuit's analysis in *Landry*, contending that it misunderstood the Supreme Court's decision in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), which held that the special trial judges of the Tax Court were inferior officers. *Id.* at 880-82. The D.C. Circuit was correct, however, in emphasizing the importance of the authority vested in special trial judges of the Tax Court to issue final decisions. In *Freytag*, it was undisputed that the special trial judges acted as inferior officers in a variety of cases. *Id.* at 882 (noting that IRS Commissioner had conceded that special trial judges "act as inferior officers" and that "the Chief Judge may assign special trial judges to render the decisions of the Tax Court" in certain cases); *see also* Respondent's Br. at 5, 10, *Freytag*, *supra*, No. 90-

762, 1991 WL 11007941 (Apr. 3, 1991). The government's argument was that the judges did not act as inferior officers in the specific category of cases at issue in *Freytag*. The Supreme Court found this reasoning unpersuasive, concluding that "[s]pecial trial judges are not inferior officers for purposes of some of their duties under [the statute], but mere employees with respect to other responsibilities." *Freytag*, 501 U.S. at 882.

In contrast, an ALJ can never render a final decision of the Commission in a case. The Commission need not involve ALJs in its administrative proceedings at all, and, if it determines that proceedings should take place before an ALJ, it is not bound by anything an ALJ decides. As the Commission has stated, it "retains plenary authority over the course of its administrative proceedings and the rulings of its law judges—both before and after the issuance of the initial decision and irrespective of whether any party has sought relief." *In re Michael Lee Mendenhall*, Exchange Act Release No. 74532, 2015 WL 1247374, at *1 (Mar. 19, 2015).[8]

[8] Plaintiffs appear to suggest that the Commission may not "undertake[] any preliminary review of the SEC ALJ's decision" or "affirmatively decide[] not to review" such decisions and that the initial decisions may simply become final by operation of law. Pls. Br. 39-40. Any such suggestion is mistaken, as the Commission's review of initial ALJ decisions on its own initiative, even where no review is sought, makes clear. *See, e.g., In re Dian Min Ma*, Exchange Act Release No. 74887, 2015 WL 2088438, at *1 (May 6, 2015) (explaining that "the Commission has determined to review the [ALJ's] decision on its own initiative," setting aside the ALJ's order in part, and providing that "as modified," the initial decision "has become the final decision of the Commission"); *In re Michael Lee Mendenhall*, 2015 WL 1247374, at *1 (Commission explaining that "we have determined *sua sponte* to vacate

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Plaintiffs correctly observe that the Supreme Court in *Freytag* cited the significant discretion exercised by special trial judges in cases over which they do not have final decision-making authority. Pls. Br. 42. Plaintiffs are mistaken, however, in arguing that the special trial judges' "'limited authority to issue final orders was only an additional reason, not the reason' that the Supreme Court determined that these judges were inferior officers." *Id.* (quoting *Hill* slip op. at 40). As the D.C. Circuit observed in *Landry,* the Court's discussion of the special judges' power to render final decisions in certain cases "would have been quite unnecessary if the purely recommendatory powers were fatal in themselves." 204 F.3d at 1134.

Plaintiffs also rely on the *Hill* district court's erroneous conclusion that SEC ALJs' "powers" are "nearly identical" to those of the Tax Court's special trial judges. Pls. Br. 42 (internal quotation marks omitted) (citing *Hill*, No. 15-01801-LMM (N.D. Ga.), *appeal docketed*, No. 15-12831 (11th Cir. June 25, 2015)). As the D.C. Circuit noted in *Landry,* "even for the non-final decisions of the type made by the [special

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the law judge's initial decision and to remand for further proceedings before the law judge"); *In re Raymond J. Lucia Cos.*, Exchange Act Release No. 540, 2013 WL 6384274, at *2 (Dec. 6, 2013) (referring to Commission's unpublished order "on its own initiative" remanding to the ALJ for additional findings); *In re Hunter Adams*, Exchange Act Release No. 52859, 2005 WL 3240600, *1 (Nov. 30, 2005) (explaining that the Commission "on our own motion . . . ordered a limited review of the decision of the administrative law judge" to consider the appropriate amount of disgorgement); *In re George C. Kern, Jr.*, Exchange Act Release No. 29356, 1991 WL 284804, at *1 (June 21, 1991) ("On its own initiative, the Commission ordered review of the administrative law judge's initial decision herein with respect to George C. Kern, Jr.").

trial judges] in *Freytag*, the Tax Court was required to defer to the [special trial judges'] factual and credibility findings unless they were clearly erroneous." *Landry*, 204 F.3d at 1133 (citing Tax Court Rule 183(c), 26 U.S.C. App. (1994)); *see also Tucker*, 676 F.3d at 1134 (holding that employees of the Internal Revenue Service's Office of Appeals were not inferior officers even though their decisions were "effective[ly] final" on the ground that their "discretion is highly constrained"). By contrast, neither the Commission nor the FDIC Board that reviewed the ALJ decisions at issue in *Landry* defers to ALJs' factual findings. 204 F.3d at 1133; 17 C.F.R. 201.411(a); *see also JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (noting that "agencies" are generally not bound by their ALJ's fact finding and instead "have the authority to make independent credibility determinations without the admitted advantage presented by the opportunity to view witnesses firsthand").[9] And whereas special trial judges have the power, for example, to issue subpoenas, 26 U.S.C. § 7456(a); Tax Court Rule 181, and "to enforce compliance with discovery orders," *Freytag*, 501 U.S. at 881-82, the Commission's ALJs may issue subpoenas, but an order would need to be obtained from a federal district court to compel compliance, *see* 15 U.S.C. § 78u(e).

[9] The Commission could make a factual finding partially based on an ALJ's credibility determination, but the Commission does not accept an ALJ's credibility determinations "blindly," *In re Kenneth R. Ward*, Exchange Act Release No. 47535, 2003 WL 1447865, at *10 (Mar. 19, 2003), and is not bound by such determinations, *see id.* The Commission can also choose to hear the witnesses' testimony itself. 17 C.F.R. § 201.452.

Plaintiffs mistakenly argue that the government's opposition to certiorari in *Landry* indicated that the case had no "implications beyond the specific context provided by FDIC ALJs at issue in that case." Pls. Br. 40. The government noted that "the court's analysis focuses on the role of a particular ALJ, and his relationship to higher agency authority, within a specific decision-making structure," and did not purport to declare a rule with regard to ALJs universally. Respondent's Br. in Opp., *Landry*, *supra*, No. 99-1916, 2000 WL 34013905, at *7 (Aug. 28, 2000). But plaintiffs identify no respect in which the FDIC ALJs differ from the Commission's ALJs, and the reasoning of *Landry* is thus fully applicable here.[10]

Plaintiffs argue (Pls. Br. 35-36) that the position of administrative law judge, like the position of a special trial judge, is established by law. That approximately 1,600 ALJs hold positions in the competitive civil service pursuant to a statute does

[10] Plaintiffs also rely on an Office of Legal Counsel (OLC) Memorandum to support their argument that the degree of "independent discretion" involved in rendering a final administrative decision is "not a necessary attribute" of a constitutional officer. Pls. Br. 41. But, even setting aside that the OLC memo endorsed the relevance of a lack of discretion, the officers described in the OLC memo—who, like SEC ALJs, lacked discretion in "administering the laws"— retained the power to "bind the rights of others . . . absent . . . subsequent sanction" by officers. *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 93, 95 (2007), http://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/05/29/op-olc-v031-p0083.pdf (internal quotation marks omitted) (citing *Opinion of the Justices*, 3 Greenl. (Me.) 481, 482 (1882)). By contrast, as discussed above, SEC ALJs do not "bind the rights of others" in the absence of the Commission's "sanction" (*i.e.*, approval) and they issue initial decisions that may be reviewed by the Commission de novo on its own initiative, even absent a petition for review.

not make them officers in the various agencies which may employ them. And the authority given to the SEC to use ALJs at its discretion likewise does not render each of them an officer. The special trial judge, in contrast, operates within an Article I tribunal where Congress has "knowingly expanded the authority of special trial judges." *Samuels, Kramer & Co. v. Commissioner of Internal Revenue*, 930 F.2d 975, 982 (2d Cir. 1991).

4. If doubt existed as to the ALJs' status, the Court would also properly consider Congress's own assessment of its statutory creations. *See Weiss v. United States*, 510 U.S. 163, 194 (1994) (Souter, J., concurring) (explaining that "in the presence of doubt" regarding constitutional officer status, "deference to the political branches' judgment is appropriate"). In enacting the APA, Congress specified that it is the "agency"—not the President, the department head, or the Judiciary—that appoints ALJs. Administrative Procedure Act, ch. 324, § 11, 60 Stat. 237, 244 (1946); *see* 5 U.S.C. § 3105; *Ramspeck*, 345 U.S. at 133 (Congress "retained the [hearing] examiners as classified Civil Service employees"). At the time, the Supreme Court had long characterized appointments pursuant to the methods prescribed in the Appointments Clause as a "well established definition of what it is that constitutes [an officer of the United States]." *United States v. Mouat*, 124 U.S. 303, 307 (1888). In other words, Congress intended them to be employees. With rare exceptions for particular agencies, in the seven decades since creating the position of ALJ, Congress has not changed the method of ALJ appointment.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I hereby certify this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 12,722 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Megan Barbero
MEGAN BARBERO

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system and caused seven hard copies to be delivered within three business days. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Megan Barbero
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