No. 19-10396

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHELLE COCHRAN,

Plaintiff – Appellant,

v.

SECURITIES AND EXCHANGE COMMISSION; JAY CLAYTON, in his official capacity as Chairman of the U.S. Securities and Exchange Commission; WILLIAM P. BARR, U.S. ATTORNEY GENERAL, in his official capacity,

Defendants – Appellees.

On Appeal from the United States District Court, Northern District of Texas, No. 4:19-CV-66-A, Honorable John McBryde, Presiding

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant Michelle Cochran certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellant	**Appellees**
Michelle Cochran	Securities and Exchange Commission; Jay Clayton, in his official capacity as Chairman of the U.S. Securities and Exchange Commission; William Barr, U.S. Attorney General, in his official capacity.

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STATEMENT REGARDING ORAL ARGUMENT

Appellant, Michelle Cochran, respectfully requests oral argument. This case involves the impact of a recent Supreme Court decision, *Lucia v. SEC*, on the district court's jurisdiction to remedy clear constitutional violations of Ms. Cochran's rights by the SEC. Oral argument will help the Court more fully develop and clarify the issues and facts.

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JURISDICTIONAL STATEMENT

Michelle Cochran appeals from the district court's Memorandum Opinion and Order entered March 25, 2019 dismissing her case for lack of subject-matter jurisdiction and the Final Judgment entered on the same day. Ms. Cochran timely filed a Notice of Appeal on April 8, 2019. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

INTRODUCTION

This case arises out of the SEC's effort to subject Michelle Cochran to a second unconstitutional enforcement proceeding after the Supreme Court concluded in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), that the administrative law judge (ALJ) who presided over her first proceeding was unconstitutionally appointed in violation of Article II.

The first unconstitutional proceeding began in April 2016, when the SEC filed an order initiating proceedings against the accounting firm that formerly employed Ms. Cochran as an auditor, the firm's founder, one other accountant, and Ms. Cochran. The SEC alleged that all of them had violated the Securities Exchange Act of 1934 by failing to follow various accounting standards in audits and quarterly reviews the firm had performed.

While Ms. Cochran's proceeding was pending, the Supreme Court decided *Lucia v. SEC*, voiding the enforcement proceeding against the petitioner and holding that he was entitled to a hearing before a new, properly appointed ALJ or before the Commission itself. 138 S. Ct. at 2054–55. Recognizing that the same problem existed with all of its ALJs, the SEC attempted to "ratify" the ALJs' previous appointments,

and then it reassigned all pending enforcement matters, including Ms. Cochran's, to new ALJs.

The reinstituted proceeding against Ms. Cochran is just as unconstitutional as the original proceeding, however—and the SEC knows it. Whereas Ms. Cochran's first ALJ was not constitutionally appointed, her second ALJ presides over matters in violation of the President's removal power. SEC ALJs are protected from removal by several layers of tenure protection, which insulate them from control by the President in violation of Article II. *See Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). The government admitted the existence of this constitutional problem with the SEC's ALJs in its brief in *Lucia*, and Justice Breyer noted the problem in his concurring opinion in the same case. *Lucia*, 138 S. Ct. at 2057.

Despite the government's admission that SEC ALJs still violate Article II, the SEC chose to refer Ms. Cochran's second enforcement proceeding to an ALJ rather than hearing her matter itself, as it is empowered to do and as the Supreme Court stated in *Lucia* that it could do. Ms. Cochran filed this action in federal district court seeking to enjoin the unconstitutional administrative proceeding and to have her

constitutional claims heard by an Article III court so she would not have to endure yet a third administrative enforcement proceeding when the second proceeding—like the first—is ultimately deemed void.

On March 25, 2019, the district court dismissed her action for lack of subject-matter jurisdiction. Although the district court was "deeply concerned with the fact that the plaintiff already has been subjected to extensive proceedings before an ALJ who was not constitutionally appointed, and contends that the one she must now face for further, undoubtedly extending, proceedings likewise is unconstitutionally appointed" ROA.271, it held that Supreme Court precedent and several pre-*Lucia* circuit court decisions compelled the conclusion that Congress had assigned exclusive jurisdiction over Ms. Cochran's claims to the SEC's administrative process.

The district court erred, however. This case involves the same jurisdictional statute that was at issue in *Free Enterprise Fund* and the same type of claim that the Supreme Court held the district court in that case had jurisdiction to hear—whether SEC ALJs violate the President's removal power. *See* 561 U.S. at 491. The circuit court cases, moreover, were all decided *before Lucia* and thus before the Supreme

Court made clear that SEC ALJs are inferior officers, who, under *Free Enterprise Fund*, may not be insulated from removal by multiple layers of tenure protection, and before the government *admitted* that the SEC's ALJs still sit in violation of Article II.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the district court err in concluding that it lacked subject-matter jurisdiction to hear Ms. Cochran's constitutional challenges to the SEC's decision to refer her enforcement matter to an ALJ, whom the SEC knows holds office in violation of Article II?

STATEMENT OF THE CASE AND FACTS

Michelle Cochran is a CPA licensed in Texas. In 2007, Ms. Cochran took a job as an hourly contractor at a small accounting firm called The Hall Group CPAs. The firm did auditing work, mostly for nonprofits and privately held companies, but it also handled audits for a few, small, publicly traded companies. Ms. Cochran initially worked ten to fifteen hours per week, but gradually increased her time to thirty-five hours per week. ROA.137.

The firm turned out to be a difficult place for Ms. Cochran to work, and she clashed with Mr. Hall often. Among other reasons, Hall wanted Ms. Cochran to become a non-equity partner in the firm so she could act as an engagement partner on audits and reviews of public companies. Reluctant to take on the additional responsibility and liability that partnership might entail, Ms. Cochran initially refused. ROA.138. Hall continued to press the issue, and he ultimately made partnership a condition of Ms. Cochran's continued employment. Ms. Cochran became a non-equity partner in The Hall Group in 2012. Hall remained the only equity partner and 100% owner of the firm. In May 2013, Ms. Cochran

notified Hall that she intended to resign. Her last day at the firm was July 1, 2013. ROA.138.

On April 26, 2016, almost three years after Ms. Cochran left The Hall Group, the SEC filed an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) against David Hall and The Hall Group, Ms. Cochran and Susan Cisneros, another accountant who had worked as a contractor at the firm. ROA.138-39.[1] The SEC alleged various violations of the Securities Exchange Act of 1934 (the "Exchange Act"), most of which resulted from The Hall Group's alleged failure to comply with auditing standards issued by the Public Company Accounting Oversight Board (PCAOB) on a number of quarterly reviews and annual audits it had performed between 2010 and 2013. ROA.144-51. Ms. Cochran's liability was premised on the fact that she had been the "engagement partner" on several of the audits and reviews. ROA.150-51, 153-55.

The SEC held a hearing before ALJ Cameron Elliot on October 24, 2016. Ms. Cochran represented herself *pro se*. On the day of the

[1] The Record on Appeal contains certain documents from Ms. Cochran's enforcement proceeding, but all of the documents from the proceeding are available at https://www.sec.gov/litigation/apdocuments/ap-3-17228.xml.

hearing, Mr. Hall and his firm settled the charges against them, and the hearing proceeded with Ms. Hall and Ms. Cisneros as the only respondents. Hall testified on behalf of the SEC. On March 7, 2017, ALJ Elliot issued an Initial Decision ruling in the SEC's favor on most of the claims against Ms. Cochran and Ms. Cisneros. ROA.139. ALJ Elliot concluded that Ms. Cochran should be fined $22,500 and banned from practicing as an accountant before the SEC for at least five years, at which point she could reapply for admission. He found that Ms. Cisneros should be penalized as well. ROA.139.

The SEC adopted ALJ Elliot's Initial Decision as final on June 15, 2017. ROA.157-58. Ms. Cochran objected to the SEC's order, arguing that the Initial Decision had not been properly served on her. She sought leave to petition the SEC to review the decision, and the SEC ordered further briefing on the issue. ROA.139. The issue was never resolved, however, because of events relating to *Lucia v. SEC* in the U.S. Supreme Court.

Raymond Lucia, an investment professional who was subjected to an SEC enforcement proceeding before an ALJ, filed his petition for certiorari in the Supreme Court on July 21, 2017. Mr. Lucia argued that

the proceeding against him was invalid because SEC ALJs are "Officers of the United States" who had not been appointed by the President or the Head of a Department, as the Appointments Clause requires. *See Lucia v. SEC*, 138 S. Ct. 2044, 2050 (2018).

In its reply to the petition, the U.S. Solicitor General, on behalf of the government, *agreed* with Mr. Lucia that SEC ALJs were unconstitutionally appointed. *Id.* at 2050. The government further argued that the status of ALJs as inferior officers meant they were unconstitutionally protected from removal. Brief for Respondent, *Lucia v. SEC*, at 21, 138 S. Ct. 2044 (2018) (No. 17-130) [hereinafter, Gov't Cert. Pet. Br. in *Lucia*]. Relying on the Court's decision in *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), which held that officers of the United States may not be insulated from presidential control by more than one layer of tenure protection, the government recognized that "[h]ere, the statutory scheme provides for at least two, and potentially three, levels of protection against presidential removal authority." Gov't Cert. Pet. Br. in *Lucia*, at 20. "It is critically important," argued the government, that the Court address the removal issue along with the Appointments

Clause issue. *Id.* at 21. "Addressing that issue now will avoid needlessly prolonging the period of uncertainty and turmoil caused by litigation of these issues." *Id*.

The government's position in *Lucia* led the SEC to attempt to "ratify" the prior appointment of its ALJs. In an order issued on November 30, 2017, the Commission stated that "[t]o put to rest any claim that administrative proceedings pending before, or presided over by, Commission administrative law judges violate the Appointments Clause, the Commission—in its capacity as head of a department—hereby ratifies the agency's prior appointment of " its ALJs. ROA.160. The Order also directed ALJs in all pending matters to reconsider their decisions. ROA.160-61. On January 26, 2018, ALJ Elliot reconsidered his earlier decision in Ms. Cochran's proceeding and reached the same result he had reached previously. ROA.140.

The Supreme Court decided *Lucia v. SEC* on June 21, 2018, holding that ALJ Elliot, like all SEC ALJs, was an inferior officer under Article II who had not been appointed either by the President or the Head of a Department. 138 S. Ct. at 2055. As a result, the Court vacated the enforcement proceeding against Mr. Lucia and held that he

was constitutionally entitled to a new hearing before a different, properly appointed ALJ or before the Commission itself. *Id.* Mr. Lucia had also argued that the Commission's November 30, 2017 Order attempting to "ratify" the appointment of its ALJs was invalid. Responding to that argument, the Court stated,

> We see no reason to address that issue. The Commission has not suggested that it intends to assign Lucia's case on remand to an ALJ whose claim to authority rests on the ratification order. The SEC may decide to conduct Lucia's rehearing itself. Or it may assign the hearing to an ALJ who has received a constitutional appointment independent of the ratification.

Id. at 2055 n.6. Although the government, in its merits brief, had again urged the Court to address the removal question, the Court declined to do so. *Id*. at 2050 n.1.

On August 22, 2018, in response to the *Lucia* decision, the SEC issued an order vacating all decisions in pending enforcement matters and assigning the matters to different ALJs. ROA.167-68. Despite the Supreme Court's speculation that the Commission might hear Mr. Lucia's matter itself or assign his hearing to an ALJ who had received an appointment independent of the November 30, 2017 "ratification"

order, the Commission simply reiterated the previous "ratification." The Order stated

> On November 30, 2017, we ratified the Appointments of [all SEC ALJs] to the office of administrative law judge in the Securities and Exchange Commission. In an abundance of caution and for avoidance of doubt, we today reiterate our approval of their appointments under the Constitution.

ROA.167 (internal marks omitted).

The Order contained a list of matters to be reassigned to different ALJs. Ms. Cochran's was one of them. ROA.172. On September 12, 2018, her matter was assigned to ALJ Carol Fox Foelak. ROA.178-79 (referring case no. 3-17228). On January 3, 2019, Ms. Cochran filed a motion to dismiss or stay the enforcement proceeding before ALJ Foelak. ROA.140. The proceedings were stayed shortly thereafter due to the government shutdown, and the stay was lifted on January 30, 2019. To date, ALJ Foelak has not ruled on Ms. Cochran's motion to dismiss or stay the enforcement proceeding.

Ms. Cochran filed the instant action on January 18, 2019, claiming that SEC's enforcement proceeding against her violated the Constitution because the ALJ appointed to her case is unconstitutionally insulated from the President's power to remove her

and because the SEC ignores its own procedural rules in violation of her right to due process of law. ROA.6-28. On February 11, 2019, she filed a motion for preliminary injunction seeking to halt the enforcement proceeding. ROA.101-02.

On March 25, 2019, the district court dismissed this case for lack of subject-matter jurisdiction, concluding that Congress intended to preclude district court jurisdiction over Ms. Cochran's constitutional claims and channel those claims through the administrative process. ROA.272, 274-78.

SUMMARY OF THE ARGUMENT

District courts ordinarily have original subject-matter jurisdiction to hear and decide constitutional questions and, importantly, to remedy constitutional violations. District courts can be deprived of that jurisdiction only where Congress intended that result.

The district court erred in concluding that it lacked jurisdiction over Ms. Cochran's constitutional claims for the fundamental reason that Congress could not have intended those claims to be litigated in the first instance before an SEC ALJ who lacks the constitutional

authority to hear *any* claims, much less Ms. Cochran's constitutional claims.

Both sides in this case recognize that Ms. Cochran's ALJ lacks the constitutional authority to preside over her enforcement proceeding. SEC ALJs are "Officers of the United States" under *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and they are unconstitutionally insulated from presidential control under *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). The government not only admitted this constitutional problem in *Lucia*, it *raised* the issue in the case and asked the Court to resolve it.

The SEC has therefore brought an enforcement proceeding against Ms. Cochran that it knows is void. The SEC has three avenues for bringing enforcement proceedings under the Exchange Act: it can bring them in a federal district court; it can hear the matters itself; or it can refer enforcement proceedings to ALJs. In Ms. Cochran's case, the SEC took the one option that violates the Constitution and her rights. The statutory scheme does not permit the SEC to refer enforcement proceedings to constitutionally unauthorized ALJs, so Congress could not have intended that result. The Supreme Court's jurisdictional

precedents on point do not stand for the proposition that the courts must stand by while agencies violate the Constitution.

Moreover, in *Free Enterprise Fund*, the Supreme Court held that the same statutory scheme at issue in this case did not display any congressional intent to preclude district court jurisdiction over claims such as Ms. Cochran's. Ms. Cochran cannot possibly obtain meaningful judicial review under the statutory scheme because she challenges the authority of the ALJ to hear her claims and the ALJ clearly lacks that authority. Circuit court review *after* she has suffered the very injury she seeks to prevent is not meaningful judicial review. Ms. Cochran's claims are also wholly collateral to the statutory scheme and the SEC lacks any expertise in addressing them. Ms. Cochran does not challenge any of the laws the SEC seeks to enforce against her, and the SEC has no expertise in addressing constitutional claims such as hers.

This Court should reverse the district court and remand so Ms. Cochran may pursue her constitutional claims in a forum that can provide her the relief to which she is entitled.

STANDARD OF REVIEW

This court reviews a dismissal for lack of subject-matter jurisdiction de novo, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff. Although the party asserting jurisdiction bears the burden of proof, the court should dismiss only where it appears certain that the plaintiff cannot prove a plausible set of facts that establish subject-matter jurisdiction. *Bank of Louisiana v. FDIC*, 919 F.3d 916, 922 (5th Cir. 2019).

ARGUMENT

The District Court Erred in Concluding that It Lacked Subject-Matter Jurisdiction to Hear Ms. Cochran's Constitutional Claims

As a general rule, district courts have original jurisdiction to resolve constitutional claims, such as Ms. Cochran's, that "arise under" the Constitution and laws of the United States. 28 U.S.C. § 1331. While Congress can deprive district courts of jurisdiction over certain types of claims and channel them through the administrative process in the first instance, the Supreme Court has held that it will find preclusion only when Congress's intent to do so is "fairly discernible" from the statutory scheme and the claims are of the type that Congress intended to be

reviewed through the administrative process. *See Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 205 (1994). Thus, where a plaintiff asserts claims that are wholly collateral to the types of claims the administrative scheme was designed to address, where the agency lacks expertise in dealing with those claims, and where a plaintiff would not be able to obtain meaningful review of her constitutional claims, the Court has presumed that Congress did not intend to preclude jurisdiction in the district courts. *See Free Enterprise Fund*, 561 U.S. at 489.

The question, in other words, is not whether Congress intended to confer jurisdiction over federal claims on the district courts, but whether Congress intended to take it away. *Whitman v. Dep't of Transp.*, 547 U.S. 512, 514 (2006).

This approach follows from several competing principles. On the one hand, the Supreme Court has made clear the vital role of the federal courts in protecting constitutional rights and ensuring that constitutional wrongs can be redressed in a forum that possesses the power to issue an adequate remedy. As the Court has stated, "equitable

relief 'has long been recognized as the proper means for preventing entities from acting unconstitutionally.'" *Free Enterprise Fund*, 561 U.S. at 491 n.2 (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)). As a result, "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

Relatedly, administrative agencies such as the SEC have no authority to resolve constitutional claims. *See*, *e.g.*, *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 673–74 (6th Cir. 2018) ("only the Judiciary enjoys the power to invalidate statutes inconsistent with the Constitution"); *Ramos v. Dist. of Columbia Dep't of Consumer & Regulatory Affairs*, 601 A.2d 1069, 1073 (D.C. 1992) (same). As a result, "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Thunder Basin*, 510 U.S. at 215 (quoting *Johnson v. Robison*, 415 U.S. 361, 368 (1974)).

On the other hand, Congress possesses the power to control the jurisdiction of the federal courts and sometimes exercises that power in

order to channel certain types of claims through the administrative process with review by an Article III court at the circuit level. *See Elgin v. Dep't of the Treasury*, 567 U.S. 1, 25 (2012) (Alito, J., dissenting). Importantly, however, in determining Congress's intent, the Supreme Court has been mindful of the fact that Congress conferred general federal question jurisdiction on district courts in 28 U.S.C. § 1331. *See Whitman*, 547 U.S. at 514. It has thus recognized that when Congress deprives district courts of jurisdiction over certain types of claims, it does so not to deprive individuals of an Article III forum in which to litigate their constitutional claims, but to serve some value that is connected to the purposes for which the administrative scheme was created in the first place. Typically, those values include efficiency of administration and enforcement, as well as avoidance of unnecessary litigation. *See Thunder Basin*, 510 U.S. at 210–11; *Elgin*, 567 U.S. at 13–14. *See also Elgin*, 567 U.S. at 26–27 (Alito, J., dissenting) (discussing statutory purposes).

In certain cases, however, it is not possible for an administrative agency to adequately address constitutional claims that result from agency action, and, in such cases, the Supreme Court has not hesitated

to find that Congress did not intend to preclude district court jurisdiction over those claims. Thus, for example, in *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991), the Supreme Court held that despite an express provision precluding jurisdiction over certain claims, the district court nonetheless had jurisdiction to hear a due process challenge to the manner in which the INS made decisions concerning an amnesty program. *Id.* at 494. In *Leedom v. Kyne*, 358 U.S. 184 (1958), the Court held that district courts had jurisdiction to hear a challenge to an action by the NLRB that was in excess of its statutory authority. *Id.* at 190. And, most relevant to this case, the Court concluded in *Free Enterprise Fund* that Congress did not intend to preclude district court jurisdiction over a removal-protections claim that is almost identical to Ms. Cochran's and that involved the same jurisdictional statute that applies here. 561 U.S. at 489–90.

Ms. Cochran's case for jurisdiction is even stronger than those mentioned above. She challenges the constitutional authority of the ALJ assigned to her case on the basis of two Supreme Court cases and the government's admission that makes clear she is correct. Under *Lucia* and *Free Enterprise Fund*, SEC ALJs sit in violation of Article II.

Her claims are identical in all meaningful respects to the claim at issue in *Free Enterprise Fund*. She is not challenging the statutes that the SEC seeks to enforce against her, but rather the constitutional authority of the ALJ to hear her case.

The district court nevertheless concluded, in agreement with the SEC and the other circuits that have addressed challenges to SEC administrative enforcement proceedings,[2] that Supreme Court precedent bars jurisdiction in this case. ROA.274-75. The district court relied primarily on *Thunder Basin*, but the circuit courts and the SEC rely as well on *Elgin*. However, both *Thunder Basin* and *Elgin* involved claims that bear no similarity to Ms. Cochran's claims. In *Thunder Basin*, a coal mine operator challenged a provision of the Mine Act that required it to post a notice on its premises identifying employee representatives who would participate in health and safety inspections. *See* 510 U.S. at 203–04. In *Elgin*, an employee challenged a statutory condition of his employment with the federal government after being fired for violating the statute. *See* 567 U.S. at 12–15. In both cases, the

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

plaintiffs challenged *statutes* that the administrative agencies were created to manage and enforce.

By contrast, Ms. Cochran is being prosecuted by the SEC—civilly, yes, but she faces serious fines and penalties that could end her ability to practice her chosen profession. Yet the SEC has referred her case to an ALJ who clearly lacks the authority to hear it. The idea that she can receive meaningful judicial review in that hearing—that she first must endure an unconstitutional hearing to be able to establish in an appellate court what the SEC has already recognized to be true—makes a mockery of the Court's holding in *Lucia* and the longstanding principle that the deprivation of constitutional rights for even a limited time constitutes irreparable injury. *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

The SEC's response that litigation is simply a cost of living in a society, ROA.252, reduces a matter of constitutional right—and the principle that that our government is subject to the rule of law and bounded by the Constitution—to a nullity. Indeed, it is the *SEC* that is

imposing those costs on Ms. Cochran by forcing her to litigate before a constitutionally infirm ALJ. When the Supreme Court made that statement in *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980)—a case involving a large oil company's dispute with the FTC over an issue clearly within the scope of the latter's statutory authority—it was not referring to a situation in which the agency had impose costs on an individual through its own unconstitutional behavior.

Congress did not intend to preclude district court jurisdiction over claims such as Ms. Cochran's and require her to litigate them in the administrative process. The district court did not properly assess the impact on its jurisdiction of *Lucia* and the government's admission in that case that SEC ALJs still sit in violation of Article II. *Lucia* changed the legal landscape with respect to removal power challenges to SEC ALJs. The case makes even clearer that the principles applied in *Free Enterprise Fund* establish jurisdiction in this case. Because all the circuit court decisions on which the district court relied were decided before *Lucia*, they are distinguishable on that basis alone. Moreover, like the district court, they misapplied the relevant jurisdictional test.

I. Congress Did Not Authorize the SEC to Bring Enforcement Proceedings Before ALJs Who Lack the Constitutional Authority to Preside Over Them

This case comes to the Court in a unique position. Both sides agree on a key issue—that SEC ALJs are protected by unconstitutional restrictions on their removal from office. The SEC contends that the problem can be solved by construing the relevant statutes in a manner that it believes would be constitutional, but that is a question that can be addressed only if this Court concludes that the district court has subject-matter jurisdiction. *Cf. Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (applying constitutional avoidance canon). As the SEC stated in its briefs before the Supreme Court in *Lucia*, "[i]f the Court concludes that the interpretation of Section 7521 advocated here cannot be reconciled with the statute, then the limitations that the provision imposes on removal of the Commission's ALJs would be unconstitutional." Brief for Respondent Supporting Petitioner, *Lucia v. SEC*, at 53, 138 S. Ct. 2044 (2018) (No. 17-130) [hereinafter Gov't Merits Br. in *Lucia*].[3] That SEC ALJs are unconstitutionally insulated

[3] The SEC made the same statement in its initial brief in the district court responding to Ms. Cochran's motion for preliminary injunction. ROA.214. It then filed an "Amended Response" it which it altered that statement slightly from "If the Court concludes that the interpretation of § 7521 advocated here cannot be

by multiple levels of tenure protection follows as a matter of course from the Supreme Court's holding in *Lucia* that they are "Officers of the United States."

The question this appeal presents is whether the district court has jurisdiction to resolve that constitutional problem now—whether, as the SEC stated in *Lucia*, the court is able to avoid "needlessly prolonging the period of uncertainty and turmoil" that failing to resolve this "critically important" issue will cause. Gov't Cert. Pet. Br. in *Lucia,* at 21. Or must the courts passively stand by while the SEC tries to delay the inevitable by bringing an enforcement proceeding before an ALJ who lacks the authority decide it? Congress did not intend to deprive the district courts of jurisdiction over threshold issues such as this one—issues that go to the heart of an ALJ's ability to carry out her function. True, Congress created a statutory scheme designed to allow

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reconciled with the statute, then the limitations on removal of SEC ALJs *would* be unconstitutional" ROA.214 (emphasis added) to "If the Court concludes that the interpretation of § 7521 advocated here cannot be reconciled with the statute *and that the limitations on SEC ALJ removal are* unconstitutional . . . ." ROA.246 (emphasis added). What matters is the government's arguments in *Lucia* concerning the impact of the decision on limitations on the removal of ALJs. Whether the government is willing now to accept the inevitable conclusion that follows from the Court's holding in *Lucia* and the government's own arguments in that case is irrelevant.

the SEC to resolve certain types of *statutory* claims, but it did not create a scheme designed to permit the SEC to feign ignorance of its ALJs constitutional defects and thereby subject individuals such as Ms. Cochran to serial enforcement proceedings that will be void ab initio.

The SEC's position is that, through the Exchange Act, Congress conferred exclusive original jurisdiction on the agency to hear any claims, constitutional or otherwise, that arise as a result of an enforcement proceeding initiated by the Commission. ROA.200-01. According to this position, the SEC is authorized to bring enforcement proceedings before ALJs despite its own admission in *Lucia* that resolution of the removal issue is necessary to prevent "uncertainty and turmoil" and despite the Supreme Court's repeated reminders that the Commission could avoid further problems by conducting hearings itself. *See Lucia*, 138 S. Ct. at 2055 & n.6. Unchecked, the SEC's brazen conduct will result not only in confusion and turmoil, but a violation of Ms. Cochran's right to a hearing before a constitutionally authorized ALJ, along with a massive waste of time and resources—Ms. Cochran's, the Commission's, and the ALJ's—when Ms. Cochran's current proceeding is deemed void, just as Mr. Lucia's eventually was in *Lucia*.

The district court agreed with the SEC that it lacked jurisdiction. Despite what the court viewed as a likely injustice to Ms. Cochran, it viewed the removal question, and the duplicative enforcement proceedings it would cause, as an issue it had no jurisdiction to prevent. ROA.276-78.

Both the SEC and the district court are wrong. The removal question is inextricably intertwined with the jurisdictional question because the latter requires the Court to determine whether Congress intended claims such as Ms. Cochran's to be litigated before the SEC. Moreover, the Supreme Court, in other cases that involved questions that go to the heart of an agency's authority, concluded that district court jurisdiction was not precluded. *See, e.g.*, *Free Enterprise Fund*, 561 U.S. at 490; *McNary*, 498 U.S. at 493; *Leedom*, 358 U.S. at 188–89. We first show why the removal question is so straightforward after *Lucia*, and then why Congress could not have intended Ms. Cochran to litigate before an ALJ who lacks the authority to hear any claims, much less her constitutional claims.

A. After *Lucia*, It Is Clear that SEC ALJs Violate the President's Removal Power

Free Enterprise Fund establishes that officers of the United States cannot be insulated from presidential control by multiple layers of tenure protection. *See* 561 U.S. at 492. The case involved a challenge to the authority of the Public Company Accounting Oversight Board (PCAOB) by an accounting firm being investigated by the Board and a nonprofit organization of which the firm was a member. *See id.* at 487. PCAOB was created by the Sarbanes-Oxley Act of 2002 and vested with extensive regulatory powers over accounting firms that audit public companies. *Id.* at 484–85 (citing 15 U.S.C. § 7211 *et seq*.). The Sarbanes-Oxley Act placed the PCAOB under the SEC's oversight and made willful violations of the PCAOB's rules violations of the Exchange Act. *Id.* The PCAOB consists of five members who are appointed by the SEC. *Id.* They are all considered officers of the United States under Article II. *Id.* at 486.

The PCAOB members could not be removed from office at the President's will. Instead, they were removable only by the SEC for "good cause." To be removed from office, members of the PCAOB had to willfully violate their own rules or a provision of the laws they oversee,

willfully abuse their authority, or fail to enforce the rules or laws under their charge "without reasonable justification or excuse." *Id.* (quoting 15 U.S.C. § 7217(d)(3)). Removal of a PCAOB member required a formal order from the SEC, notice and a hearing, and the SEC's decision was subject to judicial review. *Id.* at 486–87. SEC commissioners are also subject to similar "good cause" restrictions on removal, as they may be removed only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 487. Hence, the PCAOB was insulated from presidential control not by one layer of tenure protection, but by two. *Id.* This double layer of removal protection caused the constitutional problem in *Free Enterprise Fund*. Although the Supreme Court had previously held that a single layer of tenure protection for officers of the United States did not violate Article II, the Court concluded in *Free Enterprise Fund* that multiple layers prevented the President from "faithfully executing the laws" and were thus unconstitutional. *Id.* at 495–96.

Lucia established the necessary predicate for reaching the same conclusion about SEC ALJs that the Supreme Court reached with respect to members of the PCAOB—that SEC ALJs are officers of the United States. *See Lucia* 138 S. Ct. at 2055. As officers, ALJs may not

be insulated from removal by multiple layers of tenure protection. Yet, as the government painstakingly demonstrated in its briefs in *Lucia*, the statutory scheme that applies to SEC ALJs "provides for at least two, and potentially three, levels of protection against presidential removal authority." Gov't Cert. Pet. Br. in *Lucia*, at 20.

The APA permits removal of ALJs only for "good cause" established and determined by the Merit Systems Protection Board (MSPB). 5 U.S.C. § 7521(a). The members of the MSPB, in turn, may not be removed except for "good cause shown." 5 U.S.C. § 7211(e)(6). And SEC Commissioners, who cannot remove ALJs without approval from the MSPB, *id.* at § 7521, may not be removed except for "inefficiency, neglect of duty, or malfeasance in office." *See Free Enterprise Fund*, 561 U.S. at 487; Gov't Cert. Pet. Br in *Lucia*, at 20. These multiple layers of tenure protection for SEC ALJs violate the take care clause of Article II. *Free Enterprise Fund*, 561 U.S. at 492. *See also* Gov't Merits Br. in *Lucia*, 47, 53.

The result, as in *Lucia*, is that the ALJ assigned to Ms. Cochran's current enforcement proceeding sits in violation of Article II, and the enforcement proceeding is therefore void. *See* 138 S. Ct. at 2055. The

government recognized this consequence in *Lucia*. Referring to the Commission's November 30, 2017 Order "ratifying" the appointment of its ALJs, the government stated

> Although the Commission (and some other agencies) have taken steps, following the government's filing of its response to the certiorari petition in this case, to ensure that future proceedings are overseen by properly appointed ALJs . . . those proceedings will satisfy Article II only if the ALJs' removal protections also comply with constitutional constraints.

Gov't Merits Br. in *Lucia*, at 46. In his concurrence in *Lucia*, Justice Breyer recognized the removal-protections problem as the "embedded constitutional question" in the case and all but admitted that SEC ALJs will still violate Article II even if they are properly appointed. *Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring in part and dissenting in part) ("Congress seems to have provided administrative law judges with two levels of protection from removal without cause—just what *Free Enterprise Fund* interpreted the Constitution to forbid in the case of Board members").

The SEC has nevertheless ignored the continuing constitutional violation and forced Ms. Cochran into an enforcement proceeding that will inevitably be deemed void just as Mr. Lucia's proceeding was

deemed void. *See Lucia*, 138 S. Ct. at 2055. The Supreme Court's precedents do not require the judiciary to stand by while that happens.

B. The SEC, Not Congress, Decided to Refer Ms. Cochran's Enforcement Proceeding to an ALJ Who Violates Article II

It is clear under the Supreme Court's precedents that if Congress did not intend to preclude district court jurisdiction over Ms. Cochran's claims, then the court has jurisdiction under 28 U.S.C. § 1331. *See Free Enterprise Fund*, 561 U.S. at 489. In Part II, below, we address each step of the Court's analytical framework for deciding this question and explain why that analysis shows that the district court had jurisdiction. But there is a simpler and more direct route to answering the jurisdictional question: Congress could not have intended individuals such as Ms. Cochran to litigate their claims before ALJs who lack the authority to hear those claims. Congress only gave the SEC the power to refer enforcement matters to the SEC, but the choice to exercise that power in a given case is the SEC's, not Congress's. The SEC cannot hide behind Congressional intent in deciding to bring an enforcement matter before an ALJ whom it knows lacks the authority to preside over that matter.

The Exchange Act permits the SEC to institute administrative proceedings to enforce the securities laws. *See* 15 U.S.C. § 78d-1. Although the Commission typically brings those proceedings before an ALJ, it may preside over the proceedings itself. *See id.*; 17 C.F.R. 201.110. *See also Lucia*, 138 S. Ct. at 2049 (explaining statutory scheme for administrative proceedings); *Jarkesy v. SEC*, 803 F.3d 9, 12–13 (D.C. Cir. 2015) (same).

The Supreme Court made this eminently clear twice in *Lucia*. In holding that Mr. Lucia was entitled to a new hearing before a different ALJ, the Court stated "[t]o cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Mr. Lucia is entitled." 138 S. Ct. at 2055. And in addressing Mr. Lucia's argument that the SEC's attempt to "ratify" the appointment of its ALJs was invalid, the Court stated that it saw no reason to address that issue, because

> The Commission has not suggested that it intends to assign Lucia's case on remand to an ALJ whose claim to authority rests on the ratification order. *The SEC may decide to conduct Lucia's rehearing itself.* Or it may assign the hearing to an ALJ who has received a constitutional appointment independent of the ratification.

Id. at 2055 n.6 (emphasis added).

Nevertheless, the SEC did, in fact, assign Mr. Lucia's and all other pending enforcement matters to ALJs whose "claim to authority" rested on an updated but identical version of the ratification order, ROA.162-67, which, as the government admitted in *Lucia*, could "satisfy Article II only if the ALJs' removal protections also comply with constitutional constraints." Gov't Merits Br. in *Lucia*, at 46. As we have shown and as the government has admitted, the ALJs' removal protections do not comply with the Constitution.

The SEC argued below that this problem could be solved by construing the relevant statutes to limit the MSPB's discretion over matters involving the removal of ALJs, thus avoiding the constitutional removal problem. ROA.214. We disagree with the SEC's argument for a number of reasons. Among them, even assuming the statutes could be construed as the SEC contends, its construction would not eliminate the third layer of removal protection that ALJs enjoy. *See* Gov't Cert. Pet. Br. in *Lucia*, at 20. And in all events, the statutes could not be so construed unless and until a court were first to exercise jurisdiction over Ms. Cochran's case.

The SEC could have avoided the constitutional removal problem, however, either by bringing its enforcement action against Ms. Cochran in federal court or by presiding over Ms. Cochran's enforcement matter itself. Either course of action would have avoided the removal issue because SEC Commissioners are subject to only one layer of removal protection. *See Free Enterprise Fund*, 561 U.S. at 487. Instead, it chose to violate the Constitution by bringing an enforcement proceeding before an ALJ who lacks the authority to preside over it.

The SEC cannot seek cover under Congressional intent. The Exchange Act simply permits the SEC to bring enforcement matters before "administrative law judge[s]." 15 U.S.C. § 78d-1(a). That language cannot be construed to mean anyone the SEC deems to be an "administrative law judge" whether or not constitutionally authorized to act as such. Congress is presumed to "legislate[] in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). *See also Clark v. Martinez*, 543 U.S. 371, 381 (2005) (stating that the canon of constitutional avoidance rests on "the reasonable presumption that Congress did not intend" an interpretation of its statutes "which raises serious constitutional doubts"). Ascribing the SEC's refusal to

address the removal problem to Congress would presume Congress intended to legislate unconstitutionally, which would *create* a constitutional problem, not avoid one.

This case thus falls squarely within that class of cases in which the Supreme Court has upheld district court jurisdiction either to hear claims that go to an administrative agency's authority to carry out its statutory mandate or that are clearly outside the scope of that mandate. *See, e.g.*, *Free Enterprise Fund* 561 U.S. at 490 (finding jurisdiction where "petitioners object to the Board's existence, not to any of its auditing standards"); *McNary*, 498 U.S. at 493–94, 497 (finding district court jurisdiction over broad pattern and practice due process challenge to INS amnesty determination procedures); *Oestereich v. Selective Serv. System Local Bd. No. 11*, 393 U.S. 233, 237–38 (1968) (finding district court jurisdiction to hear a challenge to a "basically lawless" denial of conscientious objector status by a selective service board that was a "clear departure" from its statutory mandate and caused the plaintiff a constitutional injury); *Leedom*, 358 U.S. at 188, 190 (finding district court jurisdiction to challenge violation by NLRB of statutory mandate).

Leedom and *Oestereich* are instructive. In *Leedom*, the Court found district court jurisdiction to hear a challenge to a violation by the National Labor Relations Board of its statutory mandate. 358 U.S. at 188, 190. The relevant statute allowed the Board to approve a collective bargaining unit that was composed of both professional and nonprofessional employees only with the consent of a majority of the professional employees. *Id.* at 184–85. Despite this, the Board created a unit that was composed of both types of employees and refused to allow the professional employees to vote on whether they should be included. *Id.* at 185. An association of these employees sued in federal district court, arguing that the Board had exceeded its authority under the statute. *Id*. at 186. The Board argued that the district court lacked jurisdiction because the statutory scheme required the plaintiffs to exhaust their administrative remedies before seeking review in a federal circuit court. *Id*. at 186–88.

In upholding the district court's jurisdiction, the Court recognized that the case did not seek review of the type of Board action contemplated by the statutory review provisions. *Id.* at 188–90. Instead, the plaintiffs challenged an action of the Board that was "made in

excess of its delegated powers." *Id*. at 188. "Plainly," the Court stated, the Board's action "was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a 'right' assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given." *Id*. at 189.

Here, while the "right so given" is constitutional, rather than statutory, that only makes Ms. Cochran's argument stronger, for administrative agencies have no more power to violate the Constitution than they have to exceed their statutory authority. As the Court concluded in *Leedom*, "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id*. at 190. Nor can the courts "lightly infer" that Congress intended to strip them of jurisdiction to protect rights clearly conferred by the Constitution. As the Supreme Court has stated, "[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *New*

Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 358 (1989) (quoting *Willcox v. Consol. Gas Co.,* 212 U.S. 19, 40 (1909)).

In *Oestereich*, the Supreme Court found district court jurisdiction over a claim by a theology student challenging the denial of his application for an exemption from draft registration as a conscientious objector. 393 U.S. at 238–39. Although he clearly qualified for the exemption, the local selective service board denied his claim and declared him delinquent for failing to register. *See id.* at 234–35. In finding district court jurisdiction despite an administrative review process, the Court stated, "[w]e deal with conduct of a local Board that is basically lawless" and "a clear departure by the Board from its statutory mandate." *Id.* at 237–38. Because there was "no suggestion in the legislative history" that the board could wield its authority in such a manner, the Court concluded that Congress could not have intended to preclude jurisdiction in the district courts. *Id.* at 237–38. To hold otherwise "would make the Boards freewheeling agencies meting out their brand of justice in a vindictive manner." *Id.* at 237.

The statutory scheme gives the SEC three options for bringing enforcement proceedings. It can bring them in federal court, it can hear

matters itself, or it can bring enforcement proceedings before constitutionally valid ALJs. In Ms. Cochran's matter, the SEC eschewed these options, preferring to violate the Constitution and Ms. Cochran's rights by bringing an action before an ALJ whom it knows to be constitutionally defective. Congress did not authorize this "basically lawless" behavior. This Court should not conclude that the district courts lack jurisdiction to prevent it.

II. Congress Did Not Intend to Deprive the District Court of Jurisdiction to Hear Constitutional Claims Such as Ms. Cochran's

A. The Exchange Act Displays No Intent to Preclude District Court Jurisdiction Over Claims Such as Ms. Cochran's

The Supreme Court's jurisdictional analysis in cases such as this involves one fundamental question that the Court analyzes in two steps. The fundamental question is whether Congress intended to preclude district court jurisdiction over a party's claims and channel them through the administrative scheme. The two parts of that analysis are whether Congress's intent is fairly discernible from the statutory scheme and whether the claims at issue are of the type that Congress intended to be reviewed within the statutory structure. *See Free Enterprise Fund*, 561 U.S. at 489–90. To help determine whether

Congress intended the claims at issue to be litigated through the statutory scheme, the Court focuses on whether a finding of preclusion would foreclose all meaningful judicial review of those claims, whether the claims are wholly collateral to the statute's provisions, and whether they are outside the agency's expertise. *Id.* at 489. These factors do not "form three distinct inputs into a strict mathematical formula. Rather, the considerations are general guideposts useful for channeling the inquiry into whether the particular claims at issue fall outside an overarching congressional design." *Jarkesy*, 803 F.3d at 17.

In *Free Enterprise Fund*, the Supreme Court held that the same statutory scheme at issue here displays no intent to confer exclusive jurisdiction on the SEC over constitutional claims. 561 U.S. at 490–91. As the Court stated, "the text does not expressly limit the jurisdiction that other statutes confer on district courts. . . . Nor does it do so implicitly." *Id.* at 489.[4] Despite this clear holding, the five circuits that

[4] This Court's decision in *Bank of Louisiana v. FDIC*, 919 F.3d 916 is distinguishable. Unlike the Exchange Act, the statutory scheme at issue in that case contained a broad and explicit jurisdictional bar that this Court had previously held "evinces a clear intention that this regulatory process is not to be disturbed by untimely judicial intervention." *Id.* at 920 (internal citations and quotation marks omitted). Indeed, "so robust" was the statutory bar that the FDIC argued the court should decline to analyze the three *Thunder Basin* factors entirely. *Id.* at 924 ("Because the plain terms of section 1818(i) bar jurisdiction here, the FDIC sensibly

have addressed similar cases concluded that the Exchange Act in fact does display an intent to preclude jurisdiction. In so holding, those cases all noted the comprehensiveness of the Exchange Act and its similarities with the Mine Act that was at issue in *Thunder Basin*. *See Bennett v. SEC*, 844 F.3d 174, 182 (4th Cir. 2016); *Hill v. SEC*, 825 F.3d 1236, 1237 (11th Cir. 2016); *Tilton v. SEC*, 824 F.3d 276, 299 (2d Cir. 2016); *Jarkesy v. SEC*, 803 F.3d at 16–17; *Bebo v. SEC*, 799 F.3d 765, 775 (7th Cir. 2015). Of course, both of these points were evident in *Free Enterprise Fund*, yet the Court held that the Exchange Act did not explicitly or implicitly preclude jurisdiction. 561 U.S. at 489. *Elgin*, which was decided after *Free Enterprise Fund*, did not change the meaning of the Exchange Act. Because the Court's holding in *Free Enterprise Fund* is clear and because the bulk of the analysis in the

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urges that 'no court created presumption can change that result.'"). The Court nevertheless thought it "prudent to cycle through the *Thunder Basin* factors, as did the district court." The Court's analysis after that point was therefore *dicta*. *See U.S. Bank Nat'l Ass'n v. Verizon Commc'ns*, 761 F.3d 409, 427–28 (5th Cir. 2014) ("A statement is dictum if it could have been deleted without seriously impairing the analytical foundations of the holding and being peripheral, may not have received the full and careful consideration of the court that uttered it." ((quoting *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir. 2004)). But even if the Court's analysis of the *Thunder Basin* factors was not dicta, the plaintiffs' in *Bank of Louisiana* asserted claims that were analogous to those in *Thunder Basin* and *Elgin* and entirely different from Ms. Cochran's constitutional removal claim.

other circuit cases focused on the second prong of the jurisdictional test, we turn to that three-part analysis.

B. Ms. Cochran's Claims Are Not the Type that Congress Intended to Be Litigated in the Administrative Process

As noted above, Ms. Cochran is not challenging the application of the provisions of the Exchange Act the SEC seeks to enforce against her. She challenges the SEC's authority to bring an enforcement proceeding against her, and she challenges the authority of the ALJ assigned to her case. ROA.6-7. On the latter point, as we've shown, it is clear that her ALJ lacks the authority to preside over her case. Ms. Cochran's case is therefore squarely governed by *Free Enterprise Fund* and distinguishable from *Thunder Basin* and *Elgin* and the circuit decisions that relied on these cases. That lack of ALJ authority is the primary reason her claims cannot receive meaningful judicial review, are wholly collateral to the administrative scheme, and fall outside the SEC's expertise.

1. Ms. Cochran Cannot Obtain Meaningful Judicial Review Through the Administrative Scheme

Ms. Cochran cannot obtain meaningful review through the statutory process because that process cannot redress the injuries she

seeks to prevent—a hearing before an unconstitutional officer and an enforcement proceeding that violates her due process rights. That is true irrespective of the fact that she may appeal an adverse ruling to a circuit court under 15 U.S.C. § 78y, because circuit court review after the fact cannot give her back rights to which she is constitutionally entitled *now*. She is therefore in the same position as the petitioners in *Free Enterprise Fund*, who lacked any meaningful way to obtain review of their "object[ion] to the Board's existence." 561 U.S. at 490.

"It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres*, 695 F.3d at 1002 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). *See also Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1055–56 (5th Cir. 1997) (finding irreparable harm where plaintiff had to submit to a hearing that violated her due process rights); 11A *Wright & Miller, Fed. Pract. & Proc. Civ.* § 2948.1 (3d ed. 2018) ("When an alleged deprivation of a constitutional right is involved … most courts hold that no further showing of irreparable injury is necessary.").

Lucia establishes that Ms. Cochran is entitled to a hearing before a constitutionally authorized ALJ. *See* 138 S. Ct. at 2055. The Court's

holding reflects the principle that individuals are entitled to invoke the protections of structural constitutional provisions such as the separation of powers, which "serves not only to make Government accountable but also to secure individual liberty." *Boumediene v. Bush*, 553 U.S. 723, 742 (2008). *See also Bond v. United States,* 564 U.S. 211, 222 (2011) (recognizing "an injured person's standing to object to a violation of a constitutional principle that allocates power within government" where "individuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations"); *Free Enterprise Fund*, 561 U.S. at 513 ("[Petitioners] are entitled to declaratory relief sufficient to ensure that the reporting requirements and auditing standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive."). And, of course, Ms. Cochran is entitled to a hearing and an enforcement proceeding that comports with due process. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (holding that an agency violates due process when it disregards rules governing its behavior). *See also Valley*, 118 F.3d at 1056.

It is no answer to claim, as the SEC did below, that review within the administrative scheme is meaningful because Ms. Cochran's ALJ might rule in her favor on the SEC's statutory claims, thus obviating any need to resolve her constitutional claims. ROA.203. Under *Lucia* and *Free Enterprise Fund*, the ALJ lacks authority to preside over her enforcement proceeding or issue *any rulings at all*, whether for or against her. *See Lucia,* 138 S. Ct. at 2055 (holding that an action presided over by an ALJ who violates Article II is void); *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 879 (1991) (stating that a defect in the appointment goes to the validity of the proceeding). Being forced to litigate in a void enforcement proceeding is a serious constitutional injury. *See United Church of the Med. Ctr. v. Med. Ctr. Comm'n*, 689 F.2d 693, 701 (7th Cir. 1982) (finding irreparable injury where plaintiff was forced to submit to an unconstitutional hearing). *See also Valley*, 118 F.3d at 1055–56 (same). *Cf. Thunder Basin*, 510 U.S. at 216 (finding requirement to post notice on premises and submit to inspections would not subject petitioner to a "serious . . . deprivation").

According to the SEC, however, so long as Ms. Cochran can assert her claims on appeal before a circuit court *after* she is forced to endure an unconstitutional proceeding, she is afforded "meaningful review." ROA.202-03. In support of this argument, the SEC contends that *Free Enterprise Fund* applies only where a party lacks any "guaranteed path to federal court." ROA.204. This argument misunderstands both *Free Enterprise Fund* and the Supreme Court's approach to meaningful judicial review.

The petitioner in *Free Enterprise Fund* faced only a critical PCAOB inspection report when it brought its case. *See* 561 U.S. at 487, 490–91. If the firm had waited, the investigation may not have found any violations, in which case the matter would have ended. If the investigation had resulted in an alleged violation, the SEC would have brought charges against the firm in an administrative proceeding, and it would have had its "guaranteed path" to review by a circuit court under 15 U.S.C. § 78y.

Moreover, lacking a guaranteed path to federal court is one way an individual can be denied meaningful judicial review, but it is not the *only* way. *Compare Bowen v. Michigan Acad. of Family Physicians*, 476

U.S. 667, 678 (1986) (finding Congress did not intend to bar district court jurisdiction over constitutional claims where the government's argument would have left plaintiffs with "*no* forum to adjudicate statutory and constitutional challenges to [the] regulations"), *with McNary*, 498 U.S. at 496–97 (finding no meaningful review even where aliens had opportunity to contest their denial of amnesty status in a deportation proceeding in a federal circuit court). The relevant question is whether "*as a practical matter* [a party is] able to obtain meaningful judicial review." *McNary*, 498 U.S. at 496 (emphasis added). Ms. Cochran cannot possibly receive meaningful judicial review before an ALJ who lacks authority to hear her enforcement matter or in a circuit court *after* she has had to endure an unconstitutional hearing.

2. Ms. Cochran's Claims Are Wholly Collateral to the Administrative Process and the SEC Lacks Expertise to Address Them

The last two factors pertaining to Congress's intent to channel claims through the administrative process weigh in Ms. Cochran's favor for essentially the same reason: she does not challenge any of the statutes the SEC seeks to enforce against her, but instead challenges the constitutional authority of the SEC to force her to litigate her claims

in the administrative process before an unconstitutional ALJ. This fact makes her case analogous to those in which the Supreme Court has upheld jurisdiction and distinguishable from those in which it has not.

The wholly collateral and agency expertise inquiries are closely related and often overlapping. *Compare Free Enterprise Fund*, 561 U.S. at 491 (relying on the fact that the claims at issue were "statutory at root" in finding no agency expertise), *with Thunder Basin*, 510 U.S. at 214–15 (relying on same issue in finding claims not collateral to the administrative scheme). Both focus on whether the claims logically fall within the bounds of the statutory scheme, either because they turn on matters of statutory interpretation or involve the same factual inquiries that the agency typically addresses. *See Free Enterprise Fund*, 561 U.S. at 490–91; *Thunder Basin*, 510 U.S. at 214–15.

None of this is true with respect to Ms. Cochran's claims. As in *Free Enterprise Fund*, she is challenging the authority of SEC ALJs to preside over her enforcement matter. *See* 561 U.S. at 490. And it is clear, as the government admits, that her ALJ lacks that authority. Moreover, neither the SEC nor Ms. Cochran's ALJ has competence or expertise in addressing removal-protection claims. *See id.* at 491.

Indeed, the SEC's steadfast refusal to preside over Ms. Cochran's claim itself suggests a complete lack of competency to deal with the removal-protection issue. Her case could hardly be a clearer example of a collateral challenge over which the agency lacks expertise under *Free Enterprise Fund*.

Unlike in *Thunder Basin* and *Elgin*, Ms. Cochran's removal-protection claim does not turn on statutory interpretation—at least not statutes the SEC is charged with interpreting—and there are no facts that bear on her enforcement that could help to resolve that claim. As for her due process claim that the SEC is violating its own rules, the Supreme Court has found similar challenges to be collateral to a statutory scheme. *See, e.g.*, *McNary* 498 U.S. at 495 (finding jurisdiction over due process challenge to INS amnesty determination procedure where the plaintiffs "do not seek a substantive declaration that they are entitled to" amnesty "[n]or would the fact that they prevail on the merits of their purportedly procedural objections have the effect of establishing their entitlement"); *Leedom*, 358 U.S. at 187–88 (finding a challenge to an agency violation of its statutes collateral to administrative scheme).

And, as we demonstrated above, Ms. Cochran's ALJ lacks the authority to hear either of her claims. The entire proceeding is therefore wholly collateral to anything Congress could have intended to take place under the statutory scheme. *See Oestereich*, 393 U.S. at 237–38 (finding district court jurisdiction where Congress could not have intended selective service board to act in a "basically lawless" manner by denying conscientious objector status to someone who qualified for the exemption).

The SEC has argued, however, that if there is any possibility the ALJ would find in her favor, then her claims are not wholly collateral to the administrative scheme. ROA.203. This is wrong for two reasons. First, as noted above, Ms. Cochran's ALJ lacks the constitutional authority to preside over her case at all and thus can rule neither for nor against her. *Cf. Leedom*, 358 U.S. at 190 (finding district court jurisdiction where agency violated statutory authority). Anything her ALJ does will ultimately be found void. *See Lucia*, 138 S. Ct. at 2055.

Second, the SEC's interpretation of the wholly collateral prong is simply wrong. The Supreme Court has found jurisdiction in several cases in which the agency could have found in their favor on statutory

grounds, and, indeed, where the plaintiff had an opportunity for review in an Article III court. Besides, if the SEC's interpretation were correct, both the wholly collateral and agency expertise prongs of the analysis would be superfluous, for it is always possible for an agency to rule in someone's favor or dismiss an enforcement proceeding against them.

In both *Thunder Basin* and *Elgin*, the Court was concerned that district court jurisdiction would frustrate the statutory schemes at issue by allowing the individuals Congress intended to be covered by those statutes to evade them. That concern does not apply here, however, for at least two reasons. First, as in *Free Enterprise Fund* Ms. Cochran's claims arise from structural constitutional defects in the statutes that govern the removal of SEC ALJs, not in the laws that the SEC seeks to enforce against Ms. Cochran. Second, resolving Ms. Cochran's claim in federal court now will have the opposite effect of frustrating the statutory scheme, because it will eliminate the "uncertainty and turmoil" that the removal-protections issue has caused. *See* Gov't Cert. Pet. Br. in *Lucia,* at 21.

Indeed, what is actually frustrating the statutory scheme is the SEC's decision to bring these serial enforcement proceedings before

unconstitutional ALJs. By finding subject-matter jurisdiction over Ms. Cochran's claims in the district court, this Court can put an end to the SEC's unconstitutional charade of an enforcement proceeding and expedite the ultimate resolution of this case.

CONCLUSION

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

June 10, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2019, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/EFC filing system and that service will be accomplished using the appellate CM/ECF system.

/s/ Steven M. Simpson

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this document complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(ii). It is printed in Century Schoolbook, a proportionately spaced font, and includes 10,549 words, excluding items enumerated in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Fifth Circuit Rule 32.2. I relied on my word processor, Microsoft Word, to obtain the count.

/s/ Steven M. Simpson

CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that in the foregoing brief, filed using the Fifth Circuit CM/EFC filing system, all required privacy redactions have been made pursuant to Fifth Circuit Rule 25.2.13, any required paper copies to be submitted to the Court are exact copies of the version submitted electronically, and the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

/s/ Steven M. Simpson