No. 19-56101

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND J. LUCIA COMPANIES, INC. AND RAYMOND J. LUCIA, SR.,
Plaintiffs-Appellants,
v.
U.S. SECURITIES AND EXCHANGE COMMISSION, JAY CLAYTON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE U.S. SECURITIES AND EXCHANGE COMMISSION, AND WILLIAM P. BARR, IN HIS OFFICIAL CAPACITY AS UNITED STATES ATTORNEY GENERAL,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California
No. 3:18-cv-0269-DMS-JLB
Hon. Dana M. Sabraw

APPELLANTS' OPPOSED MOTION FOR INJUNCTION PENDING APPEAL

RELIEF REQUESTED UNDER CIRCUIT RULE 27-1(3) BY FEBRUARY 3, 2010

Margaret A. Little
Senior Litigation Counsel
Jessica L. Thompson
Litigation Counsel
New Civil Liberties Alliance
1225 19th St. NW, Ste. 450
Washington, DC 20036
202-869-5210
peggy.little@ncla.legal

Attorneys for Appellants
Raymond J. Lucia Companies, Inc. and
Raymond J. Lucia, Sr.

CORPORATE DISCLOSURE STATEMENT

Raymond J. Lucia Companies, Inc. has no parent corporation. No publicly held corporation owns any of the stock of Raymond J. Lucia Companies, Inc.

Date: December 4, 2019

New Civil Liberties Alliance

/s/ Margaret A. Little
Margaret A. Little

Attorney for Appellants Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr.

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MOTION FOR INJUNCTION PENDING APPEAL

Plaintiffs-Appellants respectfully move for an injunction pending appeal under Rule 8(a)(1)(c) of the Federal Rules of Appellate Procedure.

INTRODUCTION

Appellants Raymond J. Lucia Companies, Inc. (RJL) and Raymond J. Lucia, Sr. (Mr. Lucia) recently won a decision from the United States Supreme Court holding that the Administrative Law Judge (ALJ) adjudicating their enforcement proceeding before the Securities and Exchange Commission (SEC) was not lawfully appointed under the Constitution's Article II Appointments Clause. *Lucia* held that the "'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official. […] To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled." *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018). SEC's reinstituted enforcement action before a new ALJ remains constitutionally flawed, however, because SEC ALJs have more than one layer of tenure protection.

ALJs are "Officers of the United States" within the meaning of the Appointments Clause, Art. II, § 2, cl. 2, because they "hold a continuing office established by law" and exercise "'significant discretion' when carrying out … 'important functions'." *Lucia v. SEC*, 138 S. Ct. at 2053. In violation of the

President's removal power, SEC ALJs may only be removed for good cause as determined by the Merit Systems Protection Board (MSPB), 5 U.S.C. § 7521(a), whose members themselves can only be removed by the President for good cause. 5 U.S.C. § 1202(d). SEC Commissioners, who must appoint ALJs, cannot remove them without approval from MSPB and themselves enjoy for-cause removal protection. *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 619–20 (2d Cir. 2004). These multiple layers of tenure protection for ALJs violate the U.S. Constitution. Yet this structural constitutional claim cannot be challenged in SEC's enforcement proceeding because the ALJ and the Commission lack jurisdiction and power to decide such questions.

At ruinous cost Mr. Lucia and RJL litigated for six years through five layers of administrative and court proceedings before their constitutional claims were conclusively decided—in their favor—by the highest court in the land. *See* A33–A35 at ¶¶ 21–25 (Appendix submitted herewith). That ruling nullified all that came before. SEC's renewed enforcement action threatens to put the Lucia plaintiffs through a repeated years-long exercise in futility. This suit seeks to prevent such an unjust, destructive, and Kafkaesque outcome. The plaintiffs' constitutional claim must be addressed in a court of law.

STATEMENT OF THE CASE

Mr. Lucia, a former financial planning professional, is the subject of an administrative enforcement proceeding SEC initiated on September 5, 2012 against his then-successful family business. A28 at ¶ 2; A32 at ¶ 14. SEC claimed that Mr. Lucia had violated the Securities Exchange Act of 1934 by using the phrase "back test" when describing a strategy that combined actual historical data for stock-market returns with hypothetical assumptions about inflation and returns on non-stock investments. A32 at ¶ 14. The OIP did not claim that Mr. Lucia or RJL misappropriated any investor money or mishandled any investor account, nor did it cite any deficiencies in their sales practices. A32 at ¶ 15.

After a hearing, SEC's ALJ issued a decision that stated the term was misleading because it did not "meet the definition of 'backtest' that *I have adopted.*" *In the Matter of Raymond J. Lucia Companies, Inc.*, Initial Decision Release no. 540, at 30 (Dec. 6, 2013) (emphasis added). A33 at ¶ 21. Despite the term's widespread usage throughout the industry, this was the first time "back test" was held to violate the securities law. *Id.* On September 3, 2015, a divided SEC affirmed the ALJ's decision, and adopted the ALJ's penalties, which included a lifetime ban on Mr. Lucia and a fine of $300,000. A34 at ¶ 22. Mr. Lucia and RJL appealed to the full Commission. A34 at ¶ 23. In the Commission's only written dissent of 2015, two of the five Commissioners said the majority "created from

whole cloth specific requirements for advertisements that include the word "backtest," and added that Article III courts should decide the Appointments Clause question. *In the Matter of Raymond J. Lucia Companies, Inc.*, Securities Act of 1934 Release No. 75837 (Oct. 2, 2015) (Commissioners Gallagher and Piwowar, dissenting). *Id.*

Mr. Lucia and RJL then appealed to a three-judge panel of the DC Circuit, which affirmed the Commission's adoption of the ALJ's ruling in *Raymond J. Lucia Companies, Inc. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016). An evenly divided en banc decision followed, *Raymond J. Lucia Companies, Inc. v. SEC*, 868 F.3d 1021 (D.C. Cir. 2017) (en banc). A34 at ¶ 24. Mr. Lucia and RJL then filed a petition for certiorari to the Supreme Court, which was granted.

In its reply to the cert. petition, the U.S. Solicitor General, on behalf of the government, *agreed* with Mr. Lucia that SEC ALJs were unconstitutionally appointed. *Lucia*, 138 S.Ct. 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) (*FEF*), 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." *Ibid*. In its merits brief, the government argued, implausibly,[1] that the relevant statutes could be construed to avoid the removal problem, but recognized that absent such a construction, the ALJs' tenure protections violated Article II. *See* Brief for Resp't Supporting Petitioner, *Lucia v. SEC*, at 53, 138 S. Ct. 2044 (2018) (No. 17-130).

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[1] SEC's proposed "solution" advanced in this case seeks judicial excision of removal protections for SEC ALJs. *See* Defs.' Mem. in Supp. of Mot. to Dismiss at pp. 14–18, A58–A59 (proposing judicial rewriting of the meaning of "good cause" for removal of ALJs under 5 U.S.C. § 7521 and also recasting the role the MSPB plays in such determinations). This "solution" poses several insurmountable problems for SEC. First, a court would have to exercise jurisdiction to perform the statutory surgery, yet SEC has consistently resisted court jurisdiction at every stage of this proceeding. Second, its proposal does not involve honest statutory *construction*, but freewheeling judicial reformation of all or part of three levels of impermissible tenure protection. It is implausible simply to construe the statute to make the multiple layers of tenure protection go away. Finally, because SEC has the power to retry this case directly before the Commission, there is no need for such radical judicial surgery. SEC acts like Article III courts are there to nip and tuck for them like an on-call plastic surgeon ready to clean up after the fact the constitutional mess made by the government's choice of tribunal. That approach is the complete opposite of constitutional avoidance and instead asks the courts to create a kind of constitutional moral hazard. *See also Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1485–87, 200 L. Ed. 2d 854 (2018) (Thomas, J., concurring).

The United States Supreme Court vacated all prior proceedings because "Judge Elliot heard and decided Lucia's case without the kind of appointment the [Appointments] Clause requires." *Lucia v. SEC*, 138 S. Ct. at 2055.[2] 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, notably stating that no lower court had addressed the question, thereby calling for lower courts to address whether the multiple layers of tenure protection enjoyed by SEC ALJs were constitutional.

Appellants brought suit in the Southern District of California on November 28, 2018 seeking to enjoin SEC from subjecting them to a second unconstitutional administrative proceeding. A1. On August 21, 2019, the district court dismissed this case for lack of subject-matter jurisdiction and denied the motion for preliminary injunction as moot. *Lucia v. SEC*, No. 18-cv-02692 DMS, 2019 WL 3997332 (S.D. Cal. Aug. 21, 2019) (Sabraw, J.). In so ruling, the court noted:

> [f]ive circuit courts, [...] have held the federal securities laws create a detailed review scheme that channels all judicial review of SEC

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[2] In footnote 6 of *Lucia*, Justice Kagan noted that the Court also declined to address the fully-briefed question of whether the SEC's ratification was effective 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." *Lucia*, 138 S.Ct. at 2055 n. 6 (emphasis added.)

> administrative proceedings to the courts of appeals, thus precluding district court jurisdiction. [...]. The Court agrees with these decisions…

Id.

ARGUMENT

I. MOVING FOR AN INJUNCTION IN THE DISTRICT COURT WOULD BE IMPRACTICABLE

A district court's authority to issue an injunction is reviewed de novo. *See United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc). When the district court's ruling rests solely on conclusions of law and the facts are established and undisputed, as they are here, the denial of injunctive relief is reviewed de novo. *Independent Living Ctr. of S. California, Inc. v. Shewry*, 543 F. 3d 1050, 1055 (9th Cir. 2008).

Under Rule 8(a)(1)(c) of the Federal Rules of Appellate Procedure, a party must ordinarily seek an injunction pending appeal in the first instance in the district court. Parties may move directly in the court of appeals, however, if "moving first in the district court would be impracticable." FED. R. APP. P. 8(a)(2)(A)(i). Moving first in the district court would be impracticable here for two reasons.

First, given the district court's conclusion that it lacked subject-matter jurisdiction over appellants' claims, it appears that the district court lacks jurisdiction to issue an injunction. *See Shell Offshore Inc. v. Greenpeace, Inc.*, 864 F. Supp. 2d 839, 842 (D. Alaska 2012), *aff'd*, 709 F.3d 1281 (9th Cir. 2013) ("A district court may not grant a preliminary injunction if it lacks subject matter

jurisdiction over the claim before it"); *accord Nat'l Athletic Trainers' Ass'n, Inc. v. U.S. Dep't of Health & Human Servs.,* No. CIV.A.3:05CV1098-G, 2005 WL 1923566, at *2 (N.D. Tex. Aug. 11, 2005) (holding that "a court lacks the authority to provide injunctive relief once it has determined that it lacks jurisdiction over the underlying case" and noting that the party could still seek an injunction in the court of appeals under FED. R. APP. P. 8(a)(2)); *Tropf v. Fidelity Nat'l Title Ins. Co.*, 289 F.3d 929, 942 (6th Cir. 2002) ("[w]here a district court dismisses a case for lack of [subject matter] jurisdiction it does not have the authority … to enjoin actions by the parties in the state courts or state administrative proceedings"); *Barwood, Inc. v. District of Columbia*, 202 F.3d 290, 294–95 (D.C. Cir. 2000) ("just as a court without jurisdiction over an underlying case has no jurisdiction to issue a subpoena (unless in aid of determining jurisdiction), or to enforce it by civil contempt . . . so too a court without jurisdiction over an underlying case cannot issue a TRO, or enforce it by civil contempt").

Second, moving first in the district court is impracticable because appellants' enforcement proceeding is under way, with the important deadline of expert disclosures—and the associated costs—quickly approaching on February 14, 2020. Moving first in a district court that lacks power to enjoin would needlessly compound the briefing and waste time. *See, e.g.*, A71, *Michelle Cochran v. SEC, et*

al., No. 19-10396, (5th Cir. Sept. 24, 2019) (per curiam) (granting injunction pending appeal when it was impracticable to move first in the district court).

II. APPELLANTS ARE ENTITLED TO AN INJUNCTION STAYING THEIR ENFORCEMENT PROCEEDING

Plaintiffs are entitled to a preliminary injunction if they show (1) they will suffer irreparable injury if injunctive relief is not granted, (2) the moving party will probably prevail on the merits, (3) remedies available at law, such as monetary damages, are inadequate to compensate for their injury which outweighs the threatened harm to the party whom they seek to enjoin, and (4) granting the preliminary injunction will not disserve the public interest. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 674–75 (9th Cir. 1984). When the government is the opposing party, the last two factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). A preliminary injunction is appropriate when a plaintiff demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011).

A. The Fifth Circuit Recently Enjoined SEC Proceedings on Identical Grounds

The Fifth Circuit Court of Appeals recently enjoined SEC's administrative proceedings against a respondent, Michelle Cochran, who just like appellants here,

was facing reinstituted administrative proceedings following *Lucia*. *See* A71. Those proceedings, like these, were brought before an SEC ALJ—indeed, the very same ALJ—who enjoys unconstitutional multiple layers of tenure protection. To reach that decision, the appellate panel found in favor of the respondent under the factors set forth above.

An important consideration in weighing the case for an injunction is the compelling, repeated, injustice of serial to-be-vacated administrative proceedings. In the *Cochran* case, the district judge had dismissed Ms. Cochran's complaint, citing the weight of circuit court authority, but also had directly addressed the inequity of such proceedings:

> The court is deeply concerned with the fact that plaintiff already has been subjected to extensive proceedings before an ALJ who was not constitutionally appointed, and contends that the one she must now face for further, undoubtedly extended, proceedings likewise is unconstitutionally appointed. She should not have been put to the stress of the first proceedings, and, if she is correct in her contentions, she again will be put to further proceedings, undoubtedly at considerable expense and stress, before another unconstitutionally appointed administrative law judge.

Cochran v. SEC, No. 4:19-CV-066-A, 2019 WL 1359252, at *2 (N.D. Tex. Mar. 25, 2019).

What was true of Ms. Cochran is even more true of Mr. Lucia and RJL, who ran a harrowing gauntlet of proceedings to the Supreme Court. The observations made by the district court in *Cochran* should raise grave concerns about the

administration of justice if the conduct and reasoning of SEC continue unchecked. Notably, the D.C. Circuit, en banc, unanimously agreed in a similar context that it must first decide a separation-of-powers challenge before remand to the agency. *PHH v. CFPB*, 881 F.3d 75, 83 (D.C. Cir. 2018). By haling RJL and Mr. Lucia before an unconstitutional ALJ in 2012, SEC required them to endure a proceeding that would be nullified, and now on remand, persists in retrying them before another constitutionally defective ALJ—this time one whom the Solicitor General has already conceded is unconstitutional. The injustice is palpable, the harm, incalculable.

B. Appellants Have Presented a Substantial Case on the Serious Legal Question of Jurisdiction

District courts have original jurisdiction to resolve constitutional claims 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 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 directed to be reviewed through the administrative process. *See FEF,* 561 U.S. 477 at 489; *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994). If, however, a plaintiff asserts claims that are wholly collateral to the types of claims the administrative scheme was designed to address, the agency lacks expertise in

dealing with those claims, and the plaintiffs would be unable to obtain meaningful review of their claims, the Court recognizes that Congress did not divest courts of jurisdiction. *See FEF*, 561 U.S. at 489. The question is not whether Congress conferred jurisdiction over this constitutional claim on the district courts, but whether Congress took it away. *Whitman v. Dep't of Transp.*, 547 U.S. 512, 514 (2006).

Under this analysis, appellants can make a substantial case for district court jurisdiction. First, the Supreme Court has already held in *FEF* that the *very same statutory provision* that applies in this case, 15 U.S.C. § 78y, did not preclude district court jurisdiction over a removal claim virtually identical to RJL and Mr. Lucia's. *See* 561 U.S. at 489–90. The Exchange Act's judicial review provision, the Court observed, "does not expressly limit the jurisdiction that other statutes confer on district courts … [n]or does it do so implicitly." *Id*. at 489.

Second, appellants' claims are clearly not the type Congress directed to be adjudicated under SEC's administrative process. As in *FEF*, appellants' removal claim is wholly collateral to the types of claims SEC and its ALJs are charged with adjudicating under the Exchange Act. RJL and Mr. Lucia are not challenging the merits of SEC's allegations in this action. Instead, just like the petitioners in *FEF*, they object to the ALJ's very authority to hear their case. *Cf*. *FEF*, 561 U.S. at 490 (stating that "petitioners object to the Board's existence, not to any of its auditing

standards"). Moreover, because SEC ALJs lack authority to hear constitutional claims, appellants' Art. II and due process claims cannot be resolved in the administrative hearing. *See, e.g.*, *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 673–74 (6th Cir. 2018).

Also, as in *FEF*, appellants' protection from removal claim is outside SEC's expertise. *See* 561 U.S. at 491. The statutory scheme provides that SEC ALJs may decide cases under the securities laws, and those laws alone. Indeed, in stark contrast to the Supreme Court's holding in *Lucia* and the government's position on the appointments and removal issues in that case, SEC and its ALJs had erroneously maintained for years that its ALJs were not inferior officers subject to the Appointments Clause and thus presented no removal problems. *See, e.g.*, *In the Matter of Timbervest, LLC, Joel Barth Shapiro, Walter William Anthony Boden, III, Donald David Zell, Jr., & Gordon Jones II*, Release No. 4197, 2015 WL 5472520 at *23–28 (Sept. 17, 2015) (rejecting appointments and removal challenges to ALJ). ALJs also cannot be expected to rule on the propriety of their own tenure protections. Were they to do so, they would essentially be acting as judges in their own cases in fundamental violation of the rule of law.

Nor can RJL and Mr. Lucia obtain meaningful judicial review of their protection from removal claim during or after the enforcement proceeding, because having to appear before an ALJ who lacks the authority to preside over their case is

the very harm they seek to avoid in this action. *See, e.g.*, *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1062 (9th Cir. 1995) (finding irreparable harm where plaintiff had to submit to a hearing that violated her First Amendment rights); *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); *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). This is no hypothetical claim that RJL and Mr. Lucia have tossed out to complicate SEC's enforcement proceeding against them. It is a fundamental problem that the *government* in *Lucia* admitted is both valid and critical to resolve.

This issue is not a matter merely of time and expense, but of constitutional injury. Under *Lucia*, RJL and Mr. Lucia are constitutionally entitled to be subjected to a hearing only before a properly authorized ALJ. *See* 138 S. Ct. at 2055. If they must now submit to an invalid hearing, the right *Lucia* recognized is nugatory. That is true even though RJL and Mr. Lucia could appeal an adverse ruling to a circuit court under 15 U.S.C. § 78y, because circuit court review after the fact cannot give back rights to which they are constitutionally entitled *now*. They are therefore in the same position as the petitioners in *FEF*, who lacked any meaningful way to obtain review of their "object[ion] to the Board's existence"

after the fact. 561 U.S. at 490. Further, appellants will have had to twice lay out their entire defense in invalid proceedings, the effect of which will be to greatly enhance SEC's ability to advantageously prosecute a future valid proceeding. Surely deliberately forcing a citizen to reveal his defense strategy in serial, to-be-voided hearings, raises due process concerns. *See, e.g., Commonwealth v. G.F.*, 479 Mass. 180 (2018) (due process would not permit indefinite number of retrials.)

SEC cannot invoke Congressional intent to justify its referral of RJL and Mr. Lucia's proceeding to an unconstitutional ALJ after *Lucia* and its clear implications for the removal issue. While the Exchange Act permits SEC to institute administrative proceedings to enforce the securities laws, it leaves up to the Commission whether to refer such proceedings to ALJs, to preside over proceedings itself, or to bring actions in district court. *See* 15 U.S.C. § 78d-1. SEC should not be entitled to ignore the implications of *Lucia* and the government's own position in that case in selecting a tribunal. When it nevertheless tries to do so, the courts must at least have jurisdiction to hear constitutional deficiencies acknowledged and created by SEC. *See, e.g.*, *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 493–94, 497 (1991) (district court has jurisdiction over broad pattern and practice due process challenge to INS procedures); *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 237–38 (1968) (district court has jurisdiction to hear a challenge to a "basically lawless" proceeding).

C. The *SEC ALJ Cases* Do Not Alter the Supreme Court's Holding in *FEF*

Though five other circuits have held that district courts lack subject-matter jurisdiction in past challenges to SEC enforcement proceedings, *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), those cases are distinguishable or wrongly decided for several reasons—not least because they disregard *FEF*'s unambiguous jurisdictional holding *under the same statutory scheme*.

Second, all of these decisions pre-date *Lucia*'s holding that SEC's ALJs are officers under Article II. Moreover, these decisions also pre-date the Solicitor General's confession *in this very case* that SEC ALJs are unconstitutionally protected from removal by multiple layers of tenure protection.

Third, the Federal Circuit recently ruled that Administrative Patent Judges (APJs) are principal officers who enjoy unconstitutional removal protections, and that remand before a new panel of judges "to cure the constitutional error" is required by the Supreme Court's ruling in *Lucia*. *Arthrex, Inc. v. Smith & Nephew, Inc., et al.*, No. 2018-2140, 2019 WL 5616010 (Fed. Cir. Oct. 31, 2019). This ruling, combined with the Fifth Circuit's recent injunction pending appeal in *Cochran v. SEC, et al.*, A71, undercut Judge Sabraw's deference to prior sister circuits. The tide has turned.

Fourth, all the circuit decisions relied on the Supreme Court's decisions in *Thunder Basin* and *Elgin v. Dep't of the Treasury*, 567 U.S. 1 (2012), to the exclusion of *FEF*, which is the only *Supreme Court* case involving both the same statutory scheme and the same claim at issue in this case. Even though *FEF* held directly to the contrary, the circuit decisions concluded that the Exchange Act in fact does display an intent to preclude jurisdiction. *See Bennett*, 844 F.3d at 182; *Hill*, 825 F.3d at 1237; *Tilton*, 824 F.3d at 299; *Jarkesy*, 803 F.3d at 16–17; *Bebo*, 799 F.3d at 775. But their reliance on *Thunder Basin* and *Elgin* is misplaced because, unlike here, both cases involved different statutory schemes (Mine Act, CSRA) that were expressly exclusive with no savings clause, whereas *FEF* holds that § 78y is *not* exclusive. *Thunder Basin* and *Elgin* also both involved challenges to statutes that the agencies were created to adjudicate and enforce, *see Thunder Basin*, 510 U.S. at 214–15; *Elgin*, 567 U.S. at 12–15, 22–23, not a challenge to the validity of the tribunal itself. To read *Elgin* as the government proposes is to suggest that *Elgin* somehow *sub silentio* overruled *FEF*'s recent, on point and unanimous decision on jurisdiction for Art. II removal challenges SEC seeks to force into administrative proceedings.

Fifth, the circuit decisions essentially changed the Supreme Court's jurisdictional test which requires a court to consider *three* factors under *Thunder Basin*, specifically whether 1) the statutory scheme provides meaningful judicial

review; 2) the constitutional issues are wholly collateral to ALJ adjudication; and 3) the questions to be determined fall entirely outside agency expertise.

The cases upon which SEC relies placed almost all of their weight on the "meaningful judicial review" prong, even though *Thunder Basin* itself does not speak to the question of weight and which factors, if any, can be ignored contrary to the relevant Supreme Court cases. *See Bennett*, 844 F.3d at 183 n. 7 (stating that "[w]e agree with our sister circuits to have addressed the matter that meaningful judicial review is the most important factor in the *Thunder Basin* analysis" (citations omitted)). These circuit opinions essentially jettison one or both of the "wholly collateral" and "agency expertise" tests, which they admit are "closer questions" (*Tilton*, 824 F.3d at 282) or "not free from ambiguity" (*Bennett*, 844 F.3d at 186) or "do not cut strongly either way" (*Hill*, 825 F.3d at 1250).

All of the circuit decisions also mistake *eventual* judicial review for "meaningful" judicial review, an error which strips the meaning out of meaningful. The dissent in *Tilton* made just this point: "[W]hile there may be review, it cannot be considered truly 'meaningful' at that point." *Tilton*, 824 F.3d at 298 (Droney, J.). Indeed, had the Second Circuit correctly decided the jurisdictional and merits questions, it would have spared Lynn Tilton an unconstitutional proceeding. *Tilton*'s dissent proved both prophetic and worthy of emulation.

Tilton's dissent is not alone. Three district court decisions have likewise concluded that jurisdiction exists in similar cases. *Gray Fin. Grp., Inc. v. SEC*, 166 F. Supp. 3d 1335 (N.D. Ga. 2015) (May, J.); *Hill v. SEC*, 114 F. Supp. 3d 1297 (N.D. Ga. 2015) (May, J.); (*Hill* and *Gray* both vacated by 825 F.3d 1236); *Duka v. SEC*, 103 F. Supp. 3d 382, 389–92 (S.D.N.Y. 2015) (Berman, J.) (abrogated by *Tilton*, 824 F.3d 276). While these opinions—unlike *FEF*—are obviously not precedential, they do support the conclusion that the jurisdictional issue in this case is both serious and one on which appellants can make a substantial case that they are correct.

This Court, unconstrained by any adverse precedent in the Ninth Circuit, should decline to follow the course of error traveled by other circuits. It should embrace the far superior reasoning of the many courts cited above—including a controlling Supreme Court case—that have found jurisdiction, and course-correct a body of law that has led to repeatedly vacated proceedings. *FEF* provides the rule of decision on both jurisdiction and the merits, and this court must follow that controlling authority.

D. Absent an Injunction, Appellants Will Suffer Irreparable Harm

"It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see*

also Valley, 118 F.3d at 1055–56; 11A *Wright & Miller, Fed. Pract. & Proc., Civ.* § 2948.1 (3d ed. 2018) ("When an alleged deprivation of a constitutional right is involved … most courts" require no further showing of irreparable injury.).

Lucia establishes that RJL and Mr. Lucia have a right not to be subjected to a hearing before a constitutionally defective 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. *FEF*, 561 U.S. at 513 ("[Petitioners] are entitled to declaratory relief sufficient to ensure that the … standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive.").

If RJL and Mr. Lucia are forced to submit to yet another unconstitutional enforcement proceeding, they will, for the second time, lose the right to a constitutional tribunal, which not only constitutes irreparable harm, *see Valley*, 118 F.3d at 1056; *United Church*, 689 F.2d at 701, but also makes a mockery of *Lucia*'s holding that SEC ALJs must comply with Article II.

E. The Balance of Equities Heavily Favors an Injunction

While RJL and Mr. Lucia will suffer irreparable harm if they are forced to undergo yet another unconstitutional enforcement proceeding, SEC will suffer no harm if the proceeding is enjoined. The government urged the Court in *Lucia* to address the problem in order to "avoid needlessly prolonging the period of

uncertainty and turmoil caused by litigation of these issues." Gov't Cert. Pet. Br. in *Lucia* at 21. SEC can have no interest in compounding litigation by pursuing yet another constitutionally infirm enforcement proceeding destined to be voided. SEC has known about the protection from removal problem since at least November 29, 2017, when the government filed its brief supporting certiorari in *Lucia*. The Commission could have brought an action against RJL and Mr. Lucia in district court or even presided over the matter itself, as the Supreme Court noted in *Lucia*. 138 S. Ct. at 2055 n. 6. Having decided instead to assign the enforcement proceeding to another constitutionally defective ALJ—whom SEC knows to be defective—SEC should not now be heard to complain. A delayed enforcement proceeding causes no harm at all to resolve a constitutional issue that the government itself argued was "critically important" to address promptly. *See* Gov't Cert. Pet. Br. in *Lucia* at 21.

Finally, the public interest always favors the enforcement of the Constitution. *See Melendres*, 695 F.3d at 1002 ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights." (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994))); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[I]t may be assumed that the Constitution is the ultimate expression of the public interest.") (citation

omitted); *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 298 (5th Cir. 2012).

CONCLUSION

For the foregoing reasons, this Court should enjoin RJL and Mr. Lucia's SEC administrative enforcement proceeding pending the outcome of this appeal.

Date: December 4, 2019

New Civil Liberties Alliance

/s/ Margaret A. Little
Margaret A. Little
Jessica L. Thompson

Attorneys for Appellants Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr.

STATEMENT OF RELATED CASES

Appellants are not aware of any related cases pending in the Ninth Circuit.

Date: December 4, 2019

New Civil Liberties Alliance

/s/ Margaret A. Little
Margaret A. Little

Attorney for Appellants Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr.

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Circuit Rules 27-1(1)(d) and 32-3(2) because it contains 5,593 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 27-1(1)(d).

Pursuant to Federal Rule of Appellate Procedure 27(d)(1)(E), this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Office 365 Times New Roman 14-point font.

Date: December 4, 2019

New Civil Liberties Alliance

/s/ Margaret A. Little
Margaret A. Little

Attorney for Appellants Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr.

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: December 4, 2019

New Civil Liberties Alliance

/s/ Margaret A. Little
Margaret A. Little

Attorney for Appellants Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr.

No. 19-56101

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RAYMOND J. LUCIA COMPANIES, INC. AND RAYMOND J. LUCIA, SR.,
Plaintiffs-Appellants,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION, JAY CLAYTON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE U.S. SECURITIES AND EXCHANGE COMMISSION, AND WILLIAM P. BARR, IN HIS OFFICIAL CAPACITY AS UNITED STATES ATTORNEY GENERAL,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California
No. 3:18-cv-0269-DMS-JLB
Hon. Dana M. Sabraw

APPENDIX TO APPELLANTS' OPPOSED MOTION FOR INJUNCTION PENDING APPEAL

RELIEF REQUESTED UNDER CIRCUIT RULE 27-1(3) BY FEBRUARY 3, 2010

Margaret A. Little
Senior Litigation Counsel
Jessica L. Thompson
Litigation Counsel
New Civil Liberties Alliance
1225 19th St. NW, Ste. 450
Washington, DC 20036
202-869-5210
peggy.little@ncla.legal

Attorneys for Appellants
Raymond J. Lucia Companies, Inc. and
Raymond J. Lucia, Sr.

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Mark J. Perry, CA Bar No. 212532
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave. NW,
Washington, DC 20036-5306
Telephone: 202-887-3667
Email: MPerry@gibsondunn.com

Margaret A. Little (*pro hac vice pending*), CT Bar No. 303494
Caleb Kruckenberg (*pro hac vice pending*), PA Bar No. 322264
New Civil Liberties Alliance
1225 19th Street NW, Suite 450
Washington, DC 20036
Telephone: 202-869-5210
Email: peggy.little@ncla.legal
Email: caleb.kruckenberg@ncla.legal

Counsel for Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

RAYMOND J. LUCIA, COMPANIES, INC. and RAYMOND J. LUCIA, SR.,

Plaintiffs

v.

U.S. SECURITIES AND EXCHANGE COMMISSION, JAY CLAYTON, in his official capacity as Chairman of the U.S. Securities and Exchange Commission, and MATTHEW G. WHITAKER, in his official capacity as Acting United States Attorney General,

Defendants.

CIVIL ACTION NO: '18CV2692 DMS JLB

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Raymond J. Lucia Companies, Inc. (RJL) and Raymond J. Lucia, Sr. (Mr. Lucia) for their complaint against the United States Securities and Exchange Commission (SEC or the Commission), Jay Clayton, in his official capacity as Chairman of the U.S. Securities and Exchange Commission, and Matthew G. Whitaker, in his official capacity as Acting United States Attorney General, allege as follows:

Preliminary Statement

1. This action arises from the SEC's attempt to subject Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr. to an unconstitutional administrative proceeding before an Administrative Law Judge (ALJ) whose appointment violates Article II of the United States Constitution. In violation of the President's removal power, SEC ALJs may only be removed for good cause as determined by the Merit Systems Protection Board (MSPB), 5 U.S.C. § 7521(a), whose members themselves can only be removed by the President for good cause. 5 U.S.C. § 1202(d). SEC Commissioners, who have powers of appointment over ALJs, cannot act without approval from MSPB and themselves enjoy for-cause protection against removal. *MFS Sec. Corp. v. SEC*, 380 F. 3d 611, 619-20 (2d Cir. 2004). These multiple layers of tenure protection violate Article II of the United States Constitution.

2. RJL and Mr. Lucia already underwent one unconstitutional administrative proceeding commenced in 2012 that they litigated all the way to the United States Supreme Court before the constitutional claim that the ALJ in that action had not been constitutionally appointed was decided—in his favor—by the highest court in the land.

3. Although the SEC could have lawfully brought those 2012 proceedings either in a federal district court or before the Commission, it chose to bring them before an unconstitutionally appointed ALJ.

4. In the 2012 proceedings, the SEC maintained a litigation position so erroneous that the Department of Justice took the extraordinary step of confessing error before the Supreme Court.

5. The SEC is now reinstituting proceedings before an ALJ whose appointment is still unconstitutional, thereby subjecting RJL and Mr. Lucia to years of protracted litigation and appeals before they will be before a court that has jurisdiction to hear their claims.

6. Further, the SEC is proceeding in violation of its own rules, deadlines and procedures, which violates RJL's and Mr. Lucia's right to due process under law and, due to the passage of time, gravely prejudices his ability to defend himself in the reinstituted proceedings.

7. The grant of jurisdiction under Article III of the United States Constitution and 28 U.S.C. § 1331 requires this court to determine these constitutional questions before that administrative action proceeds.

8. This Court offers RJL and Mr. Lucia their only opportunity for meaningful judicial review that could prevent these deprivations of their constitutional rights.

Parties

9. Plaintiff Raymond J. Lucia Companies, Inc. (RJL) is a California corporation located in San Diego, California.

10. Plaintiff Raymond J. Lucia, Sr. (Mr. Lucia) was a registered investment advisor associated with and the sole owner of RJL. Mr. Lucia is a resident and citizen of California residing in San Diego.

11. Defendant United States Securities and Exchange Commission (SEC) is an independent agency of the United States government headquartered in Washington, DC.

12. Defendant Jay Clayton is the Chairman of the United States Securities and Exchange Commission. He is sued in his official capacity.

13. Defendant Matthew G. Whitaker is the acting Attorney General of the United States, and the head and principal officer of the United States Department of Justice. He is sued in his official capacity.

Jurisdiction and Venue

14. This action for declaratory and injunctive relief is brought under the grant of jurisdiction in Article III of the United States Constitution and 28 U.S.C. § 1331, which provides that federal district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States," and 28 U.S.C. § 2201, which authorizes declaratory judgments.

15. This Court has subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337, 1346, 1651, 2201 and 5 U.S.C. §§ 702 and 706. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and (e).

Factual Background

RJL and Mr. Lucia's Business

16. Raymond J. Lucia was a financial planning professional who for nearly 40 years had an unblemished record in his chosen profession.

17. Ray Lucia spent four decades building a successful family business, RJL, that eventually came to employ his four children, brother and nephew and approximately 100 hardworking, well-paid individuals.

18. Ray Lucia's businesses also included highly successful media ventures, including his own radio show, television and media appearances, all built upon his spotless reputation, name recognition and prominence in the financial planning profession.

19. To market his business and educate potential clients about his work, Mr. Lucia and RJL held free seminars for prospective clients that promoted a retirement planning strategy he called

"Buckets of Money" (BOM), which urged retirees and pre-retirees to diversify their assets into buckets of safe (*e.g.* CDs, bonds, annuities etc.) and buckets of riskier investments (*e.g.* stocks, real estate). That strategy informs retirees that when income is needed, they should withdraw from the safer investments first, allowing the riskier investments time to grow, thus mitigating the sequence of returns risk of having to potentially liquidate riskier assets if the stock market goes negative for an extended period early in retirement. Numerous academic studies have supported the efficacy and superiority of this concept.

20. In all their regulated activities, Mr. Lucia and RJL rigorously followed all SEC rules and regulations, its strict requirements, and used no promotional materials that had not been submitted for prior written regulatory approvals by broker-dealers registered with the Financial Industry Regulatory Authority (FINRA) or the SEC.

21. Mr. Lucia used a slideshow in his seminars comparing outcomes for hypothetical investors using different strategies accompanied by contemporaneous explanations and drawings on an overhead that elucidated his recommended strategy, followed by a period of unscripted audience questions and answers.

22. Two of the 126 slides in his show used the term "back test" to describe a comparison between actual historical stock market returns and a hypothetical portfolio using hypothetical assumptions regarding inflation and rates of return on real-estate and non-stock investments that followed Mr. Lucia's method.

23. All of the slides showing examples—including the two "back test" slides—contained prominent disclaimers such as, "This is a hypothetical illustration and is not representative of an actual investment" and "Rates of return are hypothetical in nature and are for illustrative purposes only." These disclaimers appeared nearly 50 times throughout the presentation.

24. In addition, Mr. Lucia's oral presentation (confirmed in a webinar, the only evidence of what was actually communicated to Mr. Lucia's audiences), repeatedly urged attendees to read the many disclosure slides, while warning the audience: "Understand nothing can be guaranteed…" "Understand we can't guarantee rate of return. No one can…" "Now remember all the disclaimers on the screen. Very important that you understand nothing here is guaranteed… Once again, understand the disclaimers."

25. In all of his seminars and webinars, Mr. Lucia expressly and repeatedly reminded his audience that these were hypothetical illustrations—using hypothetical, pretend, assumed rates of return—and identified clearly where he was not using actual historical data in his assumptions.

26. All of the slides used in his free seminars, including the ones that used the term "back test," had been submitted, reviewed and pre-approved by broker-dealers registered with the Financial Industry Regulatory Authority (FINRA) 20-30 times per year over the course of 2004 to 2010.

27. In addition, Mr. Lucia was hired by other broker dealers, including two public company broker-dealers, to present the identical BOM seminars numerous times. On most of these occasions, the broker-dealers were provided the slide shows in advance of the seminar, and none of their compliance departments took issue with the slides, the presentation or the back tests.

28. In 2003, the SEC reviewed a similar version of the full slide show, including the two slides that used the term "back test" and the SEC examiners raised no concerns that they were misleading. Indeed, the 2003 examiners specifically concluded that RJL "does not advertise performance," and took no issue with Mr. Lucia's use of assumptions in a back test.

29. In March 2010, the SEC conducted an examination of RJL, but did not bring an Order Instituting Proceedings (OIP) against RJL and Mr. Lucia until September 5, 2012.

No Losses or Harm to Any Client, Seminar Attendee or Investor

30. The OIP did not claim that any investor money had been misappropriated or that any investor account had been mishandled or cite to any sales practices deficiencies.

31. No SEC examination ever claimed any investor complaints or losses, nor did the OIP that led to the end of Mr. Lucia's ability to engage in his chosen profession.

32. No securities were offered or sold at Mr. Lucia's presentations.

33. None of the nearly 50,000 potential investors who attended the seminars at the time these "back test" slides were in use filed a complaint with the SEC alleging that the slides were misleading.

34. Upon receiving notice from the SEC in 2010 that the agency now objected to those slides, Mr. Lucia and RJL immediately ceased using any and all material of any concern to the SEC, including the slides in question, and Mr. Lucia voluntarily removed all three of his books from circulation.

The Charges Against RJL and Mr. Lucia

35. Nevertheless, in the 2012 OIP the SEC charged that Mr. Lucia violated the securities laws by using the word "back test" when describing a strategy that combined actual historical data for stock-market returns with hypothetical assumptions about inflation and returns on non-stock investments.

36. The word 'back test" is undefined in the law and SEC regulations, and it had never before been construed in any judicial or administrative proceeding. Nor had Congress or the Commission ever given fair notice that either would regulate its usage.

37. "Back test" is a term commonly used in the financial planning industry to mean a 'look back" at how a strategy would have performed subject to various hypotheticals and assumptions.

It is not used in any strictly defined way in the industry and has multiple applications in both financial services and academia.

38. Mr. Lucia fully and repeatedly disclosed in his seminars exactly how he was applying the term "back test." He made perfectly clear what assumptions, hypotheticals, and/or actual data were used in his back tests.

39. The SEC enforcement division insisted that a "back test" must rely exclusively on historical data—even when a presentation explicitly discloses that hypothetical assumptions are being used, even after their expert viewed marketing material from a trillion-dollar mutual fund company, with fifty million investor shareholders, advertising a back test that used a hypothetical inflation rate.

The Proceedings Against Lucia

40. In 2012, the SEC had the option of bringing its enforcement proceedings under the Securities and Exchange Act of 1934 and the Investment Advisers Act of 1940 against Mr. Lucia either in federal district court or in an administrative proceeding. It elected to institute proceedings against RJL and Mr. Lucia before an unconstitutionally appointed administrative law judge, Cameron Elliot.

41. At the time, ALJ Elliot had not been appointed by the Commission. Instead, he and the other SEC ALJs were apparently appointed by the Chief ALJ, not by a constitutionally authorized officeholder.

42. ALJ Elliot, to whom the division presented its arguments, is reported at the time of Mr. Lucia's hearing to have "found the defendants liable in every contested case he has heard" and, on information and belief said to "defendants during settlement discussions on a case they should

be aware he had never ruled against the agency's enforcement division." *See* Jean Eaglesham, *Fairness of SEC Judges Is in Spotlight*, Wall St. J. (Nov. 22, 2015).

43. ALJ Elliot has also admitted publicly that he had "never given less than a permanent bar" to anyone who contested the charges against them. *Id.*

44. For their hearing before ALJ Elliot, Mr. Lucia and RJL had scheduled witnesses to provide testimony on their behalf. However, days before these witnesses were scheduled to testify, the SEC's enforcement division served them with subpoenas demanding production of all their financial records, in every format, from any source, over a five-year period, subject to the penalty of fine and/or imprisonment. Subsequently, the witnesses declined to appear on Mr. Lucia's behalf. As a result, ALJ Elliot never heard evidence from witnesses favorable to RJL and Mr. Lucia. The witnesses even wrote a letter to ALJ Elliot complaining of the eleventh-hour intimidation, but Elliot refused to enter it into the record.

45. On July 8, 2013, ALJ Elliot issued an order revoking Plaintiffs' investment adviser registrations and barring them from the industry for life even though the record lacked any evidence of either customer complaints or losses. *In the Matter of Raymond J. Lucia Companies, Inc.*, Initial Decision Release no. 540.

46. In reaching his decision, ALJ Elliot admitted that he was adopting a new definition of "back test." Specifically, he wrote that Plaintiffs' use of the term "back test" was misleading because it did not "meet the definition of 'back test' that *I have adopted." In the Matter of Raymond J. Lucia Companies, Inc.*, Initial Decision Release no. 540, at 30 (Dec. 6, 2013) (emphasis added).

47. Mr. Lucia's use of the term "back test" was held to violate the securities law—even though it was used throughout the industry as Mr. Lucia used it. This was the first time the SEC

had ever held that using the term "back test" in a hypothetical illustration —a term often used both before and since Mr. Lucia's proceeding—violated the securities laws and constituted fraud.

48. Citing the "substantial financial success" that Mr. Lucia and his company had supposedly "enjoyed at their clients' expense," ALJ Elliot also ordered $300,000 in civil monetary penalties against Plaintiffs. *In the Matter of Raymond J. Lucia Companies, Inc.*, Initial Decision Release no. 540, at 60.

49. There was no evidence, much less a finding, that the conduct at issue caused *any* client complaints or investor losses. Nor was there any evidence that RJL and Mr. Lucia profited at the expense of their clients. Indeed, ALJ Elliot made no findings that any of Mr. Lucia and his company's clients were harmed and pointed to no evidence of any such harm.

50. On September 3, 2015, the Commission entered an order affirming ALJ Elliot's decision. Despite the lack of any evidence of harm to consumers and any evidence that anyone was misled by Mr. Lucia's presentation, the Commission entered an order that essentially adopted ALJ Elliot's findings and penalties imposing a lifetime ban on Mr. Lucia and RJL, revoking Mr. Lucia's and RJL's investment adviser registrations, and imposing a penalty of $250,000 on RJL and $50,000 on Mr. Lucia.

51. In the Commission's only written dissent of 2015, two out of five Commissioners pointed out a critical flaw in the ALJ's and the Commission's decisions. The dissenters explained that the majority had "create[d] from whole cloth specific requirements for advertisements that include the word 'back test'" and then deemed it misleading "if a back test fails to use actual historical rates—even if the slideshow presentation specifically discloses the use of assumed rates for certain components." *In the Matter of Raymond J. Lucia Companies, Inc.*, Securities

Act of 1934 Release No. 75837 (Oct. 2, 2015) (Commissioners Gallagher and Piwowar, dissenting).

52. The dissenters also noted that Article III courts should decide the Appointments Clause constitutional questions. *Id.*

53. Plaintiff appealed the Commission's decision to the DC Circuit. On October 22, 2015, the Commission stayed the civil penalties imposed on Plaintiffs pending appeal. However, the Commission refused to stay Mr. Lucia's lifetime ban from the industry or the revocation of Plaintiffs' respective registrations.

54. On August 9, 2016, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's order. *Raymond J. Lucia Companies, Inc. v. S.E.C.*, 832 F.3d 277 (D.C. Cir. 2016).

55. This was the first time that RJL and Mr. Lucia were before a judicial authority. In its decision, the circuit court noted that its review is "deferential," with the Commission's conclusions to be set aside "only if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id*, 832 F.3d at 289-90. As to Mr. Lucia's appeal of the lifetime ban, "a most serious sanction," the DC Circuit reviewed its imposition under an "especially deferential" standard, and left this most draconian, career-ending ban in place "even without investor injury." The Court refused to consider like cases where the lesser sanction of censure and monitoring was imposed, because they were imposed "in settled proceedings, where the avoidance of time-and-manpower-consuming adversary proceedings[] justif[ied] accepting lesser remedies in settlement." *Id.* (internal citation and quotation marks omitted).

56. On June 26, 2017, Plaintiffs' petition for review was denied by the equally divided Court en banc. *Raymond J. Lucia Companies, Inc. v. S.E.C.*, 868 F.3d 1021 (D.C. Cir. 2017) (*en banc*).

57. Mr. Lucia and RJL filed a petition for certiorari to the Supreme Court which was granted.

58. On June 21, 2018, the United States Supreme Court vacated all prior proceedings because "Judge Elliot heard and decided Lucia's case without the kind of appointment the [Appointments] Clause requires." *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2055 (2018).

59. Plaintiffs RJL and Mr. Lucia had to litigate the constitutionality of the Appointment of SEC ALJs all the way to the Supreme Court just to get a constitutionally appointed ALJ.

60. All of those proceedings have cost him everything, his livelihood, reputation, health, and business, and put dozens of employees out of a job, and cost well over a million dollars in defense costs and attorney fees. They have also deprived consumers of access to a proven wealth-creation strategy.

Orders from the SEC Regarding Appointment

61. While the *Lucia* challenge at the Supreme Court was pending, on November 29, 2017, the Solicitor General (SG) on behalf of the United States submitted a brief in which the SG agreed with Lucia and RJL that the ALJ who tried Mr. Lucia's proceeding, Cameron Elliot, was not constitutionally appointed. The next day, on November 30, 2017, the SEC issued an order that announced that it would "put to rest" any claim that SEC ALJs were not constitutionally appointed by ratifying the agency's "prior appointment of" SEC ALJs. *Order*, Securities Act of 1933 Release No. 10440 (Nov. 30, 2017).

62. In footnote 6 of the *Lucia* opinion, Justice Kagan noted that the Court declined to address the fully-briefed question of whether the November 30, 2017 ratification was effective

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*." *Lucia*, 138 S.Ct. at 2055 n. 6 (emphasis added.)

63. On August 22, 2018, the SEC issued an order, the first paragraph of which read: "On November 30, 2017, we ratified the appointments of Chief Administrative Law Judge Brenda Murray and Administrative Law Judges Carol Fox Foelak, Cameron Elliot, James E. Grimes, and Jason S. Patil 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 as our own under the Constitution." *Order*, Exchange Act Release No. 83907, at 1 (Aug. 22, 2018).

64. In a document issued by the USDOJ entitled, *Guidance on Administrative Law Judges after Lucia v. SEC (S. Ct.)*, the Solicitor General suggested, "Additionally, it would be fitting for the ratifications to be accompanied by an appropriate degree of public ceremony and formality …. for example, a Department Head might re-administer the oath of office to incumbent ALJs in a public ceremony, or on record of a regular public hearing or meeting. These steps … [though not strictly necessary] will underscore that the Department Head has satisfied the purposes of the Appointments Clause by accepting public responsibility for the appointment of specific persons to the office of ALJ."

65. On September 28, 2018, the Commission responded to a Freedom of Information Act request about the steps it had taken to properly appoint its ALJs. Although the SEC has

identified 89 pages of records responsive to that request, it decided to "withhold these records in their entirety" under various exemptions including work product/anticipation of litigation.

RJL and Mr. Lucia Today

66. Mr. Lucia has lost the ability to make a living in his chosen profession and indeed in any profession. The word "fraud" has destroyed his reputation. His media business has been decimated. Radio stations terminated his talk show and his sponsors left. Mr. Lucia's TV and radio appearances have dried up entirely.

67. As a result, Mr. Lucia has lost his home, investment properties, his retirement savings and any prospect of future employment. He suffered a heart attack from the stresses associated with this multilayered prosecution, through administrative hearings, to a Commission hearing, a panel and *en banc* review in the DC Circuit culminating in a successful appeal to the Supreme Court. All of this came at great cost. He assets are depleted and RJL has no assets remaining. He lives on a small pension, Social Security, and occasional gifts from his children.

68. Although the SEC's prior decision has been set aside, it remains available in online searches, with no indication provided by the government that it is an unconstitutional nullity. His name and reputation will forever be tainted as having been sued for allegedly committing a victimless fraud by the SEC.

69. And now the SEC wants him to start from square one in its multi-layered administrative scheme in front of another unconstitutional ALJ.

SEC Policies

70. SEC Commissioner Hester Peirce noted in a recent speech: "Punishing every small violation … means casting discretion aside in favor of making the SEC look tough. Violations are not all equally serious. I agree with Commissioner Michael Piwowar, who notes: 'If every

rule is a priority, then no rule is a priority … While following the 'broken windows' approach, perhaps the SEC should have changed its name to the 'Sanctions' and Exchange Commission, because it acted like a branch of the U.S. Attorney's Office for the Southern District of New York." Hester M. Peirce, *The Why Behind the No*, Remarks at the 50th Annual Rocky Mountain Securities Conference, May 11, 2018.

71. Commissioner Peirce further expressed concern with "rulemaking by enforcement. Due process starts with telling individuals in advance what actions constitute violations of the law …. It is wrong to try to do an end run around the APA by using the enforcement process to make policy. Instead, the Enforcement Division only should bring actions based on established legal obligations." *Id.*

72. Commissioner Peirce also observed: "The effects of an investigation or proceeding on a private party can be devastating … For the individual under investigation, professional careers, reputations, and personal relationships can suffer. As the SEC's canons of ethics put it: 'The power to investigate carries with it the power to defame and destroy.' This price is too high for violations that are minor." *Id.*

The Administrative Scheme and the Appointments Clause

73. The SEC may bring actions in federal district court or it may elect to seek civil penalties in administrative proceedings against an entity it finds "is violating or has violated any provision of [the Securities and Exchange Act of 1934], or any rule or regulations issued under [the '34 Act]," 15 U.S.C. §§ 77a, 77h-1(g), or the Investment Advisers Act of 1940. 15 U.S.C. §§ 80b-1, 80b-3.

74. The SEC's jurisdiction pursuant to the '34 Act and the Advisers Act *is limited to consideration of whether conduct violated the Securities laws*—and that topic alone. *See* 15

U.S.C. §§ 78u(a)(1) ("Authority and discretion of Commission to investigate violations" of '34 Act), 80b-9 (Commission authority under Adviser's Act).

75. The administrative process departs from federal court process in that respondents are denied their rights to trial by jury and they have far more limited discovery and depositions. The protections afforded by the Federal Rules of Civil Procedure and the Federal Rules of Evidence are not available, with ALJs having virtually unfettered discretion over what witnesses and evidence will be allowed, including admission of hearsay and curtailing of testimony and exhibits. Most importantly, administrative proceedings are investigated, prosecuted and judged by agency employees all beholden to the entity that has brought the charges. By contrast, in federal court, the judge is independent, unbiased and not beholden to the prosecuting agency.

76. All SEC ALJs have multiple levels of protection against removal. Specifically, they can be removed only if the Merit Systems Protection Board (MSPB) finds good cause to remove them, 5 U.S.C. § 7521(a), and the members of that board can be removed only for good cause. 5 U.S.C. § 1202(d). SEC Commissioners, who have powers of appointment over ALJs, cannot act without approval from the MSPB, 5 U.S.C. § 7521, and themselves enjoy for-cause protection against removal.

77. This scheme violates Article II of the Constitution.

Laws and Rules Pertaining to the Current Administrative Action

78. SEC administrative enforcement proceedings are governed by statutes set forth in 15 U.S.C. § 78u-3(b) ('34 Act) and § 80b-3(k)(2) (Advisers Act).

79. These statutes require that the Commission's order instituting administrative proceedings "shall fix a hearing date not earlier than 30 days nor later than 60 days after service" of the OIP

"unless an earlier or later date is set by the Commission with the consent of any respondent so served."

80. Mr. Lucia and RJL did not waive this mandatory date for commencement of the proceedings.

81. SEC Rules reinforce this strict deadline to hold the hearing and also require that the ALJ issue an initial decision no later than 300 days from the service of the OIP. Rule 360(a)(2), SEC Rules of Practice, 17 C.F.R. § 201.360(a)(2).

82. The Commission had to commence its hearing within 60 days from the issuance of the OIP. This 60-day deadline was statutorily required. 15 U.S.C. §§ 78u-3(b), 80b-3(k). It was also required by the Commission's rules of practice. 17 C.F.R. § 201.360(a)(2)(ii). And a properly-appointed ALJ was required to issue a decision no later than 120 days after the hearing. 17 C.F.R. § 201.360(a)(2)(i). All of these deadlines have passed years ago.

83. SEC enforcement actions give the Commission power to impose monetary penalties of up to $100,000 for Mr. Lucia and up to $500,000 for RJL for *each* alleged violation of the '34 Act, 15 U.S.C. §§ 78u (d)(3)(B)(i)-(ii), and the Advisers Act, 15 U.S.C. § 80b-3 (i)(2)(C). These punitive sanctions are separate from, and in addition to, disgorgement of funds. *See* 15 U.S.C. §§ 78u-2, 80b-3 (j).

84. The Commission's ability to impose an associational ban on Plaintiffs implicates both First Amendment associational rights and their rights to engage in a chosen profession.

85. The Commission may permanently revoke a party's investment advisor registration with the Commission and forever bar a respondent's ability to even be "associated" with an investment advisor. 15 U.S.C. § 80b-3 (f).

86. Deprivations in administrative proceedings such as these can often be more significant than even criminal sanctions. As Justice Gorsuch recently wrote,

> Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today's "civil" penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies.

Sessions v. Dimaya, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring).

87. The Commission as a whole, encompasses both the enforcement entity that investigates and prosecutes alleged violations and the Office of Administrative Law Judges. *See* 17 C.F.R. §§ 200.14 (Office of Administrative Law Judges), 200.19b (Director of the Division of Enforcement). Moreover, the Commission has the final say within the administrative proceeding concerning liability. 17 C.F.R. § 201.411.

88. On information and belief, the SEC enjoys a 90% success rate in its own hearings but has only a 69% success rate "against defendants in federal court." Jean Eaglesham, *SEC Wins with in-House Judges*, Wall St. J. (May 6, 2015) available at http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803.

89. Likewise, the New York Times reported similar statistics reflecting a higher win percentage in SEC administrative hearings than in federal court. Gretchen Morgenson, *At the SEC, a Question of Home-Court Edge*, N.Y.Times (Oct. 5, 2013).

90. Moreover, the Commission decided appeals from initial decisions "in their own agency's favor" 95% of the time between October 2010 and March 2015. Eaglesham, *supra*.

91. These structural biases factually and statistically play out in favor of enforcement and the imposition of liability. Plaintiffs have already endured an extended administrative hearing in

front of an ALJ beholden to the same entity that employs him, promulgates, interprets and/or ignores its own rules. Further its enforcement division is prosecuting RJL and Mr. Lucia. The Commission routinely accepts the ALJ decision as its own, and to the extent it hears the appeal, it relies heavily on its ALJ's findings of fact and conclusions of law.

92. Indeed, as illustrated in this case, any facts found by the ALJ, and adopted by the Commission, are deemed "conclusive" so long as they are premised on "substantial evidence." *Steadman v. SEC*, 450 U.S. 91, 97 n. 12 (1981).

93. The Court in *Lucia* held that the "'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official …. To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled." 138 S. Ct. at 2055.

94. On September 12, 2018, Chief Administrative Law Judge Brenda P. Murray assigned this matter to Administrative Law Judge Carol Fox Foelak and ordered that by no later than October 3, 2018, ALJ Foelak issue an order directing the parties to submit proposals for the conduct of further proceedings.

95. On October 2, 2018, ALJ Foelak ordered plaintiffs and the SEC Division of Enforcement to submit "a joint proposal for the conduct of further proceedings by November 30, 2018."

96. ALJ Foelak's statutory protections against removal continue to violate Article II of the United States Constitution. *See Free Enter. Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 492 (2010).

97. The SEC orders set forth above violate their own rules, procedures and deadlines and thus deprive plaintiffs of their rights to due process under law. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954).

98. Declaratory and injunctive relief is necessary to prevent Plaintiffs from being compelled to submit—yet again—to an unconstitutional proceeding and from suffering further irreparable professional, reputational and financial harm—all without meaningful judicial review.

99. In the event that these unlawful administrative proceedings result in adverse findings against plaintiffs, the ALJ's and/or Commission findings would be given substantial deference, even "especially deferential" review "entitled to the greatest weight," *Lucia*, 832 F.3d at 289, 295, entrenching the harm caused by the SEC's unconstitutional proceedings.

100. Without the requested declaratory and injunctive relief, Plaintiffs will suffer irreparable harm by being forced to undergo—for the second time—an expensive, time-consuming, reputation-destroying, unconstitutional proceeding. Judicial review after that unconstitutional proceeding has already taken place cannot and does not provide meaningful judicial review.

CAUSES OF ACTION

COUNT ONE
(Application for Preliminary Injunctive Relief)

(The Administrative Proceedings Violate Article II of the United States Constitution)

101. Plaintiffs repeat and reallege each and every allegation of the preceding paragraphs above, as if fully set forth herein.

102. SEC ALJs may only be removed for good cause as determined by the Merit Systems Protection Board (MSPB), 5 U.S.C. § 7521(a), whose members themselves can only be removed by the President for good cause. 5 U.S.C. § 1202(d). SEC Commissioners, who have powers of appointment over ALJs, cannot act without approval from MSPB and themselves enjoy for-cause protection against removal. *MFS Sec. Corp. v. SEC*, 380 F. 3d 611, 619-20 (2d Cir. 2004).

103. These multiple layers of tenure protection violate Article II of the United States Constitution.

104. Without injunctive relief from this Court, Plaintiffs Mr. Lucia and RJL will be required to submit to an unconstitutional proceeding. This in and of itself constitutes irreparable harm to plaintiffs unless the SEC's re-instituted administrative proceeding is enjoined.

105. Furthermore, if the SEC, upon recommendation from the ALJ, finds against Mr. Lucia and RJL, the harm will be severe and irremediable. Mr. Lucia has already been industry-barred for five years, has suffered irreversible business and financial losses, reputational damage, over a million dollars in defense costs, and suffered grave harm to his health and well-being. Plaintiffs are unable under the SEC's administrative adjudication scheme to obtain meaningful judicial review in time to prevent this outcome. Nor can this harm be remedied with after-the-fact money damages, as these are irreversible and non-compensable losses. Mr. Lucia is already out of business, out of money, in impaired health, irreparably reputationally damaged, and out of hope for fair treatment by his government.

106. Plaintiffs have a substantial likelihood of success on the merits of their claims. The harm to Plaintiffs far outweighs any harm, or even inconvenience, to the SEC, if such relief is granted. Plaintiffs have filed this action as early in the proceedings as possible, before any substantial government resources or time has been expended on the re-prosecution of the administrative proceeding. Finally, the grant of an injunction will serve the public interest by protecting Americans' constitutional rights, just as Mr. Lucia and RJL did in the hard-fought and costly first round of this proceeding.

COUNT TWO

(Declaratory and Injunctive Relief)

(The Administrative Proceedings Violate Article II of the United States Constitution)

107. Plaintiffs repeat and reallege each and every allegation in the preceding paragraphs above, as if more fully set forth herein.

108. SEC ALJs may only be removed for good cause as determined by the Merit Systems Protection Board (MSPB), 5 U.S.C. § 7521(a), whose members themselves can only be removed by the President for good cause. 5 U.S.C. § 1202(d). SEC Commissioners, who have powers of appointment over ALJs, cannot act without approval from MSPB and are themselves protected by for-cause protection against removal. *MFS Sec. Corp. v. SEC*, 380 F. 3d 611, 619-20 (2d Cir. 2004).

109. These multiple layers of tenure protection violate Article II of the United States Constitution.

COUNT THREE

(Declaratory and Injunctive Relief)

(The SEC's Reinstituted Administrative Proceedings Violate Constitutionally Required Deadlines)

110. Plaintiffs repeat and reallege each and every allegation in the preceding paragraphs above, as if more fully set forth herein.

111. The SEC's reinstituted administrative proceeding violates its own rules of practice and their mandatory deadlines. If an agency disregards rules governing its behavior this deprives an affected entity of the constitutionally guaranteed "due process." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). These principles, often referred to generally as the "*Accardi* doctrine," are so fundamental that an agency's disregard of rules that "afford greater procedural protections" upon parties will void agency action even without a showing of prejudice. *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959).

112. The Commission had to commence its hearing within 60 days from the issuance of the OIP. This 60-day deadline was statutorily required. 15 U.S.C. §§ 78u-3(b), 80b-3(k). It was also required by the Commission's rules of practice. 17 C.F.R. § 201.360(a)(2)(ii). And a properly-appointed ALJ was required to issue a decision no later than 120 days after the hearing. 17 C.F.R. § 201.360(a)(2)(i). Under the *Accardi* doctrine, due process therefore requires adherence to these deadlines.

113. But today, more than six years after the OIP was issued, there has never been a proper hearing before an administrative law judge, and there has been no proper decision on the merits. The OIP is, in essence, expired. This voids the SEC's action against Mr. Lucia regardless of prejudice to him. *See Vitarelli*, 359 U.S. at 539.

114. The prejudice to Mr. Lucia and RJL is also overwhelming. The conduct in this case occurred many years ago, and it will be difficult if not impossible to find witnesses who actually remember the seminars, let alone the individual slides. The Division is unlikely to carry its burden of proof, and Mr. Lucia is undeniably hampered in presenting his defense.

115. Although the SEC could have brought proceedings either in an Article III district court or before the Commission, it chose to bring them before an unconstitutionally unappointed ALJ. Even after this was brought to the SEC's attention, it dug in and maintained a litigation position so erroneous, that the Department of Justice took the extraordinary step of confessing error before the Supreme Court. Having clung to its erroneous position that the ALJ was properly appointed, the SEC must live with the consequences of having dragged plaintiffs through such a costly and extended prosecution which it brought before an improperly installed ALJ, Cameron Elliot.

116. *Accardi* requires that the Commission follow its own rules, and having elected an unconstitutional proceeding, it may not now—some six years later—commence a new proceeding under the expired OIP.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for an Order and Judgment:

Declaring unconstitutional the statutes, regulatory provisions guidance and policies providing for the removal of SEC ALJs;

Enjoining the SEC from carrying out an administrative proceeding against Mr. Lucia and RJL, or any other administrative proceedings against Plaintiffs based upon the expired OIP;

Providing such other and further relief as this Court may deem just and proper, including reasonable attorney's fees and costs of this action.

Dated: November 28, 2018

By: /S/ Mark J. Perry

Mark J. Perry, CA Bar No. 212532
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave. NW
Washington, DC 20036-5306
Telephone: 202-887-3667
Email: MPerry@gibsondunn.com

Margaret A. Little (*pro hac vice pending*), CT Bar No. 303494
Caleb Kruckenberg (*pro hac vice pending*), PA Bar No. 322264
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
Telephone: 202-869-5210
Email: peggy.little@ncla.legal
Email: caleb.kruckenberg@ncla.legal

Attorneys for Plaintiffs Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr.

JS 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

Raymond J. Lucia Companies, Inc. and Lucia, Raymond J., Sr.

(b) County of Residence of First Listed Plaintiff San Diego, CA
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Mark Perry (Gibson, Dunn & Crutcher LLP, 1050 Connecticut Ave. NW, Washington, DC 20036); Margaret Little & Caleb Kruckenberg (New Civil Liberties Alliance, 1225 19th St. NW, Suite 450, Washington, DC 20036)

DEFENDANTS

U.S. Securities and Exchange Commission; Jay Clayton, Chairman, Matthew G. Whitaker, Acting U.S. Attorney General

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

'18CV2692 DMS JLB

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ❒ 1 U.S. Government Plaintiff
- ❒ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ❒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	❒ 1	❒ 1	Incorporated *or* Principal Place of Business In This State	❒ 4	❒ 4
Citizen of Another State	❒ 2	❒ 2	Incorporated *and* Principal Place of Business In Another State	❒ 5	❒ 5
Citizen or Subject of a Foreign Country	❒ 3	❒ 3	Foreign Nation	❒ 6	❒ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ❒ 110 Insurance
- ❒ 120 Marine
- ❒ 130 Miller Act
- ❒ 140 Negotiable Instrument
- ❒ 150 Recovery of Overpayment & Enforcement of Judgment
- ❒ 151 Medicare Act
- ❒ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ❒ 153 Recovery of Overpayment of Veteran's Benefits
- ❒ 160 Stockholders' Suits
- ❒ 190 Other Contract
- ❒ 195 Contract Product Liability
- ❒ 196 Franchise

REAL PROPERTY
- ❒ 210 Land Condemnation
- ❒ 220 Foreclosure
- ❒ 230 Rent Lease & Ejectment
- ❒ 240 Torts to Land
- ❒ 245 Tort Product Liability
- ❒ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ❒ 310 Airplane
- ❒ 315 Airplane Product Liability
- ❒ 320 Assault, Libel & Slander
- ❒ 330 Federal Employers' Liability
- ❒ 340 Marine
- ❒ 345 Marine Product Liability
- ❒ 350 Motor Vehicle
- ❒ 355 Motor Vehicle Product Liability
- ❒ 360 Other Personal Injury
- ❒ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ❒ 365 Personal Injury - Product Liability
- ❒ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ❒ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ❒ 370 Other Fraud
- ❒ 371 Truth in Lending
- ❒ 380 Other Personal Property Damage
- ❒ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☒ 440 Other Civil Rights
- ❒ 441 Voting
- ❒ 442 Employment
- ❒ 443 Housing/ Accommodations
- ❒ 445 Amer. w/Disabilities - Employment
- ❒ 446 Amer. w/Disabilities - Other
- ❒ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ❒ 463 Alien Detainee
- ❒ 510 Motions to Vacate Sentence
- ❒ 530 General
- ❒ 535 Death Penalty

Other:
- ❒ 540 Mandamus & Other
- ❒ 550 Civil Rights
- ❒ 555 Prison Condition
- ❒ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ❒ 625 Drug Related Seizure of Property 21 USC 881
- ❒ 690 Other

LABOR
- ❒ 710 Fair Labor Standards Act
- ❒ 720 Labor/Management Relations
- ❒ 740 Railway Labor Act
- ❒ 751 Family and Medical Leave Act
- ❒ 790 Other Labor Litigation
- ❒ 791 Employee Retirement Income Security Act

IMMIGRATION
- ❒ 462 Naturalization Application
- ❒ 465 Other Immigration Actions

BANKRUPTCY
- ❒ 422 Appeal 28 USC 158
- ❒ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ❒ 820 Copyrights
- ❒ 830 Patent
- ❒ 835 Patent - Abbreviated New Drug Application
- ❒ 840 Trademark

SOCIAL SECURITY
- ❒ 861 HIA (1395ff)
- ❒ 862 Black Lung (923)
- ❒ 863 DIWC/DIWW (405(g))
- ❒ 864 SSID Title XVI
- ❒ 865 RSI (405(g))

FEDERAL TAX SUITS
- ❒ 870 Taxes (U.S. Plaintiff or Defendant)
- ❒ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ❒ 375 False Claims Act
- ❒ 376 Qui Tam (31 USC 3729(a))
- ❒ 400 State Reapportionment
- ❒ 410 Antitrust
- ❒ 430 Banks and Banking
- ❒ 450 Commerce
- ❒ 460 Deportation
- ❒ 470 Racketeer Influenced and Corrupt Organizations
- ❒ 480 Consumer Credit
- ❒ 490 Cable/Sat TV
- ❒ 850 Securities/Commodities/ Exchange
- ❒ 890 Other Statutory Actions
- ❒ 891 Agricultural Acts
- ❒ 893 Environmental Matters
- ❒ 895 Freedom of Information Act
- ❒ 896 Arbitration
- ❒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ❒ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ❒ 2 Removed from State Court ❒ 3 Remanded from Appellate Court ❒ 4 Reinstated or Reopened ❒ 5 Transferred from Another District *(specify)* ❒ 6 Multidistrict Litigation - Transfer ❒ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
28 U.S.C. §§ 1331, 1346 and 2201 and 5 U.S.C.§§702, 706

Brief description of cause:
Declaratory and injunctive relief against unconstitutional administrative enforcement proceedings.

VII. REQUESTED IN COMPLAINT:

❒ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:

JURY DEMAND: ❒ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE _____ DOCKET NUMBER _____

DATE 11/28/2018

SIGNATURE OF ATTORNEY OF RECORD /s/ Mark A. Perry

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE A25

Print Save As... Reset

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked**.** (See Section III below**; NOTE: federal question actions take precedence over diversity cases.**)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: Nature of Suit Code Descriptions.

V. **Origin.** Place an "X" in one of the seven boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statue.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

Mark A. Perry, CA Bar No. 212532
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave. NW
Washington, DC 20036-5306
Telephone: 202-887-3667
Email: MPerry@gibsondunn.com

Margaret A. Little (*pro hac vice pending*), CT Bar No. 303494
Caleb Kruckenberg (*pro hac vice pending*), PA Bar No. 322264
New Civil Liberties Alliance
1225 19th Street NW, Suite 450
Washington, DC 20036
Telephone: 202-869-5210
Email: peggy.little@ncla.legal
Email: caleb.kruckenberg@ncla.legal

Counsel for Raymond J. Lucia Company, Inc. and Raymond J. Lucia, Sr.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RAYMOND J. LUCIA COMPANIES, INC. and RAYMOND J. LUCIA, SR.,

Plaintiffs,

v.

U. S. SECURITIES AND EXCHANGE COMMISSION, JAY CLAYTON, in his official capacity as Chairman of the U.S. Securities and Exchange Commission, and MATTHEW G. WHITAKER, in his official capacity as Acting United States Attorney General,

Defendants.

Case No.: 18CV2692 DMS JLB

DECLARATION OF RAYMOND J. LUCIA, SR. IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Date: February 1, 2019
Time: 1:30 p.m.
Courtroom: 13A
Judge: Hon. Dana M. Sabraw
Magistrate: Hon. Jill L. Burkhardt

I, RAYMOND J. LUCIA, SR. declare under penalty of perjury that the following is true:

1. I am a 68 year-old resident of San Diego, California and a citizen of the United States. I make this declaration in support of Plaintiffs' Motion for Preliminary Injunction.

2. I began working in the field of retirement planning in the insurance industry in 1974. I became an investment professional advising clients about retirement strategies in approximately 1985. During my roughly 40-year career, I founded several companies, employed scores of people, advised hundreds of clients, wrote three books on retirement planning, and hosted "The Ray Lucia Show," a nationally syndicated, live call-in, radio and TV show. Until December 15, 2011, I was a registered investment advisor.

3. Before the SEC filed its enforcement proceeding against me in September 2012, neither I nor Raymond J. Lucia Companies, Inc. had ever been fined or disciplined by the SEC or any other regulatory body nor the subject of any disciplinary proceeding.

4. In or around 1996, I created a retirement planning strategy called "Buckets of Money" (BOM). In simple terms, BOM encouraged investors to diversify their portfolios and think of them as containing a series of "buckets" that correspond to the risk associated with their various investments. Under the BOM approach, retirees would first liquidate lower-risk investments, while allowing the riskier investments time to grow. While the number of "buckets" would vary depending on the investor's goals and risk tolerance, typically their portfolio would include a "safe bucket," containing relatively

lower-risk investments for initial spending needs during retirement such as CDs, bonds and annuities, and a "growth bucket," containing riskier investments, such as stocks and real estate, that could be left for a longer period of time. This customized approach aimed to mitigate the risk of having to liquidate more volatile assets during market downturns or a bad sequence of returns early in the distribution phase of retirement.

5. I developed the BOM strategy in part, as a result of reading a number of journal articles and studies that discussed the effects of taking retirement withdrawals in volatile markets. Since I created BOM, many investment advisors, academics and economists have begun advocating various versions of the "spend safe money first" or time segmented approach I advocated in BOM. For example, according to the article, "A Bucket Strategy For Retirement Income," FORBES, 5/08/2012, almost one third of financial professionals used a time segmented, "Buckets" like approach.

6. After I developed the BOM strategy, I began conducting free seminars to market my strategy to retirees and those approaching retirement. Each seminar lasted for roughly two hours, the majority of which was spent educating members of the audience about general financial topics including asset allocation, the pitfalls of market timing and reverse dollar cost averaging along with how the BOM method worked. The seminars were followed by a Q & A panel that included me, a certified financial planner, a fellow certified financial planner and frequently a non-affiliated independent tax attorney whom I paid to be sure information being disseminated was in no way confusing or misleading. Together we spent a significant amount of time answering unscripted, live questions from

the audience to be sure everyone had an opportunity to address specific questions to the panel.

7. During the seminars, I did not promote or sell any specific stocks, bonds, or other security or make any promise or prediction about the return on any investment portfolio. Any potential client who expressed an interest in using my firm's services after viewing the seminar was matched up with a financial advisor. The financial advisor gathered extensive financial information from that person, prepared a custom, individualized, written BOM plan, and after fully discussing the risks, features and potential benefits of the various investments, the investor was able to make an informed decision as to whether to become a client of my firm and to make investment choices. Individuals deciding to become clients signed multiple disclosure forms, completed new account information applications and afterward the documentation was submitted to my supervising broker dealer's compliance department to check their suitability before receiving final approval. This process typically took about 7 months to complete and consisted of on average four individual meetings with the potential client.

8. During the seminars, I used a slide show along with manual drawings on an overhead to help educate the audience about the BOM strategy. Much of my slide show presentation was general in nature and the drawings consisted of comparing BOM under several "what if" scenarios. Most of the slides showing examples contained prominent disclaimers such as, "This is a hypothetical illustration and is not representative of an actual investment" and "Rates of return are hypothetical in nature and are for illustrative

purposes only." Disclaimers such as these appeared nearly 50 times throughout the presentation. The presentations were always followed by a question and answer period.

9. My presentation contained 126 slides and around 30 minutes of live drawings on overhead. In two of those slides, I used the term "back test." Those two slides, which comprise only a few minutes of the two-hour presentation, also contained prominent disclaimers making clear that they were hypothetical only.

10. In my oral presentation during the seminars, confirmed in a transcript of a webinar, I repeatedly reminded the audience that the examples were hypothetical and that no one could guarantee a particular rate of return. Examples of my statements include: "Understand nothing can be guaranteed …" "Understand we can't guarantee rate of return. No one can …" "Now remember all the disclaimers on the screen. Very important that you understand nothing here is guaranteed … Once again, understand the disclaimers."

11. Before I conducted any of these seminars, all of the slides I used, including those that used the term "back test," were submitted, reviewed and pre-approved by broker-dealers registered with the Financial Industry Regulatory Authority (FINRA), who were responsible for my compliance. This submission and approval process occurred prior to each seminar, 20-30 times per year during the time that I conducted the seminars (from 2003 to 2010).

12. During this time period, I was hired several times by other broker dealers, including two public company broker-dealers, to present the identical BOM seminars.

On most of those occasions, the broker-dealers were provided the slide shows in advance of the seminars, and none of their compliance departments took issue with the slides, the presentation or my use of the term "back test."

13. Additionally, in 2003, the SEC staff reviewed a similar version of the full Power Point slide show, including the two slides that used the term "back test," and the SEC examiners raised no concerns that they were misleading. Indeed, the 2003 examiners specifically concluded that my company "does not advertise performance," and took no issue with my use of assumptions in any back test.

14. On September 5, 2012, the SEC issued an Order Instituting Proceedings against me and my company, RJL, alleging that I violated the securities laws by using the word "back test" when describing a strategy that combined actual historical data for stock-market returns with hypothetical assumptions about inflation and returns on non-stock investments.

15. The OIP did not claim that I or my company misappropriated any investor money or mishandled any investor account, nor did it cite any deficiencies in our sales practices.

16. To my knowledge, no SEC examination ever claimed that any investor complained about my presentation or suffered any losses because of it.

17. To my knowledge, none of the nearly 50,000 potential investors who attended the seminars at the time these "back test" slides were in use filed a complaint with the SEC alleging that the slides were misleading.

18. Although the SEC filed the OIP in September 2012, it notified me of its objections to my presentation in 2010. Upon receiving this notice, I and my company immediately stopped using all material that the SEC cited, including the slides in question. Out of an abundance of caution, I also removed all three of my books from circulation.

19. To my knowledge, the term "back test" was not defined in the law or in SEC rules or regulations during the time I was giving my seminars. During the time I was giving my seminars, I was unaware of any judicial or administrative construction or use of the term, and I had never heard that Congress or the SEC intended to regulate its usage.

20. "Back test" is a term commonly used in the financial planning, insurance and mutual fund industry to mean a "look back" at how a strategy might have performed subject to various hypotheticals and assumptions. To my knowledge, it was not used in any strictly-defined way in the financial services industry and has many different applications and meanings in the industry and in academia.

21. ALJ Elliot's decision stated that the term was misleading because it did not "meet the definition of 'backtest' that *I have adopted.*" *In the Matter of Raymond J. Lucia Companies, Inc.*, Initial Decision Release no. 540, at 30 (Dec. 6, 2013) (emphasis added). To my knowledge, "back test" was held to violate the securities law for the first time by ALJ Elliot in my case—even though it was commonly used as I used it throughout the industry.

22. On September 3, 2015, the SEC entered an order affirming an ALJ decision that concluded I and my company violated the securities laws. That order adopted the ALJ's penalties, which included a lifetime ban on me and my company from associating within the securities industry and a fine of $300,000.

23. I and my company appealed to the full Commission, which resulted in a 41-page decision more than two years later. In the Commission's only written dissent of 2015, two of the five Commissioners said the majority "created from whole cloth specific requirements for advertisements that include the word "backtest," and added that Article III courts should decide the Appointments Clause question. *In the Matter of Raymond J. Lucia Companies, Inc.*, Securities Act of 1934 Release No. 75837 (Oct. 2, 2015) (Commissioners Gallagher and Piwowar, dissenting).

24. I and my company appealed to a three-judge panel of the DC Circuit, *Raymond J. Lucia Companies, Inc. v. S.E.C.*, 832 F.3d 277 (D.C. Cir. 2016), followed by an evenly divided *en banc* decision by the circuit issued nearly five years after the SEC case began, *Raymond J. Lucia Companies, Inc. v. S.E.C.*, 868 F.3d 1021 (D.C. Cir. 2017) (en banc).

25. All of those proceedings were set aside and made a nullity by the United States Supreme Court in *Lucia v. SEC*, 585 U.S. ---, 138 S.Ct. 2044, 2055 (2018), which ruled that "the Commission's ALJs are 'Officers of the United States,' subject to the Appointments Clause."

25. Although I was ultimately successful in my appeal of the Appointments Clause issue to the United States Supreme Court, I incurred well over $1 million in legal and other expenses defending myself throughout this litigation. This victimless prosecution and its allegations of public fraud, publicity and lifetime bar caused me to lose my home and my ability to earn a living in virtually any and every profession. It destroyed my spotless reputation, my livelihood, and I suffered a near death heart attack due to the stress.

26. I declare under penalty of perjury that the foregoing is true and correct. Executed on December 6, 2018.

/s/ Raymond J. Lucia, Sr.____
Raymond J. Lucia, Sr.

CERTIFICATE OF SERVICE

I certify that on this 6th day of December, 2018, I have served a copy of the above and foregoing on all counsel of record through the Court's CM/ECF system.

I certify that a copy of the foregoing was also served by registered or certified mail upon all defendants in the above-entitled action on December 6, 2018 as follows:

Brent J. Fields, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE, Mail Stop 1090
Washington, DC 20549

Jay Clayton, Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Matthew G. Whitaker
Acting Attorney General
United States of America
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

U.S. Attorney's Office
Southern District of California
Federal Office Building
880 Front Street, Room 6293
San Diego, California 92101-8893

/s/Mark A. Perry
Mark A. Perry, CA Bar No. 212532

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

ROBERT S. BREWER, JR.
United States Attorney

CHRISTOPHER R. HALL
Assistant Branch Director
Federal Programs Branch

CHETAN A. PATIL (DC 999948)
CESAR A. LOPEZ-MORALES (MA 690545)
REBECCA CUTRI-KOHART (DC 1049030)
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box No. 883
Ben Franklin Station
Washington, DC 20044
Tel.: (202) 305-4968; Fax: (202) 616-8470
Email: chetan.patil@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

RAYMOND J. LUCIA COMPANIES, INC., and RAYMOND J. LUCIA, SR.,

Plaintiffs,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION, JAY CLAYTON, in his official capacity as Chairman of the U.S. Securities and Exchange Commission, and WILLIAM P. BARR[1], in his official capacity as United States Attorney General

Defendants.

Case No.: 3:18-cv-02692-DMS-JLB

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Date: March 22, 2019
Time: 1:30 p.m.
Courtroom: 13A
Judge: Hon. Dana M. Sabraw
Magistrate: Hon. Jill L. Burkhardt

[1] By operation of Fed. R. Civ. P. 25(d), Attorney General Barr is automatically substituted for former Acting Attorney General Matthew G. Whitaker as a defendant.

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INTRODUCTION

To find subject matter jurisdiction over Plaintiffs' claim, this Court would need to conclude that the Second, Fourth, Seventh, Eleventh, and D.C. Circuits all got it wrong when they unanimously concluded that district courts lack jurisdiction over claims materially identical to Plaintiffs'. The Court would then need to conclude it had jurisdiction over an Administrative Procedure Act claim even though the agency has not yet issued a final order. There is no basis in the law to do so.

Plaintiffs' motion seeks to enjoin an ongoing SEC administrative proceeding on the grounds that the provision governing the removal of SEC ALJs violates the separation of powers. However, Congress can establish a comprehensive scheme for judicial review of agency action that channels review through an administrative forum and then to the federal courts of appeals, thereby precluding district court jurisdiction. *See, e.g.*, *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). In the Securities Exchange Act of 1934, Congress did exactly that, creating a detailed review scheme that channels all judicial review of SEC administrative proceedings to the courts of appeals. Nowhere in that scheme did Congress provide for district court jurisdiction. Pursuant to this exclusive review scheme, five courts of appeals have, in recent years, addressed and rejected virtually identical attempts by plaintiffs to short-circuit SEC administrative proceedings by raising constitutional challenges to the authority of SEC ALJs in district court. *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); *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015); *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015) (collectively, the "*SEC ALJ Cases*"). These cases are directly applicable here.

At the same time, the Ninth Circuit also rejects challenges to agency proceedings raised prior to completion of those proceedings. *See Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 982 (9th Cir. 2006). And, even if the Court did have jurisdiction, Plaintiffs' claim would fail on the merits because the removal protections for SEC ALJs may be interpreted consistent with Article II of the Constitution.

In short, Plaintiffs cannot show that this Court has jurisdiction over their challenge to the SEC's ALJs, and their claim fails on the merits. Accordingly, Plaintiffs are not entitled to a preliminary injunction, and their motion should be denied.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

As part of its mission to protect investors, promote capital formation, and maintain fair, orderly, and efficient markets, the SEC investigates possible violations of the federal securities laws and enforces those laws in civil actions and administrative proceedings. The Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78a, *et seq.*, and its implementing regulations establish a comprehensive scheme for the commencement and review of SEC enforcement actions. Congress has authorized the Commission to proceed against those suspected of violating the Exchange Act and granted the Commission discretion to address potential violations by filing an enforcement action in federal district court or in administrative proceedings before the agency. *See, e.g.*, *id.* §§ 78u(d), 78u-1, 78u-2, 78u-3.

The adjudication of administrative proceedings may be delegated to an SEC ALJ. *See id.* § 78d-1(a). When the Commission assigns enforcement proceedings to an ALJ, the ALJ conducts prehearing proceedings—including holding conferences, receiving legal briefs and motions, and overseeing discovery, *see* 17 C.F.R. §§ 201.221-.22, 201.232-.33—and holds an evidentiary hearing, *id.* § 201.300. At the conclusion of the hearing, the ALJ makes an initial decision, *id.* § 201.360(a)(1), which the respondent or the SEC's Division of Enforcement may appeal to the Commission, *id.* § 201.410, or which the Commission may review on its own initiative, *id.* § 201.400(a). If no petition for review is filed and the Commission does not undertake review on its own initiative, "the Commission will issue an order" making the ALJ's initial decision final. *Id.* § 201.360(d)(2). If the Commission reviews an initial decision, it does so *de novo*, and it "may affirm, reverse, modify, [or] set aside" an initial decision "in whole or in part," "may make any findings or conclusions . . . on the basis of the record," and

may remand for further proceedings. *Id.* §§ 201.411(a), 201.452. If a majority of participating Commissioners does not agree to a disposition on the merits, the "initial decision shall be of no effect." *Id.* § 201.411(f). Sanctions are effective only upon issuance of a final order, *see id.* §§ 201.360(d), 201.411(a), and there are no circumstances under which an ALJ's initial decision becomes final without Commission action.

Congress further provided that "[a] person aggrieved by a final order of the Commission" can seek judicial review of the order in a federal court of appeals. 15 U.S.C. § 78y(a)(1). Upon the filing of the record in the court of appeals, the court has "exclusive" jurisdiction to affirm, modify, or set aside the final order. *Id.* § 78y(a)(3).

II. THE SEC'S ADMINISTRATIVE LAW JUDGES

The SEC has used ALJs since the Commission's early days. *See Charles Hughes & Co. v. SEC*, 139 F.2d 434 (2d Cir. 1943). The SEC's enabling statute authorizes the Commission to delegate any of its functions to an ALJ provided that the Commission "retain[s] a discretionary right to review" any delegated functions. 5 U.S.C. § 78d-1(a), (b). The SEC may appoint as many ALJs as is warranted. *See* 5 U.S.C. § 3105.

Once an ALJ is appointed, certain personnel actions (*e.g.*, removal, suspension) "may be taken against an [ALJ] . . . by the agency in which the [ALJ] is employed only for good cause established and determined" by the Merit Systems Protection Board ("MSPB") after an "opportunity for hearing before the [MSPB]." 5 U.S.C. § 7521; *see also* 5 C.F.R. §§ 930.211, 1201.137.

III. PROCEDURAL HISTORY

Plaintiffs were registered investment advisers who marketed a wealth-management strategy that they called "Buckets of Money," under which retirement savings were divided among assets of different risk levels (*e.g.*, bonds, fixed annuities, and stocks) and periodically reallocated as those assets changed in value. *See Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018). In September 2012, the Commission instituted administrative proceedings against Plaintiffs, alleging that they had used misleading

presentations to deceive prospective clients and charging Plaintiffs with violating various provisions of the federal securities laws. *Id.*

The proceeding was assigned to ALJ Cameron Elliot, who issued an initial decision concluding that Plaintiffs had violated the Investment Advisers Act. *Id.* at 2049-50. The Commission remanded the proceeding back to ALJ Elliot for additional fact-finding, who subsequently issued a revised initial decision. *Id.* at 2050. Plaintiffs sought Commission review, arguing, among other things, that the proceedings against them were unlawful because ALJ Elliot was an "Officer[] of the United States" within the meaning of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and was improperly appointed because he had not been appointed by the Commission itself. *Id.* On September 3, 2015, after an independent review of the record, the Commission issued a final order finding that Plaintiffs violated the securities laws in marketing their Buckets of Money strategy and rejecting their Appointments Clause claim. *Id.*

Plaintiffs appealed that decision to the D.C. Circuit and then to the Supreme Court. The Court ultimately ruled in Plaintiffs' favor, holding that the SEC's ALJs are inferior officers who had been appointed in violation of the Appointments Clause. *Id.* at 2053-54. The Court ordered that Plaintiffs were entitled to a new hearing before a properly appointed ALJ. *Id.* at 2055.

While the case was pending on appeal, the SEC issued a general order on November 30, 2017, which, among other things, ratified the appointment of its ALJs. *Id.* at 2055 n.6.[1] After the Supreme Court's decision in *Lucia*, the SEC once more ratified the appointment of its ALJs and reassigned Plaintiffs' case to ALJ Carol Fox Foelak. Since then, Plaintiffs have moved to dismiss the proceedings, in part on the grounds that the removal protections for SEC ALJs violate the separation of powers.[2]

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[1] In *Lucia*, the Court declined to address the validity of the ratification order. *See id.*

[2] *See* Resps.' Mot. to Dismiss at 22-23, *In re Raymond J. Lucia Companies, Inc.* (SEC Dec.

That motion is pending. To date, no hearing has been scheduled.

LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To obtain such relief, Plaintiffs must establish (1) "that [they are] likely to succeed on the merits," (2) "that [they are] likely to suffer irreparable harm in the absence of preliminary relief," (3) "that the balance of equities tips in [their] favor," and (4) "that an injunction is in the public interest." *Id.* at 20;[3] *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126-27 (9th Cir. 2009).

ARGUMENT

I. PLAINTIFFS CANNOT SHOW A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

A. No Jurisdiction Exists for Plaintiffs' Suit in This Court.

The *Thunder Basin* doctrine recognizes that when Congress creates a detailed statutory scheme, under which disputes are addressed first in an administrative forum and then appealed directly to a court of appeals, litigants must follow that process to raise their claims, and district courts lack jurisdiction over attempts to bypass it. *See Thunder Basin*, 510 U.S. at 215 (district court jurisdiction precluded when claims can be "meaningfully addressed in the Court of Appeals"). In the Exchange Act, Congress

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3, 2018), *available at* https://www.sec.gov/litigation/apdocuments/3-15006-event-121.pdf.

[3] After *Winter*, the Ninth Circuit held that "the 'serious questions' version of the sliding scale test for preliminary injunctions remains viable. . . . [T]he test has been formulated as follows: A preliminary injunction is appropriate when a plaintiff demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *All. for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (citation omitted). But plaintiffs must also satisfy the *Winter* factors. *Id.* "That is, 'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.*

did just that, as five courts of appeals recognize. The Court should follow suit.

"[C]ourts determine that Congress intended that a litigant proceed exclusively through a statutory scheme of administrative and judicial review when (i) such intent is fairly discernible in the statutory scheme, and (ii) the litigant's claims are of the type Congress intended to be reviewed within [the] statutory structure." *Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 498 (D.C. Cir. 2018) (quoting *Jarkesy*, 803 F.3d at 15). The Supreme Court has repeatedly held that this principle applies equally to constitutional challenges to agency action. *See, e.g.*, *Elgin v. U.S. Dep't of Treasury*, 567 U.S. 1, 10 (2012).

In *Elgin*, for example, the Supreme Court addressed *Thunder Basin* in the context of a facial constitutional challenge to the Military Selective Service Act brought in district court by former federal employees who had been removed from employment for failing to register for the Selective Service. *Id.* at 7. The Court held that the doctrine precluded district court jurisdiction, "even for employees who bring constitutional challenges[,]" because the Civil Service Reform Act provides for administrative review before the MSPB, followed by direct appeal to the Federal Circuit. *Id.* at 13. The plaintiffs were required to follow that review scheme even though they raised a constitutional claim and the MSPB believed it lacked the authority to declare a federal statute unconstitutional. *Id.* at 16-17.

Since *Elgin*, five courts of appeals have addressed attempts—just like Plaintiffs'—to enjoin administrative proceedings by plaintiffs raising constitutional challenges in district court to the authority of SEC ALJs to preside over SEC administrative proceedings. And just as the Court should do here, each court held that the Exchange Act's statutory review scheme precluded district court jurisdiction over the plaintiffs' claims. *See, e.g.*, *Bennett*, 844 F.3d at 177-78 (appointment and removal of SEC ALJs); *Hill*, 825 F.3d at 1240 (same); *Tilton*, 824 F.3d at 279-80 (same); *Bebo*, 799 F.3d at 768 (removal); *see also Jarkesy*, 803 F.3d at 16-17 (jury trial, equal protection, and due process); *see also Morris & Dickson Co. v. Whitaker*, No. 18-1406, 2018 WL 6834711, at *1 (W.D. La. Dec. 28, 2018) (appointment and removal of DEA ALJs).

1. The Exchange Act Creates a Comprehensive and Exclusive Review Scheme.

The first step of the *Thunder Basin* analysis looks to the text, structure, and purpose of the statutory scheme. *See Elgin*, 567 U.S. at 10. As the *SEC ALJ Cases* recognize, the Exchange Act reflects an intent to channel review through a detailed review scheme.

The securities laws provide a "comprehensive structure for the adjudication of securities violations in administrative proceedings." *Jarkesy*, 803 F.3d at 16. Specifically, these laws set forth an administrative process that provides respondents the opportunity to be heard and present evidence challenging the charges before an ALJ; to appeal an adverse ALJ initial decision to the Commission; and, if they are aggrieved by the resulting final order, to pursue direct judicial review in a court of appeals. *See, e.g.*, 15 U.S.C. §§ 78u-3(a), 78y(a)(1). These provisions are "nearly identical" to those of the Mine Act, *Jarkesy*, 803 F.3d at 16; *see also Hill*, 825 F.3d at 1242 ("materially indistinguishable"), which the Supreme Court held in *Thunder Basin* was the exclusive means for challenging the constitutionality of actions by the Mine Administration, *see* 510 U.S. at 207-16.

Moreover, the Exchange Act—like the Mine Act—expressly makes court of appeals jurisdiction over challenges to the Commission's final orders "exclusive." *Compare* 15 U.S.C. § 78y(a)(3), *with* 30 U.S.C. § 816(a)(1). And, also like the Mine Act, the Exchange Act provides for limited district court jurisdiction in special circumstances inapplicable here. *See Bennett*, 844 F.3d at 181; *Hill*, 825 F.3d at 1244 (collecting provisions). The decision to authorize district court review only for certain types of claims "demonstrates that Congress knew how to provide alternative forums for judicial review based on the nature of a[] . . . claim," but that it "intended no such exception" for all other claims. *Elgin*, 567 U.S. at 13; *see also Arch Coal*, 888 F.3d at 499 ("express[] authoriz[ation]" of district court jurisdiction "in only two narrow circumstances . . . leaves no role for district court review of [other cases]").

In response, Plaintiffs throw several arguments against the wall, each of which

has already been soundly rejected in the *SEC ALJ Cases*. They first seek a harbor in the Exchange Act's "savings clause," which states that the "rights and remedies" under the Act "shall be in addition to any and all other rights and remedies that may exist at law or in equity." Pls.' Mem. of P. & A. ("Pls.' Mem.") at 5-6, ECF No. 3-2 (quoting 15 U.S.C. § 78bb(a)(2)). They argue that that a "substantially similar savings clause" has been held to cut in support of preserving district court jurisdiction. *Id.* (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 144-45 (1967), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977)). But, as *Hill* and *Bennett* have already recognized, *Abbott Laboratories* is distinguishable. There, the Court's holding "rested on the narrow nature of the review statute at issue," which provided for "'*special* review procedures' only for 'certain enumerated kinds of regulations.'" *Hill*, 825 F.3d at 1244 (quoting *Abbott Labs.*, 387 U.S. at 141). Because that provision did not cover the plaintiff's particular claim, the Court concluded that "only those special agency decisions covered by the statute must be resolved under the review scheme," a conclusion "buttressed" by the savings clause. *Hill*, 825 F.3d at 1244. However, here, just as in *Hill*, the language of § 78y clearly covers Plaintiffs' claims, and thus *Abbott Laboratories* does not apply. *See id.*; *accord Bennett*, 844 F.3d at 183.[4]

Next, Plaintiffs argue that § 78y only allows for review of "final order[s]" and Plaintiffs are not challenging a final order, but rather the "*process* leading to a final decision." Pls.' Mem. at 7. The *SEC ALJ Cases* rejected this argument too. *See, e.g.*, *Tilton*, 824 F.3d at 283 (plaintiff argued that harm from "exposure to the ongoing proceeding—as distinct from any adverse ruling that might result"—warranted

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[4] Plaintiffs also argue that the Supreme Court has stated that § 78y "does not expressly . . . or implicitly" limit district court jurisdiction, Pls.' Mem. at 5 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 489 (2010)); *id.* at 8 (same), but this quote is "taken out of context" and "distinguishable on the facts" from this case, *Bennett*, 844 F.3d at 182 (addressing same quotation), because it concerned challenges to actions of the PCAOB under § 78y, not challenges to actions of the *Commission*, like Plaintiffs', *see infra* p. 12.

injunction). In *Hill*, the Eleventh Circuit held that § 78(y) demonstrated Congress's intent that "any challenge to a final Commission order, even one framed as a constitutional challenge to the *administrative process itself* . . . receive judicial review" in the court of appeals. 825 F.3d at 1243 (emphasis added). Because Plaintiffs seek to challenge an administrative proceeding that "if allowed to proceed, necessarily will result in a final order," their constitutional challenge is "essentially [an] objection[] to [a] forthcoming Commission order[]." *Id.* Indeed, Plaintiffs' interpretation of § 78y as permitting preemptive challenges before an administrative proceeding can be completed would turn Congress's administrative process on its head, allowing, as a matter of course, parties to short-circuit any administrative proceeding by running to district court before the Commission can issue a final decision. In fact, it would allow parties to fully litigate a proceeding before an ALJ, and then, if dissatisfied with the ruling, seek district court review before the Commission could act on the initial decision. That is not what Congress intended. *See Sturm, Ruger & Co., Inc. v. Chao*, 300 F.3d 867, 876 (D.C. Cir. 2002) (court has "obligation to respect the review process by Congress" by preventing plaintiff from "mak[ing] an end run around that process by going directly to district court.").

Plaintiffs also claim that the Exchange Act cannot preclude district court jurisdiction because the statute itself allows the SEC to proceed "either [in] district court or the administrative forum." Pls.' Mem. at 8; *see also id.* at 9. But "Congress granted the choice of forum to the *Commission*, and that authority could be for naught if respondents [in administrative proceedings] could countermand the Commission's choice by filing a court action." *Jarkesy*, 803 F.3d at 17; *see also Hill*, 825 F.3d at 1243-44 (same); *Tilton*, 824 F.3d at 282 n.3 (same). Thus, the choice of forum granted to the SEC does nothing to indicate that *Plaintiffs* may circumvent an ongoing administrative proceeding by filing suit in district court.

Finally, Plaintiffs suggest that § 78y cannot bar jurisdiction because the review provision is "limited to violations of the securities law," not constitutional claims. Pls.'

Mem. at 9. But, the language of the statute is broad, "covering all final Commission orders without exception," which reflects an intent to cover "any challenge to a final Commission order, even one framed as a constitutional challenge to the administrative process itself." *Hill*, 825 F.3d at 1243; *see also Elgin*, 567 U.S. at 13 (pointing to absence of exception for constitutional claims). Nor does it matter that SEC ALJs purportedly lack authority to rule on constitutional claims, *see* Pls.' Mem. at 4; *id.* at 9 n.2, as an administrative review scheme may be exclusive even if the agency "lacks authority to declare a federal statute unconstitutional." *Elgin*, 567 U.S. at 16-17.[5]

2. Plaintiffs' Claim Falls Within the Exchange Act's Review Scheme.

"A claim will be found to fall outside of the scope of" a comprehensive review scheme "in only limited circumstances, when (1) a finding of preclusion might foreclose all meaningful judicial review; (2) the claim is wholly collateral to the statutory review provisions; and (3) the claims are beyond the expertise of the agency." *Arch Coal*, 888 F.3d at 500. Plaintiffs' claim satisfies none of these requirements, and thus falls squarely within the ambit of the Exchange Act's review scheme.

As to the first requirement, Plaintiffs do not dispute that if they do not prevail before the Commission, they will be free to raise their constitutional claim to a court of appeals, which is "fully competent to adjudicate" the claim. *Elgin*, 567 U.S. at 17; *see also* 15 U.S.C. § 78y. Thus, meaningful judicial review—"the most important factor in the *Thunder Basin* analysis," *Bennett*, 844 F.3d at 183 n.7—is plainly available, *see, e.g.*, *Hill*, 825 F.3d at 1245; *Bebo*, 799 F.3d at 774 (meaningful review available because "[a]fter the pending enforcement action has run its course, [plaintiff] can raise her objections in a circuit court of appeals established under Article III").

As to the second requirement, Plaintiffs' claim is not "wholly collateral" to the

[5] For this reason, *Elk Run Coal Co. v. U.S. Department of Labor*, 804 F. Supp. 2d 8 (D.D.C. 2011), *see* Pls.' Mem. at 10, which predates and is inconsistent with *Elgin*, is of little help to Plaintiffs.

review scheme. When a claim "arises out of the enforcement proceeding and provides an affirmative defense" in that proceeding, it is not wholly collateral. *Bennett*, 844 F.3d at 187; *accord Tilton*, 824 F.3d at 288. Even a facial constitutional challenge that an agency believes it lacks authority to adjudicate is not "wholly collateral" to a review scheme when it serves as "the vehicle by which" a party seeks to reverse agency action. *Elgin*, 567 U.S. at 22. Here, the sole object of Plaintiffs' constitutional claim is to prevent the SEC from continuing the enforcement proceedings. *See* Compl. at 23, ECF No. 1 (prayer for relief). Thus, their claim is "inextricably intertwined with the conduct of the very enforcement proceeding the statute grants the SEC the power to institute and resolve as an initial matter." *Jarkesy*, 803 F.3d at 23 (citation omitted).[6]

And as to the third requirement, though Plaintiffs' removal claim does not concern the industry-specific issues the SEC typically addresses, a "broader conception of agency expertise [applies] in the jurisdictional context." *Tilton*, 824 F.3d at 289. In *Elgin*, the Supreme Court held that the MSPB could "apply its expertise" to a facial constitutional challenge to a statute—even though it disclaimed authority to adjudicate that challenge—because the claim could "involve other statutory or constitutional claims," the resolution of which "in the employee's favor might fully dispose of the case." 567 U.S. at 22-23. In other words, because the plaintiff could prevail on the underlying claims and thereby moot the constitutional claim, the latter fell within the agency's expertise. *Id.* at 23; *see also Bennett*, 844 F.3d at 187-88 (SEC "could bring its expertise to bear here by concluding that the . . . substantive claims are meritless, thereby fully disposing of the case before reaching the constitutional question"); *Hill*, 825 F.3d at 1250 ("As in *Elgin*, here the Commission might decide that the SEC's substantive claims are meritless and thus would have no need to reach the constitutional claims."). So too here. Indeed, this conclusion is consistent with the

[6] *Hill* and *Bebo* declined to decide this factor, as the other factors clearly demonstrated that jurisdiction was precluded. *See Hill*, 825 F.3d at 1252; *Bebo*, 799 F.3d at 774.

basic principle of constitutional avoidance. "[O]ne of the principal reasons to await the termination of agency proceedings is to obviate all occasion for judicial review." *FTC v. Standard Oil*, 449 U.S. 232, 244 n.11 (1980) (citation omitted).

Thus, this case is indistinguishable from the *SEC ALJ Cases*. And Plaintiffs have identified no legitimate basis for distinguishing those decisions.

First, Plaintiffs erroneously suggest that *Free Enterprise* controls this case. Pls.' Mem. at 11-14. All five courts of appeals to have decided the issue disagree. *See Bennett*, 844 F.3d at 186; *Hill*, 825 F.3d at 1247-48; *Tilton*, 824 F.3d at 288-89; *Bebo*, 799 F.3d at 774; *Jarkesy*, 803 F.3d at 19-20; *see also Morris & Dickson*, 2018 WL 6834711, at *9 (rejecting argument that *Free Enterprise* was "on all fours" with post-*Lucia* challenge to removal of DEA ALJs).[7]

In *Free Enterprise*, the Supreme Court held that the Exchange Act did not preclude district court jurisdiction over a challenge to the removal protections for members of the PCAOB, a self-regulatory organization subject to SEC oversight. 561 U.S. at 489-91. Central to this conclusion, however, was the fact that the plaintiffs lacked a guaranteed path to federal court because § 78y "provides only for judicial review of *Commission* action," not of PCAOB action, "and not every [PCAOB] action is encapsulated in a final Commission order or rule." *Id.* at 490. Thus, absent district court jurisdiction, a plaintiff seeking to challenge the PCAOB's existence would either need to challenge a "random" PCAOB rule—an option the Court found "odd" because the Exchange Act only made "*new* rules, and not existing ones . . . subject to challenge"—or violate the law—"bet[ting] the farm" by courting potential "severe punishment" just to get their day in court. *Id.* Neither of these options were considered "meaningful." *Id.* at 491.

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[7] Plaintiffs suggest that all of the *SEC ALJ Cases* "fatally . . . ignore or dismiss" *Free Enterprise*. Pls.' Mem. at 16-17. As noted, none of the cases "ignore[d]" *Free Enterprise*. Rather, they properly distinguished it and correctly held that challenges just like Plaintiffs' are governed by the Supreme Court's later decision in *Elgin*.

As the *SEC ALJ Cases* observe, Plaintiffs sit in a far different position here. They need not "erect a Trojan-horse challenge to an SEC rule" in order to "have [their] claims heard." *Jarkesy*, 803 F.3d at 20; *accord Bennet*, 844 F.3d at 186. Instead, § 78y guarantees that they can raise their constitutional claim before a court of appeals, assuming they do not prevail in the administrative forum. Nor do they need to invite punishment; they must simply raise their claim in a proceeding that has already begun. *See Hill*, 825 F.3d at 1248 (plaintiffs "need not bet the farm to test the constitutionality of SEC ALJs' appointment process" where they "have already taken the actions that allegedly violated securities laws"); *Bebo*, 799 F.3d at 774 (same).[8]

Similarly, though Plaintiffs suggest that their claim is "wholly collateral" under *Free Enterprise* because it goes to the validity of the administrative proceeding, Pls.' Mem. at 12-13; *see also id.* at 6, they "misconceive[]" how courts "have understood the term." *Jarkesy*, 803 F.3d at 23. As discussed above, Plaintiffs' claim arises directly out of the pending SEC administrative proceeding, and their challenge provides an affirmative defense in that proceeding. *See Bennett*, 844 F.3d at 187. Indeed, Plaintiffs have raised this very claim as a ground to dismiss the proceeding.[9] By contrast, in *Free Enterprise*, the plaintiffs were not subject to any ongoing administrative proceeding, so their constitutional "claim was not moored to any proceeding that would provide for

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[8] Similarly, *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), cited at Pls.' Mem. at 5, is inapposite. There, the Court permitted undocumented aliens to challenge an agency procedure without undergoing an administrative deportation proceeding because doing so would require them to "voluntarily surrender themselves for deportation," which was "tantamount to a complete denial of judicial review for most undocumented aliens." 498 U.S. at 496-97. In other words, unlike Plaintiffs, those individuals would need to "bet the farm" in order to seek judicial review, *Free Enterprise*, 561 U.S. at 490. *See, e.g.*, *Jarkesy*, 803 F.3d at 20-21 (distinguishing *McNary* on this ground); *see also Bebo*, 799 F.3d at 775 n.3 (same).

[9] Plaintiffs' other claim, not at issue in this motion—that the SEC failed to follow its own procedures, Compl. ¶¶ 110-16—also arises directly out of the administrative proceedings.

an administrative adjudication and subsequent judicial review." *Tilton*, 824 F.3d at 288.

Finally, Plaintiffs misleadingly claim that Defendants "conceded" in *Hill* that the removal claim in that case was "outside the Commission's expertise." Pls.' Mem. at 14 (quoting *Hill*, 825 F.3d at 1251 n.8). Plaintiffs take this quote out of context as well. Though their claim is certainly outside of the SEC's ordinary statutory bailiwick, contrary to Plaintiffs' assertion, *id.* at 6-7, that is not the relevant inquiry under *Thunder Basin*. Rather, as *Hill* itself understood, "the Commission's expertise could be brought to bear" even on a removal claim just like Plaintiffs' because "the Commission might decide that the . . . substantive claims are meritless and thus would have no need to reach the constitutional claims." 825 F.3d at 1250-51; *accord Elgin*, 567 U.S. at 23 (same); *Bennett*, 844 F.3d at 187-88 (same); *Tilton*, 824 F.3d at 290 (same); *Bebo*, 799 F.3d at 773 (same); *Jarkesy*, 803 F.3d at 29 (same).[10]

Second, although Plaintiffs do not dispute that they can have their claim fully adjudicated by a court of appeals, they argue that this would not be meaningful review because it would "occur only *after* . . . a hearing before an unconstitutional officer." Pls.' Mem. at 10-11. However, courts have consistently rejected this exact argument as a basis for subverting the scheme established by Congress. It was unanimously rejected in the *SEC ALJ Cases*. *See, e.g.*, *Hill*, 825 F.3d at 1245-46 (rejecting argument that post-proceeding review "cannot cure the injury [plaintiffs] will suffer—enduring an unconstitutional administrative process"); *Tilton*, 824 F.3d at 286 ("[B]eing subject[] to an unconstitutional adjudicative procedure . . . alone does not render post-proceeding judicial review less than meaningful." (citation omitted)); *Bebo*, 799 F.3d at

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[10] Plaintiffs suggest the Sixth Circuit's post-*Lucia* decision, *Jones Brothers, Inc. v. Secretary of Labor*, 898 F.3d 669 (5th Cir. 2018), is to the contrary. Pls.' Mem. at 13. It is not. The Sixth Circuit recognized that requiring a plaintiff to proceed through an administrative process "still make[s] good sense," even if an agency has "no authority to invalidate the statutes at issue," because "the crucible of administrative review ensures that the petitioner's case presents a true constitutional dispute before the Judiciary steps in to decide those weighty issues." *Jones Bros.*, 898 F.3d at 675-76.

775 ("Every person hoping to enjoin an ongoing administrative proceeding could make this argument, yet courts consistently require plaintiffs to use the administrative review schemes established by Congress."); *see also Chau v. SEC*, 72 F. Supp. 3d 417, 434 (S.D.N.Y. 2014) (same). And that decision is squarely consistent with Supreme Court precedent. *See Standard Oil*, 449 U.S. at 244 (holding that burden of defending oneself "in protracted adjudicatory proceedings," even if "substantial," does not justify enjoining proceedings (citation omitted)).[11]

Third, Plaintiffs erroneously try to cast doubt on the validity of the *SEC ALJ Cases*. They suggest that "several of those courts erred in their holdings that the Appointments Clause claim was not valid," which supposedly "call[s] into question their reasoning" on other issues. Pls.' Mem. at 15. Even if true, a reversal on one issue would not somehow invalidate a court's decision on other issues. But Plaintiffs cite to nothing in the *SEC ALJ Cases* evincing these errors, which is not surprising. None of the *SEC ALJ Cases* reached the merits of the Appointments Clause issue, for an

[11] There is no merit to Plaintiffs' suggestion, *see* Pls.' Mem. at 11, that the exception to finality under *Leedom v. Kyne*, 358 U.S. 194 (1958) applies here. The *Leedom* exception, which has been characterized as a "Hail Mary pass" for plaintiffs, *Nyunt v. Chairman, Broadcasting Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009) (Kavanaugh, J.), is limited *only* to the rare circumstance in which the agency has violated a clear *statutory* mandate or has unambiguously exceeded its *statutory* authority. Here, Plaintiffs do not contend that the SEC clearly exceeded its mandate under the Exchange Act or any other statute. Rather, they acknowledge that the ALJs' removal protections are consistent with the relevant statute, but assert that those protections violate the Constitution. In other words, it is purportedly the agency's *compliance* with, not *violation* of, the applicable statute that generates the problem in Plaintiffs' view. The *Leedom* exception does not apply in these instances. *See Morris & Dickson*, 2018 WL 6834711, at *9 ("[N]othing about [*Leedom*] suggests that district court jurisdiction may arise from a violation of open-ended constitutional provisions as interpreted by the Supreme Court."). Nor does it apply where, like here, meaningful judicial review is available. *Amerco v. NLRB*, 458 F.3d 883, 889-90 (9th Cir. 2006) (exception did not apply where "constitutional infirmities . . . can be remedied on petition for review from a final order of the [agency]").

obvious reason: the courts all held they lacked jurisdiction. Similarly, Plaintiffs' attempt to characterize *Thunder Basin* as a "doctrine in disarray" based on slight differences in the reasoning of the *SEC ALJ Cases*, Pls.' Mem. at 16, is bizarre given that all of the courts—addressing claims materially identical to Plaintiffs'—came to the exact same conclusion.

Fourth, Plaintiffs argue that the unanimous view of five courts of appeals is unpersuasive because those courts apparently failed to "consider" the purported fact that Plaintiffs "cannot raise the removal challenge before the agency." *Id.* Plaintiffs, however, can raise their claim to the agency. 15 U.S.C. § 78u (authorizing Commission to hold hearings). Indeed, they have, by filing a motion to dismiss in the administrative proceeding that raises their removal claim. And, in any event, *Elgin* is clear that a plaintiff can be required to raise a constitutional claim in an administrative proceeding even if the agency lacks authority to adjudicate the issue. 567 U.S. at 16-17.

Last, Plaintiffs observe that none of the *SEC ALJ Cases* involved plaintiffs who had raised their challenge to the Supreme Court. Pls.' Mem. at 14-15. That is, of course, true. But the idiosyncratic nature of these particular Plaintiffs does not mean Congress's exclusive review scheme applies any differently to them than to anyone else.

B. The Court Lacks Jurisdiction Because Plaintiff Does Not Challenge Final Agency Action.

The Court lacks subject matter jurisdiction over Plaintiffs' claim for the additional reason that Plaintiffs do not challenge final agency action.

If "the substantive statutes under which [a plaintiff] seeks relief do not provide for a private right of action," then "[t]o obtain judicial review under the APA, [the plaintiff] must challenge a final agency action." *Or. Nat. Desert*, 465 F.3d at 982. "[F]inality is a *jurisdictional* requirement." *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 n. 1 (9th Cir.1990) (citation omitted). An action is final only if it marks "the consummation of the agency's decision making process" and is "one by which rights

or obligations have been determined, or from which legal consequences will flow." *Gallo Cattle Co. v. USDA,* 159 F.3d 1194, 1198 (9th Cir. 1998) (citation omitted).

In this case, the only private right of action properly invoked by Plaintiffs is the APA. Compl. ¶ 15 (citing 5 U.S.C. §§ 702 and 706). Yet Plaintiffs do not challenge any SEC action that could be considered final. The administrative proceeding is ongoing. The Commission has not yet issued a final order; indeed, the ALJ has not even scheduled a hearing. Plaintiffs' mere participation in the administrative process does not impose legal consequences until that process is complete. *San Diego v. Whitman*, 242 F.3d 1097, 1102 (9th Cir. 1998) (for action to be final it must "impose an obligation, deny a right or fix some legal relationship"). No sanction can be imposed on Plaintiffs until the Commission issues a final order. And Plaintiffs could prevail before the Commission, and thus never face any agency action imposing legal obligations. Thus, until the administrative proceeding is complete, there is no final action by the SEC.

To be sure, Plaintiffs' Complaint purports to cite causes of action for their claim other than the APA, but none of these have merit. Plaintiffs' separation of powers claim does not state a separate private right of action outside of the context of Plaintiffs' ongoing administrative proceeding. If it did, any regulated entity could delay adjudication of an ongoing proceeding by pleading a constitutional challenge to the administrative process. *See Standard Oil*, 449 U.S. at 242-43 ("Judicial review . . . should not be a means of turning prosecutor into defendant before adjudication concludes."). Likewise, Plaintiffs' invocation of the Declaratory Judgment Act, Compl. ¶ 15 (citing 28 U.S.C. § 2201), does not create a private right of action.[12] *See Nationwide Mut. Ins.*

[12] If Plaintiffs intend to invoke the All Writs Act, Compl. ¶ 15 (citing 28 U.S.C. § 1651), they plead no facts even suggesting why the Court should take the "drastic" step of exercising its mandamus jurisdiction at this stage of litigation. *See Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654 (9th Cir. 1977); *see also In re United States*, 895 F.3d 1101, 1104

Co. v. Liberatore, 408 F.3d 1158, 1161 (9th Cir. 2005) ("[T]he Declaratory Judgment Act does not by itself confer federal subject-matter jurisdiction . . . .").

Thus, Plaintiffs' claim sounds in the APA, but fails to challenge any final agency action by the SEC. Accordingly, this Court lacks jurisdiction.[13]

C. Properly Construed, the ALJ's Removal Protections Are Constitutional.

Even if the Court were to find that it has jurisdiction, Plaintiffs' claim fails on the merits because the statute governing the removal of SEC ALJs, 5 U.S.C. § 7521, can be construed in a manner consistent with Article II's separation of powers principles.

Article II vests "[t]he executive Power" of the United States in the President, U.S. Const. art. II, § 1, cl. 1, who is charged with the duty to "take Care that the Laws be faithfully executed," *id.* § 3. The President's ability to execute the laws is inextricably linked to his authority to "hold[] his subordinates accountable for their conduct," *Free Enter.*, 561 U.S. at 496, including through the power to remove executive officers, *id.* at 492; *see also Myers v. United States*, 272 U.S. 52, 117 (1926) (Constitution reserves to President the "power of removing those for whom he cannot continue to be held responsible").

The APA provides that an ALJ may be removed by an agency head—here, the

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(9th Cir. 2018).

[13] For similar reasons, the Fifth Circuit has also unequivocally held that a collateral challenge to an ALJ's authority is not ripe for review until the administrative process has concluded. *See, e.g., Energy Transfer Partners, L.P. v. FERC*, 567 F.3d 134 (5th Cir. 2009) (holding that a challenge to an ALJ's statutory authority was unripe until the agency rendered its final decision); *Total Gas & Power N. Am., Inc. v. FERC*, 859 F.3d 325 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 2648 (2018) (holding that a challenge to an ALJ's constitutional authority was unripe until the agency rendered its final decision because any violation of the plaintiff's rights "rests on a series of contingencies and is not a certainty" until the agency issued its final order).

Commission—for "good cause established and determined by" the MSPB, 5 U.S.C. § 7521(a), whose members themselves are removable by the President "only for inefficiency, neglect of duty, or malfeasance in office," *id.* § 1202(d). The Supreme Court has long recognized that Congress may impose limited restrictions on the President's removal power, including, for example, for-cause removal restrictions on the power to remove principal officers of certain independent agencies and for-cause restrictions on a principal officer's ability to remove inferior officers. *See Free Enter.*, 561 U.S. at 493-94 (collecting cases). Nevertheless, relying again on *Free Enterprise*, Plaintiffs argues that the multiple layers of for-cause removal protections in § 7521 violate the separation of powers. Pls.' Mem. at 17-20.

In *Free Enterprise*, the Court struck down statutory removal provisions for members of the PCAOB, who enjoyed "rigorous" protections: A member could be removed only upon a finding by the Commission that the member "willfully violated" the Sarbanes-Oxley Act, the securities law, or the PCAOB's rules; "willfully abused" his authority; or "without reasonable justification or excuse," failed to enforce compliance with the statutes, rules, or PCAOB standards. 561 U.S. at 486, 496 (quoting 15 U.S.C. § 7217(d)(3)). And the Supreme Court assumed that members of the Commission, in turn, were removable by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 487 (citation omitted). The Court held that the "novel" and "unusual" barriers to removal created by this two-tiered scheme left the President with insufficient ability to supervise the PCAOB's execution of the laws. *Id.* at 496.

Contrary to Plaintiffs' claims, however, *Free Enterprise* does not compel the conclusion that § 7521 violates separation of powers principles. The Court in *Free Enterprise* explicitly declined to extend its holding to § 7521's removal protections for ALJs. *Id.* at 507 n.10 (noting that "unlike members of the [PCAOB], many [ALJs] of course perform adjudicative rather than enforcement or policy making functions, or possess purely recommendatory powers" (citations omitted)). Nor does *Free Enterprise*

hold that multiple layers of removal protections are *per se* unconstitutional. While SEC ALJs' status as inferior officers, *see Lucia*, 138 S. Ct. at 2053-55, implicates separation of powers principles, a proper construction of § 7521 would alleviate any constitutional concerns. In particular, construing § 7521 to permit agency heads to remove ALJs for performance-related reasons, subject to limited review by the MSPB, would provide constitutionally sufficient supervision, consistent with Article II.

The term "good cause" is undefined in the APA. Naturally read, it authorizes removal of an ALJ for misconduct, poor job performance, or failure to follow lawful directives. At the time of the APA's enactment, the term was understood to refer simply to a "[s]ubstantial" or "[l]egally sufficient ground or reason." Black's Law Dictionary 822 (4th ed. 1951). When specifically referring to employer actions, the term's conventional meaning "include[d] any ground which is put forward by authorities in good faith and which is not arbitrary, irrational, unreasonable or irrelevant to the duties with which such authorities are charged." *Id.* There is no reason to believe that Congress, in enacting § 7521, intended to deviate from that well-understood meaning. *See* Administrative Procedure Act—Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess., at 326 (1946) ("[t]he cause found must be real and demonstrable," and based on "facts and considerations warranting the finding").

Thus, "good cause" is best read to include an ALJ's failure to perform adequately or to follow agency policies, procedures, or instructions. *See Morrison v. Olson*, 487 U.S. 654, 724 n.4 (1988) (Scalia, J., dissenting) (explaining that constitutionally permissible authority to remove an officer "for cause . . . would include, of course, the failure to accept supervision"). This construction provides agencies with constitutionally sufficient latitude to remove an ALJ for appropriate job-related reasons, thereby ensuring the agency heads' control—and by extension, the President's—over inferior officers. Not only does this reflect the best reading of the text, but it is also supported by well-established principles of constitutional avoidance. *See Pub. Citizen v. DOJ*, 491 U.S. 440, 466 (1989). Under this construction,

an ALJ would still be protected from removal for invidious reasons otherwise prohibited by law. *See, e.g.*, 42 U.S.C. § 2000e-16(a) (prohibiting "discrimination based on race, color, religion, sex, or national origin" in agency personnel actions). And the President and his principal officers would be restrained from removing ALJs in order to influence the outcome of any particular adjudication. *See Myers*, 272 U.S. at 135 ("[T]here may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control."); *see also Ramspeck v. Fed. Trial Exam'rs Conf.*, 345 U.S. 128, 142-43 (1953) (hearing examiners may not be removed "at the whim or caprice of the agency or for political reasons").

Although this construction would still involve multiple layers of protection for ALJs at independent agencies, it comports with the constitutional requirements recognized in *Free Enterprise*. The intrusion on presidential authority is significantly less than under the "unusually high standard" for removal invalidated in *Free Enterprise*, under which even a member who committed a crime not specifically mentioned in the Sarbanes-Oxley Act would be entitled to keep his position. 561 U.S. at 503. Under the natural reading of "good cause," an ALJ would be removable for failure to accept lawful supervision or perform his or her duties adequately. Thus, ALJs could be held accountable by the Heads of Departments, and the President who appointed them, for failure to execute the laws faithfully, mitigating the constitutional concerns with multiple levels of removal protection.

Additionally, if the Court were to reach the removal issue, it should further construe § 7521—which requires that cause be "established and determined by the" MSPB—to mean that MSPB review is limited to determining whether factual evidence exists to support the agency's proffered, good-faith grounds. In other words, the MSPB would determine only whether facts exist to support the agency's determination, not (as it currently does) whether in the MSPB's view those facts amount to "good

cause" and also justify the sanction sought by the agency. Reading the statute in this way enables the Heads of Departments to retain primary control in the decision to remove ALJs, further providing them with constitutionally adequate authority to ensure the faithful execution of the law. This construction is well within the range of constructions available under the canon of constitutional avoidance. *See Ramspeck*, 345 U.S. at 142 (APA "leaves with the agency the responsibility" to determine if unneeded hearing examiners should be discharged, subject to appeal to Civil Service Commission to "prevent any devious practice by an agency which would abuse" that power).[14]

II. PLAINTIFFS CANNOT SHOW THAT IRREPARABLE HARM WILL RESULT FROM ALLOWING THE ADMINISTRATIVE PROCEEDING TO CONTINUE.

Plaintiffs' motion also fails because they cannot show irreparable harm.

First, and most importantly, until the Commission renders a final decision, Plaintiffs are not subject to any penalties. After the decision in *Lucia*, the prior final order was vacated and Plaintiffs' proceeding reassigned to ALJ Foelak. Since re-assignment, no hearing has yet been scheduled.[15]

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[14] 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 then the Court should invalidate only the portion or portions of § 7521 that cannot be interpreted to accord agency heads appropriate supervision of ALJs as inferior officers within their agencies and leave the remaining portions of the statute fully operative. Plaintiffs do not argue otherwise.

[15] Plaintiffs conflate the harm they are allegedly suffering from the present proceeding—which has not resulted in any sanctions because the Commission has not issued a final order—with the harm that arose from the now-vacated proceedings. Declaration of Raymond J. Lucia at p.9 ¶ 25, ECF No. 3-3. Though Mr. Lucia's professional reputation may have been impacted by those now-vacated proceedings, that harm was addressed by the Supreme Court's decision. Any reputational harm incurred from the first proceedings cannot be remedied by the issuance of an injunction halting the present proceedings. *Cf. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 34 (D.D.C. 2016) (refusing to issue preliminary

Next, Plaintiffs admits that the alleged irreparable harm is not "a matter of the costs and burdens of litigation," Pls.' Mem. at 21, which squares soundly with Supreme Court precedent holding that "the expense and annoyance of litigation," even if substantial, "is part of the social burden of living under the government," and is not irreparable harm. *Standard Oil*, 449 U.S. at 244 (citation omitted). Instead, they assert that they will suffer irreparable harm from the fact of participation in an allegedly unconstitutional proceeding. Pls.' Mem. at 21. But that too is wrong. *See Tilton*, 824 F.3d at 287 ("[P]ost-proceeding relief . . . suffices to vindicate the litigants constitutional claim."); *Bennett*, 844 F.3d at 184-85 ("The burden of defending oneself in an unlawful administrative proceeding, however, does not amount to irreparable injury."); *Home Loan Bank Bd. v. Mallonee,* 196 F.2d 336, 380 (9th Cir. 1952) (""[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted, and this is true though it be asserted (as here) that the mere holding of the prescribed administrative hearing would result in irreparable damage.").[16]

Further, any potential constitutional injury is plainly reparable. After all, should Plaintiffs not prevail before the Commission, they will have their constitutional claim

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injunction where plaintiff "cannot demonstrate that the temporary relief it seeks here . . . can prevent the harm" complained of).

[16] *Valley v. Rapides Parish School Board*, 118 F.3d 1047 (5th Cir. 1997), *see* Pls.' Mem at 20, does not stand for the proposition that participation in a purportedly invalid proceeding is an irreparable injury. There, the Fifth Circuit affirmed an injunction reinstating a school superintendent who had been removed from her position following a hearing that violated her constitutional rights because it was biased against her. *Valley,* 118 F.3d at 1053-55. The court found irreparable harm not because of the unconstitutional proceeding alone, but rather because of the injury to the plaintiff's reputation and her ability to find future employment. *Id.* at 1056. But here, Plaintiffs currently face no sanctions from the administrative proceeding and will not until the Commission issues a final order. Even then, they could seek a stay of any sanction pending appeal from the Commission and, if denied that relief, from the court of appeals. Nor are there any facts showing actual bias against Plaintiffs.

adjudicated in federal court; they cannot be irreparably injured just because they must raise it at the time and in the place Congress has specified. *See Pub. Util. Comm'r of Or. v. Bonneville Power Admin.*, 767 F.2d 622, 630 (9th Cir. 1985) (holding that "delaying review until after [final agency action] will not prevent petitioners from obtaining full and effective relief"); *see also Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984) (a preliminary injunction is "a device for preserving the status quo and preventing the irreparable loss of rights before judgment").

III. THE BALANCE OF HARMS AND THE PUBLIC INTEREST WEIGH AGAINST AN INJUNCTION.

The third and fourth injunctive factors, the balance of harms and the public interest, "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418 (2009). These factors support denying Plaintiffs' motion.

The Commission is statutorily charged with protecting investors, promoting capital formation, and ensuring market integrity by enforcing the securities laws. Congress has recognized the importance of "enabl[ing] the SEC to move quickly in administrative proceedings." S. Rep. No. 101-337. The underlying case involves allegations that Plaintiffs violated antifraud and other provisions of the Investment Advisers Act for misleading advertising while promoting their "Buckets of Money" investment scheme. In the initial proceeding, since vacated, the Commission found that Plaintiffs did indeed violate the Act. *Lucia*, 138 S. Ct. at 2050. An injunction would interfere with the Commission's enforcement efforts and result in the type of delay that Congress sought to avoid by authorizing the SEC to use administrative proceedings. *Cf. Maryland v. King*, 133 S. Ct. 1, 3 (2012) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *see also Morris & Dickson*, 2018 WL 6834711, at *11 (observing that allowing parties to enjoin ongoing administrative proceedings in district court "would effectively derail the administrative process for the time required for judicial review of the constitutional claims," which would inhibit agencies' ability "to

do what [Congress] created them to do—enforce Acts of Congress").

Plaintiffs argue that the injunction would actually be in the SEC's interests because it "should welcome a definitive ruling" before it "wast[es] its time and government resources." Pls.' Mem. at 22. But the SEC's ALJs are not acting with unconstitutional authority. *See supra* Pt. I.C. And, an injunction necessarily would interfere with the Commission's statutory role in enforcing the securities laws and would flout the exclusive scheme Congress established for review of SEC actions. Moreover, Plaintiffs may prevail in the administrative proceeding, and the public interest is not served by forcing the Court to decide a constitutional issue that may be mooted.

Plaintiffs also argue that the SEC would not be harmed by an injunction because the SEC could have filed a complaint against Plaintiffs in district court. Pls.' Mem. at 22. But Congress made a determination that the public interest would be served by allowing the SEC to choose its forum. That determination is entitled to the Court's respect. *Cf. INS v. Legalization Assistance Proj.*, 510 U.S. 1301, 1306 (1993) (staying district court injunction interfering with government's execution of immigration statute as "an improper intrusion by a federal court into the workings of a coordinate branch of the Government").

Finally, as discussed above, Plaintiffs face no irreparable injury sufficient to outweigh the interests of Defendants and the public. Therefore, the balance of harms and the public interest also weigh against a preliminary injunction.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' motion.

Dated: March 8, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ROBERT S. BREWER, JR.
United States Attorney

CHRISTOPHER R. HALL
Assistant Branch Director
Federal Programs Branch

/s/ Chetan A. Patil
CHETAN A. PATIL
CESAR A. LOPEZ-MORALES
REBECCA CUTRI-KOHART
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box No. 883
Ben Franklin Station
Washington, DC 20044
Tel.: (202) 305-4968; Fax: (202) 616-8470
Email: chetan.patil@usdoj.gov

Attorneys for Defendants

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

September 24, 2019

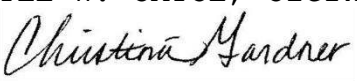
MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 19-10396 Michelle Cochran v. SEC, et al
USDC No. 4:19-CV-66

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Christina A. Gardner, Deputy Clerk
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Ms. Karen S. Mitchell
Mr. Ashley Charles Parrish
Mr. Joshua Marc Salzman
Mr. Brian Walters Stoltz

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10396

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

Appeal from the United States District Court
for the Northern District of Texas

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that Appellant's motion for an injunction pending appeal under Federal Rule of Appellate Procedure 8 is GRANTED.