No. 16-906

IN THE

Supreme Court of the United States

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

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONERS

THEODORE B. OLSON
Counsel of Record
MARK A. PERRY
AMIR C. TAYRANI
JASON NEAL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

RANDY M. MASTRO
CAITLIN J. HALLIGAN
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue, 47th Floor
New York, NY 10166-0193
(212) 355-4000

SUSAN BRUNE
BRUNE LAW P.C.
450 Park Avenue
New York, NY 10022
(212) 668-1900

Counsel for Petitioners

RULE 29.6 STATEMENT

The corporate-disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

REPLY BRIEF FOR PETITIONERS 1

I. THE COURT SHOULD GRANT REVIEW OF THE JURISDICTIONAL QUESTION 2

II. THE COURT SHOULD GRANT REVIEW OF THE APPOINTMENTS CLAUSE QUESTION 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Cases

In re al-Nashiri,
791 F.3d 71 (D.C. Cir. 2015) 5, 6

Bandimere v. SEC,
844 F.3d 1168 (10th Cir. 2016) 2, 7

Bond v. United States,
564 U.S. 211 (2011) 6

Buckley v. Valeo,
424 U.S. 1 (1976) 2

Edmond v. United States,
520 U.S. 651 (1997) 11

Elgin v. Dep't of Treasury,
567 U.S. 1 (2012) 6, 7

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) 1, 3, 4, 7, 8

Freytag v. Comm'r,
501 U.S. 868 (1991) 2, 11

FTC v. Standard Oil Co. of Cal.,
449 U.S. 232 (1980) 4, 5

Mitchell v. Forsyth,
472 U.S. 511 (1985) 11

Nixon v. Fitzgerald,
457 U.S. 731 (1982) 11

Thunder Basin Coal Co. v. Reich,
510 U.S. 200 (1994) 2, 7

Zivotofsky v. Clinton,
566 U.S. 189 (2012) 10

REPLY BRIEF FOR PETITIONERS

This case presents the Court with the opportunity to provide an authoritative answer to a constitutional question that has confounded the lower courts: whether the SEC's procedures for appointing its administrative law judges ("ALJs") are consistent with the Appointments Clause. Yet, the SEC urges this Court to deny review because Congress supposedly intended that litigants be required to defend themselves before an unconstitutionally appointed agency adjudicator, and suffer the irreparable deprivation of their constitutional rights, prior to raising an Appointments Clause challenge in federal court.

The SEC's attempt to slam the courthouse door on petitioners is incompatible with this Court's holding in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), that the federal securities laws did not preclude district court jurisdiction over an Appointments Clause challenge to the members of the PCAOB. *Id.* at 489-91. According to the SEC and the Second Circuit, "the opportunity to challenge a final agency order 'suffices to vindicate [petitioners'] constitutional claim.'" Opp. 12 (quoting Pet. App. 17a). But the Court's unanimous jurisdictional ruling in *Free Enterprise Fund* leaves no doubt that immediate judicial review in a district court is available where the plaintiff is "object[ing]" on constitutional grounds to the appointment of an agency's officials. 561 U.S. at 490.

This Court's decisions make equally clear that the SEC's mode of selecting its ALJs—who wield "'significant authority'" in administrative proceedings but are not appointed by the President, the Judiciary, or the Head of a Department—is incon-

sistent with the Appointments Clause. *Freytag v. Comm'r*, 501 U.S. 868, 881 (1991) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)). One court of appeals already has reached that conclusion, *see Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), *pet. for reh'g denied*, No. 15-9586 (10th Cir. May 3, 2017), and the only appellate decision upholding the SEC's appointment procedures has been set for rehearing en banc. Order at 1, *Raymond J. Lucia Cos. v. SEC*, No. 15-1345 (D.C. Cir. Feb. 16, 2017) ("*Lucia* Order").

The SEC makes no serious effort to reconcile its appointment procedures with this Court's precedent. And once the Second Circuit's illusory jurisdictional barrier is removed, there is no reason for the Court to pass up this opportunity to resolve that constitutional question. The SEC's plea for delay would needlessly prolong the uncertainty among the lower courts and give the agency license to continue compelling litigants to defend themselves before its unconstitutionally selected judges.

The petition should be granted on both questions.

I. THE COURT SHOULD GRANT REVIEW OF THE JURISDICTIONAL QUESTION.

The SEC rests its defense of the Second Circuit's jurisdictional ruling on Congress's "creat[ion]" of "a comprehensive scheme for . . . judicial review of proceedings brought by" the Commission, Opp. 2, which will supposedly afford petitioners "'meaningful judicial review of their Appointments Clause claim'" under *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). Opp. 12 (quoting Pet. App. 20a). But the SEC's invocation of that so-called "comprehensive scheme" simply begs the question presented in this case: whether when Congress channeled judicial review of *the outcome* of SEC administrative proceed-

ings into the courts of appeals, it also intended to foreclose challenges to *the constitutionality* of those proceedings until after the SEC has ruled against the party compelled to defend itself in that unconstitutional proceeding. This Court unambiguously rejected that proposition in *Free Enterprise Fund*, where it held that the federal securities laws do not preclude jurisdiction over Appointments Clause challenges in which a plaintiff is "object[ing] to the . . . *existence*" of an administrative body, rather than to a particular decision rendered by the agency. 561 U.S. at 490 (emphasis added).

The SEC attempts to distinguish *Free Enterprise Fund* by emphasizing that, "[u]nlike the accounting firm in [that case], petitioners need not challenge a random action of the Commission, nor must they flout a Commission order, to create an opportunity to test the validity of an ALJ appointment" because they "are *already* subject to" an administrative proceeding. Opp. 11. That argument misses the point of *Free Enterprise Fund* entirely. The reason that it made no sense to infer that Congress had required the plaintiff in that case to engage in those artificial exercises was because the plaintiff's challenge was "not to any of [the Board's] auditing standards" but "to the Board's existence" itself. 561 U.S. at 490.

The same is true here. Petitioners are not "aggrieved by" any particular "order" issued by the ALJ or the Commission in the administrative proceeding against them, Opp. 11; they instead filed suit to avoid being forced to appear before an unconstitutionally appointed ALJ *at all*. As this Court recognized in *Free Enterprise Fund*, there is no reason to believe that Congress would have intended to foreclose district court jurisdiction over a threshold constitutional objection unconnected to the merits of an

administrative proceeding. The fact that parties "in other SEC proceedings" (*ibid.*) have decided to run the gauntlet of unconstitutional SEC proceedings before raising Appointments Clause challenges in a court of appeals does not suggest that Congress *required* them to suffer that irreparable harm as the price of admission to an Article III forum.

Because petitioners are raising a constitutional challenge to the existence of the SEC's ALJs, "obtain[ing] vacatur of an unfavorable Commission order" at the conclusion of the SEC proceedings will not provide them with "'access to meaningful judicial review.'" Opp. 12 (quoting Pet. App. 20a). *Free Enterprise Fund* explicitly rejected the proposition that "win[ning] access to a court of appeals" by losing before an agency is "meaningful judicial review" for an Appointments Clause claim. 561 U.S. at 489-90. The reason is simple: vacatur of a Commission order rendered at the conclusion of the administrative proceeding would not redress the constitutional harm to petitioners from being forced to defend themselves before an unconstitutionally appointed agency adjudicator.

Rather than acknowledge the significance of this constitutional injury, the SEC recharacterizes petitioners' complaint as an objection to the "expend[iture of] resources in an administrative proceeding" and argues that, under *FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980), mere "expense and annoyance" is an insufficient basis for challenging an ongoing agency proceeding in federal court. Opp. 12-13 (internal quotation marks omitted). *Standard Oil*, however, involved a completely different legal theory and alleged injury from those at issue here. In *Standard Oil*, the plaintiff filed suit in district court to challenge the merits of the FTC's

administrative complaint against it, arguing that "the [FTC] had issued its complaint without having 'reason to believe' that [the plaintiff] was violating" the law. 449 U.S. at 235. The Court held that, despite the "expense and disruption of defending itself" in the agency proceeding, the plaintiff was required to wait for final agency action to challenge the merits of the FTC's allegations in federal court. *Id.* at 244. Here, in contrast, petitioners' injury is not "[m]ere litigation expense," *id.* (internal quotation marks omitted), but the irreparable harm of being compelled to defend themselves before an unconstitutionally appointed agency adjudicator. And, unlike the plaintiff in *Standard Oil*, petitioners did not ask the district court to pretermit altogether the SEC's resolution of the charges against them, but only to ensure that those allegations are heard by an agency official selected in conformity with the requirements of the Appointments Clause.

The SEC also cites *In re al-Nashiri*, 791 F.3d 71 (D.C. Cir. 2015), for the proposition that vacatur "fully vindicate[s] an Appointments Clause claim." Opp. 12 (internal quotation marks omitted). In *al-Nashiri*, however, the D.C. Circuit rejected a petition for a writ of mandamus, "a drastic remedy, to be invoked only in extraordinary circumstances." 791 F.3d at 78-79 (internal quotation marks omitted). The case had nothing to do with the availability of "meaningful judicial review" under *Thunder Basin*. Moreover, unlike here, the petitioner in *al-Nashiri* did not allege that he was being tried in an unconstitutional forum, but rather challenged only "the com-

position of an intermediate appellate tribunal" set to hear an interlocutory appeal. *Id.* at 81.*

The SEC's treatment of the remaining two *Thunder Basin* factors is equally flawed. The SEC contends that petitioners' Appointments Clause claim is not "'wholly collateral'" to the administrative proceeding because it is "'the vehicle by which they seek' to prevail" before the agency. Opp. 14 (quoting *Elgin v. Dep't of Treasury*, 567 U.S. 1, 22 (2012)). But petitioners' complaint did not challenge the substance of the SEC's allegations against them, and even if petitioners prevail in this case, the Commission would be free to pursue the same allegations against them in the same administrative proceeding as long as a constitutionally appointed adjudicator presides over the hearing. *See* Compl. ¶ 14 (petitioners' "claims do not depend upon the facts of this particular case"). In *Elgin*, in contrast, the plaintiffs' suit seeking reinstatement of their federal employment was not collateral to the Merit Systems Protection Board's proceedings because it was "precisely

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* The SEC also obliquely implies that petitioners' constitutional claim may not be "justiciable." Opp. 13 n.3 (citing *Bond v. United States*, 564 U.S. 211 (2011)). But the SEC has never previously suggested (and it cannot quite bring itself to do so now) that petitioners lack standing or otherwise do not present a cognizable dispute under Article III—arguing instead that Congress has "'implicitly'" precluded district court jurisdiction over petitioners' Appointments Clause claim. Opp. 5 (quoting Pet. App. 4a). That strategic decision is understandable, as petitioners are not simply members of the public "complaining . . . that their Government is violating the law," but rather seek redress for the "concrete and particular" injury of being forced to defend themselves before an unconstitutionally appointed adjudicator. *Bond*, 564 U.S. at 225 (internal quotation marks omitted).

the type of personnel action regularly adjudicated" within the administrative scheme Congress had established. 567 U.S. at 22. If the *Elgin* plaintiffs had succeeded in their suit, the court would have afforded them the same relief available from the agency—which is not the case here, where the merits of the SEC's complaint against petitioners will not be resolved by this litigation.

Finally, the SEC argues that it could apply its "expertise" to the Appointments Clause claim "by resolving the case in petitioners' favor on *other grounds*." Opp. 14 (emphasis added). That is directly at odds with *Thunder Basin* itself, which "conclude[d] that exclusive review before the" Federal Mine Safety and Health Commission was "appropriate since agency expertise could be brought to bear *on the statutory questions presented*" in the plaintiff's district court complaint. 510 U.S. at 214 (internal quotation marks and alterations omitted; emphasis added). And this Court has already determined that the Appointments Clause questions presented in petitioners' complaint are "outside the Commission's competence and expertise." *Free Enterprise Fund*, 561 U.S. at 491.

In the face of that unequivocal holding, the SEC argues that it "has expertise that bears directly on resolution of the constitutional claim" because it "knows what its ALJs actually do" and its "views can inform a court's determination of whether" the ALJs' duties make them inferior officers. Opp. 15. The Tenth Circuit, however, has already rejected the SEC's position on the Appointments Clause issue and dismissed the agency's presentation of its ALJs' authority as "incomplete." *Bandimere*, 844 F.3d at 1179-85 & n.25. And the only instance the SEC can identify in which a court "relied on the Commission's

explanation" of its ALJs' authority (Opp. 15) is the panel's opinion in *Lucia*, where the D.C. Circuit has granted rehearing en banc and is considering whether to overrule its earlier Appointments Clause opinion on which the panel relied. *Lucia* Order at 1-2. That is hardly a convincing basis for this Court to abandon its prior assessment of the Commission's lack of expertise in this area.

For all of these reasons, the Second Circuit's jurisdictional ruling is impossible to reconcile with *Free Enterprise Fund*. The SEC nonetheless urges this Court to forgo review because other courts of appeals have committed the same error. Opp. 16-17. But the absence of a circuit split is no impediment to review where important jurisdictional and constitutional questions are presented. *See*, *e.g.*, *Free Enterprise Fund*, 561 U.S. 477. In the absence of this Court's review, litigants such as petitioners will continue to be denied a federal forum in which to seek relief *before* they have suffered irreparable constitutional harm at the hands of an unconstitutionally appointed agency adjudicator. This Court's review is essential to prevent other courts from blindly replicating the errors of the Second Circuit and the other courts of appeals that have considered this jurisdictional question.

II. THE COURT SHOULD GRANT REVIEW OF THE APPOINTMENTS CLAUSE QUESTION.

The SEC acknowledges that the Tenth Circuit and D.C. Circuit have "reached conflicting outcomes" on whether the SEC's procedures for selecting its ALJs are consistent with the Appointments Clause. Opp. 18. In the face of the Tenth Circuit's decision holding those procedures to be unconstitutional, however, the SEC has not made any changes to its

appointment process and has continued to set enforcement proceedings for trial before its ALJs. It is therefore clear that only this Court's intervention will suffice to secure the SEC's compliance with the Appointments Clause. The SEC's arguments for delaying review of that constitutional question are uniformly unpersuasive.

The SEC emphasizes that "proceedings" in the Tenth and D.C. Circuits "are still ongoing" because the SEC filed a petition for rehearing en banc in *Bandimere* and the D.C. Circuit granted rehearing en banc in *Lucia*. Opp. 18. But the Tenth Circuit denied rehearing in *Bandimere* after the SEC's brief in opposition was filed. Order at 1-2, *Bandimere v. SEC*, No. 15-9586 (10th Cir. May 3, 2017). In any event, it is certain to be many months before the Court is afforded its next opportunity to consider the Appointments Clause question. In the interim, the SEC will continue to initiate enforcement actions before its ALJs, and the respondents in those proceedings will continue to suffer the irreparable constitutional harm of being compelled to defend themselves before an unconstitutionally appointed agency adjudicator. Given the significant probability that this Court will ultimately decide the Appointments Clause question—an undisputedly important constitutional issue that has divided the lower courts—the Court should take advantage of this opportunity to put an end to this serial constitutional violation at the earliest possible moment.

The SEC also urges this Court to delay review because the Appointments Clause question is "currently percolating" in other lower courts, including in cases where the Eighth and Ninth Circuits may eventually address the issue. Opp. 18. But the proliferation of Appointments Clause challenges to the

SEC's ALJs only underscores that, sooner or later, this Court will need to step in. There are no critical facts or legal arguments that require further development in the lower courts as a precursor to that review. The SEC has not changed its basic position on the Appointments Clause question since filing its petition for rehearing en banc in *Bandimere*, which the SEC cites in its brief in opposition as its sole basis for defending its appointment procedures. Opp. 18 n.4; *see also*, *e.g.*, Pet. for Reh'g or Reh'g En Banc 4-15, *Bandimere v. SEC*, No. 15-9586 (10th Cir. filed Mar. 13, 2017) (arguing that SEC ALJs are employees because they do not exercise significant authority "in [their] own right" but only as aides to the Commission); Corrected SEC Br. 32-58, *Aesoph v. SEC*, No. 16-3830 (8th Cir. filed Mar. 13, 2017) (same); SEC Br. 13-43, *Raymond J. Lucia Cos. v. SEC*, No. 15-1345 (D.C. Cir. filed Apr. 24, 2017) (same). It is therefore highly unlikely that further developments in the lower courts will inform this Court's eventual resolution of the Appointments Clause question.

Finally, the SEC contends that this Court should deny review because the Second Circuit did not reach the Appointments Clause issue. Opp. 17, 19-20. But as petitioners have already shown (Pet. 32-33), that is not an insuperable obstacle to review—especially because the constitutional question has already been examined at length by both the Tenth and D.C. Circuits, whose opinions this Court can consult for guidance. This case is thus unlike *Zivotofsky v. Clinton*, 566 U.S. 189 (2012), where this Court was "without the benefit of thorough lower court opinions to guide [its] analysis of the merits" and accordingly left it "to the lower courts to consider the merits in the first instance." *Id.* at 201-02; *see also* Opp. 17.

Here, both sides of the issue have been considered (and endorsed) by lower courts.

Nor is the SEC able to offer meaningful distinctions of *Freytag*, *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), where this Court decided important constitutional questions that the courts of appeals declined to reach. As the SEC acknowledges (at 19), this Court in *Freytag* even overlooked the petitioner's *waiver* of the Appointments Clause issue in the lower courts in light of "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." 501 U.S. at 879 (citation omitted). This case is thus a *stronger* candidate for review than *Freytag* because petitioners have consistently pressed their Appointments Clause argument at every stage of these proceedings. And the SEC does not suggest that the "official immunity" issues (Opp. 19) this Court resolved in *Mitchell* and *Nixon* were any more pressing than the critical "structural safeguard[ ] of the constitutional scheme" at issue here. *Edmond v. United States*, 520 U.S. 651, 659 (1997). While the district courts in those cases had addressed the relevant constitutional question (Opp. 19), this Court already has the benefit of multiple district court *and* court of appeals opinions on the Appointments Clause question.

Thus, if this Court weres to postpone review, it would merely facilitate the SEC's continuing constitutional violations without securing any countervailing benefit to its ultimate resolution of the Appointments Clause question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
MARK A. PERRY
AMIR C. TAYRANI
JASON NEAL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

RANDY M. MASTRO
CAITLIN J. HALLIGAN
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue, 47th Floor
New York, NY 10166-0193
(212) 355-4000

SUSAN BRUNE
BRUNE LAW P.C.
450 Park Avenue
New York, NY 10022
(212) 668-1900

Counsel for Petitioners

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