No.

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

PETITION FOR A WRIT OF CERTIORARI

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

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

Counsel for Petitioners

QUESTIONS PRESENTED

Under this Court's precedents, any government official who "exercis[es] significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by" the Constitution's Appointments Clause. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976); *see also* U.S. Const. art. II, § 2, cl. 2. Administrative law judges ("ALJs") who act as hearing officers for the Securities and Exchange Commission ("SEC") wield extensive authority over administrative proceedings and issue decisions that, except in rare cases where the Commission grants review, are the final decision of the agency. It is undisputed that the SEC does not appoint its ALJs in the manner that the Appointments Clause prescribes for inferior officers.

Petitioners brought an Appointments Clause challenge in federal district court, seeking to enjoin an SEC administrative proceeding against them that was to be presided over by an ALJ.

The questions presented are:

1. Whether Congress has authorized federal district court jurisdiction over Appointments Clause challenges to SEC ALJs.

2. Whether SEC ALJs are inferior officers within the meaning of the Appointments Clause.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that LD Investments, LLC is the parent company of Patriarch Partners, LLC. Zohar Holding, LLC is the parent company of Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC. There is no publicly held corporation holding ten percent or more of the shares of the above entities.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES.. v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED......... 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 10

I. THE SECOND CIRCUIT'S DECISION IS FUNDAMENTALLY INCOMPATIBLE WITH THIS COURT'S DECISION IN *FREE ENTERPRISE FUND* 12

A. The Second Circuit Misapplied The *Thunder Basin* Factors 13

B. Neither *Elgin* Nor *Standard Oil* Supports The Second Circuit's Decision 17

C. The Unanimity Among The Circuits Underscores The Importance Of This Court's Review 19

II. THIS COURT SHOULD DEFINITIVELY RESOLVE WHETHER SEC ALJS ARE INFERIOR OFFICERS WITHIN THE MEANING OF THE APPOINTMENTS CLAUSE 21

III. THIS CASE PRESENTS A VALUABLE OPPORTUNITY TO ADDRESS TWO IMPORTANT AND RECURRING QUESTIONS 31

CONCLUSION 34

APPENDIX A: Opinion of the United States Court of Appeals for the Second Circuit (June 1, 2016)..1a

APPENDIX B: Opinion of the United States District Court for the Southern District of New York (June 30, 2015) 48a

APPENDIX C: Order of the United States Court of Appeals for the Second Circuit Denying Rehearing and Rehearing En Banc (Aug. 23, 2016)..76a

APPENDIX D: Constitutional, Statutory, and Regulatory Provisions Involved.........................78a

TABLE OF AUTHORITIES

Page(s)

Cases

Bandimere v. SEC,
__ F.3d __, 2016 WL 7439007
(10th Cir. Dec. 27, 2016) 3, 11, 27, 28, 30

Bebo v. SEC,
799 F.3d 765 (7th Cir. 2015) 20

Bennett v. SEC,
844 F.3d 174 (4th Cir. 2016) 20, 31

Buckley v. Valeo,
424 U.S. 1 (1976) 3, 11, 22, 25, 30, 34

Carlson v. Green,
446 U.S. 14 (1980) 32

Duka v. SEC,
2015 WL 4940057
(S.D.N.Y. Aug. 3, 2015) 28

Edmond v. United States,
520 U.S. 651 (1997) 22, 23, 26, 29, 30, 34

Elgin v. Dep't of Treasury,
132 S. Ct. 2126 (2012) 17, 18

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) ....
.... 4, 10, 11, 12, 13, 14, 15, 16, 17, 21, 24

Freytag v. Comm'r,
501 U.S. 868 (1991) ....
.... 11, 22, 23, 24, 25, 28, 29, 32, 33

FTC v. Standard Oil Co. of Cal.,
449 U.S. 232 (1980) 19

Go-Bart Importing Co. v. United States,
282 U.S. 344 (1931) 29

Hill v. SEC,
825 F.3d 1236 (11th Cir. 2016) 20

Hill v. SEC,
114 F. Supp. 3d 1297 (N.D. Ga. 2015) 28

Ironridge Glob. IV, Ltd. v. SEC,
146 F. Supp. 3d 1294 (N.D. Ga. 2015) 26

Jarkesy v. SEC,
803 F.3d 9 (D.C. Cir. 2015) 20

Landry v. FDIC,
204 F.3d 1125 (D.C. Cir. 2000) 27, 29

Mitchell v. Forsyth,
472 U.S. 511 (1985) 32

Nixon v. Fitzgerald,
457 U.S. 731 (1982) 32

PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1 (D.C. Cir. 2016) 27

Raymond J. Lucia Cos. v. SEC,
832 F.3d 277 (D.C. Cir. 2016) 3, 12, 26, 27

Thunder Basin Coal Co. v. Reich,
510 U.S. 200 (1994) 4, 8, 12, 15

Weiss v. United States,
510 U.S. 163 (1994) 23, 26, 29

Constitutional Provisions

U.S. Const. art. II, § 2, cl. 2.......................3, 11, 22, 30

Statutes

5 U.S.C. § 556(b)(3) 24

5 U.S.C. § 556(c)(1) 24
5 U.S.C. § 556(c)(2) 24
5 U.S.C. § 556(c)(3) 24
5 U.S.C. § 556(c)(4) 24
5 U.S.C. § 556(c)(5) 24
5 U.S.C. § 556(c)(6) 25
5 U.S.C. § 556(c)(9) 25
5 U.S.C. § 556(c)(10) 25, 30
15 U.S.C. § 78d-1(a) 24
15 U.S.C. § 78d-1(c) 25, 30
15 U.S.C. § 80b-13(a) 8
15 U.S.C. § 80b-13(b) 14, 19
28 U.S.C. § 1254(1) 1

Regulations

17 C.F.R. § 200.14(a) 24
17 C.F.R. § 200.14(a)(1) 24
17 C.F.R. § 200.14(a)(3) 24
17 C.F.R. § 200.14(a)(4) 24
17 C.F.R. § 200.14(a)(5) 24
17 C.F.R. § 200.14(a)(6) 25
17 C.F.R. § 200.14(a)(7) 25
17 C.F.R. § 200.14(a)(8) 25, 30
17 C.F.R. § 201.111 25
17 C.F.R. § 201.111(a) 24
17 C.F.R. § 201.111(b) 24

17 C.F.R. § 201.111(c) 24
17 C.F.R. § 201.111(d) 24, 25
17 C.F.R. § 201.111(e) 25
17 C.F.R. § 201.111(h) 25
17 C.F.R. § 201.111(i) 25
17 C.F.R. § 201.141(b) 25
17 C.F.R. § 201.155 24
17 C.F.R. § 201.161 25
17 C.F.R. § 201.180(a) 25
17 C.F.R. § 201.200(d)(2) 24
17 C.F.R. § 201.221(b) 25
17 C.F.R. § 201.230 24
17 C.F.R. § 201.232 24
17 C.F.R. § 201.233 24
17 C.F.R. § 201.234 24
17 C.F.R. § 201.250 25
17 C.F.R. § 201.322 24
17 C.F.R. § 201.326 25
17 C.F.R. § 201.360(a) 25
17 C.F.R. § 201.360(d)(2) 31
17 C.F.R. § 201.411(b)(1) 30
17 C.F.R. § 201.411(b)(1)(i) 25
17 C.F.R. § 201.411(b)(1)(ii) 25
17 C.F.R. § 201.411(b)(1)(iii) 25
17 C.F.R. § 201.411(b)(2) 25, 30

Other Authorities

Jean Eaglesham, *SEC Wins with In-House Judges*, Wall St. J., May 6, 2015 2

H.R. Rep. No. 111-687 (2010) 2

Raymond J. Lucia Cos., Exchange Act Release No. 76241, 2015 WL 6352089 (Oct. 22, 2015) 14

SEC, ALJ Initial Decisions, https://www.sec.gov/alj/aljdec.shtml 30

SEC, Office of Administrative Law Judges, http://www.sec.gov/alj (Aug. 3, 2015) 26

PETITION FOR A WRIT OF CERTIORARI

Petitioners Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 824 F.3d 276. Pet. App. 1a-47a. The court of appeals' order denying rehearing en banc is unreported. Pet. App. 76a-77a. The opinion of the district court is unreported but is available at 2015 WL 4006165. Pet. App. 48a-75a.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2016, and a timely petition for rehearing was denied on August 23, 2016. On October 27, 2016, Justice Ginsburg granted an extension of time for filing a petition for a writ of certiorari until January 20, 2017. No. 16A408. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reproduced at Pet. App. 78a-119a.

STATEMENT

In the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress "dramatically expanded" the authority of the Securities and Exchange Commission ("SEC" or "Commission") "to impose penalties administratively, making it essential-

ly 'coextensive with the SEC's authority to seek penalties in Federal court.'" Pet. App. 4a (quoting H.R. Rep. No. 111-687, at 78 (2010)) (alterations omitted). Since receiving that authority, the SEC has begun "prosecut[ing] an increasing number of cases" before its own administrative law judges ("ALJs"), rather than in federal court before Article III judges. Pet. App. 4a-5a.

Unsurprisingly, the SEC fares far better on its home court than in a neutral forum: Recent analyses have determined that "[t]he SEC won against 90% of defendants before its own judges in contested cases from October 2010 through March [2015]," a rate "markedly higher than the 69% success the agency obtained against defendants in federal court over the same period." Jean Eaglesham, *SEC Wins with In-House Judges*, Wall St. J., May 6, 2015. This disparity results from various pro-prosecution procedural features of the SEC's administrative proceedings—including limited discovery for defendants, permissive rules governing the admissibility of evidence, and accelerated pretrial timelines—as well as the institutional pressure exerted on the SEC's ALJs, who, according to a former ALJ, are "expected to work on the assumption that 'the burden was on the people who were accused to show that they didn't do what the agency said they did.'" *Id.*

The procedural unfairness of SEC administrative proceedings is compounded by the agency's method of hiring its ALJs. The SEC's ALJs exercise extensive authority over administrative proceedings—they examine witnesses, rule on the admissibility of evidence, and make factual findings, among other powers—and therefore possess the type of "substantial authority" that renders government officials "inferior officers" subject to the requirements of the Appoint-

ments Clause. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). But the SEC's ALJs are not selected by the Commission itself or through one of the other procedures prescribed by the Appointments Clause, which provides for the selection of inferior officers by the President, the courts, or the heads of departments. *See* U.S. Const. art. II, § 2, cl. 2. They are chosen instead by SEC staff from a pool of candidates selected by the Office of Personnel Management, and thus neither the ALJs themselves nor the individuals who select them are politically accountable in the manner explicitly required by the Constitution. The constitutionality of this selection procedure is the subject of a direct and acknowledged circuit split between the Tenth and D.C. Circuits. *Compare Bandimere v. SEC*, __ F.3d __, 2016 WL 7439007 (10th Cir. Dec. 27, 2016) (SEC ALJs are inferior officers), *with Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016) (SEC ALJs are not inferior officers), *pet. for reh'g en banc pending*.

After the SEC initiated an administrative enforcement action against petitioners, they filed suit in federal district court to enjoin the SEC's stacked-deck proceeding on the ground that the presiding ALJ was appointed in violation of the Appointments Clause. A divided panel of the Second Circuit held that Congress has "implicitly precluded" federal district courts from exercising jurisdiction over suits raising Appointments Clause challenges to the SEC's ALJs by providing for judicial review of final Commission action in a court of appeals. Pet. App. 4a. Under the Second Circuit's reasoning, petitioners are prohibited from litigating their challenge to the appointment of the ALJ assigned to preside over their administrative proceeding until *after* that proceeding has concluded and administrative appeals have been

exhausted. In other words, even though petitioners have raised serious constitutional objections to the tribunal itself, they must undergo trial before—and are currently awaiting a decision by—that very tribunal.

That decision cannot be squared 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. *Id.* at 489-91. As the dissenting judge below emphasized, the Second Circuit's jurisdictional analysis—while purportedly based on an application of the factors identified by this Court in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994)—disregarded the "control[ling]" force of this Court's subsequent decision in *Free Enterprise Fund* and "stripped" two of the three *Thunder Basin* factors "of any significance." Pet. App. 32a (Droney, J., dissenting).

This Court's review is warranted to resolve the conflict between the Second Circuit's decision and *Free Enterprise Fund*, and to provide a definitive answer to the underlying question whether SEC ALJs are inferior officers under the Appointments Clause. These recurring issues have profound significance for litigants—like petitioners here—who are forced to defend themselves in constitutionally infirm administrative tribunals without meaningful access to the federal courts, and for the SEC itself, which is confronted with conflicting appellate decisions regarding the constitutionality of its appointment procedures.

1. Lynn Tilton is the founder and Chief Executive Officer of Patriarch Partners, LLC ("Patriarch"). Through Patriarch and its affiliates, Ms. Tilton has

restructured and built hundreds of companies, including well-known American brands like Rand McNally, Stila Cosmetics, Dura Automotive, and MD Helicopters. Ms. Tilton's innovative lending techniques and expert management have saved companies and American jobs in industries and regions abandoned by other investors. Ms. Tilton has achieved many of these successes by creating investment funds that raise cash by issuing debt to sophisticated institutional investors, known as noteholders. The SEC's enforcement action in this case relates to three of those funds, referred to as the "Zohar Funds."

The Zohar Funds' principal investment strategy, unique in their class, is to make loans to deeply distressed companies and implement a turnaround strategy to build value for the funds and their noteholders. Ms. Tilton guides the management of these portfolio companies as Manager or Chief Executive Officer, and Patriarch's affiliates provide operational and management services and work day-to-day on company business.

In 2009, the SEC's Enforcement Division began an informal investigation of Patriarch. In October 2014, after a five-year investigation, the Enforcement Division issued a notice to petitioners in which it outlined alleged violations of the Investment Advisers Act. The Enforcement Division's theory is based on a sharply contested contractual interpretation of the Zohar Funds' indentures, which the Division has argued required more specific disclosures to noteholders than were provided. *See* C.A. J.A. A-15. The Division has also alleged that the quarterly financial statements that the Zohar Funds provided to noteholders were not prepared in compliance with generally accepted accounting principles, contrary to

the requirements of the indentures and to certifications signed by Ms. Tilton that accompanied the financial statements. *See* C.A. J.A. A-15-16.

In March 2015, the Commission decided by a rare 3-2 margin to bring an enforcement action against Ms. Tilton, Patriarch, and the other Patriarch entities who are petitioners in this Court. C.A. J.A. A-28. The Commission issued an Order Instituting Proceedings ("OIP") against petitioners, seeking "disgorgement and civil penalties" under the Investment Advisers Act, as well as an injunction against future violations. C.A. J.A. A-25.

Consistent with its recent preference to litigate in its own tribunals, *see* Pet. App. 4a-5a, the Commission ordered its Enforcement Division to pursue the case before an SEC ALJ, rather than in federal district court. The OIP directed the ALJ to convene a hearing within 60 days and to issue an initial decision within 300 days. C.A. J.A. A-26.

2. On April 1, 2015, two days after the Commission issued the OIP, petitioners filed suit against the SEC in the United States District Court for the Southern District of New York.

Petitioners sought declaratory and injunctive relief based on constitutional deficiencies in the SEC's administrative proceeding. As relevant here, petitioners alleged that the ALJ assigned to hear the case is an inferior officer who was not appointed in a manner consistent with the Appointments Clause because she exercises significant authority over SEC administrative proceedings but is appointed by Commission staff, rather than by the President, the courts, or the Commission itself. *See* Pet. App. 51a-52a. Petitioners explained that they "challenge the constitutionality of the SEC ALJ program on its face,

and their claims do not depend upon the facts of this particular case (the liability or lack of liability for the securities violations alleged). Their claim is that they should not stand trial in an unconstitutionally structured forum." Compl. ¶ 14; *see also* Pet. App. 51a.

Petitioners moved for a preliminary injunction regarding the ongoing administrative proceeding. The SEC opposed on the grounds that the district court lacked jurisdiction and that the SEC's ALJs are mere employees, rather than inferior officers within the meaning of the Appointments Clause.

The district court denied petitioners' motion for a preliminary injunction and dismissed the case for lack of subject matter jurisdiction. Pet. App. 75a. Acknowledging that "[i]n recent months, district courts have reached different conclusions as to whether they have jurisdiction over claims similar to the ones Plaintiffs raise here," the district court concluded that Congress had precluded district court jurisdiction over petitioners' Appointments Clause claim by providing for post-enforcement review in the federal securities laws and that petitioners could therefore raise their claim only through a petition for review to a court of appeals after the conclusion of agency proceedings. Pet. App. 54a-55a.

3. Petitioners appealed the district court's decision to the Second Circuit. The day after oral argument, the Second Circuit issued an order staying "the Securities and Exchange Commission proceedings against [petitioners] . . . pending further order of this Court." C.A. Order (Sept. 17, 2015).

In June 2016, a divided panel affirmed, agreeing with the district court that Congress had "implicitly precluded" district court jurisdiction over petitioners'

Appointments Clause claim. Pet. App. 4a. The majority purported to rely on the factors this Court identified in *Thunder Basin* as relevant to the jurisdictional preclusion inquiry: the availability of "meaningful judicial review," whether the constitutional claim is "wholly collateral to a statute's review provisions," and whether the claim is "outside the agency's expertise." 510 U.S. at 212-13 (internal quotation marks omitted); *see also* Pet. App. 9a. In reality, the majority gave dispositive weight to the first of those three factors, concluding that the "Appointments Clause claim will be subject to meaningful judicial review through administrative channels" because petitioners could "appeal to a federal circuit court" after the conclusion of the SEC proceedings that they seek to enjoin as unconstitutional. Pet. App. 11a-12a; *see also* Pet. App. 5a (citing 15 U.S.C. § 80b-13(a)). The possibility of judicial review after the administrative proceeding has ended, the majority held, "weighs strongly against district court jurisdiction." Pet. App. 11a-12a.

The majority acknowledged that the two other *Thunder Basin* factors "present closer questions," but stated that they could not overcome the supposed availability of "meaningful judicial review." Pet. App. 11a-12a. The majority went on to conclude that those factors also weighed against jurisdiction. According to the majority, petitioners' Appointments Clause claim is not "wholly collateral" to the SEC's administrative scheme because it is the "vehicle by which [they] seek to prevail in the [SEC] proceeding." Pet. App. 23a (internal quotation marks omitted). As to the "agency's expertise," the majority concluded that the SEC could "bring its expertise to bear in a manner potentially relevant to the constitutional is-

sue by resolving the statutory charges against"—or in favor of—petitioners. Pet. App. 28a.

Judge Droney dissented. He explained that "[t]his case is nearly indistinguishable from *Free Enterprise Fund*," where this Court applied the *Thunder Basin* factors to the federal securities laws and held that Congress had *not* precluded jurisdiction over an Appointments Clause challenge to the Public Company Accounting Oversight Board ("PCAOB"). Pet. App. 32a (Droney, J., dissenting). Judge Droney emphasized that "[t]he majority's application of the *Thunder Basin* factors has stripped the 'wholly collateral' and 'outside the agency's expertise' factors of any significance" because those factors would "always [be] satisfied" under the majority's approach once "administrative proceedings have been initiated." *Id.* "[C]onclud[ing] that *Free Enterprise* controls," he reasoned that "those two factors here have precisely the same weight as they did in *Free Enterprise*, and the application of the remaining factor does not change the result." *Id.*

Petitioners filed a timely petition for rehearing en banc, which the Second Circuit denied.

4. After the Second Circuit issued its decision, the court vacated its stay of the administrative proceeding, C.A. Order (June 28, 2016), and this Court denied petitioners' application for a stay pending disposition of their petition for a writ of certiorari. No. 16A242.

The Commission's enforcement action against petitioners therefore moved forward, and a hearing took place before the ALJ from October 24 to November 10, 2016. The parties completed post-hearing briefing on January 13, 2017, and are currently awaiting a decision from the ALJ. Under the

Second Circuit's opinion, petitioners cannot raise their Appointments Clause claim in a federal court until the ALJ issues a decision and the Commission considers and decides any petitions for review, a process that could take years. *See* Tr. at 3635:23-24, *In re Lynn Tilton*, File No. 3-16462 (Nov. 9, 2016) (ALJ stating that an "appeal to the Commission" by either petitioners or the Enforcement Division "will be three more years").[1]

REASONS FOR GRANTING THE PETITION

This suit directly challenges the constitutionality of the SEC's procedures for appointing its ALJs, an indisputably important question that is the subject of an acknowledged circuit split. Yet, in a 2-1 opinion, the Second Circuit concluded that the district court lacked jurisdiction to reach the merits of the Appointments Clause issue. That decision squarely conflicts with this Court's holding in *Free Enterprise Fund* that the federal securities laws did not preclude district court jurisdiction over an Appointments Clause challenge. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489-91 (2010). This Court explained that the *Thun-*

[1] In the aftermath of the Second Circuit's decision to lift its stay in June 2016, the ALJ and Commission made several decisions that could significantly affect the outcome of the proceeding. In particular, the ALJ refused to schedule the hearing for a date in December jointly proposed by petitioners and the Enforcement Division that would have permitted something approaching a reasonable time for the parties to prepare their cases in this complicated dispute. And even though the SEC amended its Rules of Practice in July 2016 to address some of the procedural shortcomings in its administrative proceedings, the Commission refused to apply the new prehearing procedures to petitioners' proceeding, which began several months *after* the new rules were issued.

der Basin factors "point[ed] against any limitation on review" in *Free Enterprise Fund* because the plaintiffs' Appointments Clause challenge raised a constitutional "object[ion] to [the agency's] existence," rather than to any particular decision it had rendered. *Id.* at 490. As the dissent below recognized, the court of appeals' conclusion that the federal securities laws foreclose jurisdiction over petitioners' "nearly indistinguishable" Appointments Clause claim, Pet. App. 32a (Droney, J., dissenting)—which likewise objects to the existence of the SEC's ALJs under the agency's current appointments procedures—is impossible to reconcile with *Free Enterprise Fund*.

The Court should also grant review of the underlying question that petitioners sought to raise in the district court: whether the SEC's ALJs are inferior officers whose appointments must meet the requirements of the Appointments Clause. This Court has explained that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II]." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). The Commission's position that its ALJs are mere employees (*see*, *e.g.*, SEC C.A. Br. 43) is plainly wrong, and contravenes this Court's holding in *Freytag v. Commissioner*, 501 U.S. 868 (1991), that special trial judges with similar powers to the SEC's ALJs "exercise[d] significant discretion" and were therefore inferior officers whose appointments were required to conform to the Appointments Clause. *Id.* at 882. Notwithstanding this Court's clear holding in *Freytag*, there is a direct and irreconcilable circuit split on this Appointments Clause question. *Compare Bandimere v. SEC*, __ F.3d __, 2016 WL 7439007 (10th Cir. Dec. 27, 2016) (SEC

ALJs are inferior officers), *with Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016) (SEC ALJs are not inferior officers), *pet. for reh'g en banc pending.*

This case presents the Court with the opportunity to address both of these important, frequently recurring issues. Unless this Court intervenes, parties targeted for administrative enforcement actions will be compelled to defend themselves before the very tribunals they challenge as unconstitutional, as petitioners were here; and the SEC will continue to insist—erroneously—that its ALJs are mere employees rather than officers of the United States.

I. THE SECOND CIRCUIT'S DECISION IS FUNDAMENTALLY INCOMPATIBLE WITH THIS COURT'S DECISION IN *FREE ENTERPRISE FUND*.

This Court "presume[s] that Congress does not intend to limit jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994)). In *Free Enterprise Fund*, this Court applied these *Thunder Basin* factors and concluded—in a portion of its opinion that did not elicit a dissent from any Justice—that the federal securities laws did *not* preclude district court jurisdiction over a suit seeking a declaratory judgment that the members of the PCAOB were appointed in violation of the Appointments Clause. *Id.* The Second Circuit reached the opposite conclusion here regarding petitioners' Appointments Clause challenge to the SEC's ALJs. As Judge Droney emphasized in his dissent, the Sec-

ond Circuit's decision is flatly at odds with this Court's "control[ling]" decision in *Free Enterprise Fund*, Pet. App. 32a (Droney, J., dissenting), and upends the *Thunder Basin* framework by nullifying, for all intents and purposes, two of its three jurisdictional factors.

A. The Second Circuit Misapplied The *Thunder Basin* Factors.

The Availability Of Meaningful Judicial Review. This Court held in *Free Enterprise Fund* that "meaningful judicial review" would not be possible in the absence of district court jurisdiction over the plaintiffs' Appointments Clause claim because the plaintiffs were "object[ing] *to the Board's existence*, not to any of its auditing standards" or other actions. 561 U.S. at 489-90 (emphasis added; internal quotation marks omitted). If district court jurisdiction had been unavailable, the only way the plaintiffs in that case could have litigated their Appointments Clause challenge in federal court would have been by petitioning for review in a court of appeals *after* either "challeng[ing] a [new] Board rule at random" in an SEC proceeding or "incur[ring] a sanction (such as a sizeable fine) by ignoring Board requests for documents and testimony" and asking the SEC to review the sanction. *Id.* (emphasis omitted). The Court concluded that these circuitous routes to federal court—requiring the plaintiffs to engage with the very administrative apparatus they challenged as unconstitutional—were not "'meaningful' avenue[s] of relief" on the plaintiffs' constitutional claim. *Id.* at 491.

Here, in contrast, the Second Circuit concluded that petitioners "will have access to meaningful judicial review of their Appointments Clause claim

through administrative channels" because they could "appeal to a federal circuit court from an adverse ruling by the Commission." Pet. App. 12a, 20a. Under *Free Enterprise Fund*, however, it is clear that the mere possibility of "win[ning] access to a court of appeals" by losing in an administrative proceeding does not provide "meaningful judicial review" of a claim challenging the procedures for appointing (or removing) an agency's officials. 561 U.S. at 489-90 (internal quotation marks omitted).

Post-enforcement judicial review would not be "meaningful" review for petitioners because, as Judge Droney explained in his dissenting opinion, by the time petitioners are able to present their Appointments Clause challenge to a court of appeals, they "will already have suffered the injury they are attempting to prevent"—defending themselves before an unconstitutionally appointed ALJ. Pet. App. 44a (Droney, J., dissenting). Thus, "even if the final Commission order is vacated," "the possibility of obtaining an injunction" against the unconstitutional administrative proceeding will be "moot." *Id.* at 44a-45a. Moreover, if the ALJ rules against Ms. Tilton in the administrative proceeding, she may be subject to an SEC-imposed bar on securities-industry employment before she is able to raise her constitutional challenge in a court of appeals, depriving her of the right to practice her chosen profession before any court has considered her constitutional challenge. *See* 15 U.S.C. § 80b-13(b); *see also Raymond J. Lucia Cos.*, Exchange Act Release No. 76241, 2015 WL 6352089 (Oct. 22, 2015) (refusing to stay order imposing an employment bar pending an appeal raising an Appointments Clause challenge).

"[W]hile there may be review" after the SEC proceedings have run their course, "it cannot be consid-

ered . . . 'meaningful' at that point" because post-enforcement review could not remedy the impairment of petitioners' constitutional rights or provide compensation for their economic losses. Pet. App. 45a (Droney, J., dissenting); *see also Thunder Basin*, 510 U.S. at 218 (concluding that meaningful review was available where the agency's "penalty assessments become final and payable only *after* full review by both the Commission and the appropriate court of appeals") (emphasis added).

Wholly Collateral. The Second Circuit also departed from this Court's application of the "wholly collateral" factor, which militated in favor of jurisdiction in *Free Enterprise Fund* because the plaintiffs were challenging the "existence" of the PCAOB, as opposed to "any . . . orders or rules from which review might be sought." 561 U.S. at 490. Just as in *Free Enterprise Fund*, petitioners challenge the *existence* of the SEC's ALJs under the agency's current appointments procedures and expressly disclaimed in their complaint any challenge to their "liability or lack of liability for the securities violations alleged" by the SEC. Compl. ¶ 14. Nothing that transpires during petitioners' suit will have any bearing on the merits of the SEC's securities-law allegations against petitioners (and nothing that takes place in the administrative proceeding will have any impact on the merits of the Appointments Clause question).

The Second Circuit nevertheless held that petitioners' Appointments Clause claim is not collateral to the administrative review framework because the claim is "procedurally intertwined with the SEC's ongoing proceeding, where it functioned as an affirmative defense." Pet. App. 22a. In *Free Enterprise Fund*, however, this Court expressly rejected the proposition that jurisdiction over a plaintiff's "gen-

eral challenge" to an agency's "existence" is precluded whenever there is a procedural mechanism for raising that claim in an administrative proceeding. 561 U.S. at 490. The Second Circuit's contrary approach effectively nullifies the "wholly collateral" factor in any case where there is an ongoing administrative proceeding because, under the Second Circuit's reasoning, "as long as the claim could somehow serve to end administrative proceedings in a plaintiff's favor," this factor supports preclusion. Pet. App. 38a (Droney, J., dissenting). In any event, while petitioners did raise their Appointments Clause challenge as an affirmative defense to the Commission's allegations, petitioners' success on that constitutional claim would *not* prevent the SEC from continuing to pursue its securities-law allegations against petitioners in front of an ALJ appointed in conformity with the Appointments Clause.

Outside The Agency's Expertise. Finally, the Second Circuit's application of the "agency expertise" factor likewise conflicts with *Free Enterprise Fund*, which held that the plaintiffs' Appointments Clause challenge was "outside the Commission's competence and expertise" and that "the courts are at no disadvantage in answering" that constitutional question without the agency's views on the issue. 561 U.S. at 491. Here, the Second Circuit acknowledged that "the SEC does not possess unique legal expertise in analyzing the constitutional sufficiency of its appointments," Pet. App. 25a, which should have been the end of the matter under *Free Enterprise Fund*. *See* Pet. App. 43a (there is "no difference in the application of this factor here to the SEC and its application to the SEC in *Free Enterprise*") (Droney, J., dissenting).

The Second Circuit nevertheless concluded that the "agency expertise" factor weighed in favor of preclusion based on its belief that "the Commission may bring its expertise to bear in a manner potentially relevant to the constitutional issue" simply "by resolving the statutory charges against [petitioners]" or "rul[ing] that [petitioners] did not violate the Investment Advisers Act." Pet. App. 27a-28a. But just as with the "wholly collateral" factor, that reasoning transforms the "agency expertise" inquiry into one that will invariably favor preclusion because, as long as an agency proceeding has been (or is likely to be) commenced, the agency will *always* rule for or against the party against whom charges were brought. That is directly contrary to *Free Enterprise Fund*, where the Court analyzed the substance of the specific constitutional claims at issue and concluded that "[n]o [agency] expertise [was] required" to resolve them. 561 U.S. at 491.

B. Neither *Elgin* Nor *Standard Oil* Supports The Second Circuit's Decision.

The Second Circuit misread this Court's decision in *Elgin v. Department of Treasury*, 132 S. Ct. 2126 (2012), as providing support for its application of the *Thunder Basin* factors. *See* Pet. App. 21a-28a. In *Elgin*, the Court held that the Civil Service Reform Act ("CSRA") precluded district court jurisdiction over a suit in which former federal employees sought reinstatement in their jobs on the ground that they had been discharged for violating an allegedly unconstitutional statute. 132 S. Ct. at 2131-32. The Court held that the plaintiffs were required to raise their claims through the administrative review process established by the CSRA, which set out in "painstaking detail . . . the method for covered em-

ployees to obtain review of adverse employment actions" before the Merit Systems Protection Board ("MSPB"). *Id.* at 2134. The MSPB was the proper forum because the case was a "challenge to CSRA-covered employment action brought by CSRA-covered employees requesting relief that the CSRA routinely affords." *Id.* at 2140.

According to the Second Circuit, "a claim is not wholly collateral" under *Elgin* "if it serves as the 'vehicle by which' a party seeks to prevail in an administrative proceeding." Pet. App. 21a (quoting *Elgin*, 132 S. Ct. at 2139-40). And with respect to agency expertise, the Second Circuit read *Elgin* as establishing that constitutional challenges are precluded any time an agency could "resolv[e] accompanying, potentially dispositive issues in the same proceeding," no matter how far the constitutional issue may be outside the agency's competence. Pet. App. 25a.

But as Judge Droney recognized, the Second Circuit drastically "overstates what [this] Court did" in *Elgin* and the relevance of that decision to this case. Pet. App. 37a (Droney, J., dissenting). The Court held that the "wholly collateral" and "agency expertise" factors favored preclusion in *Elgin* because the plaintiffs' challenge was "precisely the type of personnel action regularly adjudicated by the MSPB" and was likely to involve "threshold questions" such as "statutory or constitutional claims that the MSPB routinely considers." 132 S. Ct. at 2140. Here, by contrast, petitioners did not file suit in the district court to obtain relief routinely granted by the SEC, but instead to *prevent* the SEC from overstepping its constitutional bounds when performing its regulatory responsibilities. It is the province of the federal courts—not administrative agencies—to provide a safeguard against such governmental overreach. *El-*

gin is thus far from the jurisprudential watershed the Second Circuit made it out to be.

The Second Circuit was equally misplaced in its reliance on *FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980), to support its conclusion that petitioners will receive meaningful judicial review even if they are forced to wait until the unconstitutional ALJ proceeding has run its course. Pet. App. 18a-20a. The differences between *Standard Oil* and this case are stark. In *Standard Oil*, the plaintiff did not file suit to challenge the constitutional authority of the adjudicator, but was instead challenging the legal sufficiency of the allegations in the FTC's administrative complaint. 449 U.S. at 235. Thus, the only injury that the plaintiff alleged was the "expense and disruption of defending itself in protracted adjudicatory proceedings" that it believed had no merit, *id.* at 244, as opposed to the irreparable constitutional injury here of being forced to defend oneself before an unconstitutionally appointed adjudicator. In addition, the statutes governing FTC proceedings deprived the agency's sanctions of any binding force "until judicial review [was] complete," up to and including review in this Court on certiorari. *Id.* at 241 & n.10. Here, in contrast, the SEC has the authority to impose an immediately effective bar on Ms. Tilton's employment in the securities industry that would remain in force during the pendency of post-enforcement judicial review. *See* 15 U.S.C. § 80b-13(b).

C. The Unanimity Among The Circuits Underscores The Importance Of This Court's Review.

The Second Circuit majority sought to justify its refusal to recognize district court jurisdiction over

petitioners' Appointments Clause claim by reference to decisions of the D.C. Circuit and Seventh Circuit that have reached the same result. *See* Pet. App. 9a (citing *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016); *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015)). But an error is an error, whether it is made once or repeatedly. In fact, the proliferation of courts committing the same jurisdictional error amplifies the pressing need for this Court's review—the Second Circuit's decision is not an isolated instance of ignoring this Court's precedents, but rather one in a series of similar erroneous decisions that now also includes decisions from the Fourth and Eleventh Circuits. *See Bennett v. SEC*, 844 F.3d 174 (4th Cir. 2016); *Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016).

Each of the other courts of appeals that has addressed this jurisdictional issue has committed the same fundamental error as the Second Circuit here. In reliance on each other's analysis, they have consistently misapplied the *Thunder Basin* factors, and departed from *Free Enterprise Fund*, by concluding that a plaintiff has access to "meaningful judicial review" simply because "she can raise her objections in a circuit court of appeals" "[a]fter the pending enforcement action has run its course." *Bebo*, 799 F.3d at 774; *see also Jarkesy*, 803 F.3d at 19 ("[b]ecause Jarkesy's constitutional claims . . . can *eventually* reach an Article III court," he had access to meaningful judicial review) (emphasis added; internal quotation marks omitted) (citing *Bebo*, 799 F.3d at 771-73); *Hill*, 825 F.3d at 1247 (same, citing decision below); *Bennett*, 844 F.3d at 184 n.10 (same, citing decision below). *Free Enterprise Fund* makes clear, however, that litigants need not participate in proceedings before the very agency decision-maker they

challenge as unconstitutional in order to "win access" to an Article III forum in which to raise their Appointments Clause claim. 561 U.S. at 490.

In direct contravention of *Free Enterprise Fund*, the circuits are marching in lockstep, in the wrong direction. In such circumstances, it is incumbent upon this Court to intervene and interrupt the emerging tide of unanimity among the lower courts. In the absence of this Court's review, the error will inevitably be replicated in every circuit and effectively set in stone.

* * *

The Second Circuit's decision—and the other decisions that have reached the same jurisdictional conclusion—uniformly ignore *Free Enterprise Fund*'s central teaching: Post-enforcement review is illusory where the administrative proceeding itself impairs a party's constitutional rights. *See* 561 U.S. at 491. For litigants confronted with the specter of an unconstitutional agency proceeding, the only "meaningful access" to federal court is *before* the proceeding has taken place, when a litigant can seek injunctive relief that prevents the infliction of irreparable constitutional harm. This Court should grant certiorari before still-more courts blindly follow the Second Circuit's lead by relegating litigants to unconstitutional agency proceedings that they are powerless to escape through recourse to the federal district courts.

II. THIS COURT SHOULD DEFINITIVELY RESOLVE WHETHER SEC ALJS ARE INFERIOR OFFICERS WITHIN THE MEANING OF THE APPOINTMENTS CLAUSE.

The Court should also grant review of the second question presented: whether SEC ALJs are inferior

officers who must be appointed pursuant to the Appointments Clause. The Second Circuit did not reach that issue because of its (erroneous) jurisdictional ruling, but it is squarely presented and ought to be decided sooner rather than later in light of the acknowledged circuit split.

A. The Appointments Clause recognizes two categories of constitutional officers and establishes different methods of appointing them. "[P]rincipal (noninferior) officers" such as those expressly listed in the Clause—"Ambassadors, other public Ministers . . . , [and] [j]udges"—must be nominated by the President and confirmed by the Senate. *Edmond v. United States*, 520 U.S. 651, 659 (1997); *see also* U.S. Const. art. II, § 2, cl. 2. "'[I]nferior officers'"—those "whose work is directed and supervised at some level by" principal officers—may be appointed through that same process or else "'the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.'" *Edmond*, 520 U.S. at 660, 663 (quoting U.S. Const. art. II, § 2, cl. 2).

This Court has made clear that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II]." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). The Court reaffirmed that definition of "Officer of the United States" in *Freytag v. Commissioner*, 501 U.S. 868 (1991), where it considered the constitutional status of special trial judges who presided over tax cases referred to them by the Chief Judge of the Tax Court. *Id.* at 872, 881. The Court held that the special trial judges were inferior officers because they "per-

form[ed] more than ministerial tasks," including "tak[ing] testimony, conduct[ing] trials, rul[ing] on the admissibility of evidence," and "enforc[ing] compliance with discovery orders." *Id.* at 881-82. "In the course of carrying out these important functions," the Court explained, "the special trial judges exercise[d] significant discretion." *Id.* at 882.

This Court has likewise deemed military judges to be inferior officers based on their significant authority. In *Weiss v. United States*, 510 U.S. 163 (1994), the government did not even dispute that military judges "act as 'Officers' of the United States" "because of the authority and responsibilities they possess." *Id.* at 169. Those responsibilities included "rul[ing] on . . . legal questions" and instructing participants on "procedures to be followed." *Id.* at 167-68. And in *Edmond*, the Court concluded that intermediate appellate military judges "exercise[d] significant authority on behalf of the United States," and accordingly qualified as "Officers of the United States," because they were acting as adjudicators. 520 U.S. at 662. The Court reached that conclusion even though the judges had "no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers" (and therefore were inferior officers, rather than principal officers). *Id.* at 665.

Thus, under this Court's precedents, any federal official who wields "significant authority" comparable to the special trial judges in *Freytag* or the military judges in *Weiss* and *Edmond* is an inferior officer and must be appointed through one of the procedures specified in the Appointments Clause. And while the Court has not yet had occasion to apply that standard to an agency's ALJs, a number of Justices have already expressed the view that, as a general matter,

ALJs are inferior officers. *See Freytag*, 501 U.S. at 910 (Scalia, J., joined by O'Connor, Kennedy, and Souter, JJ., concurring in part and concurring in the judgment); *Free Enter. Fund*, 561 U.S. at 542 (Breyer, J., joined by Stevens, Ginsburg, and Sotomayor, JJ., dissenting).

B. The SEC's ALJs readily satisfy this Court's definition of "inferior officers" because they exercise substantial authority under federal statutes and Commission regulations when "conduct[ing] hearings in proceedings instituted by the Commission." 17 C.F.R. § 200.14(a).

Congress has authorized the Commission to delegate "any of its functions," "including functions with respect to hearing" enforcement proceedings, to "an administrative law judge." 15 U.S.C. § 78d-1(a); *see also* 5 U.S.C. § 556(b)(3) (authorizing ALJs to preside over agency hearings). Pursuant to that authority, the Commission has delegated far-reaching adjudicatory powers to its ALJs. For example, like the special trial judges in *Freytag*, the SEC's ALJs "regulate the course of the hearing," 5 U.S.C. § 556(c)(5); *see also* 17 C.F.R. §§ 200.14(a)(5), 201.111(d), "[e]xamine witnesses," 17 C.F.R. § 200.14(a)(4), "rule on offers of proof and receive relevant evidence," 5 U.S.C. § 556(c)(3); *see also* 17 C.F.R. §§ 200.14(a)(3), 201.111(c), "[i]ssue subpoenas," 5 U.S.C. § 556(c)(2); 17 C.F.R. § 201.111(b), and oversee depositions and document production, *see* 5 U.S.C. § 556(c)(4); 17 C.F.R. §§ 201.230, 201.232-.234. *Compare Freytag*, 501 U.S. at 881-82 (listing special trial judges' similar responsibilities). They also amend charging documents, 17 C.F.R. § 201.200(d)(2), enter defaults, *id.* § 201.155, "administer oaths and affirmations," 5 U.S.C. § 556(c)(1); *see also* 17 C.F.R. §§ 200.14(a)(1), 201.111(a), issue protective orders, *id.* § 201.322, rule

upon motions, including for summary disposition, 5 U.S.C. § 556(c)(9); *see also* 17 C.F.R. §§ 200.14(a)(7), 201.111(h), 201.250, grant stays, 17 C.F.R. § 201.161, "[h]old pre-hearing conferences," *id.* § 200.14(a)(6); *see also id.* §§ 201.111(e), 201.221(b), hold settlement conferences, 5 U.S.C. § 556(c)(6), regulate cross-examination and "the conduct of the parties and their counsel," 17 C.F.R. § 201.111(d); *see also id.* § 201.326, and impose contempt sanctions by excluding a person from a deposition, hearing, or conference, *id.* § 201.180(a). The SEC's ALJs possess broad discretion in deciding how to carry out these duties. *See* 17 C.F.R. § 201.111 (granting ALJs "authority to do all things necessary and appropriate to discharge [their] duties").

At the conclusion of a hearing, unless the Commission directs otherwise or the parties waive an ALJ ruling, the ALJ must "prepare an initial decision containing the conclusions as to the factual and legal issues presented" and "issue an appropriate order." 17 C.F.R. §§ 200.14(a)(8), 201.111(i), 201.141(b), 201.360(a); *see also* 5 U.S.C. § 556(c)(10). By statute, that "action of . . . [the] administrative law judge" is "for all purposes, including appeal or review thereof, deemed the action of the Commission" unless the Commission grants review—which is discretionary in most cases—upon request of a party or *sua sponte*. 15 U.S.C. § 78d-1(c); *see also* 17 C.F.R. § 201.411(b)(1)(i)-(iii), (b)(2).

In light of the "significant authority" that the SEC's ALJs exercise over every aspect of the agency's administrative proceedings—from overseeing prehearing discovery to issuing a decision on the merits—they are inferior officers who must be appointed in conformity with the Appointments Clause. *Buckley*, 424 U.S. at 126; *see also Freytag*, 501 U.S. at 882;

Weiss, 510 U.S. at 169; *Edmond*, 520 U.S. at 665.[2] It is undisputed, however, that the SEC's ALJs are hired by the Chief ALJ and other Commission staff from a pool of candidates preapproved by the Office of Personnel Management, and thus are not selected in a manner prescribed by the Appointments Clause. *See* Notice of Filing 1-3, *In re Timbervest, LLC*, SEC File No. 3-15519 (June 4, 2015); *see also Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 283 (D.C. Cir. 2016) ("The Commission has acknowledged the ALJ was not appointed as the Clause requires . . . ."), *pet. for reh'g en banc pending.* The SEC's appointment procedures for its ALJs therefore contravene this Court's Appointments Clause precedent.

C. Even though this Court's decisions establish a definition of "inferior officer" that plainly encompasses the SEC's ALJs, the courts of appeals have reached conflicting decisions on this constitutional question.

In *Lucia*, the D.C. Circuit held that the SEC's ALJs are employees, rather than inferior officers, because they supposedly cannot issue decisions that are "independently final." 832 F.3d at 287. In reaching that conclusion, the D.C. Circuit expressly "reject[ed]" the "view . . . that the ability to 'render a fi-

---

[2] Indeed, until recently, the SEC's own website stated that its "'Administrative Law Judges are *independent judicial officers* who . . . conduct public hearings . . . in a manner similar to non-jury trials in the federal district courts.'" *Ironridge Glob. IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294, 1300 (N.D. Ga. 2015) (quoting SEC, Office of Administrative Law Judges, http://www.sec.gov/alj (Aug. 3, 2015)) (emphasis added). "The SEC rewrote its website description sometime after August 2015 and removed its reference to 'judicial officers.'" *Id.* at 1300-01.

nal decision on behalf of the United States,' while having a bearing on the dividing line between principal and inferior Officers, is irrelevant to the distinction between inferior Officers and employees." *Id.* at 285 (citation omitted).

The D.C. Circuit's decision in *Lucia* was based on its earlier 2-1 decision in *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), which held that the ability unilaterally to render a final decision is an essential attribute of an inferior officer. *See Lucia*, 832 F.3d at 284-85. That case was wrong when it was decided, *see Landry*, 204 F.3d at 1140-44 (Randolph, J., concurring in part and concurring in the judgment), and remains wrong today. *See PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 55-56 (D.C. Cir. 2016) (Randolph, J., concurring).

In *Bandimere v. SEC*, __ F.3d __, 2016 WL 7439007 (10th Cir. Dec. 27, 2016), the Tenth Circuit expressly rejected the D.C. Circuit's holding in *Lucia*—as well as the earlier *Landry* decision on which it was based—and held that the SEC's "ALJs are inferior officers" who must be appointed in conformity with the Appointments Clause. *Id.* at *7. The Tenth Circuit concluded that "SEC ALJs exercise significant discretion in performing 'important functions' commensurate with the [special trial judges'] functions described in *Freytag*," *id.* at *8, and that while "[f]inal decision-making power is relevant in determining whether a public servant exercises significant authority," that "does not mean *every* inferior officer *must* possess final decision-making power." *Id.* at *11. "Thus," in the Tenth Circuit's view, "the fact that the SEC can reverse its ALJs does not mean

they are employees rather than inferior officers." *Id.* at *12.[3]

D. The direct and acknowledged conflict between the Tenth and D.C. Circuits on the constitutionality of the SEC's procedures for appointing its ALJs—who preside over hundreds of administrative enforcement actions every year—is a compelling reason for granting the petition for a writ of certiorari in this case. Upon review, this Court should reject the D.C. Circuit's flawed analysis, which is impossible to reconcile with this Court's Appointments Clause jurisprudence and ignores the fact that the SEC's ALJs can and do issue final decisions.

In *Freytag*, this Court expressly rejected the proposition that a government official without the power to make final decisions cannot be an inferior officer. The government argued that the special trial judges in that case were mere employees "because they lack authority to enter a final decision." *Freytag*, 501 U.S. at 881. The Court disagreed, explaining that the "argument ignore[d] the significance of the duties and discretion that special trial judges possess" in overseeing hearings. *Id.* That "significant discretion" exercised by the special trial judges sufficed to make them officers under *Buckley*'s standard. *Id.* at 882.

To be sure, the Court in *Freytag* concluded *in the alternative* that the judges' ability to issue final decisions in some types of cases was sufficient to make

---

[3] Several district courts have reached the same conclusion as the Tenth Circuit in *Bandimere*. *See Hill v. SEC*, 114 F. Supp. 3d 1297, 1319 (N.D. Ga. 2015), *vacated on other grounds*, 825 F.3d 1236 (11th Cir. 2016); *Duka v. SEC*, 2015 WL 4940057, at *2-3 (S.D.N.Y. Aug. 3, 2015), *vacated on other grounds*, No. 15-2732 (2d Cir. June 13, 2016).

them inferior officers. 501 U.S. at 882. But that statement was "clearly designated . . . as an alternative holding." *Landry*, 204 F.3d at 1142 (Randolph, J., concurring in part and concurring in the judgment). And, in that alternative holding, the Court did not purport to make final decision-making authority a *necessary* condition for inferior-officer status; rather, the Court merely deemed that authority to be *sufficient* "[e]ven if the duties of special trial judges . . . were not as significant as [this Court] . . . ha[d] found them to be." *Freytag*, 501 U.S. at 882.

The D.C. Circuit's "final decision" rule also conflicts with a number of cases in which this Court has held that adjudicators who lacked final decision-making authority were officers under the Appointments Clause. In *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931), the Court stated that "United States commissioners are inferior officers," even though "[a]ll the commissioner's acts" at issue "were preparatory and preliminary." *Id.* at 352, 354. In *Weiss*, all sides agreed that the military judges were inferior officers, even though their decisions were subject to review by the Court of Military Review. 510 U.S. at 168-69. And the judges of the Coast Guard Court of Criminal Appeals in *Edmond* were "'inferior officers,'" even though they "ha[d] no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." 520 U.S. at 665-66. None of those officials would be inferior officers under the D.C. Circuit's test.

Indeed, the D.C. Circuit's "final decision" standard collapses the distinction between principal and inferior officers that lies at the core of the Appointments Clause. Principal officers answer directly to the President and are subject to the most stringent

procedure in the Appointments Clause—nomination by the President and appointment with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2; *see also Edmond*, 520 U.S. at 659. Inferior officers, by contrast, are "directed and supervised at some level by others" and lack "power to render a final decision . . . unless permitted to do so by other Executive officers." *Edmond*, 520 U.S. at 663, 665. These "other Officers of the United States" do not require Senate confirmation, but they still must be appointed in a manner consistent with the latter part of the Appointments Clause. U.S. Const. art. II, § 2, cl. 2; *see also Buckley*, 424 U.S. at 126 ("*any* appointee exercising significant authority" must "be appointed in the manner prescribed by" the Clause) (emphasis added).

In any event, SEC ALJs can and do make final decisions by issuing orders that resolve "the factual and legal issues presented" in the proceedings over which they preside. 17 C.F.R. § 200.14(a)(8); *see also* 5 U.S.C. § 556(c)(10). Although the losing party may petition for review by the Commission, the Commission's review (with few exceptions) is discretionary. *See* 17 C.F.R. § 201.411(b)(1)-(2). It is also rarely sought—a review of SEC proceedings from 2014 and 2015 shows that the Commission did not grant review in approximately 90% of cases. SEC, ALJ Initial Decisions, https://www.sec.gov/alj/aljdec.shtml; *see also Bandimere*, 2016 WL 7439007, at *12 n.36. When the Commission declines discretionary review of an ALJ's initial decision or no review is timely sought, "the action of any such . . . administrative law judge . . . shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission." 15 U.S.C. § 78d-1(c). Consistent with that statutory mandate, the Commission "issue[s] an or-

der that the decision has become final" upon the expiration of the time for seeking review (or the denial of review). 17 C.F.R. § 201.360(d)(2).

Thus, even if this Court's precedent did make the ability to render final decisions a *sine qua non* of "inferior officer" status, Congress has afforded that authority to the SEC's ALJs. The D.C. Circuit's decision in *Lucia* is therefore both factually and legally flawed, and its holding should be rejected by this Court.

III. THIS CASE PRESENTS A VALUABLE OPPORTUNITY TO ADDRESS TWO IMPORTANT AND RECURRING QUESTIONS.

The questions presented are tremendously important to the hundreds of litigants that are compelled each year to defend themselves in SEC administrative proceedings. Since Dodd-Frank expanded the SEC's ability to try cases in its in-house administrative tribunal, the SEC has "prosecuted an increasing number of cases" before its own ALJs. Pet. App. 4a-5a. The Second Circuit's jurisdictional ruling—which continues to be reflexively followed by other courts of appeals, *see*, *e.g.*, *Bennett*, 844 F.3d at 187—would deny those litigants the opportunity to protect themselves from constitutional injury by pursuing an Appointments Clause challenge in federal district court *before* being required to participate in an unconstitutional agency proceeding. *See* Pet. App. 44a ("Forcing [petitioners] to await a final Commission order before they may assert their constitutional claim in a federal court means that by the time the day for judicial review comes, they will already have suffered the injury that they are attempting to prevent.") (Droney, J., dissenting).

This Court should grant review and resolve both the jurisdictional and Appointments Clause issues before more litigants are denied an Article III forum in which to vindicate their constitutional rights. While the Second Circuit's jurisdictional error prevented it from reaching the Appointments Clause question, this Court has granted review of questions not passed upon below on a number of occasions where, as here, "the interests of judicial administration will be served by addressing the issue" because it is "important, recurring," and "squarely presented." *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980).

In fact, the Court did so in *Freytag*, where the Fifth Circuit had declined to reach the petitioners' Appointments Clause argument on waiver grounds. 501 U.S. at 872. The Court "exercise[d] [its] discretion to hear petitioners' challenge to the constitutional authority of the Special Trial Judge" in light of the "strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." *Id.* at 879 (internal quotation marks omitted). Similarly, in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the court of appeals had incorrectly held that it lacked jurisdiction to review a district court ruling denying a claim of qualified immunity. *Id.* at 530. The Court reversed that jurisdictional holding and then proceeded to the "purely legal question" as to whether immunity applied, "notwithstanding that it was not addressed by the Court of Appeals." *Id.*; *see also Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982) (reversing court of appeals' decision that it lacked jurisdiction over an interlocutory appeal and then addressing the "pure issue of law" the court of appeals had refused to consider).

The merits issue here is likewise a purely legal one: whether the significant authority exercised by

SEC ALJs makes them inferior officers under the Appointments Clause. The parties fully briefed that issue in the district court and the court of appeals, and the Second Circuit declined to consider it only because of its erroneous jurisdictional ruling. There is no dispute that, if the SEC's ALJs are inferior officers, the SEC's hiring procedures do not satisfy the requirements of the Appointments Clause, *see*, *e.g.*, C.A. J.A. A-69, at 29:10-17, and the ALJ assigned to petitioners' administrative proceeding is therefore constitutionally barred from presiding over that matter and issuing a decision. Deferring a ruling on the squarely presented Appointments Clause question would only prolong the doubt and confusion created by the conflicting lower-court decisions regarding the constitutionality of the SEC's appointment procedures.

Nor is the fact that the parties are currently awaiting a decision from the ALJ a reason for this Court to withhold review. Petitioners' Appointments Clause claim challenges a "structural" error that "goes to the validity of the . . . proceeding" itself, *Freytag*, 501 U.S. at 879-80, and a grant of certiorari by this Court would provide good cause to stay the administrative proceeding. Moreover, even if the SEC proceeding moves forward, it will almost certainly be months before the ALJ issues a decision and years before the Commission's lengthy appeal process is complete. *See* Tr. at 3635:23-24, *In re Lynn Tilton*, File No. 3-16462 (Nov. 9, 2016) (ALJ estimating "three more years" of agency proceedings). This Court's decision is thus likely to be issued well before the conclusion of administrative proceedings.

CONCLUSION

The Appointments Clause "is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659 (quoting *Buckley*, 424 U.S. at 125). Yet, that safeguard is being systematically violated by the SEC—at the expense of the constitutional rights of the ever-increasing number of parties forced to defend themselves in SEC administrative proceedings. This Court should grant review to ensure that litigants in agency proceedings have a meaningful ability to raise constitutional challenges in the federal courts and to end the SEC's serial deprivation of litigants' constitutional rights.

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

January 18, 2017