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, et al.

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California
No. 3:18-cv-02692-DMS-JLB
Hon. Dana M. Sabraw

APPELLANTS' OPENING BRIEF

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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: January 29, 2020

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INTRODUCTION

This appeal arises from the Securities and Exchange Commission's (SEC) attempt to subject Raymond J. Lucia Companies, Inc. (RJL) and Raymond J. Lucia, Sr. (Mr. Lucia) to a second unconstitutional administrative proceeding before an Administrative Law Judge (ALJ) whose appointment violates Article II of the United States Constitution, after the United States Supreme Court vacated SEC's first attempt to try them.

The first unconstitutional proceeding began in 2012, what will be eight years before this appeal is briefed, and even longer before it is heard. Although the SEC lawfully could have brought that action in the district court or before the Commission, instead, the SEC hauled Mr. Lucia before an administrative law judge who had never received a proper appointment in violation of the SEC's duty to bring cases only in lawful tribunals. Mr. Lucia and RJL endured a six-week trial before that ALJ and an appeal to the Commission. There, two dissenting Commissioners correctly noted three years later that the ALJ who heard the case, Cameron Elliot, had levied hundreds of thousands of dollars in fines, revoked Mr. Lucia's licensure and issued a lifetime bar for violation of a rule he had "made up out of whole cloth." Those Commissioners also correctly noted that constitutional questions such as the validity of the ALJ's appointment, could only be addressed by Article III Courts.

Mr. Lucia and RJL's appeal to the D.C. Circuit in 2015 was unavailing, and an evenly split D.C. en banc decision in 2016 tacitly affirmed that injustice. Only after taking their case to the highest court of the land were RJL and Mr. Lucia able to prevail on the elementary proposition that they could only be tried before a properly appointed ALJ. From 2012 to 2018, SEC maintained a litigation position so erroneous that the Department of Justice ultimately took the extraordinary step of confessing error before the Supreme Court!

The Supreme Court ordered in *Lucia v. SEC*, 138 S. Ct 2044, 2054-55 (2018) that RJL and Mr. Lucia were required to have a hearing before a new, properly appointed ALJ or before the Commission itself.[1]

Proceeding in defiance of that command, SEC has persisted in prosecuting RJL and Mr. Lucia before an ALJ who is just as unconstitutional as the first one—and SEC knows it. SEC ALJs are protected from removal by multiple layers of tenure protection, which insulate them, like Matryoshka dolls, from control by the President in violation of Article II.[2] *See Free Enterprise Fund v. Pub. Co.*

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[1] Unusually, Justice Kagan's opinion for the court held that the adjudicator on remand "cannot be Judge Elliot, even if he has by now received (or receives sometime in the future) a constitutional appointment … [t]o cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled." *Lucia*, 138 S. Ct. at 2055.

[2] 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

Accounting Oversight Bd., 561 U.S. 477 (2010) (*FEF*). The government admitted this unconstitutionality in its brief in *Lucia*, and Justice Breyer called it the "embedded" constitutional infirmity in his concurring opinion. *Lucia*, 138 S. Ct. at 2057. Despite that admission, SEC proceeded before an ALJ, rather than hear the *Lucia* case itself, as it is empowered to do and as the Supreme Court in *Lucia* twice stated that it could do.[3]

RJL and Mr. Lucia instituted this challenge in the district court so that they would not have to endure a second—and ultimately a third—administrative enforcement proceeding when the second, like the first—is inevitably deemed void. Just the recitation of that convoluted state of affairs demonstrates the grave and protracted injustice that flows inevitably from SEC's intransigence. This case

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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.

[3] In another context, the Third Circuit recently recognized administrative agencies' inhospitable incentives and incapacity to address such constitutional error when it noted "the likely futility of claimants raising such concerns" in administrative proceedings, noting that although "the SSA was aware that the ALJ appointments might be rendered unconstitutional by the Supreme Court yet declined to take corrective action until well after *Lucia* was decided." *Cirko v. Commissioner of Social Security*, 2020 WL 370832 (Jan. 23, 2020), at *17 n. 12.

involves the identical statutory scheme and type of claim that *FEF* has already commanded federal courts to hear.

This case also presents this court of appeals with the question of how a constitutional—to say nothing of rational—system of justice must operate. Should RJL and Mr. Lucia, possessed of a constitutional right to a proper ALJ, have to endure a decade or more of unconstitutional proceedings before ALJs, pointless Commission review, circuit court review and Supreme Court proceedings only to have the whole process end in serial vacatur, with impending, inevitable retrials hovering as the pyrrhic reward? Could Congress have possibly intended such a flawed process when it provided for administrative schemes for violations of the securities laws—and the securities laws alone—citing the speed and expedition of such due-process compromised review? Or should the SEC be confined to lawful tribunals—and lawful tribunals alone—when it exerts its considerable powers to hale Americans before them putting their lives, livelihoods, resources and reputations at stake? To state those questions compels concern—and reversal of the decision below.

JURISDICTIONAL STATEMENT

Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr. appeal from the district court's Order (1) Granting Defendants' Motion to Dismiss and (2) Denying Plaintiffs' Motion for Preliminary Injunction as Moot entered on August

21, 2019. ER7. The basis for jurisdiction in the district court was 28 U.S.C. § 1331. This court has jurisdiction over the appeal under 28 U.S.C. § 1291.

Appellants filed a timely notice of appeal on September 17, 2019, ER1, pursuant to F.R.A.P. 4. This appeal is from a final order or judgment that disposed of all plaintiffs' claims.

STATEMENT OF ADDENDUM

The full text of the relevant statutory provisions is set forth in the statutory addendum included at the end of this brief. *See* 9th Cir. R. 28-2.7.

ISSUES PRESENTED

Did the district court err in concluding that it lacked subject-matter jurisdiction to hear RJL and Mr. Lucia's constitutional challenge to the SEC's referral of their enforcement proceeding to an ALJ who enjoys multiple layers of tenure protection in violation of Article II?

STATEMENT OF THE CASE[4]

Raymond J. Lucia, Sr. was a financial planning professional who for nearly 40 years had an unblemished record in his chosen profession. ER17. He built a successful family business, RJL, that came to employ approximately 100 people,

[4] All of the documents from the administrative proceeding are available at https://www.sec.gov/litigation/apdocuments/ap-3-15006.xml.

and which also included highly successful media ventures, including his own radio show, television and media appearances built upon his name-recognition, prominence in the financial planning profession, and reputation for probity. ER17.

To promote his business and educate potential clients, Mr. Lucia and RJL held free seminars for prospects that promoted a retirement planning strategy he called "Buckets of Money" (BOM). ER17-18. That strategy urged retirees and pre-retirees to diversify their assets into buckets of safe (CDs, bonds, annuities) and buckets of riskier investments (stocks, real estate). The strategy told retirees that they should draw income first from the safer investments, so as to allow time for the riskier investments to grow. ER18. Numerous academic studies support the efficacy and soundness of this approach. ER18.

All of Mr. Lucia and RJL's promotional materials had been submitted for prior written regulatory approvals by broker-dealers registered with the Financial Industry Regulatory Authority (FINRA) or the SEC. ER18. Specifically, in 2003, the SEC reviewed his promotional materials, including two slides that used the term "back test," and raised no concerns that they were misleading. Appellants fully and repeatedly disclosed the exact assumptions, hypotheticals and/or actual data used in the back tests, and the SEC does not contend otherwise. ER21. Indeed, the 2003 SEC examiners specifically concluded that RJL and Mr. Lucia "does not advertise performance." ER19.

In 2010, RJL and Mr. Lucia received notice that the agency examiners now objected to the slides; RJL and Mr. Lucia immediately ceased using any and all material of any concern to the SEC, including the slides in question. Mr. Lucia also voluntarily removed all three of his books from circulation. ER20.

Two years later, in 2012, the SEC brought an order instituting proceedings (OIP) against RJL and Mr. Lucia charging that they 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. ER20. The OIP made no claim that any investor had complained or suffered losses or that any sales practices by RJL or Mr. Lucia led to any harm to anyone at all. ER 20. No securities were offered or sold at the Lucia presentations, and none of the nearly 50,000 potential investors who attended the seminars filed a complaint with the SEC that the slides were misleading. ER 20.

The term "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 SEC ever given fair notice that it would regulate its usage. ER20.

The Administrative Proceedings

In 2012, the SEC had its choice of proceeding directly before the Commission, in federal district court, or in a proceeding before an administrative

law judge, an option in which the SEC prevails 90% of the time (as opposed to only a 69% success rate in federal courts). ER31.

It elected to institute the OIP before an unconstitutionally appointed ALJ, Cameron Elliot, who boasted that he had "found the defendants liable in every contested case he has heard," and who warned respondents before him that "they should be aware he had never ruled against the agency's enforcement division." ER21–22. ALJ Elliot also admitted publicly that he had "never given less than a permanent bar" to anyone who contested the charges against them." ER22

Mr. Lucia and RJL had scheduled witnesses to provide testimony on their behalf. Shortly before they were to testify, the SEC's enforcement division served those witnesses with subpoenas demanding production of all their personal financial records, in every format, from any source, over a five-year period, subject to the penalty of fine and/or imprisonment. ER22. Subsequently, those witnesses declined to appear on Mr. Lucia's and RJL's behalf. As a result, ALJ Elliot never heard evidence from witnesses favorable to RJL and Mr. Lucia. Those witnesses even wrote a letter to ALJ Elliot complaining of the eleventh-hour intimidation, but ALJ Elliot refused to enter it into the record. ER22.

On July 8, 2013, ALJ Elliot issued an order revoking RJL and Mr. Lucia's investment advisor registrations and barred them from the industry for life even though the record was undisputed that the case lacked any evidence of customer

complaints or losses. ER22. In reaching that decision, ALJ Elliot specifically wrote that appellants' use of the term "back test" was misleading because it did not "meet the definition of 'back test' that *I have adopted.*" ER22 (emphasis added). Further, citing the "substantial financial success" that Mr. Lucia and his company had supposedly "enjoyed at their clients' expense," ALJ Elliot ordered them to pay $300,000 in civil money penalties even though the record lacked any evidence, much less a finding, of any customer complaints or investor losses. ER23.

The Commission Proceedings

On September 3, 2015, the Commission entered an order that essentially adopted and affirmed ALJ Elliot's findings, penalties, registration revocations and lifetime ban. ER23. In the Commission's only written dissent of 2015, two of the five Commissioners dissented because the majority had "create[d] from whole cloth" a rule for "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." ER23-24. Those dissenters also presciently noted that Article III courts should decide the Appointments Clause constitutional challenges timely raised by appellants. ER24.

Appeal to the D.C. Court of Appeals

Appellants appealed the Commission ruling to the D.C. Circuit. On October 22, 2015, the Commission stayed the civil penalties, but refused to stay Mr. Lucia's lifetime ban or the revocations of appellants' registrations. ER24.

On August 9, 2016, the D.C. Circuit affirmed the Commission's order. *Raymond J. Lucia Companies, Inc. v. S.E.C.*, 832 F.3d 277 (D.C. Cir. 2016). In this first review by a judicial authority, the circuit court noted that its review is "deferential" and that the Commission's decision could be set aside "only if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 832 F.3d at 289–90 . As to Mr. Lucia's appeal of the lifetime ban, "a most serious sanction," the D.C. Circuit reviewed its imposition under an "especially deferential" standard and left this most draconian, career- and reputation-destroying ban in place "even without investor injury." ER24. On June 26, 2017, appellants petition for en banc review was denied by an equally divided D.C. Circuit. *Raymond J. Lucia Companies, Inc. v. S.E.C.*, 868 F.3d 1021 (D.C. Cir. 2017) (*en banc*).

Supreme Court Proceedings

Mr. Lucia and RJL then filed a petition for certiorari to the Supreme Court, which it granted.

In replying 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 *FEF*, 561 U.S. 477, which held that officers of the United States may not be insulated from presidential control by more than one layer of tenure protection, the government recognized that "[h]ere, the statutory scheme provides for at least two, and potentially three, levels of protection against presidential removal authority." Gov't Cert. Pet. Br. in *Lucia*, at 20. "It is critically important," argued the government, that the Court address the removal issue along with the Appointments Clause issue. *Id*. at 21. "Addressing that issue now will avoid needlessly prolonging the period of uncertainty and turmoil caused by litigation of these issues." *Id*.

The government's position in *Lucia* led the SEC to attempt to "ratify" the prior appointment of its ALJs. In an order issued on November 30, 2017, the Commission stated that "[t]o put to rest any claim that administrative proceedings pending before, or presided over by, Commission administrative law judges violate

the Appointments Clause, the Commission—in its capacity as head of a department—hereby ratifies the agency's prior appointment of " its ALJs. ER25.

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).[5] 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, and thus calling for lower courts to address whether the multiple layers of tenure protection enjoyed by SEC ALJs were constitutional.

RJL and Mr. Lucia had to litigate for six years the constitutionality of his ALJ's appointment all the way to the Supreme Court. Those proceedings have cost him everything: his livelihood, reputation, health, and business, and they have put

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[5] 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.) The SEC has declined to respond to a FOIA request designed to ascertain how the formalities of reappointment occurred. ER40-41.

dozens of employees out of a job, and cost well over a million dollars in defense costs and attorney fees. ER25, 27.

Post Supreme Court Proceedings

Judicial Proceedings

RJL and Mr. Lucia sued in the Southern District of California on November 28, 2018 seeking to enjoin the SEC from subjecting them to a second unconstitutional administrative proceeding. ER14. On August 21, 2019, the district court dismissed this case for lack of subject-matter jurisdiction, concluding that Congress intended for its "detailed review scheme…[to] channel[] all judicial review of SEC administrative proceedings to [eventual review in] the courts of appeals, thus precluding district court jurisdiction." ER11.

Administrative Proceedings

The SEC recommenced administrative proceedings against RJL and Mr. Lucia before ALJ Carol Fox Foelak in 2018. On November 29, 2018, appellants moved to dismiss the administrative proceedings and challenged the ALJ's unconstitutional removal protections. ER53. Nearly eight months later, on July 15, 2019, ALJ Foelak denied their motion. ER48.

SUMMARY OF THE ARGUMENT

FEF provides the controlling rule of decision for this Court on both jurisdiction and the merits. That decision unambiguously held that federal courts

have jurisdiction to hear constitutional questions regarding Article II removal power, and further that "Officers of the United States" may not be protected by more than one layer of tenure protection.

Administrative agencies and their ALJs lack power to right such constitutional wrongs, *see La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (agencies' powers limited to those conferred by Congress), so federal courts *must* exercise jurisdiction. Notably, the *Lucia* decision itself calls for lower *courts*, not ALJs, to address this question. 138 S.Ct. at 2050 n.1. Furthermore, the logic of the jurisdictional question requires that a court decide this issue before unconstitutional, to-be-vacated hearings take place—for a second time in the case of these appellants.

The text and structure of the securities laws compel this court to find jurisdiction, factors which were not considered by the errant circuit courts upon which the SEC relies. Those decisions misapply the *Thunder Basin* line of cases which involve statutory schemes of exclusive review, and further misapply the factors set forth by the Supreme Court in the decisions that control this case.

Requiring these questions to be decided by an ALJ who lacks authority to decide them, and whose decision is institutionally biased and is preordained to be set aside, deprives appellants of due process. It further denies appellants any effective remedy because the unconstitutional hearing *is* the harm. Prompt initial

judicial review of the constitutionality of the SEC's reinstituted proceedings is required under the Constitution and precedents that bind this court.

ARGUMENT

I. FEDERAL COURTS HAVE JURISDICTION AND MUST EXERCISE IT UNDER CONTROLLING SUPREME COURT AUTHORITY

A. Standard of Review

This court reviews a dismissal for lack of subject-matter jurisdiction de novo. *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1151 (9th Cir. 2017). Review of a trial court's grant of dismissal for lack of subject-matter jurisdiction is without deference. The court should accept all well-pleaded facts of a complaint as true and view them in the light most favorable to the plaintiff. *Warren v. Fox Family Worldwide, Inc.*, 327 F. 3d 1136, 1139 (9th Cir. 2003). 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).

B. *Free Enterprise Fund* and Other Controlling Supreme Court Cases Establish Jurisdiction

District courts have original jurisdiction to resolve constitutional claims that "arise under" the Constitution and laws of the United States under 28 U.S.C. § 1331, and specifically jurisdiction to provide "equitable relief … for preventing

entities from acting unconstitutionally.'" *FEF*, 561 U.S. at 491 n.2 (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)).[6]

The Supreme Court in *FEF* unequivocally held that federal courts have jurisdiction over cases such as this one on this exact same issue and under the same statutory scheme and that nothing in 15 U.S.C. § 78y ousts that jurisdiction, even implicitly. 561 U.S. at 489–90 (finding jurisdiction where "petitioners object to the Board's existence, not to any of its auditing standards"). Notably, the *Lucia* decision itself calls for lower *courts*, not ALJs, to address this question. 138 S. Ct. at 2050 n.1.

Lucia established the necessary predicate for reaching the same conclusion about SEC ALJs that the Supreme Court already reached with respect to members of the PCAOB—that SEC ALJs are officers of the United States. *Id.* at 2055. As officers, ALJs may not be insulated from removal by multiple layers of tenure

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[6] "[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, 358 (1989) (quoting *Willcox v. Consol. Gas Co.,* 212 U.S. 19, 40 (1909)).

protection. Yet, current law only allows ALJs to be removed for "good cause" established and determined by the Merit Systems Protection Board (MSPB). 5 U.S.C. § 7521(a). The members of the MSPB, in turn, may not be removed except for "good cause shown." *Id*. at § 7211(e)(6). SEC Commissioners cannot remove ALJs without approval from the MSPB, *id*. at § 7521, and may not themselves be removed except for "inefficiency, neglect of duty, or malfeasance in office." *See FEF*, 561 U.S. at 487; Gov't Cert Pet. Br. in *Lucia*, 2017 WL 5899983, at *20. These multiple layers of tenure protection for SEC ALJs violate Article II. *FEF*, 561 U.S. at 492. *See also* Gov't Merits Br. in *Lucia*, 2018 WL 1251862, at *47, *53.

Thus, the new ALJ assigned to RJL and Mr. Lucia's enforcement proceeding on remand sits in violation of Article II, and the new enforcement proceeding is void. *See Lucia*, 138 S. Ct. at 2055. The government recognized this inevitable consequence in *Lucia.* Referring to SEC's November 30, 2017 order "ratifying" its ALJ appointments, the government stated:

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

Gov't Merits Br. in *Lucia*, 2018 WL 1251862, at *46.

In his *Lucia* concurrence, Justice Breyer referred to the removal-protections issue as the "embedded constitutional question" in the case. 138 S. Ct. at 2060 (Breyer, J., concurring) ("Congress seems to have provided administrative law judges with two levels of protection from removal without cause—just what *Free Enterprise Fund* interpreted the Constitution to forbid . . . ."). Footnote 10 of *FEF* had left open the question whether ALJs could enjoy more than one layer of removal protection. 591 U.S. at 507 n.10. The Court effectively closed the question in *Lucia*.

The U.S. Supreme Court reviewed the identical statutory scheme at issue here in *FEF* and concluded that Article III courts are not stripped of jurisdiction and therefore *must* decide structural questions of constitutional administrative law:

> The Government reads [15 U.S.C.] § 78y as an exclusive route to review. But the text does not expressly limit the jurisdiction that other statutes confer on district courts. See, *e.g.*, 28 U.S.C. §§ 1331, 2201 . . . . We do not see how petitioners could meaningfully pursue their constitutional claims under the Government's theory [of exclusive jurisdiction]. . . .
> . . . .
> Petitioner's constitutional claims are also outside the Commission's competence and expertise. . . . They are instead standard questions of administrative law, which the courts are at no disadvantage in answering.
>
> We therefore conclude that § 78y did not strip the District Court of jurisdiction over these claims.

561 U.S. at 489–91. The Court then observed:

> [E]quitable relief 'has long been recognized as the proper means for preventing entities from acting unconstitutionally'. . . '[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue

> injunctions to protect rights safeguarded by the Constitution'. . . . If the Government's point is that an Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim, it offers no reason and cites no authority why that might be so.

Id. at 491 n.2 (internal citations omitted).

In short, the statutory schemes in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), *Elgin v. Department of Treasury*, 567 U.S. 1 (2012)[7] and *Bank of Louisiana v. FDIC*, 919 F.3d 916 (5th Cir. 2019) feature exclusive review, whereas the Exchange Act expressly contemplates retention of Article III jurisdiction. Add to that *FEF*'s clear holding that nothing in § 78y precludes district court

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[7] In the context of SSA administrative proceedings, the Third Circuit dismissed the government's argument that *Elgin* required that a petitioner first undergo administrative proceedings as a "patent misreading of *Elgin*, which neither dealt with exhaustion nor remarked upon the agency's competence to hear constitutional claims," also noting that the relief must be something the ALJ is capable of providing, *i.e.*, within its *competence*, which *FEF* tells us constitutional resolution of Art. II claims are not. *Cirko*, at *15, n.10. *Cirko* also notes that the rationale of giving an agency first shot at error correction does not hold water:

> We need not give an agency the opportunity for error correction that it is incapable of providing—*i.e.*, where it is not "empowered to grant effective relief." See *McCarthy* [*v. Madigan*], 503 U.S. [146] at 147 [1992]. This case falls squarely in that category: At neither the trial nor the appellate levels could the SSA's administrative judges cure the constitutionality of their own appointments, whether by reappointing themselves, see *Lucia*, 138 S. Ct. at 2051 (explaining that "the President, a court of law, or a head of department" must appoint ALJs), or by transferring the case to a constitutionally appointed ALJ, see Appellant's Br. 6 (conceding that all SSA ALJs were unconstitutionally appointed prior to *Lucia*).

Cirko, at *16.

jurisdiction under §§ 1331 and 2201, even implicitly, and SEC's arguments that agencies have "exclusive" jurisdiction wither.[8]

Where an administrative agency cannot adequately address constitutional claims that result from agency action, as is the case here, the Supreme Court has not hesitated to find that Congress did not intend to preclude district court jurisdiction over those claims. This is true even when the relevant statutes impose clear jurisdictional limits and have eventual judicial review. In *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 494, 497 (1991), for example, the Supreme Court permitted a constitutional challenge to immigration proceedings despite an *express* statutory limit on the court's jurisdiction, because Congress would have used "more expansive language" had it intended to preclude review. *Id.* at 494. *See also Oestereich v. Selective Service Bd.*, 393 U.S. 233, 235, 237–38 (1968) (finding jurisdiction over a student's appeal of his Selective Service induction despite an express statutory bar because the bar as written would be "out of harmony . . . with constitutional requirements"); *Leedom v. Kyne*, 358 U.S. 184, 190 (1958) ("This Court cannot lightly infer that Congress does not intend judicial

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[8] The Supreme Court has long presumed that parties may challenge agency action before they suffer any harm. *See*, *e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815–16 (2016); *Abbott Labs. v. Gardner*, 387 U.S. 136, 139–41, 152–53 (1967); *United States v. Nourse*, 34 U.S. 8, 28–29 (1835) (Marshall, C.J.).

protection of rights it confers against agency action taken in excess of delegated powers.").

The question, therefore, is not whether Congress intended to confer jurisdiction, but whether it intended to take it away. *Whitman v. Dep't of Transp.*, 547 U.S. 512. 514 (2006). Here, the statute itself provides the district court as a forum for these claims. The SEC cannot manufacture Congressional intent by making that choice for Congress, which must express its own intent within the statute. If otherwise available federal court jurisdiction can be extinguished by the SEC's initial choice of forum, this grants power to the SEC to turn respondents' rights into mere "options," available only at the SEC's prerogative. Worse, this power would give the agency an incentive to go before the ALJ *precisely to avoid* adjudication of constitutional issues. By postponing competent review of constitutional questions, SEC could 1) make the process the punishment and 2) roll the dice that the respondent will settle, give up, or run out of funds for a defense before he can ever reach a forum that has the competence to rule on these constitutional infirmities. Constitutional rights—and federal jurisdiction—would then become mere options doled out at the agency's whim. Congress surely did not intend to confer the power to extinguish otherwise available federal jurisdiction on agency administrators, either explicitly or implicitly, as recognized by *FEF*.

The Third Circuit recently rejected the SSA's assertion that claimants must exhaust remedies in agency proceedings noting:

> [E]xhaustion is generally inappropriate where a claim serves to vindicate structural constitutional claims like Appointments Clause challenges, which implicate both individual constitutional rights and the structural imperative of separation of powers. *Glidden v. Zdanok*, 370 U.S. 530, 536–37 (1962).
>
> The importance of the Appointments Clause has been recognized since our nation's founding. In the colonial system, appointments were distributed in "support of a despicable and dangerous system of personal influence," The Federalist No. 77, at 421 (Alexander Hamilton) (E.H. Scott ed., 1894), that enabled officers to "harass our people, and eat out their substance," The Declaration of Independence para. 12 (U.S. 1776). Indeed, the "power of appointment to offices" was seen in the Founding Era as "the most insidious and powerful weapon of eighteenth century despotism." *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991) (quoting Gordon S. Wood, The Creation of the American Republic 1776–1787 79, 143 (1969)). By requiring that all "Officers of the United States" be appointed by the president, a head of department, or a court of law, see U.S. Const. art. II, § 2, cl. 2, our Founders sought to replace that "despicable and dangerous system," The Federalist No. 77, supra, at 421, with one that favored political accountability and neutrality, and our Supreme Court has upheld the protection of the Clause in various cases for the express purpose of "protec[ting] individual liberty," *NLRB v. Noel Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring) (citation omitted), and upholding the "principle of separation of powers," *Buckley v. Valeo*, 424 U.S. 1, 121 (1976).

Cirko v. Commissioner of Social Security, 2020 WL 370832 (Jan. 23, 2020).[9]

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[9] *Cirko* also dismisses the notion that agency expertise has any role to play in deciding an Article II constitutional question: "agency expertise is rendered irrelevant … by the well-worn maxim that constitutional questions, including Appointments Clause challenges are 'outside the [agency's] *competence* and expertise.'" citing *FEF*, at 491. *Cirko*, at *15 (emphasis added).

And in similar contexts, circuit courts have held that exhaustion is unnecessary when a plaintiff objects to the structure, rather than the merits, of the administrative proceedings against her. *See, e.g.*, *Dragna v. Landon*, 209 F.2d 26, 28 (9th Cir. 1953) ("[W]here the action of an administrative body is void and *ultra vires*, it is unnecessary that a plaintiff seeking relief against such action should exhaust his administrative remedies.'); *Hammond v. Baldwin*, 866 F.2d 172, 176 (6th Cir. 1989) ("[I]f the injury is infirmity of the process, neither a final judgment nor exhaustion is required."); *Finnerty v. Cowen*, 508 F.2d 979, 982–83 (2d Cir. 1974) ("[W]e agree with other recent opinions dispensing with the exhaustion requirement in situations where the very administrative procedure under attack is the one which the agency says must be exhausted."); *Marsh v. County School Bd.*, 305 F.2d 94, 98 (4th Cir. 1962) ("To insist, as a prerequisite to granting relief against discriminatory practices, that the plaintiffs first pass through the very procedures that are discriminatory would be to require an exercise in futility."). *Touche Ross & Co. v. SEC*, 609 F. 2d 570, 574 (2d Cir. 1979) held that a litigant should not be required to submit to an administrative proceeding where there was no need for further agency action, the question was of pure statutory interpretation and exhaustion would have required them to submit to the very procedures they were attacking. This precise reasoning applies to RJL and Mr. Lucia's challenge.

C. The Logic of the Jurisdictional Question Commands a Court Decision

This Court must address the Article II question *before* appellants undergo an unconstitutional proceeding. Congress did not intend to deprive the district courts of jurisdiction over constitutional challenges to an ALJ's claimed powers. As set forth above, *FEF* unequivocally holds that federal district courts have jurisdiction to address constitutional claims identical to those at issue here. To nonetheless permit the SEC to delay the inevitable by bringing an enforcement proceeding before an unconstitutionally appointed officer generates inefficiencies and poses a grave challenge to the rule of law. Potentially dozens of claimants are enduring unconstitutional proceedings that can be reversed, according to the SEC, only on review of a final order. This approach clogs the courts and agencies with to-be-voided proceedings and eviscerates the promise of rapid review that was the administrative scheme's sine qua non.[10]

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[10] In 2014, then-Director of the SEC Enforcement Division Andrew Ceresney explained that the administrative scheme which denies jury trial, evidentiary and procedural protections afforded in Article III courts was meant to "produce prompt decisions" from hearings "held promptly." *Remarks to the American Bar Association's Business Law Section Fall Meeting* (Nov. 21, 2014), *available at* https://www.sec.gov/news/speech/2014-spch112114ac. This promptness was important to all the parties because "[p]roof at trial rarely gets better for either side with age; memories fade and the evidence becomes stale." *Id.*

Under SEC's logic, these plaintiffs must wait it out until they reach a circuit court, which would mean that wasteful, void, to-be-vacated proceedings must be endured by Americans and the federal government alike at collective great cost to both. No rational system of justice would require that proceedings take place in this order. No constitutional system would defer the question of constitutionality to be decided after extended administrative trials and appeals take place in those unconstitutional tribunals before a qualified adjudicator can reach the question.

To insist upon exhaustion of administrative remedies in these circumstances is to ensure that the SEC can deplete parties before them, financially and otherwise, before they ever reach a forum where they can vindicate their constitutional claims.

D. Neither the Commission Nor Its ALJs Are Empowered to Decide Constitutional Questions

Only the Article III judiciary has the power to decide the constitutionality of this ALJ and thereby keep the elected branches within their assigned roles. An ALJ is not empowered to resolve this collateral constitutional question or to decide on her own authority that she may occupy her office.

Whether appellants' ALJ was unconstitutionally appointed has nothing to do with the merits of the securities law violations that the SEC alleges. Requiring SEC to reassign Mr. Lucia and RJL to a lawful tribunal says nothing about the constitutionality of the review of final orders under the securities laws. RJL and

Mr. Lucia raise an entirely collateral question, which the district court has jurisdiction to review under *Thunder Basin*, 510 U.S. at 212–13.

SEC's dilatory insistence on administrative proceedings raises additional structural and due process problems. The administrative scheme contemplates a "final order" issued by the ALJ, which the Commission then reviews. Yet no final order is involved in this case. And neither the Commission nor the ALJ is an Article III court. Both lack the lawful power to rule on constitutional questions, because their statutory mandate is solely to enforce the securities laws. *See Lucia*, 138 S. Ct. at 2049.

SEC chose to bring this case in an unconstitutional forum. It cannot then avoid the consequences of the Court's clear directive in *Lucia* that the original hearing was a legal nullity. *See id.* at 2055. Just as an ALJ cannot be expected to rule on her own authority to preside, neither the ALJ nor the Commission, even assuming the best of intentions, can be expected to slap herself or itself on the wrist and agree that they are breaking the rules in the manner in which they have re-prosecuted this action. Realistically speaking, a district court is the *only* forum in which appellants can seek and obtain a remedy.

For all these reasons, this Court must intervene to recognize subject-matter jurisdiction so that federal courts can rule on the constitutional question and provide relief.

II. THE TEXT AND STRUCTURE OF THE SECURITIES LAWS COMPEL THIS COURT TO FIND JURISDICTION

Congress did *not* exclusively commit SEC enforcement actions to administrative agency proceedings. Quite to the contrary, 15 U.S.C. § 78aa vests "[t]he district courts of the United States" with "*exclusive* jurisdiction of violations of [the Exchange Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by [the Exchange Act] or [the] rules or regulations thereunder" (emphasis added). Congress has also provided jurisdiction in federal court for actions under the Advisor's Act and the Investment Company Act. Both Acts have "Jurisdiction of Offenses and Suits" that provide "[t]he district courts of the United States […] shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder […] to enforce any liability or duty created by, or to enjoin any violation of this title or the rules, regulations, or orders thereunder.
15 U.S.C. § 80a–43; *and* 15 U.S.C. § 80b–14(a). Similarly,
15 U.S.C. § 78u(d)(3)(A) authorizes SEC to bring enforcement actions in federal court.

Furthermore, 15 U.S.C. § 78y(a)(1), which governs review of final Commission orders, employs permissive, not mandatory language. That an aggrieved litigant "may" seek post-agency review of a final order in a court of appeals cannot support a construction of "exclusive" administrative jurisdiction in

the first instance. Crucially, § 78y(a)(3) indicates that appellate court jurisdiction becomes exclusive only after SEC issues a "final order," only if an aggrieved litigant chooses to invoke the circuit court review, and even then only when SEC files its administrative record with the court. None of those predicates applies here. Finally, 15 U.S.C. § 78bb(a)(2) expressly preserves "any and all" other avenues of relief in the courts.

Read together, these statutory provisions make it impossible to infer any intent by Congress whatsoever to limit, much less to divest, district courts of jurisdiction under 28 U.S.C. § 1331 to adjudicate constitutional challenges raised well before any final order could ever be issued. The *SEC ALJ Cases*[11] all fail to acknowledge this statutory structure and accordingly provide a misleading road map to decision, which this court should not hesitate to ignore.

III. THE PRECEDENTS CITED BY SEC DO NOT PRECLUDE JURISDICTION

Before proceeding to the analysis of the *SEC ALJ Cases* upon which SEC and the district court below rely, it is important to note that this Court cannot even consider these cases until it first applies controlling Supreme Court authority and

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[11] *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).

its own precedent.[12] *FEF* and this circuit's decision in *Lone Star Cement Corp. v. FTC* [1964 TRADE CASES P 71,322], 339 F. 2d 505 (9th Cir. 1964), control and require reversal. *Lone Star Cement* "requires the court to weigh: (1) The extent of injury from pursuing an administrative remedy, (2) the degree of doubt about agency jurisdiction, and (3) the involvement of agency expertise in the question of jurisdiction." *See also*, *Times Mirror Co. v. F.T.C.*, No. 78-3422-LEW, 1979 WL 1651, at *1 (C.D. Cal. June 13, 1979).

Here, RJL and Mr. Lucia face (1) the injury of protracted proceedings destined to be vacated at great cost both to them and to the public fisc, (2) a controlling United States Supreme Court decision in *FEF* which compels district court jurisdiction *under this exact same statute*, and (3) an agency ALJ who has no experience or expertise whatsoever in deciding questions of federal jurisdiction.

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[12] In determining what constitutes clearly established law, a circuit court first looks to Supreme Court precedent and then to its own. *See Fid. Expl. & Prod. Co. v. U.S.*, 506 F.3d 1182, 1186 (9th Cir. 2007) ("[W]e must follow the Supreme Court precedent that directly controls[.]"); *U.S. v. Salas*, 879 F.3d 530, 537 (9th Cir. 1989) ("A three-judge panel of this court cannot disregard or overrule a prior decision of this court.); *Cerrato v. San Francisco Cnty. Coll. Dist.*, 26 F.3d 968, 972 n.15 (9th Cir. 1994) (observing that this Court is bound by its prior decisions absent "en banc reversal or an intervening Supreme Court decision").

Because appellants satisfy all three *Lone Star Cement* elements to be considered in this circuit, this court must reverse the judgment below.

A. The *SEC ALJ Cases*' Attempts to Distinguish *FEF* Make No Sense

Rather than directly address the holding of *FEF*, or acknowledging this circuit's three part inquiry set forth above, SEC relies on five flawed out-of-circuit court decisions. By ignoring the Supreme Court's dispositive holding in *FEF*, perhaps SEC hopes that the sheer volume of errant circuit court opinions will overcome the Supreme Court's inexorable command that federal courts hear constitutional questions—specifically this exact Article II question. But, even where numerous federal courts of appeals have adopted a position, neither the Court—nor the Constitution—"resolve[s] questions such as the one before us by a show of hands." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 715 (2011).

The *SEC ALJ Cases* reason that because no administrative proceedings had commenced in *FEF*, plaintiffs were free to make their constitutional challenge in court. But it is no answer to claim that *FEF* is distinguishable because the petitioner there lacked any "guaranteed path to federal court." The petitioner in *FEF* faced only a critical PCAOB inspection report when it brought its case. *See* 561 U.S. at 487, 490–91. If the petitioner had waited, PCAOB may not have found any violations, in which case the matter would have ended. If the investigation had resulted in an alleged violation, PCAOB would have brought charges in an

administrative proceeding, and the petitioner would have had a "guaranteed path to federal court." Clearly, it was not simply the possibility of obtaining eventual circuit court review that mattered to the Court in *FEF*, but the fact that the petitioner was challenging the very authority of the PCAOB to act. *See id*. at 490 ("[P]etitioners object to the Board's existence, not to any of its auditing standards.").

Thus, other circuit courts have gotten the analysis exactly backwards. Here, an ongoing administrative proceeding inflicts serious and ongoing harm on appellants. In *FEF*, the unconstitutionally appointed board had taken no action against the plaintiff. SEC would have *FEF* stand for the proposition that parties can bring constitutional claims against SEC in court only if they have not been harmed while parties who are being *actively* harmed by being subjected to an unconstitutional proceeding must wait it out for § 78y judicial review. That defies logic.

The *SEC ALJ Cases* also fall into the fallacy of thinking that the mooting of claims by an unconstitutional ALJ equals constitutional avoidance. This is wrong. First, Congress did not set up administrative schemes as mechanisms to obliterate constitutional rights. ALJs are empowered to hear securities laws cases, and those cases alone. Second, allowing the ALJ to moot the constitutional question by finding for the respondent would empower the ALJ to protect her own position.

And last, but most important, such mooting would still subject the respondent to an unconstitutional proceeding, which *Lucia* held there is a right to avoid. The hearing *is* the harm. The process *is* the punishment, whether or not RJL and Mr. Lucia prevail. This is especially so when SEC's serial proceedings deliberately prolong the process and give new meaning to the term "administrative exhaustion." And even if RJL and Mr. Lucia were to prevail and thus "moot" their constitutional claim, that success on the merits would render the constitutional injury permanent, irreversible, and entirely unreviewable. This result would also prevent percolation of lower court opinions on the removal question from reaching the Supreme Court. The *SEC ALJ Cases* are unjust, illogical and unreasoned. This Court should adopt a just, logical and well-reasoned approach by recognizing that RJL and Mr. Lucia should not have to undergo a Sisyphean ordeal to vindicate their constitutional rights.

B. The *SEC ALJ Cases* Conflate Eventual Judicial Review with Meaningful Judicial Review

The *SEC ALJ Cases* conflate *eventual* judicial review with *meaningful* judicial review, contrary to law, experience and common sense. This court should decline to follow that error-strewn path.

Article III courts should employ standard injunction analysis and exercise jurisdiction over constitutional claims that go to the legitimacy of the proceeding in order to prevent SEC from engaging in such unconstitutional behavior. By so

doing, Article III courts properly discharge their constitutional duty to provide meaningful judicial review of legitimate constitutional violations and prevent important questions of administrative and constitutional law from being decided outside Article III courts.[13]

The approach advocated here—to review any constitutional challenge under the strict standards for injunctive relief[14]—will fully address the underlying concerns about meritless constitutional claims, and at the same time protect the compelling constitutional rights of respondents such as appellants. Otherwise, if such circuit rulings continue to accumulate, courts will surrender their ability to

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[13] *See, e.g.*, Adam M. Katz, Note, *Eventual Judicial Review*, 118 Colum. L. Rev. 1139, 1162 (2018) ("[R]eading *Thunder Basin* to imply that 'meaningful' review is satisfied by any *eventual* review effectively reduces *Thunder Basin* to a binary analysis ('will review be available at some point?') without consideration of the coercive or constitutionally dubious elements of an administrative proceeding.… [G]iven the incentive for the parties to settle prior to reaching a trial…, this cabining of constitutional challenges constrains the ability of Article III courts to develop administrative and constitutional law … [and] runs counter to fairness intuitions, feeding suspicions of gamesmanship and undercutting the perceived legitimacy of the SEC.").

[14] *See* Katz, *Eventual Judicial Review*, *supra*, at 1181–82 (advocating for the standard injunction analysis as a desirable framework for Article III courts to employ to both allow "defendants to receive a hearing in federal court without having to navigate the serpentine internal processes of the SEC, with the very likely possibility of the parties settling during the interim" and "weed out frivolous constitutional challenges, thereby encouraging defendants ex ante to carefully consider whether to raise a constitutional challenge at all").

provide a meaningful constitutional check on the gamesmanship and unconstitutional behavior of administrative agencies.

Dilatory or unmeritorious constitutional claims are easily screened out by use of preliminary injunction analysis described above. This is exactly what this circuit did in *Lone Star Cement* and is the same approach taken by the court in *Duka v. SEC*, 103 F. Supp. 3d 382 (S.D.N.Y. 2015) (*abrogated by Tilton*, 824 F.3d at 279) where Judge Berman took the constitutional challenge seriously, and found jurisdiction to reach the question of whether a preliminary injunction should issue. By adopting this standard, this court can guard against gamesmanship by either party and put the "meaningful" back into "meaningful judicial review."

Bennett and *Tilton* also fall into plain error when they assert that an Article II claim arising out of an enforcement proceeding is an "affirmative defense" and is therefore not wholly collateral. This displays those courts' misunderstanding and misuse of a fundamental concept of basic pleading practice. An affirmative defense is an "assertion of facts and arguments that, if true, will defeat the ... prosecution's claim, even if all the allegations in the complaint are true." *Black's Law Dictionary* (10th ed. 2014). Appellants claim only that the judge adjudicating their claims or defenses is not constitutionally appointed to decide them. And they seek relief only in the form of a properly appointed ALJ, not the dismissal of the agency's substantive claims. There is no "affirmative defense" operating here.

C. The *SEC ALJ Cases* All Preceded *Lucia*—and That Matters

The *SEC ALJ Cases* were all decided before the Supreme Court handed down its opinion in 2018 that SEC ALJ appointments violated the Constitution. They thus were decided without the benefit of *Lucia*'s command that a challenge to an unconstitutionally appointed federal officer requires vacatur of ongoing enforcement proceedings.[15] In short, the *SEC ALJ Cases* are of dubious precedential weight because they were decided without the knowledge that ALJs are federal officers.

District courts post-*Lucia* are readily asserting jurisdiction over claims that ALJs' appointments are invalid. *See, e.g.*, *Probst v. Berryhill*, 377 F. Supp. 3d 578, 586–88 (E.D.N.C. 2019) (considering the "merits of plaintiff's Appointments Clause claim" to "conclude[ ] that the ALJ who decided plaintiff's case was appointed in violation of the Appointments Clause."); *Bradshaw v. Berryhill*, 372 F. Supp. 3d 349 (E.D.N.C. 2019); *Am. Fed'n of Gov't Emps., AFL-CIO v. Trump*, 318 F. Supp. 3d 370 (D.D.C. 2018).

The Fifth Circuit recently issued an injunction pending appeal in *Cochran v. SEC*, (5th Cir. Sept. 24, 2019) (per curiam), which meant that it found, at a

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[15] *FEF* involved no ongoing enforcement, so its ruling on unconstitutional Article II removal protections did not require vacatur of any proceedings.

minimum, that an identical Art. II removal challenge presented (1) a "substantial case on the merits" involving "a serious legal question" (2) irreparable harm if an injunction is not granted; (3) that the issuance of an injunction will not substantially injure the other parties to the proceeding; and (4) that the public interest favored the movant. *Cochran* is awaiting decision.

Where a controlling Supreme Court case finds jurisdiction under the same statute, see *FEF,* and where RJL and Mr. Lucia have even greater irreparable harm than that before the court in *Cochran*, and further where the SEC could avoid the expense and futility of another vacated round of proceedings, both the public interest and the interests of both parties before the court can only be served by a federal court ruling now on these important questions. As the Third Circuit noted recently in *Cirko*, in an analogous Article II appointments context:

> An individual litigant need not show direct harm or prejudice caused by an Appointments Clause violation. As the D.C. Circuit has noted, "it will often be difficult or impossible for someone subject to a wrongly designed scheme[, including an Appointments Clause violation,] to show that the design—the structure—played a causal role in his loss." *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000). But this difficulty to show direct harm does not diminish the important individual liberty safeguarded by the Appointments Clause. Such harm is presumed.

Cirko, at *7-8.

In the instant case, RJL and Mr. Lucia's harm is evident, protracted and ongoing. As in *Freytag*, where, unlike here, the petitioners not only failed to raise a timely objection, but also had affirmatively consented to the assignment to the ALJ they

claimed was unconstitutionally appointed, the Supreme Court held that "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers" meant that the strength of that interest excused exhaustion, and the Court heard the challenge on the merits. *Id*. at 880.

D. *Standard Oil* Does Not Change the Analysis

SEC's and the district court's reliance on *FTC v. Standard Oil*, 449 U.S. 232 (1980) is misplaced. Standard Oil did not challenge the proceeding's constitutionality or raise any wholly collateral challenge to the FTC proceeding. Appellants, by contrast, are being denied a constitutional right to a lawful tribunal that the Supreme Court has recently recognized, upheld, and vacated proceedings to vindicate. Being forced to defend oneself in an unconstitutional proceeding is a cognizable constitutional harm aside from cost. *See United Church of the Med. Ct. v. Med. Ctr. Comm'n*, 689 F.2d 693, 701 (7th Cir. 1982) (recognizing that being subjected to an "unconstitutionally constituted decisionmaker" warranted injunctive relief).[16] As the Supreme Court recognized on this very point: "'[O]ne who makes a timely challenge to the constitutional validity of an officer who

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[16] *See also Seguin v. City of Sterling Heights*, 968 F.2d 584, 589 (6th Cir. 1992) (noting that a Due Process Clause violation is an injury "instantly cognizable in federal court, regardless of whether [there had been] a final decision on the merits …").

adjudicates his case' is entitled to relief." *Lucia*, 138 S. Ct. at 2055 (quoting *Ryder v. United States*, 515 U.S. 177, 182–83 (1995)). This Court must provide it.

These concerns animated *FEF* and support appellants' constitutional challenge. By asserting jurisdiction over and reviewing this claim for injunctive relief, Article III courts can check unconstitutional agency behavior, guarantee Americans that courts will hear their legitimate constitutional claims, and allow for the rational and sensible development of law governing agency enforcement proceedings.

Consider, too, the path SEC asks Mr. Lucia and RJL to retrace. When Mr. Lucia challenged the lawfulness of his ALJ's appointment, his claim was rejected at the administrative proceeding, by the full Commission (over a dissent by two Commissioners), again by the D.C. Circuit, and denied by an en banc panel evenly divided on the point. *He only prevailed at the U.S. Supreme Court.* Not only his case, but many others, were vacated and new hearings ordered years after the events.

After *Lucia*, SEC cannot lawfully demand that RJL and Mr. Lucia endure all of this again. Congress never contemplated that administrative agencies would decide the constitutionality of their own ALJs' appointments, and nothing in any of the relevant securities laws assigns constitutional questions to the Commission or its ALJs for resolution.

IV. IT WOULD VIOLATE DUE PROCESS FOR THIS COURT TO SEND APPELLANTS TO AN ALJ THAT CANNOT LAWFULLY HEAR APPELLANTS' CONSTITUTIONAL CLAIM, THAT HAS ALREADY VIOLATED THE CONSTITUTION BY DENYING THAT CLAIM, AND THAT IS STRUCTURALLY AND PERSONALLY BIASED BECAUSE OF THAT CLAIM

A. The ALJ Cannot Lawfully Hear Appellant's Constitutional Claim

Congress vested the power to hear constitutional claims in the federal district courts. See 28 U.S.C. § 1331. The Supreme Court has recognized that nothing in § 78y ousts that jurisdiction, even implicitly. *FEF*, at 489. Congress' grant of power to the SEC to hear cases, or to delegate that power to ALJs, applies only to claims asserting violations of the securities laws, not ones asserting structural constitutional claims that go to the very legitimacy of the tribunal. These undisputed—even axiomatic—principles of law require that this court find jurisdiction in the district court for the Lucia appellants.

B. The ALJ Violated the Constitution When She Refused to Grant Relief on Appellants' Constitutional Claim

Because the ALJ is exercising quasi-judicial authority, it cannot refuse to follow relevant law, including the Constitution. Congress can withdraw jurisdiction but not the judicial power and duty to follow the law. Here, not only the Constitution, but a recent decision of the Supreme Court in *FEF* holds that district courts have jurisdiction over these questions. The ALJ's order of July 15, 2019 violates the Constitution and Supreme Court precedents that bind all Article III

courts. *See*, ER48. The plainly erroneous decision of the ALJ must be promptly set aside, not allowed to fester for years while it compounds its damage upon these appellants—and the rule of law.

C. When the ALJ Heard the Case, She Was Necessarily Institutionally Biased

The question of whether appellants' adjudicator enjoys unconstitutional levels of protection from removal must also be decided by a court because, logically, the ALJ is recused. It is difficult to imagine a scenario in which an adjudicator's personal interest—here, keeping her job—is more obviously adverse to the litigant's. Mr. Lucia and RJL's challenge implicates concerns about objectivity, fairness, and impartiality. No assurances, however sincere or well meaning, by the administrative law judge could realistically "dissipate the doubts that a reasonable person would probably have about" the propriety of the adjudicator. *Republic of Panama v. Am. Tobacco Co. Inc.*, 217 F.3d 343, 347 (5th Cir. 2000).

V. SECTION 78Y REVIEW EFFECTIVELY DENIES ANY REMEDY

This misapplied reasoning of the *SEC ALJ Cases* also fails to acknowledge that, if limited to delayed post-agency appellate review, the Lucia appellants might *never* get *any* opportunity to seek or obtain redress for their constitutional injury because of the overwhelming incentive to settle SEC cases or the possibility that the ALJ finds no liability. *See* Katz, *Eventual Judicial Review*, *supra*, at 1183.

Even if appellants do obtain review, it will be too late to undo or remedy the injury. *See Tilton*, 824 F.3d at 298 (Droney, J., dissenting) ("Forcing the [plaintiffs] 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."). This is what the Supreme Court meant when it said, "We do not see how petitioners could meaningfully pursue their constitutional claims under the Government's theory [of exclusive jurisdiction]." *FEF*, 561 U.S. at 490.

VI. SEC'S PROPOSED CONSTRUCTION OF 5 U.S.C. § 7521 CANNOT AND DOES NOT SAVE THE DAY

Noting that the "merits of plaintiff's argument are not before the Court," SEC nonetheless proceeded below to argue those merits. It urged a construction of 5 U.S.C. § 7521 that it hopes will save it from the fatal admission by the Solicitor General before the Supreme Court that the multiple layers of removal protections violate Article II. It proposes that judges remodel the meaning of "good cause" for removal of ALJs under § 7521 and reinterpret the role the Merit Systems Protection Board plays in such determinations, to protect SEC from having to accord any respect to appellants' constitutional rights.

The SEC's game of shifting positions shows the lengths the government will go to preserve its lawless power over Americans brought before administrative tribunals. But more to the point, the SEC's proposed construction undermines the

SEC's claim that this court lacks jurisdiction. Excising removal protections for SEC ALJs would require a federal court first to exercise jurisdiction to perform the statutory surgery. Yet, SEC has resisted court jurisdiction at every stage of this proceeding.

Here SEC does not propose an honest statutory construction. Instead, it urges this court to undertake freewheeling judicial reformation of all or part of three levels of impermissible tenure protection. It is implausible to construe these statutes to make the multiple layers of tenure protection vanish, or to pretend that "good cause" does not mean what it has long meant. The Supreme Court has repeatedly told lower courts that they may not rewrite statutes based on policy concerns. *See, e.g.*, *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019).

This Court therefore cannot adopt the construction SEC advocated below. The statute provides that ALJs may be removed only "for good cause *established and determined* by" the MSPB, 5 U.S.C. § 7521 (emphasis added), so § 7521 does not grant the Commission the power to institute removal proceedings at all, because the MSPB has the independent and exclusive power to remove ALJs, and the board itself has its own removal protections." *Lucia*, 138 S. Ct. at 2016 (Breyer, J., concurring). *See also Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter for the court, as well as the agency, must give effect to the

unambiguously expressed intent of Congress."). What's more, the government's proposed construction of § 7521 does nothing to address the second level of constitutional infirmity found in the removal protections afforded the Commissioners. SEC's transparent attempts to walk back the Department of Justice's well-established position that SEC ALJs' removal protections were unconstitutional should not be countenanced. Br. for Resp't Supporting Pet'r (U.S. Solicitor General), *Lucia v. SEC*, 2018 WL 125162, at *52-53 (U.S. Feb. 21, 2018). And even if a future court were to rewrite the removal-protection statutes as SEC wishes, that would not avoid vacatur and remand, because appellants' ALJ would still have been acting under the unconstitutional scheme.

The Solicitor General was right then, and the Lucia appellants should prevail now. The shifting positions advocated in SEC's briefs should be recognized as gamesmanship and dismissed.

Finally, because SEC has the power to retry this case directly before the Commission, there is no need for judicial acrobatics. Article III courts were not established to tailor statutes retroactively at the bidding of administrative agencies, nor to rewrite statutes to adopt the agency's bespoke solution to the constitutional mess made by the agency's own choice of tribunal. Taking that approach would be the antithesis of constitutional avoidance and would create constitutional moral hazard.

VII. THE SEC'S ASSERTION OF POWER TO EXPOSE RESPONDENTS TO REPEATED, TO-BE-VACATED PROCEEDINGS MUST BE SUBJECT TO PROMPT JUDICIAL REVIEW IN COURTS FOR IT TO HAVE ANY LEGITIMACY

Administrative agencies such as the SEC operate outside the pathways of binding power established by the Constitution. As has been amply shown above, the SEC makes binding rules not adopted by Congress and enforces them in tribunals that are not courts, using ALJs who are illegitimately insulated from removal under the Constitution. For such pathways of power to have any legitimacy, they must be subject to regular, speedy and full judicial review. Indeed, this was long offered as a principal justification for administrative power. *See,* Thomas W. Merrill, *Article III, Agency Adjudication and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 939, 981–82 (2011).[17] If this court backs away from this foundation for the legitimacy of administrative adjudication, it may spare the SEC a loss in this one tragically protracted proceeding—but it will do so at the prohibitive cost of raising profound questions about whether such an unreviewed and coercive flex of administrative

[17] That article also notes that should courts review "whether the agency was acting within the scope of its jurisdiction as authorized by law" as RJL and Mr. Lucia urge this court to do, "the American administrative state might … be a good deal more coherent." Merrill, 111 Colum. L. Rev. at 1002-1003.

power means that this agency has slipped its moorings and freed itself of the last element of constitutionality restraining it.

CONCLUSION

Good law, as recognized by Chief Justice Roberts in *McBride*, 564 U.S. at 715, is not made by totaling up temporary batting averages among the circuits, as SEC urges this court to do. Enduring law is made by examining the reasoning—and the consequences of that reasoning—on the development of law that is meant to serve the purpose of the fair administration of justice. And by this metric, the *SEC ALJ Cases* fail badly.

The observations made by the district court in an identical case now pending in the Fifth Circuit, *Cochran v. SEC* should raise grave concerns about the administration of justice if the conduct and reasoning of SEC goes unchecked:

> 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) (McBryde, J.).

By haling the Lucia appellants before an unconstitutional ALJ in 2012, SEC required them to endure a proceeding that would be nullified, and now on remand,

the Commission persists on retrying them yet again before another constitutionally defective ALJ. The injustice is palpable. SEC's assertions about the efficiency of administrative proceedings, risible.

This Court, unconstrained by any adverse precedent in the Ninth Circuit, should decline to follow this course of error. It should embrace the far superior reasoning of the many courts cited above, including controlling Supreme Court cases that have found jurisdiction, and course-correct a body of law that has led to such troubling outcomes.

For the foregoing reasons, RJL and Mr. Lucia respectfully request that this Court find jurisdiction in federal courts so that they may pursue their constitutional claims in a forum that can provide the relief to which they are entitled.

Dated: January 29, 2020

New Civil Liberties Alliance

/s/ Margaret A. Little
Margaret A. Little
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STATEMENT OF RELATED CASES

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

Date: January 29, 2020.

New Civil Liberties Alliance

/s/ Margaret A. Little
Margaret A. Little

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

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,361 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Office365 Times New Roman 14-point font.

Date: January 29, 2020

New Civil Liberties Alliance

/s/ Margaret A. Little
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Attorneys for Appellants Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr.

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2020 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: January 29, 2020.

New Civil Liberties Alliance

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