

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 August Term, 2015

4 (Argued: September 16, 2015 Decided: June 1, 2016)

5 Docket No. 15-2103

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Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC,
8 Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC,
9 *Plaintiffs-Appellants,*

10 v.

11 Securities and Exchange Commission,
12 *Defendant-Appellee.*
13

14 Before: NEWMAN, SACK, and DRONEY, *Circuit Judges.*

15 The appellants, Lynn Tilton and several of her investment firms, are
16 respondents in an ongoing administrative proceeding initiated by the Securities
17 and Exchange Commission and conducted by an administrative law judge. They
18 brought suit in the United States District Court for the Southern District of New
19 York to enjoin the Commission's proceeding before its completion, on the theory
20 that the administrative law judge's appointment violated the Appointments
21 Clause of Article II of the United States Constitution. The district court (Ronnie
22 Abrams, *Judge*) dismissed the suit for lack of subject matter jurisdiction. The

1 appellants now ask us to overturn that dismissal and reach the merits of their
2 constitutional argument. We agree with the district court, however, that
3 Congress implicitly precluded federal jurisdiction over the appellants'
4 Appointments Clause claim while the Commission's proceeding remains
5 pending. The judgment of the district court is therefore

6 AFFIRMED.

7 Judge NEWMAN concurs in a separate opinion.

8 Judge DRONEY dissents in a separate opinion.

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10 Slate, Meagher & Flom LLP, New York, NY
11 (Christopher J. Gunther, *on the brief*), for
12 *Plaintiffs-Appellants*.

13 Susan E. Brune (*on the brief*), Brune &
14 Richard LLP, New York, NY, for *Plaintiffs-*
15 *Appellants*.

16 MARK B. STERN, Appellate Staff Attorney
17 (Mark R. Freeman and Megan Barbero,
18 Appellate Staff Attorneys, *on the brief*), for
19 Benjamin C. Mizer, Principal Deputy
20 Assistant Attorney General, and Beth S.
21 Brinkmann, Deputy Assistant Attorney
22 General, United States Department of
23 Justice, Washington, DC, for *Defendant-*
24 *Appellee*.

25 Jeannette A. Vargas (*on the brief*), for Preet
26 Bharara, United States Attorney for the

1 Southern District of New York, *for*
2 *Defendant-Appellee.*

3
4 SACK, *Circuit Judge:*

5 The Securities and Exchange Commission (the "SEC" or the "Commission")
6 enforces the federal securities laws by, among other things, filing actions seeking
7 monetary penalties against alleged transgressors. Under the 2010 Dodd-Frank
8 Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), Pub. L.
9 No. 111-203, 124 Stat. 1376, the SEC's enforcement actions generally may take
10 either of two forms: a civil lawsuit in federal district court, or an administrative
11 proceeding conducted by the Commission or an administrative law judge
12 ("ALJ"). Where both of those alternatives are available, the choice between them
13 belongs to the SEC without express statutory constraint.

14 In this case, the SEC chose to seek penalties against the appellants, Lynn
15 Tilton and several of her investment firms, by commencing an administrative
16 proceeding conducted by an ALJ. That proceeding is subject to two layers of
17 review: A party that loses before the ALJ may petition for *de novo* review by the
18 Commission, and a party that loses before the Commission may petition for
19 review by a federal court of appeals. Not unlike a lawsuit in district court,

1 therefore, the administrative proceeding ultimately offers the losing party a route
2 to federal appellate review.

3 The appellants contend that the SEC's administrative proceeding is
4 unconstitutional because the presiding ALJ's appointment violated Article II's
5 Appointments Clause. They have raised that claim as an affirmative defense
6 within the proceeding and will be able to argue the issue in a federal court of
7 appeals if they lose before the Commission. The appellants nevertheless sought
8 more immediate access to federal court: Two days after the administrative
9 proceeding against them began, they filed a separate lawsuit in the United States
10 District Court for the Southern District of New York asserting their
11 Appointments Clause claim and seeking an injunction against the ALJ's
12 adjudication based on its alleged unconstitutionality.

13 The district court (Ronnie Abrams, *Judge*) dismissed the suit for lack of
14 subject matter jurisdiction. Relying in part on the Supreme Court's decisions in
15 *Elgin v. Department of Treasury*, --- U.S. ---, 132 S. Ct. 2126 (2012), *Free Enterprise*
16 *Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), and *Thunder*
17 *Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), the court concluded that the
18 appellants' Appointments Clause challenge fell within the exclusive scope of the

1 SEC's administrative review scheme and could reach a federal court only on
2 petition for review of a final decision by the Commission.

3 We agree. By enacting the SEC's comprehensive scheme of administrative
4 and judicial review, Congress implicitly precluded federal district court
5 jurisdiction over the appellants' constitutional challenge.

6 **BACKGROUND**

7 Until 2010, the SEC's authority to impose monetary penalties through
8 administrative proceedings was relatively limited. The agency could not, for
9 example, penalize a non-regulated person such as Tilton through administrative
10 channels. The Dodd-Frank Act dramatically expanded the SEC's authority to
11 impose penalties administratively, making it essentially “coextensive with [the
12 SEC’s] authority to seek penalties in Federal court.” H.R. Rep. No. 111–687, at 78
13 (2010). Since then, the SEC has reportedly prosecuted an increasing number of
14 cases through administrative proceedings, with a rate of success notably higher
15 than it has achieved in federal district courts. *See* Jean Eaglesham, *In-House*
16 *Judges Help SEC Rack Up Wins*, Wall St. J., May 7, 2015, at A1.

17 When the Commission chooses to seek penalties administratively, it must
18 either preside over the proceeding itself or designate a hearing officer — usually

1 an ALJ — to do so. *See* 17 C.F.R. § 201.110. A presiding ALJ has authority to
2 issue an initial decision, which may become final only by order of the
3 Commission. *See id.* § 201.360. If a party petitions for review of the ALJ's initial
4 decision, the Commission ordinarily reviews the decision *de novo* before issuing a
5 final order. *See id.* § 201.411. And a final order issued under the securities laws,
6 including the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 *et seq.*, is in turn
7 subject to judicial review by a federal court of appeals, *see id.* § 80b-13(a)
8 (providing that "[a]ny person or party aggrieved by an order issued by the
9 Commission under [the Investment Advisers Act] may obtain a review of such
10 order in the United States court of appeals within any circuit wherein such
11 person resides or has his principal office or place of business, or in the United
12 States Court of Appeals for the District of Columbia").

13 During the past year or so, several respondents in ongoing SEC
14 administrative proceedings have asserted that Article II of the United States
15 Constitution bars the agency's ALJs from acting as hearing officers. These
16 respondents have made two distinct constitutional arguments: that the ALJs are
17 impermissibly insulated from presidential removal, and that they were not

1 appointed in accordance with the Appointments Clause.¹ Respondents may
2 raise those arguments as affirmative defenses during the course of their
3 administrative proceedings, subject to potential judicial review in the event of an
4 adverse decision by the Commission. Seeking more immediate judicial scrutiny,
5 however, some respondents — the appellants among them — attempted to raise
6 their Article II claims in parallel actions brought in federal district courts before
7 their administrative proceedings concluded. See *Spring Hill Capital Partners, LLC*
8 *v. SEC*, No. 15-CV-4542 (S.D.N.Y. 2015) (challenging ALJ's appointment); *Hill v.*
9 *SEC*, No. 1:15-CV-1801 (N.D. Ga. 2015) (challenging ALJ's appointment and
10 insulation from removal); *Duka v. SEC*, No. 15-CV-357 (S.D.N.Y. 2015)
11 (challenging ALJ's appointment and insulation from removal); *Bebo v. SEC*, No.
12 15-C-3 (E.D. Wis. 2015) (challenging ALJ's insulation from removal).

¹ The Appointments Clause reads in pertinent part:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but 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.

U.S. Const. Art. II, § 2, cl. 2.

1 In the case at bar, the SEC initiated an administrative proceeding before an
2 ALJ in March 2015, alleging that the appellants had violated the Investment
3 Advisers Act. Two days later, the appellants filed this lawsuit in the United
4 States District Court for the Southern District of New York. They sought to
5 enjoin the SEC's administrative proceeding on the ground that, among other
6 things, the presiding ALJ's appointment violated the Appointments Clause.² The
7 SEC moved to dismiss the suit, arguing in part — as it has in cases brought by
8 similarly situated respondents — that the district court lacked subject matter
9 jurisdiction over the lawsuit. In the Commission's view, the administrative
10 proceeding at issue, once begun, precluded the appellants' collateral
11 Appointments Clause challenge.

12 While the district court heard argument and deliberated, several other
13 federal judges reached conflicting decisions on the same jurisdictional issue,
14 creating a split both within and outside the Southern District. *Compare Spring*
15 *Hill*, No. 15-CV-4542 (S.D.N.Y. June 26, 2015) (bench ruling) (Ramos, J.)
16 (concluding that the court lacked jurisdiction over a respondent's Article II

² The appellants also argued before the district court that their presiding ALJ was impermissibly insulated from presidential removal. They have not pressed that argument on appeal, although they purport to have "preserve[d]" it. Appellants' Br. at 31 n.10.

1 challenge to the ALJ conducting an ongoing administrative proceeding), *with Hill*
2 *v. SEC*, 114 F. Supp. 3d 1297 (N.D. Ga. 2015) (concluding that there was such
3 jurisdiction), *and Duka v. SEC*, 103 F. Supp. 3d 382, 392 (S.D.N.Y. 2015) (same); *see*
4 *also Bebo v. SEC*, 2015 WL 905349, at *4, 2015 U.S. Dist. LEXIS 25660, at *10 (E.D.
5 Wis. Mar. 3, 2015) (concluding, before the case at bar was filed, that the court
6 lacked jurisdiction over a respondent's Article II challenge to the ALJ conducting
7 an ongoing administrative proceeding), *aff'd*, 799 F.3d 765 (7th Cir. 2015). On
8 June 30, 2015, after weighing the merits of those intervening decisions, the
9 district court decided in favor of the SEC, dismissing the appellants' suit as
10 implicitly precluded by the Commission's statutory scheme of administrative
11 and judicial review. *Tilton v. SEC*, No. 15-CV-2472, 2015 WL 4006165, at *1, 2015
12 U.S. Dist. LEXIS 85015, at *2-3 (S.D.N.Y. June 30, 2015).

13 The appellants now ask us to reverse the district court's jurisdictional
14 dismissal of their Appointments Clause claim and rule, on the merits, that the
15 ALJ presiding over their administrative proceeding was unconstitutionally
16 appointed. At the appellants' request, we have stayed the SEC's proceeding
17 pending our decision in this appeal. We review the district court's determination

1 of subject matter jurisdiction *de novo*. *Scelsa v. City Univ. of N.Y.*, 76 F.3d 37, 40
2 (2d Cir. 1996).

3 DISCUSSION

4 The statutes that establish the SEC's scheme of administrative and judicial
5 review, including the Dodd-Frank Act and the Investment Advisers Act, do not
6 expressly preclude federal district court jurisdiction over the appellants'
7 Appointments Clause claim. The crucial jurisdictional issue in this case,
8 therefore, is whether the statutes do so implicitly.

9 To resolve that issue, we must first determine whether it is "fairly
10 discernible" from the "text, structure, and purpose" of the securities laws that
11 Congress intended the SEC's scheme of administrative and judicial review "to
12 preclude district court jurisdiction." *Elgin*, 132 S. Ct. at 2132-33. That initial
13 inquiry is guided by the proposition that "[g]enerally, when Congress creates
14 procedures designed to permit agency expertise to be brought to bear on
15 particular problems, those procedures are to be exclusive." *Free Enterprise*, 561
16 U.S. at 489 (internal quotation marks omitted).

17 If we conclude that the SEC's scheme precludes district court jurisdiction,
18 we must then decide whether the appellants' Appointments Clause claim is "of

1 the type Congress intended to be reviewed within th[e] statutory structure." *Id.*
2 (alteration in original) (quoting *Thunder Basin*, 510 U.S. at 207). This second
3 inquiry is guided by the Supreme Court's decisions in *Thunder Basin*, *Free*
4 *Enterprise* and *Elgin*, which instruct us to "presume" that a claim is not confined
5 to administrative channels "if 'a finding of preclusion could foreclose all
6 meaningful judicial review'; if the suit is 'wholly collateral to a statute's review
7 provisions'; and if the claims are 'outside the agency's expertise.'" *Id.* (quoting
8 *Thunder Basin*, 510 U.S. at 212-13). We refer to those considerations as the
9 *Thunder Basin* factors.

10 Our resolution of these two inquiries — whether Congress intended the
11 SEC's administrative scheme to preclude district court jurisdiction, and whether
12 the scheme encompasses a respondent's Appointments Clause challenge to a
13 presiding ALJ — leads us to conclude that the appellants' lawsuit must be
14 dismissed. Two of our sister circuits recently reached similar conclusions. *See*
15 *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015); *Bebo v. SEC*, 799 F.3d 765 (7th Cir.
16 2015), *cert. denied*, 136 S. Ct. 1500 (2016). We agree in large part with their
17 reasoning.

18

1 I

2 As an initial matter, the text, structure, and purpose of the securities laws
3 make clear that Congress intended the SEC's scheme of administrative review to
4 permit the Commission to bring its expertise to bear in enforcing the securities
5 laws. The scheme enables the SEC's Division of Enforcement to bring statutory
6 charges before an administrative tribunal and affords respondents the
7 opportunity to gather evidence, present a defense, and appeal any adverse
8 rulings in federal court. In *Thunder Basin*, the Supreme Court held that a similar
9 scheme precluded federal district court jurisdiction over challenges to an
10 agency's application of a statute to particular facts. 510 U.S. at 208-09, 216. We
11 reach the same conclusion here. Generally, therefore, persons responding to SEC
12 enforcement actions are precluded from initiating lawsuits in federal courts as a
13 means to defend against them. See *Jarkesy*, 803 F.3d at 16-17 (analogizing the
14 SEC's statutory review scheme to the scheme at issue in *Thunder Basin* and
15 concluding that Congress intended "to preclude suits [in federal courts] by
16 respondents in SEC administrative proceedings in the mine-run of cases").³

³ The *Hill* decision concluded that "[t]here can be no 'fairly discernible' Congressional intent to limit jurisdiction away from district courts when the text of the statute" permits the SEC to initiate enforcement actions in either "district court [or]

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II

The appellants do not contest that conclusion. They implicitly acknowledge that an SEC administrative proceeding, once initiated, is the exclusive initial forum for claims "requiring the development of a factual record, the exercise of agency discretion, or the application of a statute to particular facts." Appellants' Br. at 4. They argue, however, that their Appointments Clause challenge is a distinct type of claim: "a threshold constitutional challenge to agency practice." *Id.* at 12. They assert that this type of claim satisfies all three of the *Thunder Basin* factors and so falls outside the exclusive purview of the SEC's administrative review scheme.

The district court held that the appellants' Appointments Clause claim failed to satisfy at least two of the *Thunder Basin* factors: It would be subject to meaningful judicial review within the SEC's administrative scheme, and it was not "wholly collateral" to the scheme. *Tilton*, 2015 WL 4006165, at *4-12, 2015 U.S.

administrative proceedings." *Hill*, 114 F. Supp. 3d at 1306. We disagree. Congress's decision to vest the SEC with a choice between forums does not imply that the chosen forum should not be exclusive of the other. To the contrary — without such exclusivity, the SEC's statutory power to choose would be illusory. *See Jarkesy*, 803 F.3d at 17 ("Congress granted the choice of forum to the Commission, and that authority could be for naught if respondents . . . could countermand the Commission's choice by filing a court action.").

1 Dist. LEXIS 85015, at *9-34. The district court also suggested, but did not decide,
2 that the Appointments Clause claim failed to satisfy the remaining *Thunder Basin*
3 factor because it did not fall outside the SEC's expertise. *See id.* at 2015 WL
4 4006165, at *12-13, 2015 U.S. Dist. LEXIS 85015, at *34-36. Despite leaving a
5 decision as to that factor open, the court concluded that Congress intended the
6 SEC's administrative review scheme to encompass the appellants' Appointments
7 Clause claim, to the exclusion of federal district court jurisdiction.

8 We agree with that conclusion. The appellants' Appointments Clause
9 claim will be subject to meaningful judicial review through administrative
10 channels, a fact that weighs strongly against district court jurisdiction. *See Bebo*,
11 799 F.3d at 774-75 (characterizing the availability of meaningful judicial review as
12 the "most important" *Thunder Basin* factor). And although the other two *Thunder*
13 *Basin* factors present closer questions in this case, they do not persuasively
14 demonstrate that the Appointments Clause claim falls outside the scope of the
15 SEC's overarching scheme.

16 A. *The Availability of Meaningful Judicial Review*

17 Turning in more detail to the application of the *Thunder Basin* factors, we
18 first consider whether the SEC's administrative scheme assures that the

1 appellants have an opportunity for meaningful judicial review of their
2 Appointments Clause claim. The appellants do not dispute that the scheme
3 offers *some* judicial review: an appeal to a federal circuit court from an adverse
4 ruling by the Commission. They argue, however, that such review would not be
5 "meaningful" because it could not provide an adequate remedy for the SEC's
6 alleged violation of the Appointments Clause. That is so, in the appellants' view,
7 because their exposure to the ongoing proceeding — as distinct from any adverse
8 ruling that might result — would itself constitute a grave constitutional injury
9 that could not be redressed after the fact. As precedential support for their
10 position, the appellants cite the Supreme Court's decision in *Free Enterprise* and
11 our decades-old decision in *Touche Ross & Co. v. SEC*, 609 F.2d 570 (2d Cir. 1979).

12 The appellants' argument is not without force, as demonstrated by its
13 success in several district courts. *See Hill*, 2015 WL 4307088, at *6-8, 2015 U.S.
14 Dist. LEXIS 74822, at *17-19; *Duka*, 103 F. Supp. 3d 382, 390-91. Ultimately,
15 however, we are not convinced. In our view, the appellants' argument
16 misconstrues both *Free Enterprise* and *Touche Ross* and is at odds with the
17 established approach to analogous jurisdictional disputes in federal courts.

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1 *i. Free Enterprise*

2 *Free Enterprise* dealt with the Public Company Accounting Oversight Board
3 (the "PCAOB"), an entity created under the Sarbanes-Oxley Act of 2002, Pub. L.
4 No. 107-204, 116 Stat. 745, to supervise the practices of accounting firms. The
5 PCAOB's five members were to be appointed by the SEC, and some — but not
6 all — of the PCAOB's regulatory actions required SEC approval in the form of a
7 final Commission order. The Sarbanes-Oxley Act, like the Investment Advisers
8 Act before it, permitted losing parties to appeal from an adverse final order to a
9 federal court of appeals. The statute made no provision, however, for federal
10 review of Board actions that did not require SEC approval. *See Free Enterprise*,
11 561 U.S. at 489-90.

12 In the *Free Enterprise* case, the PCAOB had, in the course of its supervisory
13 work, "inspected [a particular accounting] firm, released a report critical of its
14 auditing procedures, and [began] a formal investigation." *Id.* at 487. Those
15 actions were not subject to review by the SEC or approval by final Commission
16 order, and so did not give rise to an administrative route to federal review. *Id.* at
17 489-90. The accounting firm then filed a lawsuit in federal district court that
18 sought to void the PCAOB's actions on Article II grounds. The firm argued, as

1 the appellants do here, that the SEC had violated the Appointments Clause when
2 it selected the members of the PCAOB, rendering their appointments
3 constitutionally infirm. *Id.* at 487-88.

4 The Supreme Court held that the district court could exercise jurisdiction
5 over the accounting firm's lawsuit, despite the availability of administrative
6 review regarding some other PCAOB actions. *Id.* at 490-91. The Court reasoned,
7 in part, that the administrative review scheme failed to make any form of judicial
8 review meaningfully accessible to the firm. Because the PCAOB's regulatory
9 actions had not produced a reviewable Commission order, the accounting firm
10 could have raised its constitutional objection in federal court through
11 administrative channels only by manufacturing a new, tangential dispute that
12 *would* require a Commission order, and then using that dispute as a vehicle for
13 its Article II claims. The Court deemed that circuitous option inadequate, and so
14 concluded that meaningful judicial review was not otherwise available to the
15 accounting firm. *Id.* at 490.

16 The appellants read *Free Enterprise* to suggest that judicial review of an
17 Article II challenge to an administrative tribunal is not meaningful if conducted
18 after the tribunal's proceeding concludes, because of the inherent remedial

1 limitations of post-proceeding review. *See* Appellants' Br. at 13, 17-18. We
2 disagree. The *Free Enterprise* Court's analysis turned on the accessibility of post-
3 proceeding review by a federal court of appeals — not on whether such review,
4 if accessible, could adequately remedy the PCAOB's alleged violation of Article
5 II. *Free Enterprise* therefore lends no support to the appellants' characterization of
6 their prospective constitutional injury as irremediable after the conclusion of
7 their administrative proceeding.

8 *ii. Touche Ross*

9 The appellants' reliance on *Touche Ross* is similarly unavailing. There, the
10 SEC took steps to institute an administrative proceeding against an accounting
11 firm and several of its partners (collectively, "Touche Ross") under Rule 2(e) of
12 the Commission's Rules of Practice, which related to the suspension and
13 disbarment of persons practicing before the Commissioner. *Touche Ross*
14 immediately filed a lawsuit in federal court seeking to enjoin the proceeding on
15 the ground that Rule 2(e) was not authorized by statute.

16 The district court declined to exercise jurisdiction. It reasoned, in part, that
17 the planned administrative proceeding would not irreparably harm *Touche Ross*,
18 which meant that *Touche Ross* was required to exhaust the administrative

1 review process before raising its claims in federal court. *See Touche, Ross & Co. v.*
2 *SEC*, No. 76-CV-4489, 1978 WL 1084, at *4-5, 7-9, 1978 U.S. Dist. LEXIS 17974, *9-
3 12, 18-19, 23 (S.D.N.Y. Apr. 24, 1978), *aff'd sub nom. Touche Ross & Co. v. SEC*, 609
4 F.2d 570 (2d Cir. 1979).

5 On appeal, this Court recognized district court jurisdiction over Touche
6 Ross's lawsuit. The panel acknowledged that federal challenges to
7 administrative proceedings at "intermediate stages" are generally disfavored,
8 particularly where — as in the case before it — the agency had not acted "plainly
9 beyond its jurisdiction." *Touche Ross*, 609 F.2d at 576. Nonetheless, the Court
10 permitted Touche Ross's lawsuit to proceed on the ground that its constitutional
11 claim would not benefit from the SEC's "expertise," "discretion" or factfinding,
12 and was thus already ripe for federal adjudication. *Id.* at 577.

13 The Court's decision did not suggest that a federal court would be unable
14 to vindicate Touche Ross's challenge to Rule 2(e) after the SEC's proceeding
15 concluded.⁴ It held only that there was no compelling reason for Touche Ross to
16 wait for post-proceeding review because the administrative tribunal would not

⁴ Indeed, in a concurring opinion, two members of the panel expressed their confidence in the capacity of post-proceeding judicial review to "correct the occasional excesses and errors that are an inevitable part of the administrative process." *Touche Ross*, 609 F.2d at 583 (Kaufman, C.J., concurring).

1 unsuccessfully challenged the transfer of his case to another district must await
2 the other district court's "final judgment" before appealing); *see also In re al-*
3 *Nashiri*, 791 F.3d 71, 75, 80 (D.C. Cir. 2015) (concluding, in denying a petition for
4 writ of mandamus, that a defendant who unsuccessfully raised an Appointments
5 Clause challenge to two of the United States Court of Military Commission
6 Review's presiding judges must await the judges' ruling before appealing in
7 federal court). Like the appellants here, a litigant in this kind of case must
8 expend financial and emotional resources to complete a proceeding that may
9 ultimately prove constitutionally infirm.⁵ Subsequent judicial review cannot
10 restore those resources, but it can vacate the resulting judgment and remand for
11 a new proceeding. That post-proceeding relief, although imperfect, suffices to
12 vindicate the litigant's constitutional claim. *See Germain*, 930 F.2d at 1040
13 (explaining that if a jury trial were in fact improper, an appellate court could
14 "remand for a nonjury trial, thus vindicating the [objecting defendant's] right");
15 *see also In re al-Nashiri*, 791 F.3d at 80 ("Vacatur [premised on the defendant's
16 Appointment Clause claim], even at the appeal-from-final-judgment stage,

⁵ Cf. Learned Hand, *The Deficiencies of Trials To Reach the Heart of the Matter*,
3 Association of the Bar of the City of New York, Lectures on Legal Topics 89, 105 (1926)
(musing that becoming a party to a lawsuit should be "dread[ed] . . . beyond almost
anything else short of sickness and death").

1 would fully vindicate [the defendant's] rights and the President's and the
2 Senate's constitutional powers." (internal quotation marks and alterations
3 omitted)). The litigant's financial and emotional costs in litigating the initial
4 proceeding are simply the price of participating in the American legal system,
5 and not an irreparable injury that necessitates interlocutory review of the initial
6 court's jurisdiction.

7 The Supreme Court applied this principle to facts similar to those
8 presented to us here in *FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980).
9 There, an oil company brought suit in federal district court to enjoin an ongoing
10 administrative proceeding conducted by the Federal Trade Commission ("FTC"),
11 contending that the proceeding as a whole was unlawful because the FTC had
12 initiated it without the requisite evidentiary basis. *Id.* at 235. As a general
13 matter, a respondent in this type of proceeding must exhaust its administrative
14 remedies before filing a related action in federal court, unless the respondent
15 would suffer irreparable injury from the delay. *See Renegotiation Bd. v.*
16 *Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974). The oil company argued that it had
17 exhausted all relevant remedies before filing its federal lawsuit. *Standard Oil*, 449
18 U.S. at 243. In the alternative, however, the company contended that any failure

1 to exhaust should be excused because the company would suffer irreparable
2 injury in the form of "expense and disruption" if it were compelled to complete
3 the administrative proceeding before reaching federal court. *Id.* at 244. That
4 argument closely resembles the appellants' claim here that post-proceeding
5 judicial review will be powerless to remedy the injury they will suffer by
6 enduring the SEC's administrative adjudication.

7 The Supreme Court concluded that a federal court would be able to
8 meaningfully review the oil company's claim after the administrative proceeding
9 ended, and therefore ordered the company's lawsuit dismissed on jurisdictional
10 grounds. The Court acknowledged that the company would endure
11 "substantial" expense and disruption before the administrative proceeding
12 concluded. *Id.* But it deemed that hardship to be "part of the social burden of
13 living under government," rather than a form of irreparable injury justifying
14 immediate judicial review. *Id.* at 244-45. As the D.C. Circuit subsequently
15 explained, where "the 'injury' inflicted on the party seeking review is the burden
16 of going through an agency proceeding," the Supreme Court's decision in
17 *Standard Oil* "teaches that the party must patiently await the denouement of

1 proceedings within the Article II branch." *USAA Fed. Sav. Bank v. McLaughlin*,
2 849 F.2d 1505, 1510 (D.C. Cir. 1988).

3 In other decisions, the Supreme Court has concluded that post-proceeding
4 judicial review would not be meaningful because the proceeding itself posed a
5 risk of some additional and irreparable harm beyond the burdens associated
6 with the dispute resolution process. *See, e.g., McNary v. Haitian Refugee Ctr., Inc.*,
7 498 U.S. 479, 496-97, 499 (1991) (permitting a class of undocumented aliens to
8 raise a due-process challenge to INS proceedings in district court, rather than
9 pursue eventual review in a federal court of appeals through administrative
10 channels, partly because most of the aliens could "ensure themselves review in
11 courts of appeals only if they voluntarily surrender[ed] themselves for
12 deportation," a "price . . . tantamount to a complete denial of judicial review for
13 most undocumented aliens"). But the appellants have identified no such
14 additional, irreparable harm here. The only prospective injury that they
15 describe is "being subjected to an unconstitutional adjudicative procedure," with
16 the attendant "embarrassment, expense, . . . ordeal . . . [and] state of anxiety and
17 insecurity." Appellants' Br. at 19, 21 (alterations in original and internal
18 quotation marks omitted). As *Standard Oil* and other decisions discussed above

1 indicate, the prospect of such harm alone does not render post-proceeding
2 judicial review less than meaningful. *Cf. In re al-Nashiri*, 791 F.3d at 79-80
3 (explaining that the defendant's "abstract concern" that his presiding judges
4 violated "the separation of powers" because they had been improperly appointed
5 did not establish a prospective irreparable injury that justified immediate federal
6 intervention in ongoing administrative proceedings).

7 We therefore conclude that the appellants will have access to meaningful
8 judicial review of their Appointments Clause claim through administrative
9 channels. *See Bebo*, 799 F.3d at 774 (concluding that a respondent in an ongoing
10 SEC administrative proceeding could obtain meaningful judicial review "[a]fter
11 the pending enforcement action has run its course" by "rais[ing] her objections,"
12 including an Article II challenge to the presiding ALJ, "in a circuit court of
13 appeals established under Article III"); *see also Jarkesy*, 803 F.3d at 27 ("Even
14 assuming [the respondent] is right that Congress has unconstitutionally
15 delegated power to the SEC to decide whether to place him in an administrative
16 proceeding rather than in a court action, [the respondent] has no inherent right to
17 avoid an administrative proceeding at all. Thus, his rights can be vindicated by a

1 reversal of the Commission's final order if the court of appeals grants his petition
2 for review." (internal quotation marks omitted)).

3 B. *Wholly Collateral*

4 We next consider whether the appellants' Appointments Clause claim is
5 "wholly collateral" to the SEC's administrative scheme. The Supreme Court has
6 not explained precisely how to make this determination, although *Elgin* suggests
7 that a claim is not wholly collateral if it serves as the "vehicle by which" a party
8 seeks to prevail in an administrative proceeding. *See* 132 S. Ct. at 2139-40. In the
9 absence of more extensive guidance, lower courts have adopted two competing
10 approaches. Some decisions have suggested that a claim is *not* wholly collateral
11 to an administrative proceeding only if it is substantively intertwined with the
12 merits dispute that the proceeding was commenced to resolve. *See Hill*, 114 F.
13 Supp. 3d at 1309 (concluding that the respondent's Article II challenge was
14 "wholly collateral" to the ongoing administrative proceeding because "[w]hat
15 occurs at the . . . proceeding and the SEC's conduct there is irrelevant to" the
16 constitutional challenge); *Duka*, 103 F. Supp. 3d at 391 (concluding that the
17 respondent's Article II challenge was "wholly collateral" to the ongoing
18 administrative proceeding because the challenge did not "attack any order that

1 may be issued . . . relating to the outcome of the SEC action" (internal quotation
2 marks omitted)). Other decisions have suggested that a claim is not wholly
3 collateral if it has been raised in response to, and so is procedurally intertwined
4 with, an administrative proceeding — regardless of the claim's substantive
5 connection to the initial merits dispute in the proceeding. *See Jarkesy*, 803 F.3d at
6 23 (concluding that claims arising "from actions the Commission took in the
7 course of [its administrative] scheme" were not "wholly collateral"); *Bebo*, 2015
8 WL 905349, at *2-4, 2015 U.S. Dist. LEXIS 25660, at *4-10 (implicitly concluding
9 that the respondent's Article II challenge did not qualify as wholly collateral to
10 the ongoing administrative proceeding because it was raised there as an
11 affirmative defense). *See generally Bebo*, 799 F.3d at 773-74 (comparing these two
12 lines of decisions).

13 The district court here adopted the latter approach. It began its analysis by
14 noting that the appellants' Appointments Clause claim is substantively
15 "unrelated to the securities violations underlying the administrative proceeding,"
16 such that resolving the challenge "cannot reasonably be characterized as the
17 'regular' or 'routine' business of SEC administrative proceedings." *Tilton*, 2015
18 WL 4006165, at *11, 2015 U.S. Dist. LEXIS 85015, at *31-32 (quoting, with minor

1 alterations, *Elgin*, 132 S. Ct. at 2140). Nevertheless, the court decided that the
2 claim did not qualify as "wholly collateral" because it was procedurally
3 intertwined with the SEC's ongoing proceeding, where it functioned as an
4 affirmative defense. *Id.* at 2015 WL 4006165, at *12, 2015 U.S. Dist. LEXIS 85015,
5 at *32-34.

6 Absent further guidance from the Supreme Court, we are inclined to agree
7 with the district court's assessment. The SEC chose to enforce the Investment
8 Advisers Act against the appellants by initiating an administrative proceeding
9 and appointing an ALJ to act as the hearing officer. The appellants'
10 Appointments Clause claim arose directly from that enforcement action and
11 serves as an affirmative defense within the proceeding. To be sure, the claim
12 could be narrowly categorized as collateral to the statutory merits of the
13 Investment Advisers Act charges against the appellants. But we cannot conclude
14 that the claim is *wholly* collateral to the SEC's administrative scheme more
15 broadly. As the district court recognized, it is "difficult to see how [the
16 Appointments Clause claim] can still be considered 'collateral to any
17 Commission orders or rules from which review might be sought,' since the ALJ
18 and the Commission will, one way or another, rule on those claims and it will be

1 the Commission's order that [the appellants] will appeal." *Tilton*, 2015 WL
2 4006165, at *12, 2015 U.S. Dist. LEXIS 85015, at *32 (citation and some internal
3 quotation marks omitted) (quoting *Free Enterprise*, 561 U.S. at 490); *see also Jarkesy*,
4 803 F.3d at 23 (reaching a similar conclusion). Put another way, the
5 Appointments Clause claim, like accompanying defenses to the merits of the
6 Investment Advisers Act charges, is a "vehicle by which" the appellants seek to
7 prevail in the proceeding. *Elgin*, 132 S. Ct. at 2139. The claim identifies a
8 purported error in the way the Commission has sought to enforce the securities
9 laws, albeit one that sounds in administrative procedure rather than statutory
10 construction.

11 The dissent argues that the appellants' Appointments Clause claim is as
12 collateral to the SEC's administrative scheme as the accounting firm's
13 Appointments Clause claim was in *Free Enterprise*. *See ante* at 16-17. We are not
14 persuaded by the analogy. The Supreme Court's jurisdictional conclusion in *Free*
15 *Enterprise* was, in our view, shaped principally by the absence of the type of
16 procedural link between constitutional claim and administrative proceeding that
17 exists here. The accounting firm objected to actions that the PCAOB had taken
18 entirely outside the scope of the SEC's scheme of administrative and judicial

1 review — actions that could not be the subject of "any Commission orders . . .
2 from which review might be sought." *Free Enterprise*, 561 U.S. at 490. The firm
3 filed suit in federal district court, and the Supreme Court allowed the suit to
4 proceed, because the Appointments Clause claim was not moored to any
5 proceeding that would provide for an administrative adjudication and
6 subsequent judicial review.⁶ Here, by contrast, the appellants' Appointments
7 Clause claim targets an aspect of an ongoing administrative proceeding. We
8 think that distinction significantly alters the "wholly collateral" analysis, such
9 that the second *Thunder Basin* factor does not favor district court jurisdiction in
10 this case. *See Jarkesy*, 803 F.3d at 23 (noting that a constitutional challenge might
11 qualify as collateral if it "were filed in court before the initiation of any
12 administrative proceeding," as in *Free Enterprise*, but concluding that

⁶ In explaining why the accounting firm's Appointments Clause claim qualified as wholly collateral, the *Free Enterprise* decision at one point characterized the claim as an "object[ion] to the [PCAOB's] existence." 561 U.S. at 490. Like the D.C. Circuit, we do not read that language "to define a new category of collateral claims that fall outside an otherwise exclusive administrative scheme." *Jarkesy*, 803 F.3d at 24. In our view, the Supreme Court classified the accounting firm's claim as wholly collateral because the PCAOB's disputed actions could not be reviewed by the Commission, which meant that the firm's Appointments Clause challenge to those actions fell entirely outside the scope of the administrative scheme and could not be resolved by a Commission "order[] . . . from which [judicial] review might be sought." *Free Enterprise*, 561 U.S. at 490.

1 constitutional challenges were not collateral when raised in response to "multiple
2 aspects of [an] ongoing proceeding").

3 C. *Agency Expertise*

4 The final consideration within the *Thunder Basin* framework is whether the
5 appellants' Appointments Clause claim falls outside the SEC's expertise. This is a
6 close question. As an initial matter, the Supreme Court's decision in *Free*
7 *Enterprise* suggests that the SEC does not possess unique legal expertise in
8 analyzing the constitutional sufficiency of its appointments. There, the Court
9 concluded that the merits of an Appointments Clause challenge to the PCAOB
10 fell "outside the Commission's competence and expertise" because the claim
11 raised only "standard questions of administrative law," which were unrelated to
12 any "statutory" or "fact-bound inquiries" that the SEC might be singularly
13 qualified to perform. 561 U.S. at 491.

14 Under *Touche Ross*, that conclusion might end our analysis of agency
15 expertise. As noted, the panel there permitted respondents to challenge an
16 ongoing SEC administrative proceeding in federal district court solely because
17 the legal substance of the challenge fell outside the administrative tribunal's
18 expertise and could not be usefully developed through its factfinding. 609 F.2d

1 at 577. But the Supreme Court has since adopted a broader conception of agency
2 expertise in the jurisdictional context. *Elgin*, in particular, emphasizes that an
3 agency may bring its expertise to bear on a constitutional claim indirectly, by
4 resolving accompanying, potentially dispositive issues in the same proceeding.
5 See *Jarkesy*, 803 F.3d at 28-29 (noting that "*Elgin* . . . clarified . . . that an agency's
6 relative[ly low] level of insight into the *merits* of a constitutional question is not
7 determinative" of whether the agency can bring its expertise to bear).

8 In *Elgin*, federal employees who allegedly had been discharged for
9 violating a statutory command sought reinstatement by challenging the
10 constitutionality of the statute. Congress had previously created an
11 administrative process to adjudicate specified personnel decisions regarding
12 federal employees, which was conducted initially by the Merit Systems
13 Protection Board ("MSPB") and subject to review in the Federal Circuit. Before
14 completing that administrative process, the employees attempted to raise their
15 constitutional challenge to the statute in federal district court. In an effort to
16 establish federal jurisdiction, they contended that the claim fell outside the
17 MSPB's expertise because the MSPB disclaimed authority to determine the
18 constitutionality of a federal statute. *Elgin*, 132 S. Ct. at 2130-31, 2140.

1 The Supreme Court disagreed. Although the MSPB had indeed disclaimed
2 authority to resolve constitutional challenges to statutes, the Court identified
3 several ways in which the agency might "otherwise" bring its expertise "to bear"
4 in proceedings that raised those challenges. First, the MSPB could resolve
5 "preliminary questions unique to the employment context" that might "obviate
6 the need to address the constitutional challenge." *Id.* at 2140. Second, "the
7 challenged statute [could] be one that the MSPB regularly construes, and its
8 statutory interpretation could alleviate constitutional concerns." *Id.* And third,
9 "an employee's appeal [could] involve other statutory or constitutional claims
10 that the MSPB routinely considers, in addition to a constitutional challenge to a
11 federal statute," whose resolution "in the employee's favor might fully dispose of
12 the case." *Id.* In light of those potential applications of agency expertise to other
13 dimensions of the administrative proceeding, the Court concluded that there was
14 "no reason to conclude that Congress intended to exempt" the employees'
15 constitutional challenge "from exclusive review before the MSPB and the Federal
16 Circuit." *Id.*

17 Applying *Elgin's* approach here, we think that the SEC might bring its
18 expertise to bear on the appellants' proceeding by resolving accompanying

1 statutory claims that it "routinely considers," and which "might fully dispose of
2 the case" in the appellants' favor. 132 S. Ct. at 2140. In particular, the
3 Commission could rule that the appellants did not violate the Investment
4 Advisers Act, in which case the constitutional question would become moot.

5 It may be argued that the application of agency expertise to the statutory
6 issues in the appellants' proceeding would improperly skip over their
7 Appointments Clause claim, which raises a "threshold" issue that logically
8 precedes a merits adjudication. Although we are mindful of that concern, the
9 Supreme Court appears to have rejected an analogous argument in *Standard Oil*.
10 There, the respondent oil company, like the appellants here, sought to raise a
11 "threshold" challenge to its administrative proceeding as a whole soon after the
12 proceeding began. The Ninth Circuit permitted the district court to exercise
13 jurisdiction over that challenge, in part because it feared that the oil company's
14 victory on other grounds in the administrative proceeding would evade, and
15 improperly "moot," the threshold issue. *Standard Oil Co. of Cal. v. FTC*, 596 F.2d
16 1381, 1387 (9th Cir. 1979), *rev'd*, 449 U.S. 232 (1980). The Supreme Court
17 expressly rejected that rationale and reversed, explaining:

18 [O]ne of the principal reasons to await the termination of agency
19 proceedings is to obviate all occasion for judicial review. Thus, the

1 possibility that [the oil company's] challenge may be mooted in
2 adjudication warrants the requirement that [the company] pursue
3 adjudication, not shortcut it.

4
5 *Standard Oil*, 449 U.S. at 244 n.11 (internal quotation marks and citations
6 omitted). In light of that passage, we are inclined to read *Elgin's* mention of
7 "other statutory or constitutional claims" that might "fully dispose of the case,"
8 132 S. Ct. at 2140, to include the Investment Advisers Act charges here.

9 Such a reading of *Elgin* dovetails with our analysis of the availability of
10 meaningful judicial review. We have already concluded, in keeping with
11 established federal practice regarding analogous disputes, that the appellants
12 may adequately vindicate their Appointments Clause claim by first awaiting a
13 final Commission order and then petitioning for judicial review on constitutional
14 grounds only if the order is adverse. By the same logic, a favorable Commission
15 order, including one on statutory grounds, would provide an acceptable
16 resolution of the Appointments Clause claim and obviate any need for judicial
17 review. It follows, we think, that the Commission may bring its expertise to bear
18 in a manner potentially relevant to the constitutional issue by resolving the
19 statutory charges against the appellants. For that reason, the final *Thunder Basin*
20 factor lends minimal support to the appellants' jurisdictional argument. *See*

1 *Jarkesy*, 803 F.3d at 29 (concluding that "the Commission's expertise can otherwise
2 be brought to bear on the issues in [the respondent's] proceeding" because "the
3 agency could moot the need to resolve" the respondent's constitutional claims,
4 including several threshold challenges to the proceeding as a whole, "by finding
5 that he did not commit the securities-law violations of which he stands accused"
6 (internal quotation marks omitted)); *Bebo*, 799 F.3d at 773 ("*Elgin* explained that
7 the possibility that [the respondent] might prevail in the administrative
8 proceeding (and thereby avoid the need to raise her constitutional claims in an
9 Article III court) does not render the statutory review scheme inadequate.").

10 CONCLUSION

11 After considering each of the *Thunder Basin* factors, we conclude that
12 Congress intended the appellants' Appointments Clause claim "to be reviewed
13 within" the SEC's exclusive "statutory structure." *Free Enterprise*, 561 U.S. at 489
14 (quoting *Thunder Basin*, 510 U.S. at 207). The "threshold" nature of the claim does
15 not defeat the presumption that it, like other procedural and substantive
16 defenses to an enforcement action, must be resolved in the first instance through
17 agency proceedings. To the contrary: "Many respondents in SEC proceedings
18 join substantive defenses to their securities charges together with challenges to

1 the Commission's actions or authority. It makes good sense to consolidate all of
2 each respondent's issues before one court for review, and only after an adverse
3 Commission order makes that review necessary." *Jarkesy*, 803 F.3d at 29-30. We
4 therefore conclude, in keeping with the decisions of the Seventh and D.C.
5 Circuits in *Bebo* and *Jarkesy*, that the appellants must await a final Commission
6 order before raising their Appointments Clause claim in federal court. The
7 judgment of the district court is AFFIRMED, and our stay on further proceedings
8 by the SEC is VACATED.

Jon O. Newman, *Circuit Judge*, concurring:

An additional reason why the Appellants in this case must raise their Appointments Clause issue by filing a petition for review in a court of appeals rather than initiate a new action in a district court is a concept that has been called "colorable jurisdiction." As the Seventh Circuit has explained in a case challenging an order of criminal contempt, "If a court has colorable jurisdiction of a case, though later it is determined that actually it didn't have jurisdiction, an order of criminal contempt issued by the court before the absence of jurisdiction is determined is valid." *Mann v. Calumet City*, 588 F.3d 949, 954 (7th Cir. 2009).

The Supreme Court, without using the phrase "colorable jurisdiction," made the same point in *United States v. United Mine Workers of America*, 330 U.S. 258 (1947). The Court there ruled that even if the constitutionality of a statute is in doubt, an order issued by a court under that statute must be obeyed and enforced even by criminal contempt. *See id.* at 293. The Court noted that "a different result would follow were the question of jurisdiction frivolous and not substantial," *id.*, or, as Justice Frankfurter's concurrence put it, the "court is

so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities," *id.* at 309 (Frankfurter, J., concurring).

The concept of colorable jurisdiction has also been deemed relevant to the availability of a collateral attack to challenge a judgment for lack of subject matter jurisdiction. Courts have distinguished between an erroneous assertion of subject matter jurisdiction, where collateral attack is precluded by *res judicata*, and a clear usurpation of judicial power, where collateral attack is permitted. See *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986) (collecting cases); see also Restatement (Second) of Judgments § 12(1) (1982). "Collateral attack is available only if the assertion of subject matter jurisdiction was without colorable basis, not merely erroneous." *In re U.S. Catholic Conference*, 824 F.2d 156, 165 (2d Cir. 1987), *rev'd on other grounds*, *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988) (on direct appeal, nonparty witness held in civil contempt may challenge subject matter jurisdiction of court in underlying action).

The Administrative Law Judge ("ALJ") that will be hearing the pending administrative proceeding against the Appellants is not an interloper. The ALJ is an official of the agency,

facially clothed with authority to adjudicate the proceeding before her. Whether her appointment comports with the Appointments Clause is a fair question, but there is surely a plausible basis for arguing that her appointment is valid.

With colorable jurisdiction, the ALJ may adjudicate the administrative case, and the losing party will have its opportunity to seek review before the Commission and then petition for review of a final order in a Court of Appeals, *see* 15 U.S.C. § 80b-13(a).

For this additional reason, I concur in Judge Sack's opinion for the Court.

1 DRONEY, *Circuit Judge*, dissenting:

2 This case is nearly indistinguishable from *Free Enterprise Fund*
3 *v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010). It differs
4 in only one significant way: administrative proceedings have begun
5 against the appellants. The majority concludes that this distinction
6 alone warrants a different outcome, finding that the fact of the
7 ongoing proceedings means that the three factors identified by the
8 Supreme Court in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994)
9 for determining whether Congress intended to limit jurisdiction of
10 the district courts are satisfied. Consequently, the majority holds
11 that there was no subject matter jurisdiction before the district court.

12 I respectfully dissent. The majority's application of the
13 *Thunder Basin* factors has stripped the "wholly collateral" and
14 "outside the agency's expertise" factors of any significance: in its
15 view, as long as administrative proceedings have been initiated,
16 those two factors are always satisfied. The majority bases its

1 understanding of this substantive-to-procedural switch in those two
2 factors on their application by the Supreme Court in *Elgin v.*
3 *Department of Treasury*, 132 S. Ct. 2126 (2012), but the nature of the
4 constitutional claim presented in *Elgin* was entirely different. I
5 disagree with the majority's interpretation of *Elgin* and conclude
6 that those two *Thunder Basin* factors must be analyzed substantively
7 to determine their weight in each particular case.

8 I conclude that *Free Enterprise* controls here. In my view, those
9 two factors here have precisely the same weight as they did in *Free*
10 *Enterprise*, and the application of the remaining factor does not
11 change the result. Thus, I would find that the district court had
12 subject matter jurisdiction to consider the constitutional challenge.

13 **I. The *Thunder Basin* Factors**

14 The Supreme Court in *Thunder Basin* identified the following
15 three factors as helpful in determining whether a statute which
16 provides for administrative review of agency action was intended by

1 Congress to preclude district court jurisdiction over claims before a
2 final administrative determination: whether the claims are “wholly
3 collateral to a statute's review provisions,” whether they are
4 “outside the agency's expertise,” and whether “a finding of
5 preclusion could foreclose all meaningful judicial review.” *Id.* at
6 212–13 (internal quotation marks omitted). The Court referred to
7 each as helping determine whether it is “fairly discernible” from a
8 “statutory scheme” that Congress “has allocated initial review to an
9 administrative body.” *Id.* at 207, 212–13.¹

10 I disagree somewhat with the majority's interpretation of the
11 third factor, “meaningful judicial review,” but it is the majority's

¹ The majority describes the *Thunder Basin* factors as coming into play only in the second part of a two-part test, seemingly splitting the analysis between asking (1) whether Congress intended to preclude district court jurisdiction and (2) whether Congress intended for the claims at issue to be reviewed within the statutory structure. Majority Op. at 10–11. I disagree with this dichotomy and the conclusion that the factors are relevant only to the second inquiry. *See, e.g., Elgin*, 132 S. Ct. at 2136 (referring to *Thunder Basin* factors as relevant to the single argument characterized variously as: “Congress does not intend to limit district court jurisdiction” (alterations omitted) and “[Petitioners'] claims are not the type that Congress intended to be reviewed within the [administrative] scheme”). However, the majority opinion does not return to this schema and thereafter focuses on the *Thunder Basin* factors as answering the ultimate question of whether the appellants are precluded from bringing their constitutional claims in the district court.

1 application of the two other factors—“wholly collateral” and
2 “outside the agency’s expertise” —with which I most disagree.

3 There are three cases in which the Supreme Court has
4 reviewed the application of these three factors: *Thunder Basin*, *Free*
5 *Enterprise*, and *Elgin*. In each, the Supreme Court’s analysis of the
6 “wholly collateral” and “outside the agency’s expertise” factors has
7 focused on the substance of the claims.

8 In *Thunder Basin*, a non-union mine owner filed an action in
9 district court challenging its employees’ designation of certain union
10 representatives to be involved in safety inspections under the
11 Federal Mine Safety and Health Amendments Act (“Mine Act”).
12 The Mine Act provided for administrative hearings and decisions
13 concerning safety issues, and ultimate appeal to the Courts of
14 Appeals. Respondents contended that this “comprehensive review
15 process,” *id.* at 208, in the Mine Act indicated that Congress
16 intended that the safety claim be exclusively reviewed in the

1 “statutory structure,” *id.* at 212, and that there was no subject matter
2 jurisdiction for the mine owner’s suit in the district court.

3 In its analysis of whether the mine owner’s claims must first
4 be brought in an administrative proceeding, the Supreme Court
5 analyzed the “wholly collateral” and “outside the agency’s
6 expertise” factors only by considering the substance of the claims
7 with no mention of the procedural aspects of the case. *Id.* at 213–14
8 (noting that “Petitioner’s statutory claims at root require
9 interpretation of the parties’ rights and duties under [the Mine Act
10 and accompanying regulations], and as such arise under the Mine
11 Act and fall squarely within the Commission’s expertise” and that
12 the agency has “extensive experience interpreting the walk-around
13 rights” that were at issue).

14 The Supreme Court engaged in the same sort of substantive
15 analysis in *Free Enterprise*. In *Free Enterprise*, an accounting firm filed
16 an action in the district court which challenged a report issued by

1 the newly created Public Company Accounting Oversight Board
2 (“PCAOB”). The PCAOB was created as an accounting reform in
3 the Sarbanes-Oxley Act of 2002 and its members were appointed by
4 the SEC. The report had criticized the firm’s accounting procedures,
5 but no sanctions were imposed. Thus, the accounting firm could not
6 utilize the statutory administrative review proceedings available
7 before the SEC. The action in the district court by the accounting
8 firm challenged the appointments of the PCAOB members by the
9 SEC, claiming that they violated the Appointments Clause of the
10 Constitution and the members had no authority to issue the negative
11 report. The PCAOB sought to dismiss the action on the basis that
12 the district court had no subject matter jurisdiction to consider the
13 accounting firm’s claim.

14 In its analysis of the “wholly collateral” and “outside the
15 agency’s review” factors, the *Free Enterprise* Court examined the
16 substance of the constitutional claim as it related to agency expertise,

1 561 U.S. at 491 (“[T]he statutory questions involved do not require
2 technical considerations of agency policy.” (quotation marks and
3 alterations omitted)), and explained the “wholly collateral” factor in
4 terms of the substantive content of the challenge, *id.* at 490.
5 (“[P]etitioners object to the Board’s existence, not to any of its
6 auditing standards. Petitioners’ general challenge to the Board is
7 collateral to any Commission orders or rules from which review
8 might be sought.”). It made no reference to the procedural aspects
9 of the claim.

10 II. *Elgin v. Department of Treasury*

11 The third case in which the Supreme Court addressed the
12 *Thunder Basin* factors was *Elgin v. Department of Treasury*, 132 S. Ct.
13 2126 (2012). The majority concludes that the *Elgin* Court
14 considerably altered the “wholly collateral” and “outside the
15 agency’s expertise” factors, but I disagree. I believe the outcome in

1 *Elgin* was not produced by varying those factors, but by the different
2 type of constitutional claim presented.

3 In *Elgin*, the plaintiffs challenged their dismissal from federal
4 employment for failure to comply with the Military Selective Service
5 Act by not registering for the draft. Although the plaintiffs had
6 available to them the right to challenge their dismissals through
7 administrative hearings before the Merit Systems Protection Board
8 (“MSPB”) and subsequent judicial review in the Federal Circuit, they
9 instead brought suit in federal district court.² Their constitutional
10 arguments were that the Selective Service Act discriminates on the
11 basis of sex by requiring only males to register and is a bill of
12 attainder. *Id.* at 2131. Notably, the plaintiffs made no challenge to
13 the available administrative process; they argued only that the
14 *substance* of the laws being enforced against them—laws routinely
15 administered by the MSPB—was unconstitutional. Unsurprisingly,

² One of the plaintiffs did pursue remedies through the MSPB, but declined to appeal the decision he received within the administrative system, instead joining the others in their suit in district court. *Elgin*, 132 S. Ct. at 2131.

1 then, the Supreme Court’s analysis of the “wholly collateral” and
2 “outside of the agency’s expertise” factors, and its conclusion that
3 those two factors in *Elgin* weighed in favor of dismissal of the
4 district court action, was necessarily quite different from that in *Free*
5 *Enterprise*.

6 The Supreme Court’s application of the “wholly collateral”
7 factor rejected the plaintiffs’ argument that their constitutional
8 claims had “nothing to do” with the “day-to-day personnel actions
9 adjudicated by the MSPB.” *Id.* at 2139. The Supreme Court pointed
10 out that a challenge to dismissal from employment based on federal
11 statutes is “precisely the type of personnel action regularly
12 adjudicated by the MSPB and the Federal Circuit within the [Civil
13 Service Reform Act (“CSRA”)] scheme.” *Id.* at 2140. Whether or not
14 that particular challenge involved a constitutional question, it was—
15 in the words of the Supreme Court—“a challenge to CSRA-covered

1 employment action brought by CSRA-covered employees requesting
2 relief that the CSRA routinely affords." *Id.*

3 The majority here concludes that *Elgin* held that "a claim is
4 not wholly collateral if it has been raised in response to, and so is
5 procedurally intertwined with, an administrative proceeding,"
6 Majority Op. at 27, pointing to the Supreme Court's statement that
7 the constitutional claims in *Elgin* were "the vehicle by which [the
8 petitioners] s[ought] to reverse the removal decisions" made against
9 them, *id.* at 2139. However, that overstates what the Supreme Court
10 did in its application of that factor. That portion of the opinion
11 meant nothing more than that the plaintiffs were challenging actions
12 against them under the statutes committed to the MSPB by attacking
13 the constitutionality of those very statutes—it does not suggest that
14 *no challenge* that would end ongoing proceedings could be
15 considered collateral to a statute's review provisions. Such an
16 interpretation would swallow the rule, for there would no longer be

1 any need to evaluate the substance of a claim as long as the claim
2 could somehow serve to end administrative proceedings in a
3 plaintiff's favor. This is inconsistent with *Thunder Basin* and *Free*
4 *Enterprise* (and, in fact, with *Elgin*, which looked carefully at the
5 substance of the challenge). It would also turn the factor into an
6 easy, binary question: Is a proceeding ongoing? If yes, then no claim
7 that would end the proceeding can be wholly collateral. This cannot
8 be what the *Elgin* Court intended. In my view, it held only that a
9 claim involving the substance of the very act entrusted to the agency
10 for implementation and requesting the types of relief that the agency
11 regularly gives—a far cry from the present case, where the
12 constitutional claim has no relation to the securities laws entrusted
13 to the SEC and the requested remedy of disallowing the proceedings
14 before the ALJ is obviously not a routine outcome—cannot be
15 considered “wholly collateral” to the administrative scheme.

1 As for the “outside the agency’s expertise” factor, the *Elgin*
2 Court made clear that this factor would weigh against jurisdiction in
3 cases where a claim needing agency expertise was a “threshold” or
4 “preliminary question” that would “obviate the need to address the
5 constitutional challenge.” *Id.* at 2140. This described the situation in
6 *Elgin*, where before deciding that the Selective Service Act was
7 unconstitutional the MSPB had to decide “threshold questions” to
8 which the MSPB could apply its expertise, such as whether
9 constructive discharge occurred as well as whether additional
10 claimed violations of employment statutes took place, which “might
11 fully dispose of the case.” *Id.* Those decisions could be informed by
12 its agency expertise in the area of employment law. *Id.* In such a
13 context, the MSPB’s expertise could properly be “brought to bear”
14 on the constitutional claim. *Id.* (quoting *Thunder Basin*, 510 U.S. at
15 214–15). The majority here acknowledges that an issue of federal
16 jurisdiction or the appropriate composition of an adjudicatory

1 body—such as the Appointments Clause challenge presented in this
2 case—logically precedes a merits adjudication; therefore, there is no
3 “threshold” or “preliminary” question that would “obviate the need
4 to address the constitutional challenge.”

5 The majority nonetheless concludes that the *Elgin* Court
6 interpreted this factor to mean that “an agency may bring its
7 expertise to bear on a constitutional claim indirectly, by resolving
8 accompanying, potentially dispositive issues in the same
9 proceeding.” Majority Op. at 32. It does so by citing the *Elgin*
10 Court’s reference to a situation in which an appeal involves “other
11 statutory or constitutional claims that the MSPB routinely considers,
12 in addition to a constitutional challenge to a federal statute.” *Elgin*,
13 132 S. Ct. at 2140. The majority thus concludes that an issue to
14 which an agency may apply its expertise need only be dispositive,
15 not necessarily “preliminary,” for it to weigh against jurisdiction.
16 Majority Op. at 33-34.

1 That interpretation does not comport with the language of
2 *Elgin*, however, which explicitly set that description out as an
3 *example* of a situation in which there might be “threshold questions”
4 that would allow the initial agency reviewing the case to *not reach*
5 the constitutional question.³ Nor would such an expansive
6 interpretation be consistent with the facts underlying and the setting
7 of *Elgin*, where the potentially dispositive issue was clearly a
8 “preliminary” or “threshold question.”

9 To read *Elgin* as broadly as the majority does would mean that
10 as long as a proceeding is ongoing, the “outside the agency’s
11 expertise” factor *must* weigh against jurisdiction—because any time
12 a proceeding has commenced there is of course some possibility that
13 a plaintiff may prevail on the merits. This would turn a substantive

³ That paragraph in *Elgin* makes clear that each of the sentences cited by the majority at Majority Op. 33 are examples of cases with “threshold questions,” not additional pathways to preclusion. See *Elgin*, 132 S. Ct. at 2140 (“But petitioners overlook the many threshold questions that may accompany a constitutional claim and to which the MSPB can apply its expertise. Of particular relevance here, preliminary questions unique to the employment context may obviate the need to address the constitutional challenge. *For example*, . . . *In addition*, *Or*, an employee’s appeal may involve other statutory or constitutional claims that the MSPB routinely considers, in addition to a constitutional challenge to a federal statute.” (emphases added)). The Supreme Court has elsewhere defined a “threshold question” as one “that must be resolved . . . before proceeding to the merits [of another claim].” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 88–89 (1998).

1 factor into a purely procedural—and binary—one, which is
2 inconsistent with the description of the factor in *Thunder Basin*, *Free*
3 *Enterprise*, or *Elgin* itself.

4 In sum, to agree with the majority’s interpretation of *Elgin*,
5 one must conclude that the Supreme Court intended to eliminate
6 any substantive analysis of the “wholly collateral” and the “outside
7 the agency’s expertise” factors in any case where an administrative
8 proceeding is ongoing.⁴ To the contrary, *Elgin* itself engages with
9 the substance of the precluded claims in a way that the majority
10 seems to believe is now unnecessary.

11 The majority’s interpretation also serves to move the *Thunder*
12 *Basin* factors away from their original function, which was to assist
13 in a holistic analysis to determine whether it is “fairly discernible”
14 from a “statutory scheme” that Congress “has allocated initial
15 review to an administrative body.” *Thunder Basin*, 510 U.S. at 207.

⁴ In fact, in *Elgin*, only one of the plaintiffs had initiated administrative proceedings; the others had filed suit directly in the district court but *could have* initiated proceedings. *Elgin*, 132 S.Ct. at 2131. Consequently, the implication of the majority’s reading of *Elgin* is likely to be even greater than this.

1 *Elgin* recognized this function: it engaged in an extensive analysis of
2 the history and structure of the relevant statutes before turning to
3 the *Thunder Basin* factors, which it referred to as “three additional
4 factors in arguing that [the petitioners’] claims are not the type that
5 Congress intended to be reviewed within the CSRA scheme.” 132 S.
6 Ct. at 2136.

7 I would apply the three *Thunder Basin* factors for divining
8 legislative intent faithful to *Thunder Basin*, *Free Enterprise* and *Elgin*.

9 **III. Application of the *Thunder Basin* Factors**

10 **A. “Wholly Collateral to a Statute’s Review Provisions”**

11 The Supreme Court in *Free Enterprise* concluded that the
12 constitutional claim there was “wholly collateral” to any
13 administrative proceedings that might be brought against the
14 plaintiffs. That challenge was essentially the same as the challenge
15 here: that the appointment of the members of the PCAOB by the
16 SEC violated the Appointments Clause of the Constitution. It
17 explained that the plaintiffs’ “general challenge to the Board is

1 'collateral' to any Commission orders or rules from which review
2 might be sought" because they "object to the Board's *existence*, not to
3 any of its auditing standards." *Free Enterprise*, 561 U.S. at 490
4 (emphasis added). Here, as well, the appellants object to the very
5 existence of SEC administrative proceedings conducted by ALJs
6 who are, in their view, not appointed in accordance with the
7 Appointments Clause.

8 The majority finds that this factor weighs against jurisdiction
9 based only on its interpretation of *Elgin*, which I have addressed
10 above. I would reject that interpretation. I see no difference
11 between the Appointments Clause challenge in *Free Enterprise* and
12 here; it is completely collateral to the work of the PCAOB as well as
13 to the work of the SEC and its ALJs. I would find that this factor
14 weighs strongly in favor of jurisdiction.

15 **B. "Outside the Agency's Expertise"**

16 In *Free Enterprise*, the Supreme Court explained that the
17 Appointments Clause claim relating to the appointment of the

1 PCAOB by the SEC was “outside the Commission’s competence and
2 expertise,” requiring no understanding of a particular industry and
3 no “technical considerations of agency policy.” *Id.* at 491 (internal
4 quotation marks and alterations omitted). The same conclusion
5 applies to the Appointments Clause issue here. Like the
6 determination of the appointment authority for the PCAOB
7 members in *Free Enterprise*, the SEC has no particular expertise in
8 determining whether the system of appointing its Administrative
9 Law Judges comports with the Appointments Clause of the
10 Constitution.

11 The majority agrees as far as *Free Enterprise* goes, concluding
12 only that this *Thunder Basin* factor has been changed by *Elgin*. For
13 the reasons discussed above, I disagree. I see no difference in the
14 application of this factor here to the SEC and its application to the
15 SEC in *Free Enterprise*. I would find that this factor also weighs
16 strongly in favor of jurisdiction.

1 **C. “Meaningful Judicial Review”**

2 The “meaningful judicial review” factor presents the only
3 significant difference between the present case and *Free Enterprise*. I
4 agree with the majority that this factor tends to weigh in favor of
5 preclusion because a subsequent appeal to this Court following a
6 final Commission order is available.

7 Nonetheless, I do not believe that the difference between the
8 available judicial review in *Free Enterprise* and in this case is so
9 significant as to justify a different outcome, given the identical
10 application of the other two factors, as well as a substantial question
11 as to whether subsequent judicial review here would be
12 “meaningful.”

13 The majority is correct in noting that *Free Enterprise* differed
14 from this case in that no reviewable administrative order was
15 possible unless the plaintiff “manufactur[ed] a new, tangential
16 dispute that *would* require a Commission order.” Majority Op. at
17 17. And as the *Free Enterprise* Court noted, “[w]e normally do not

1 require plaintiffs to bet the farm by taking the violative action before
2 testing the validity of [a] law.” 561 U.S. at 490 (internal quotation
3 marks and alterations omitted).

4 The *Free Enterprise* situation was not so different from the
5 present one as to require a different outcome, however. Here, the
6 administrative proceedings once concluded would have led to an
7 order subject to judicial review—but only if the appellants had
8 continued litigating before the SEC ALJ and lost on the merits.⁵

9 Forcing the appellants to await a final Commission order
10 before they may assert their constitutional claim in a federal court
11 means that by the time the day for judicial review comes, they will
12 already have suffered the injury that they are attempting to prevent.
13 The majority finds that the “litigant’s financial and emotional costs

⁵ Given that the vast majority of all SEC administrative proceedings end in settlements rather than in actual decisions, it might well be that choosing to litigate is, in fact, equivalent to “betting the farm.” See Brian Mahoney, *SEC Could Bring More Insider Trading Cases In-House*, LAW360 (June 11, 2014), <http://www.law360.com/articles/547183/sec-could-bring-more-insider-trading-cases-in-house> (quoting Andrew Ceresney, the head of the SEC’s Division of Enforcement, as explaining that the “vast majority of our cases settle,” and stating, “I will tell you that there have been a number of cases in recent months where we have threatened administrative proceedings, it was something we told the other side we were going to do and they settled”).

1 in litigating the initial proceeding are simply the price of
2 participating in the American legal system,” Majority Op. at 22, but
3 the issue is less the costs and burden of litigation and more that the
4 appellants are challenging the very existence of the ALJs as a part of
5 the statutory scheme. The appellants seek to enjoin the SEC
6 proceedings, but by the time that they access any judicial review, the
7 proceedings will be complete, rendering the possibility of obtaining
8 an injunction moot even if the final Commission order is vacated. In
9 my view, this diminishes the weight of this factor, for while there
10 may be review, it cannot be considered truly “meaningful” at that
11 point.

12 The majority cites a number of decisions for the principle that
13 “post-proceeding relief . . . suffices to vindicate the litigant’s
14 constitutional claim,” Majority Op. at 21–22, but none involves an
15 analysis of the “meaningful judicial review” prong of this test.
16 *Germain v. Connecticut National Bank*, 930 F.2d 1038, 1040 (2d Cir.

1 1991) involved an interlocutory appeal of the denial of a jury trial
2 demand in a bankruptcy proceeding and the application of the
3 collateral order doctrine exception that an order be “effectively
4 unreviewable on appeal.” *D’Ippolito v. American Oil Co.*, 401 F.2d
5 764, 765 (2d Cir. 1968) addressed the question of whether an order
6 by a district court transferring an antitrust action to another district
7 was a “final judgment” under 28 U.S.C. § 1291. *In re al-Nashiri*, 791
8 F.3d 71, 79 (D.C. Cir. 2015), addressed the “irreparable injury” test
9 meriting the grant of a writ of mandamus to stop a military
10 commission trial. And *FTC v. Standard Oil Co. of California*, 449 U.S.
11 232, 244 (1980) concerned whether the issuance of a complaint by the
12 Federal Trade Commission caused “irreparable injury” allowing for
13 judicial review or whether final agency action was necessary.

14 When it comes to the “meaningful judicial review” factor, it is
15 my view that we need look no further than *Free Enterprise* itself to
16 understand that being forced to undergo an allegedly

1 unconstitutional proceeding may play into the analysis of whether
2 judicial review is “meaningful.” The Court in *Free Enterprise*
3 identified a number of *possible* ways that the plaintiffs in that case
4 could obtain review of their constitutional claims against the board
5 (such as “select[ing] and challeng[ing] a Board rule at random” or
6 “incur[ring] a sanction (such as a sizable fine) by ignoring Board
7 requests for documents and testimony,” 561 U.S. at 490); it simply
8 decided that none of the options were reasonable to ask of the
9 plaintiffs and therefore none provided “meaningful” judicial review.
10 *Id.* at 490–91.

11 The Supreme Court in *Free Enterprise* also explained that the
12 plaintiffs were “entitled to declaratory relief sufficient to ensure that
13 the reporting requirements and auditing standards to which they are
14 subject *will be enforced only by a constitutional agency accountable to the*
15 *Executive,*” and it allowed the plaintiffs to bring their claim at a time
16 where no administrative proceedings had yet been formally brought

1 against them. 561 U.S. at 513 (emphasis added). This suggests that
2 the Supreme Court considers the very *process* of enforcement by an
3 unconstitutional body to be an injury that can be relevant to the
4 determination of whether post-proceeding review is “meaningful.”

5 **IV. Conclusion**

6 For all these reasons, I am unpersuaded that the “meaningful
7 judicial review” prong has enough weight to overpower the other
8 two factors and result in a finding of no jurisdiction. The other two
9 factors clearly mirror those in *Free Enterprise*, and the available
10 review is not meaningful enough to set those two factors aside.
11 Thus, the Appointments Clause challenge here is not “of the type
12 Congress intended to be reviewed within th[e] statutory structure.”⁶
13 *Thunder Basin*, 510 U.S. at 212.

⁶ Since the purpose of the application of the *Free Enterprise* factors is to determine whether Congress intended to deprive district courts of subject-matter jurisdiction to hear pre-administrative-adjudication claims, it seems relevant that Congress continues to authorize the SEC to choose whether it will pursue violations before its ALJs in administrative proceedings or in the district court as civil actions. To permit those subject to SEC enforcement actions to challenge administrative proceedings in the district courts on the basis of constitutional challenges that have nothing to do with the expertise of the SEC or with factual matters relevant to their own particular circumstances would seem consistent with that Congressional intent.

1

2 I would reverse the decision of the district court and remand
3 for an adjudication of the merits of the Appointments Clause claim.