# 15-0461-cv

# United States Court of Appeals

*for the*

# Second Circuit

WING F. CHAU, HARDING ADVISORY LLC,

*Plaintiffs-Appellants*,

v.

SECURITIES AND EXCHANGE COMMISSION,

*Defendant-Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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## PRELIMINARY STATEMENT

The SEC concedes that the controlling question on this appeal is whether Congress intended to preclude pre-enforcement judicial review of agency enforcement decisions in cases like this one. With this question in mind, the SEC opens its argument by canvassing materials that it contends bear on the question. Not only is that effort largely unsuccessful, it is entirely irrelevant. For the agency review statutes at issue here, the Supreme Court has already announced the test that answers the question: "we presume that Congress does not intend to limit jurisdiction 'if a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489-90 (2010) (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994)).

The SEC attempts to relegate *Free Enterprise* to outlier status. But every post-*Free Enterprise* decision cited by either party that concerns pre-proceeding review in connection with the review statutes at issue here—even those finding no jurisdiction—recognizes that *Free Enterprise* establishes the governing test. There is no basis for declining fairly to apply *Free Enterprise*.

To the extent the SEC engages on the *Free Enterprise* factors, it rests its argument largely on the notion that meaningful post-proceeding judicial review

will be available. But in so arguing, it relies heavily on cases that involve merely garden-variety administrative law issues concerning, *e.g.*, the construction of a statute, or the propriety of an administrative structure. The claims here are different. The SEC and its employees stand accused of acting with improper motives in initiating the in-house proceeding. The type of record required to support meaningful review for such claims is necessarily more contentious and probing, making the in-house proceeding's lack of complete discovery a more significant obstacle. More fundamentally, as detailed in Mr. Chau and Harding's opening brief, the development of a meaningful record here will depend entirely upon the Commission *repeatedly and voluntarily choosing to implicate itself* and its employees in potentially embarrassing conduct—such as by choosing to make available the reasons for treating Mr. Chau as they did, rather than hiding those reasons behind privilege claims or procedural discovery objections. On this fundamental issue going to the heart of the appeal, the SEC is silent. The silence is telling.

Further, while the SEC suggests in cursory fashion that any gaps in procedure can be remedied through a remand order issued by a Circuit Court, the SEC provides no explanation as to how this could actually work for claims that require appropriately probing and iterative American-style discovery. Again, unlike the cases the SEC relies upon, those here do not involve merely the type of

ordinary administrative law issues as to which relevant materials likely exist in the investigative file itself, or are otherwise contained within the merits record. Of course, there *do* exist cases that apply *Free Enterprise*'s "meaningful judicial review" factor to claims for disparate agency prosecution—and they find that subject matter jurisdiction is not precluded, including, most notably, Judge Jed S. Rakoff's *Gupta* decision. As to *Gupta*, the SEC, again, is silent.

Stripped of rhetoric and arguments imported from cases involving different types of claims and considerations, both the decision of the District Court and the position of the SEC appear at bottom to rest upon the notion that allowing pre-enforcement review would "swallow" the review statute. But such *ad hoc*, court-by-court policy analyses of the potential risks and benefits of pre-enforcement review form no part of the *Free Enterprise* test. And in any event, as demonstrated in Mr. Chau and Harding's opening brief, the District Court misperceived the risks. As evidenced by multiple decisions cited in the opening brief, courts that find subject matter jurisdiction under *Free Enterprise* can quickly dismiss non-meritorious suits under Rule 12(b)(6). On this point, the SEC, again, is silent.

Ultimately, the SEC brief fails fairly to confront the issues presented by the claims at issue here. At a moment when the SEC is increasingly withdrawing from federal courts and instead funneling into its in-house proceeding cases that the proceeding was not designed to handle, it is imperative to adhere to the *Free*

*Enterprise* test, under which the modest pre-enforcement judicial screening requested here is permitted. The decision below should be reversed.

## ARGUMENT

### I. UNDER THE *FREE ENTERPRISE* CRITERIA, THE DISTRICT COURT HAS SUBJECT MATTER JURISDICTION.

As set forth in the opening brief, the Supreme Court in *Free Enterprise* held that Congress did not intend for agency jurisdiction under the Exchange Act to be exclusive, at least where (i) a finding of preclusion could foreclose all meaningful judicial review, (ii) the suit is wholly collateral to a statute's review provisions, and (iii) the claims are not peculiarly within the agency's expertise. *See* Plaintiffs-Appellants' Opening Brief at 24, *Chau v. S.E.C.*, No. 15-461 (2d Cir. May 29, 2015) [hereinafter "Br."].[1] Those factors are present here.

#### A. A Finding Of Preclusion "Could Foreclose All Meaningful Judicial Review."

Mr. Chau and Harding demonstrated in their opening brief that a finding of preclusion "could foreclose all meaningful judicial review" because (i) the in-house administrative proceeding cannot be relied upon to develop a record adequate to support meaningful review here, and (ii) where a claimant alleges disparate prosecution, requiring the prosecution first to be suffered in its entirety

[1] The SEC acknowledges that the Securities Act, the Advisers Act, and the Company Act "are analogous in relevant part" to the Exchange Act. Brief of the S.E.C. at 3 n.2, *Chau v. S.E.C.*, No. 15-461 (2d Cir. Aug. 28, 2015) [hereinafter "SEC"].

undermines the usefulness of review. *See* Br. at 25-31. The SEC's arguments in response fail fairly to confront the nature of the claims here.

1. The In-House Proceeding Cannot Be Relied Upon To Develop An Adequate Record To Support Review.

Mr. Chau and Harding demonstrated in their opening brief that the SEC's in-house proceeding cannot be relied upon for development of an adequate record for review, due both to significant gaps in discovery procedures and to the irreconcilable, sharply conflicting roles that the Commission plays in the proceeding. *See* Br. 26-29. In its brief, the SEC relies heavily on the decisions in *Elgin v. Dep't of Treasury*, 132 S. Ct. 2126 (2012), and *Bebo v. S.E.C.*, No. 15-1511, 2015 WL 4998489 (7th Cir. Aug. 24, 2015), arguing that *Elgin* in particular "foreclose[s]" Mr. Chau and Harding's argument. *See* SEC at 30-31. The SEC also enumerates a series of procedural mechanisms available in the in-house proceeding that purportedly suffice to allow development of a meaningful record. *See id.* at 31-33.

The SEC's arguments, however, do not confront the nature of the claims at issue here. Unlike in *Elgin* (a case filed under the Civil Service Reform Act alleging that certain statutes operate in tandem to work an unconstitutional sex discrimination), or *Bebo* (a case alleging that certain provisions of Dodd-Frank are unconstitutional), Mr. Chau and Harding's claims here do not involve merely garden-variety administrative law claims in which the issue turns on, *e.g.*, how a

statute is interpreted, or whether a particular administrative structure comports with the constitution. Instead, SEC personnel are here charged with acting on the basis of improper motives. Two significant differences from *Elgin* and *Bebo* follow.

*First*, the discovery necessarily will be more intrusive and confrontational. The facts needed to support a determination of whether, *e.g.*, an administrative practice violates the constitution, may be relatively discrete and easy to identify and produce. By contrast, where both the Commission and its employees are charged with acting on improper motives, meaningful discovery will be more probing—and may require ongoing revision and iteration depending on what is discovered. Contentious depositions involving SEC lawyers who are prosecuting the merits case will be at the center of discovery, as will internal documents and communications among Commission employees potentially implicating them or their superiors in misconduct.[2] In this context, arguments that "judicial notice" may be taken of public facts, *see* SEC at 12, only highlight the inadequacy of the in-house procedures. When motivation is at issue, there are few public facts to notice.

*Second*, the SEC's anodyne assurances that a party may "request the issuance of a subpoena," or "file a motion with the full Commission 'for leave to adduce additional evidence,'" *see* SEC at 31, utterly fail to confront the more

[2] Of course, to obtain such discovery, the plaintiff must first survive a motion to dismiss. But then there is the prospect of full discovery in federal court to prove his case.

fundamental obstacle identified in Mr. Chau and Harding's opening brief—the development of a meaningful record in the in-house proceeding would in effect require the Commission to repeatedly and voluntarily implicate itself or its employees in potentially embarrassing conduct. *See* Br. at 26-28. The privilege issue is illustrative. Citing the decision below, the SEC argues that the true obstacle to discovery was a privilege ruling that could just as well been delivered in a federal court. *See* SEC at 33. But the circumstances could hardly be more different in the in-house proceeding than in federal court. In the in-house proceeding, the entity accused of acting with improper motives, *i.e.*, the Commission, not only has a self-interest in deciding to assert or waive privilege or discovery arguments that might shield critical documents, but it also has that same self-interest in *adjudicating* whether any such claims are valid. *See* Br. at 33.[3]

This same fundamental flaw would infect resolution of all of the discovery disputes that may inevitably arise in the course of resolving Mr. Chau and Harding's claims—not to mention resolution of the substance of the claims. As detailed in Mr. Chau and Harding's opening brief, when it comes to the adjudication of claims brought in the in-house proceeding, the SEC stands by its own. *See* Br. at 9-12 (citing, *inter alia*, SEC success rates of 90% in its in-house

[3] Moreover, this same entity, the Commission, is engaged in litigation in the federal courts, such that a decision to disapprove of its own privilege claim could undermine the position of its Enforcement Division in the federal courts.

proceeding and 95% in in-house appeals; former SEC ALJ statements that her "loyalty" was questioned when she ruled against the agency; fact that the ALJ hearing Mr. Chau and Harding's case has found every defendant in a contested case liable on at least some SEC charges).[4]

Indeed, subsequent to Mr. Chau and Harding's filing of their opening brief, the SEC itself has confirmed—even *touted*—the principle that the ALJs presiding over the in-house proceeding lack independence. In an Opinion issued September 3, 2015, the Commission, in arguing that its ALJs are mere "employees," repeatedly casts them as low-level functionaries that lack independence. *See* Opinion of the Commission, *In re Raymond J. Lucia Cos., Inc.*, Admin. Proc. File No. 3-15006 at 3, 29 (S.E.C. Sept. 3, 2015), www.sec.gov/litigation/opinions/2015/34-75837.pdf. Having described FDIC ALJs as mere "aides who assist the Board in its duties," the Commission opines that "the mix of duties and powers of our ALJs is similar in all material respects to the duties and role of" the FDIC ALJs. *See id.* at 29, 32 (discussing and relying on *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), instead of *Freytag v. Comm'r*, 501 U.S. 868 (1991)). Further, the Commission presents a lengthy, comprehensive

[4] While considerations relating to an inadequate record are most apparent with respect to the equal protection claim for disparate prosecution, a challenge premised upon the SEC's recently admitted failure to conduct hearings with appropriate procedures or before "officers of the Commission designated by it," *see* Br. at 4, 10, is also affected by the lack of an impartial officer to address it. *See* Br. at 31.

enumeration of the many ways in which—in its own view—the ALJs serve as mere functionaries of the Commission, *see id.* at 30-31, concluding that "although ALJs may play a significant role in helping to shape the administrative record initially, it is the Commission that ultimately controls the record for review and decides what is in the record." *Id.* at 31. Thus, it is the view of the SEC itself that there is no independent hearing officer to adjudicate discovery or privilege disputes, and responsibility for what is allowed into the record lies with the Commission itself.

Again, the claims here do not involve merely, *e.g.*, the agency's interpretation of a statute. Where claims call into question an actor's motives, a proceeding that depends for its fairness on that very same actor—or its admittedly non-independent functionaries—voluntarily choosing to implicate itself in potential misconduct or voluntarily waive its carefully-guarded privilege certainly "could foreclose all meaningful judicial review." On this fundamental point, examined in detail in Mr. Chau and Harding's opening brief, *see* Br. at 9-14, 26-29, the SEC is silent.

Ultimately, then, the decisions and reasoning in *Elgin* and *Bebo* shed little light on the practical obstacles to a meaningful record in *this* case. Of course, there does exist a case that addresses the "meaningful review" concept in the context of disparate prosecution claims—and it reaches the natural conclusion. *See Gupta v.*

*S.E.C.*, 796 F. Supp. 2d 503, 513-14 (S.D.N.Y. 2011) (finding *Free Enterprise* factors satisfied, in part because "[t]he Commission, having approved the OIP . . . would be inherently conflicted in assessing such a claim," and "the SEC's administrative machinery does not provide a reasonable mechanism for raising or pursuing [the equal protection] claim").[5] As to *Gupta*, the SEC, again, is silent.[6]

The SEC suggests as a fallback position that whatever procedural gaps might exist in the in-house proceeding, a Circuit Court can remedy them through a remand order. *See* SEC at 32-33. But the SEC does not attempt to explain how that would actually work in practice for claims like these, and it is easy to understand why. Unlike in *Elgin* and *Bebo*, where the appellate courts might have been able to order the production of a relatively limited and discrete set of materials to address the bread-and-butter administrative law claims there at issue, here the claims of disparate prosecution require more searching discovery, as discussed above. The SEC fails to explain how a remand order could convert its weak in-house discovery mechanisms into American-style discovery and also

[5] Indeed, in a recent lower court decision that the SEC cites throughout its brief, *Tilton v. S.E.C.*, the court emphasizes that "no discovery is necessary to adjudicate" the appointments clause claims at issue there, and specifically notes that the analysis would be different for a case involving an equal protection claim for disparate prosecution such as that in *Gupta*. *See Tilton v. S.E.C.*, No. 15-CV-2472 (RA), 2015 WL 4006165, at *9 & n.8 (S.D.N.Y. June 30, 2015) (Abrams, J.) (appeal pending, docket no. 15-2103-cv) (noting *Gupta* court's explanation of why discovery was inadequate for disparate prosecution claims, and concluding that "[h]ere, by contrast, the purely legal questions at issue are not fact-dependent and the administrative record would not be *similarly lacking*") (emphasis added).

[6] *Gupta* appears in the SEC brief only in a parenthetical that merely notes that a phrase in Mr. Chau and Harding's brief was a quotation from *Gupta*. *See* SEC at 39.

purge the inherent bias of the gatekeeper. At best, the SEC's approach, if adopted for claims like Mr. Chau and Harding's, would convert the Circuit Court into a kind of magistrate judge, enmeshed in resolving day-to-day discovery disputes. Of course, there already is constituted an impartial tribunal with expertise in such matters—the very federal courts from which the SEC recently has been retreating. In any event, the SEC's unexplained proposal is not a sound basis on which to conclude that preclusion "could not foreclose meaningful judicial review."

2. Causing Mr. Chau And Harding To Suffer The Harm In Its Entirety Undermines The Usefulness Of Judicial Review.

Mr. Chau and Harding also demonstrated in their opening brief that where a party charges disparate prosecution, a post-proceeding review is less useful because it requires the party to suffer the complained-of prosecution in its entirety. *See* Br. at 29-31. In their opposition brief, the SEC argues that (i) requiring a party to wait for post-proceeding review is commonplace, (ii) this Court's decision to the contrary in *Touche Ross & Co. v. S.E.C.*, 609 F.2d 570 (2d Cir. 1979) should not be adhered to, and (iii) allowing pre-proceeding review would "swallow the schemes themselves." *See* SEC at 34-37. Each of these arguments is without merit.

*First*, the SEC's argument that parties often have to wait for post-proceeding review relies heavily on the Seventh Circuit's decision in *Bebo*, which, to the extent it finds unproblematic subjecting constitutional claimants to the proceeding,

contradicts this Court's decision in *Touche Ross*. As explained in Mr. Chau and Harding's opening brief, with respect to a claim that challenged the SEC's very authority to commence the proceeding, this Court in *Touche Ross* rejected an argument that the claimants must wait for post-proceeding review, explaining that "to require appellants to exhaust their administrative remedies would be to require them to submit to the very procedures which they are attacking." *Touche Ross*, 609 F.2d at 577. Moreover, the remaining cases cited by the SEC do not involve equal protection claims for disparate prosecution—and most do not even involve the review statutes at issue here (and thus present different questions of Congressional intent).[7] Again, there are, of course, cases involving disparate prosecution claims, *see Gupta*, 796 F. Supp. 2d at 514 (subsequent review not meaningful where claimant "would be forced to endure the very proceeding he alleges is the device by which unequal treatment is being visited upon him"), but the SEC does not address *Gupta*.

[7] *See FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239-44 (1980) (addressing doctrine of exhaustion under FTCA); *Deaver v. Seymour*, 822 F.2d 66, 66-70 (D.C. Cir. 1987) (rejecting request for equitable relief against criminal prosecution in case involving constitutionality of independent counsel statute); *Germain v. Conn. Nat'l Bank*, 930 F.2d 1038, 1039-40 (2d Cir. 1991) (addressing applicability of collateral order doctrine to motion to strike jury demand); *Sturm, Ruger & Co. v. Chao*, 300 F.3d 867, 876 (D.C. Cir. 2002) (addressing claims challenging lawfulness of data collection and survey under OSHA); *Fort v. Am. Fed'n of State, Cnty. & Mun. Emps.*, 375 F. App'x 109, 110-12 (2d Cir. 2010) (rejecting request for injunction to block disciplinary proceeding for lack of irreparable injury, based *inter alia* upon review of union's constitution); *Aref v. United States*, 452 F.3d 202, 206 (2d Cir. 2006) (rejecting on multiple grounds request for mandamus relief concerning protective orders and confidentiality issues in criminal proceeding); *Tilton*, 2015 WL 4006165, at *1 (appeal pending, docket no. 15-2103-cv) (finding *Free Enterprise* factors satisfied in case which, as discussed *supra*, involved no claims of disparate prosecution).

*Second*, the SEC's argument that *Touche Ross* should not be followed because it was issued before *Thunder Basin* and *Elgin* and purportedly "cannot be squared with" this Court's decision in *Altman v. S.E.C.*, 768 F. Supp. 2d 554 (S.D.N.Y. 2011), *see* SEC at 36-37, is well off the mark. The *Free Enterprise* decision establishes the governing test under the agency's review statute (as even *Bebo* and the District Court recognized), and while *Touche Ross* indeed pre-dates that decision and concerns the doctrine of exhaustion, nothing in *Touche Ross* is inconsistent with *Free Enterprise*. Indeed, courts within the Second Circuit have cited and relied upon *Touche Ross* subsequent to *Free Enterprise*—as part of their application of the *Free Enterprise* factors. *See Gupta*, 761 F. Supp. 2d at 514 (citing *Touche Ross* in explaining why subjecting equal protection claimant to complained-of proceeding in its entirety undermines meaningful review); *Duka v. S.E.C.*, No. 15 Civ. 357 (RMB), 2015 WL 1943245, at *7 n.12 (S.D.N.Y. Apr. 15, 2015) (citing *Touche Ross* to refute the argument that plaintiff "must patiently await the denouement of [administrative] proceedings"). Nor does this Court's decision in *Altman* require that *Touche Ross* not be adhered to. *Altman* concerned an appeal filed *after* an administrative proceeding had reached its conclusion and the appellant had already litigated two hearings on the constitutional issue. *See Altman v. S.E.C.*, 687 F.3d 44, 45-46 (2d Cir. 2012); *Altman*, 768 F. Supp. 2d at 562. Such a case sheds little light on the issues here. Moreover, for a challenge

premised upon the SEC's recently admitted failure to conduct hearings before "officers of the Commission designated by it," *see* Br. at 4, 10, being made to suffer the proceeding in its entirety also drains any meaning from later review. *See Touche Ross*, 609 F.2d at 577.

*Third*, the SEC's argument that allowing pre-enforcement review will "swallow" the statutory review schemes themselves, *see* SEC at 35, is simply a restatement of the policy calculus that appears to animate both the District Court's decision and the SEC's position. As discussed below, such policy arguments do not excuse application of the *Free Enterprise* factors, and even if they could, the District Court here misperceived the risks of review. *See* Part II-B, *infra*.

### B. Mr. Chau And Harding's Constitutional Claim Is "Wholly Collateral."

In their opening brief, Mr. Chau and Harding demonstrated that their equal protection claim is "wholly collateral" to the statutory review provisions because the claim could be proven even if they were guilty of all the conduct charged by the SEC. *See* Br. at 31-34. In response, the SEC offers little of substance.

Citing language from a lower court decision involving an appointments clause issue, the SEC first suggests that the claims here are not wholly collateral because they "flow[] from" the fact that Mr. Chau and Harding are the subject of the in-house proceeding. *See* SEC at 38 (citing *Tilton*, 2015 WL 4006165, at *12). But that amorphous standard would be little better than the District Court's

amorphous "related to" standard. As Mr. Chau and Harding have demonstrated, defining down "wholly collateral" to mean "related to" (or something similarly amorphous) would result in the bar of constitutional claims that Congress never expressed any intention to preclude, and the correct approach in equal protection claim cases is to instead adhere to the clean, principled application of *Free Enterprise*'s "wholly collateral" standard adopted in *Gupta* and *Arjent LLC v. S.E.C.*, 7 F. Supp. 3d 378 (S.D.N.Y. 2014): because the unequal treatment claim could be proven even if the claimants were guilty of the SEC's substantive charges, the claim is wholly collateral. *See* Br. at 33-34.[8]

The SEC also suggests that a claim cannot be wholly collateral if a claimant is "already within the review mechanism." SEC at 38. But it would have been quite easy for the Supreme Court to articulate that as the relevant factor—and it did not. Indeed, the absurdity of the SEC's suggested standard can be seen by applying it to a claim for disparate prosecution: the agency can cut off jurisdiction simply by initiating the very proceeding that is improper. Rather than adopting this proposed "ongoing proceeding" standard, the Court should apply the Supreme Court's "wholly collateral" standard, which, in the context of a disparate prosecution claim like the one here, is satisfied because Mr. Chau and Harding

[8] The SEC argues that the District Court did not replace "wholly collateral" with "related to," because it cited other cases that used the phrase "wholly collateral" rather than "related to." *See* SEC at 38 n.9. But simply invoking the term "wholly collateral" and then using it to mean "related to" results, in practical terms, in the same departure from the *Free Enterprise* standard.

could "state a claim even if [they] were entirely guilty of the charges made against [them] in the OIP." *Gupta*, 796 F. Supp. 2d at 513; *see also Arjent*, 7 F. Supp. 3d at 384.[9]

Finally, the SEC cites *Bebo* for the proposition that the "wholly collateral" element should not be dispositive, because meaningful post-proceeding review purportedly will be available here. *See* SEC at 38-39. As an initial matter, the SEC omits to mention that in *Bebo* (a case on which it heavily relies throughout its brief), while ultimately not resolving the issue, the Seventh Circuit commented that the constitutional claim there at issue "can reasonably be characterized as 'wholly collateral' to the statute's review provisions." *Bebo*, 2015 WL 4998489, at *1. In any event, the SEC's argument is unavailing, because meaningful post-proceeding review is not available here, as discussed above.

### C. No Agency Expertise Puts The Courts At A "Disadvantage" In Adjudicating The Claim.

In their opening brief, Mr. Chau and Harding demonstrated that the third *Free Enterprise* factor is satisfied because there is no special agency competence or expertise that puts the federal courts at a "disadvantage" in adjudicating the

[9] For similar reasons, a challenge premised upon the SEC's recently admitted failure to conduct hearings before "officers of the Commission designated by it," *see* Br. at 4, 10, would also be wholly collateral, as the challenge could have merit even if claimants were guilty of the underlying conduct charged.

equal protection claim. *See* Br. at 35-37. In response, the SEC focuses on irrelevant side issues and fails to address the relevant legal standard.

The SEC first discusses whether the agency has the authority to address the constitutional claims. *See* SEC at 39. But as Mr. Chau and Harding demonstrated in their opening brief, the issue is not whether the agency has the authority to adjudicate the claims, it is whether they have a special competence and expertise that put the federal courts at a disadvantage. *See* Br. at 36.

The SEC then suggests that the factor is satisfied because the agency can "bring to bear" expertise in resolving the claims. *See* SEC at 39. But again, as demonstrated, the question is not whether the agency has any expertise, it is whether that expertise is sufficient to put the federal courts at a "disadvantage" for the claims at issue. *See* Br. at 35-36. Here, as even the District Court acknowledged, "[a]djudication of such [constitutional] claims is 'not peculiarly within the SEC's competence.'" *Chau v. S.E.C.*, 72 F. Supp. 3d 417, 434 (S.D.N.Y. 2014) (Plaintiffs-Appellants' Special Appendix at 31).[10] The third *Free Enterprise* factor is satisfied.

[10] Moreover, for a challenge premised upon the SEC's failure to conduct hearings before "officers of the Commission designated by it," *see* Br. at 4, 10, the questions involved would be "standard questions of administrative law, which the courts are at no disadvantage in answering." *Free Enter.*, 561 U.S. at 491.

## II. THE SEC'S ADDITIONAL ARGUMENTS DO NOT PROVIDE A BASIS FOR DISREGARDING THE *FREE ENTERPRISE* TEST.

Because the *Free Enterprise* factors (discussed *supra*) are satisfied here, the District Court decision must be reversed. Neither the SEC's attempt to marginalize *Free Enterprise*, nor the District Court's *ad hoc* policy analysis, excuse a fair application of the *Free Enterprise* factors.

### A. The SEC's Efforts To Marginalize *Free Enterprise* Are Unavailing.

As the SEC acknowledges, the controlling question on this appeal is whether Congress, in enacting the statutory review scheme, intended to preclude pre-enforcement review. *See* SEC at 14 ("[T]he question is whether it is 'fairly discernible' that Congress intended to channel judicial review through the Commission's administrative process.").

With the controlling question identified, the SEC devotes a significant portion of its argument to identifying case law and legislative materials that it suggests bear on that question. *See* SEC at 19-23. But none of this material has any relevance, because for the review statute at issue here, the Supreme Court has already announced the governing test: "we presume that Congress does not intend to limit jurisdiction if a finding of preclusion could foreclose all meaningful judicial review; if the suit is wholly collateral to a statute's review provisions; and if the claims are outside the agency's expertise." *Free Enter.*, 561 U.S. at 489-90

(internal citations omitted).[11] Remarkably, the SEC does not mention *Free Enterprise* at all in its discussion of whether Congress intended to preclude jurisdiction, instead addressing it in its Argument section for the first time at page 27—where it simply seeks to distinguish the case on its facts. *See* SEC at 27-28 (arguing that *Free Enterprise* involved "considerations not present here," chiefly among them that there was no pending agency proceeding). But nothing in *Free Enterprise* indicates that its facts represent the only facts under which jurisdiction is not foreclosed. More fundamentally, whatever fact distinctions might be drawn in evaluating whether a particular *Free Enterprise* factor is satisfied, those

[11] The SEC's attempt to rely on the text and structure of the review statutes, *see* SEC at 19-21, fails not only because the Supreme Court in *Free Enterprise* announced the above three-factor governing test, but also because the Supreme Court *expressly rejected* the argument that the review statutes made agency review exclusive—whether expressly or implicitly. *See Free Enter.*, 561 U.S. at 489 ("[T]he text [of 78y] does not expressly limit the jurisdiction that other statutes confer on district courts. *Nor does it do so implicitly*.") (emphasis added) (citation omitted). And the SEC's attempt to rely on "*TRAC*" principles, *see* SEC at 22-23, fares no better. In the *TRAC* cases, Circuit Courts acted to prevent interference with appellate authority that formed the final stage of review for matters proceeding through a Congressionally designed administrative scheme. *See Telecomms. Research and Action Ctr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984); *Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd.*, 750 F.2d 81, 84 (D.C. Cir. 1984); *Pub. Util. Comm'r of Or. v. Bonneville Power Admin.*, 767 F.2d 622, 626-27 (9th Cir. 1985). In *In re FCC*, 217 F. 3d 125 (2d. Cir. 2000), also cited by the SEC, the Court does not apply *TRAC* and the case does not concern administrative preclusion of District Court jurisdiction. By contrast, allowing the District Court to hear Mr. Chau and Harding's claims would not constitute "interference" with the Congressionally-designed review statutes at issue *here*, because the Supreme Court has already held that for these statutes, the scheme is *not* exclusive, so long as the *Free Enterprise* factors are met. Moreover, to the extent the SEC argues that the very fact that a Circuit Court holds ultimate review authority under a review scheme means that upon commencement of a proceeding, District Court jurisdiction is lost, *see* SEC at 22, its argument simply disregards *Free Enterprise*, replacing the Supreme Court's three-factor test with an entirely different test—all on the basis of cases concerning different review statutes, most decided before *Free Enterprise*. The SEC identifies no post-*Free Enterprise* case applying *TRAC* principles to bar review under the statutes at issue here, and its reliance on those principles is misplaced.

distinctions provide no basis whatsoever for jettisoning the three-factor test entirely. Indeed, every post-*Free Enterprise* case cited by either party that concerns pre-enforcement review in connection with the review statutes at issue here acknowledges that the *Free Enterprise* factors represent the governing test—even those denying jurisdiction.

The SEC's attempt to marginalize *Free Enterprise* is unsustainable. The test established by the Supreme Court must be adhered to.

### B. The District Court's Policy Views Do Not Excuse Adherence To *Free Enterprise*.

As Mr. Chau and Harding demonstrated in their opening brief, the District Court, for its part, departed in substance from the *Free Enterprise* test by improperly relying upon its own policy assessments regarding the risks and benefits of pre-enforcement review. *See* Br. at 37-38. In its opposition brief, the SEC, relying principally on *Elgin*, in effect argues that such policy analysis is in fact appropriate. *See* SEC at 40-41 (arguing that it is appropriate for the district court to "explor[e] the consequences of [its] ruling" and "consider whether [its] holding would further the purposes of the review scheme"). The SEC's response is meritless. Again, *Elgin* concerns a different review statute, and the Supreme Court was considering Congressional intent under that statute as it formulated its rule. *See Elgin*, 132 S. Ct. at 2135-36. For the agency review statutes at issue here, the

Supreme Court in *Free Enterprise* has already announced a three-factor test, and a free-wheeling policy analysis is not among the factors.

Further, as Mr. Chau and Harding demonstrated in their opening brief, the risks of abuse identified by the District Court as a reason to deny jurisdiction are preventable through normal processes within jurisdiction, such as Rule 12(b)(6) motion practice. *See* Br. at 38-39; *Arjent*, 7 F. Supp. 3d at 384-85 (dismissing claim under Rule 12(b)(6) after finding subject matter jurisdiction exists); *Gupta*, 796 F. Supp. 2d at 514 ("[D]iversionary tactics can be quickly disposed of in the ordinary case through dismissal for failure to plead a plausible claim."); *Duka*, 2015 WL 1943245, at *7 (finding subject matter jurisdiction but initially denying motion for preliminary injunction and temporary restraining order).[12] In response to Mr. Chau and Harding's argument on this critical point, the SEC once again is silent.

Ultimately, as discussed in Mr. Chau and Harding's opening brief, while relief of the nature requested here is modest, it has taken on a more profound importance in light of the SEC's recently publicized policy to increasingly withdraw from the federal courts in favor of placing accused persons into its in-

[12] In *Duka*, shortly after the District Court's denial of plaintiff's motion for preliminary injunction and temporary restraining order, plaintiff filed an amended complaint which included a new claim alleging an additional Appointments Clause violation. *See Duka v. S.E.C.*, No. 15 Civ. 357 (RMB), 2015 WL 4940057, at *1 (S.D.N.Y. Aug. 3, 2015). After rejecting the SEC's motion to dismiss, the District Court granted plaintiff's motion for a preliminary injunction. *See id.* at *3; *Duka v. S.E.C.*, No. 15 Civ. 357 (RMB), 2015 WL 4940083, at *3 (S.D.N.Y. Aug. 12, 2015) (appeal pending, docket no. 15-2732-cv).

house proceeding. *See* Br. at 39-40. Even more than at the time the *Free Enterprise* decision was issued, it is imperative that the test announced by the Supreme Court in that case be fairly adhered to and the federal court screening permitted thereunder be allowed in a case like this one.

## CONCLUSION

For the foregoing reasons and those set forth in their opening brief, Mr. Chau and Harding respectfully request that the decision of the District Court be reversed and the matter remanded for further proceedings in the District Court.

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Respectfully submitted,

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