Court of Appeals Case No.: 15-13738

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GRAY FINANCIAL GROUP, INC.,
LAURENCE O. GRAY, and
ROBERT C. HUBBARD, IV,

Plaintiffs/Appellees,

v.

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,

Defendant/Appellant.

On Appeal from the United States District Court
Northern District of Georgia, Atlanta Division

BRIEF OF APPELLEES GRAY FINANCIAL GROUP, INC., LAURENCE O. GRAY AND ROBERT C. HUBBARD, IV

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GRAY FINANCIAL GROUP, INC., ET AL v.
U.S. SECURITIES AND EXCHANGE COMMISSION
CASE NO. 15-13738

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with 11th Circuit Rule 26.1-1, the undersigned counsel of record for Plaintiffs-Appellees certifies that, to the best of my knowledge, the following additional persons and entities not listed on Defendant-Appellant's Certificate of Interested Persons and Corporate Disclosure Statement filed with this Court on September 16, 2015 may have an interest in the outcome of this proceeding:

1. Aguilar, Luis A.
2. Gallagher, Daniel M.
3. Piwowar, Michael S.
4. Stein, Kara M.
5. White, Mary Jo

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT
(Continued)

CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellee Gray Financial Group, Inc. certifies that it has no parent corporation and that no publicly-held corporation owns 10 percent or more of its stock.

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STATEMENT REGARDING ORAL ARGUMENT

It is believed that the legal issues are sufficiently complex that oral argument will assist the Court in evaluating the relative merits of the parties' positions and therefore Plaintiffs-Appellees request that the Court permit oral argument in this case.

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STATEMENT OF JURISDICTION

This is an interlocutory appeal from an Order of the United States District Court of the Northern District of Georgia, which granted the motion of Plaintiffs-Appellees Gray Financial Group, Inc., Laurence O. Gray, and Robert C. Hubbard, IV (collectively "Gray") for a preliminary injunction. As discussed more fully below, the district court has jurisdiction over Gray's constitutional claims under § 1331, unless Congress precluded judicial review of the claims, which it has not. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded it has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 over Gray's constitutional challenges under Article II of the United States Constitution, which were lodged while no SEC administrative proceeding was pending.

2. Whether the district court correctly found Securities and Exchange Commission ("SEC") Administrative Law Judges ("ALJs") are "inferior officers" of the United States who must be appointed in accordance with the Appointments Clause, Article II, of the United States Constitution.

3. Whether the district court abused its discretion in granting Gray's Motion for a Preliminary Injunction to enjoin the SEC from proceeding with an

administrative proceeding against Gray before an unconstitutionally appointed ALJ that the SEC filed in response to Gray's district court action challenging the same.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS

While under investigation by the SEC, Gray filed an action in the United States District Court, Northern District of Georgia, on February 19, 2015. (*See* R:1). Gray sought declaratory relief and an injunction to enjoin the SEC from commencing an administrative proceeding against it on grounds that such a proceeding, if filed, would violate Article II of the United States Constitution. *Id.* at 1-3. At the time Gray filed suit, the SEC had not filed its administrative proceeding and would not do so for over three months. (R:8:4; R:41-3).

The parties actively litigated in federal court. (R:8; R:14-1). Gray served multiple sets of discovery requests seeking information related to its constitutional challenge, including discovery germane to SEC ALJs' inferior officer status, and filed a motion to expedite discovery. (R:8). The discovery did not in any way relate to the charges Gray ultimately received from the SEC. *Id.*; (R:41-3). Gray's discovery sought information about the significant authority SEC ALJs possess (*e.g.*, their training, expertise, responsibilities, and charges) and their supervision and direction by principal officers (*e.g.*, hiring, termination, salary information, assignments, and duties). (R:8:15-16). The SEC opposed all discovery. (R:15;

R:18). On April 20, 2015, the SEC filed a motion to dismiss Gray's constitutional challenge, claiming that Gray's suit was not ripe because the SEC had not yet filed an administrative proceeding and informing the court that it may not do so at all. (R:14-1:10).

More than eight months after the SEC formally told Gray that it preliminarily concluded that Gray had violated certain federal securities laws, and three months after Gray filed this lawsuit contesting the constitutionality of the SEC's administrative process, and a month after the SEC responded by claiming the case was unripe, the SEC brought formal charges against Gray relating to the offer and sale of Fund II to Georgia pension plans. (R:28:10; R:1; R:14-1:10; R:41-3). Instead of bringing these charges as a counterclaim in the pending federal court case, the SEC issued an Order Initiating Proceedings ("OIP"), commencing a collateral administrative proceeding. (*See* R:41-3).

The OIP alleged that Gray committed violations of the federal securities laws and sought remedies of disgorgement, civil penalties, and a cease-and-desist order. *Id.* at 6-7. Subsequently, the SEC designated ALJ Cameron Elliot[1] to

[1] Prior to joining the SEC, ALJ Elliot was an ALJ for the Social Security Administration and was a seasoned litigator, working both in private practice and for the government as a U.S. Department of Justice trial attorney and as an assistant U.S. attorney in Florida and in New York. He graduated from Harvard Law School in 1996 and served a two-year clerkship for Judge Edward Reed in the U.S. District Court in Nevada. *See* Press Release, SEC Announces Arrival of New

preside over the administrative proceeding, and a final hearing was scheduled for October 26, 2015. (*See* R:41-4; R:54-1).

By early June 2015, the SEC publicly admitted in unrelated litigation that SEC Commissioners did not appoint its ALJs, including the assigned ALJ, Cameron Elliot. (R:28:25, 25-26; R:35:1-2; R:35-1). The SEC conceded that if a court found the SEC ALJ to be an inferior officer, then the Appointments Clause challenge would likely succeed on the merits. (R:28:25-26). How SEC ALJs were appointed was an issue that Gray had sought discovery about. (R:8). Immediately upon learning that SEC ALJs were not appointed constitutionally, on June 3, 2015, Gray amended its Complaint to add a second specific Article II challenge, based on an Appointments Clause violation. (R:28:23-27). On August 4, 2015, the district court issued an Order granting Gray's Motion for Preliminary Injunction, enjoining the SEC from conducting its administrative proceeding before an ALJ who was not appointed in accordance with the Appointments Clause, and finding that Gray had shown a likelihood of success on the merits of its Appointments Clause claim. (R:56:1, 36, 39). This appeal followed.

(cont'd) Administrative Law Judge Cameron Elliot (April 25, 2011), https://www.sec.gov/news/press/2011/2011-96.htm.

II. STATEMENT OF THE FACTS

Gray Financial Group, Inc. ("Gray Financial") is a privately held and minority-owned investment adviser properly registered with the SEC. (R:28:5). Laurence O. Gray and Robert C. Hubbard, IV are both officers in the company. *Id*. at 4. Gray Financial, Mr. Gray and Mr. Hubbard are collectively referred to herein as "Gray." Gray provides investment advisory consulting services to public and private pension plans. *Id.* at 5. That includes assisting pension boards with the preparation and annual review of investment policy guidelines, conducting manager searches and due diligence, and monitoring and analyzing investment performance. *Id*. at 5. Most of Gray's business involves advising clients on a non-discretionary basis, meaning that Gray does not control the investment decision-making and does not "manage" client assets. (R:70-1:1, 3). For non-discretionary relationships, only duly authorized representatives of the clients are able to make investment decisions and Gray may not move client assets away from client accounts – if at all – unless authorized by the client in writing. *Id.* at 1-2, 2. Gray does not hold client funds or assets, but instead those assets are housed with independent custodians. *See Id.* at 3.

Following the lead of most other states, the Georgia legislature enacted legislation in 2012 (the "New Georgia Law") allowing Georgia-based public pension plans, like plans in other states, the opportunity to diversify investment

risk through "alternative investments." (R:28:5-6, 6). As a result, Gray's Georgia public pension clients sought out investment opportunities the New Georgia Law permitted, and Gray Financial took steps to create a fund to meet that demand. *See Id*. at 8-9. Previously, Gray Financial had done this successfully for its clients outside of Georgia, with the assistance of a well-regarded and highly experienced New York-based law firm that handled all legal issues and advised on business decisions. *Id*. at 8.

Since the prior experience had been overwhelmingly successful, Gray Financial, through an affiliate, turned to the same New York-based legal and business advisory team to create the investment for its Georgia clients, known as GrayCo Alternative Partners II, LP ("Fund II"). *Id*. at 8-9. The law firm's role in this engagement, which included ensuring compliance with the New Georgia Law, was critically important because the New Georgia Law, as it turned out, was unclear, vague, and ambiguous. *Id.* at 6-7, 8-9. Neither Mr. Gray nor Mr. Hubbard had any formal legal training and were relying on the New York law firm in all respects. *Id*. at 8, 8-9. The project was successfully developed, and Georgia-based clients invested in Fund II and did so with no reported client losses. *Id*. at 8-9.

Although there had been no claimed losses in Fund II, the SEC advised Gray formally in August 2013 that it was conducting a confidential and non-public investigation into Gray and specifically into whether Fund II complied with the

New Georgia Law. *Id.* at 9. The SEC investigated even though no securities regulator had ever before raised concerns of wrongdoing by Gray Financial, Mr. Gray, or Mr. Hubbard. *Id.* Moreover, although the SEC had represented that the investigation was "private," the fact and nature of the SEC's investigation was released to the national press in a significant and harmful way. *Id.* at 9-10.

On August 1, 2014, the SEC issued "Wells notices" to Gray indicating that, although the investigation was ongoing, it had reached a preliminary conclusion that Gray had violated certain specific federal securities laws. *Id*. at 10. The SEC alleged that Gray had violated provisions of the Investment Advisers Act – a federal law – by offering to Georgia-based clients an alternative investment fund that the SEC alleged did not comply with its interpretation of the New Georgia Law. *Id*. Although Gray denied the allegations and stressed that it had relied on the advice of highly-compensated and, what they reasonably believed to be, skilled legal counsel, the SEC staff threatened to bring an enforcement action against Gray unless Gray agreed to draconian settlement terms. *Id*. at 11, 12. The SEC filed its OIP on May 21, 2015. (R:41-3).

III. STANDARD OF REVIEW

"A district court's grant of a preliminary injunction order involves a mixed standard of review." *S.E.C. v. Unique Fin. Concepts, Inc.*, 196 F.3d 1195, 1198 (11th Cir. 1999). An order issuing an injunction is reviewed for abuse of

discretion and substantive questions of law are reviewed *de novo*. *Id*. Moreover, "when a preliminary injunction is challenged on the basis of jurisdiction, a plaintiff need only establish 'a reasonable probability of ultimate success upon the question of jurisdiction when the action is tried on the merits.'" *Id*. (citation omitted).

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's order granting a preliminary injunction. The district court did not abuse its discretion in granting the preliminary injunction and correctly determined that subject matter jurisdiction exists under 28 U.S.C. § 1331. The Complaint pleads claims "arising under" the Constitution and the "laws [] of the United States," namely that the SEC ALJs' removal and appointment violates Article II of the U.S. Constitution. (R:56:10-11; R:28:1-2, 23-27, 30-33); 28 U.S.C. § 1331.

The SEC has the burden to prove congressional intent to divest the district court of jurisdiction through a two-step process. Congress rarely intends to preclude review; judicial review is presumed. First, the district court did not err in concluding that it was not "fairly discernible" in the statutory scheme that Congress intended to preclude judicial review. The Supreme Court has already rejected the SEC's argument that the Securities Exchange Act's administrative review statute, 15 U.S.C. § 78y, divests the district court of jurisdiction where, as here, the plaintiff challenges the constitutionality of the SEC's administrative

process and not a final SEC order, rule, or interpretation thereof. The district court correctly concluded that "Congress's purposeful language allowing *both* district court and administrative proceedings shows a different intent," than for the statutory review scheme to be the exclusive path for judicial review for this case. (R:56:11-13) (emphasis in original).

Second, the district court correctly ruled that Gray's claims are not ones Congress intended to be reviewed solely within the administrative process. Pursuant to this second step of the test, courts have upheld jurisdiction (1) when a finding of preclusion could foreclose all meaningful judicial review, (2) when the suit is "'wholly collateral to a statute's review provisions'", *or* (3) when the claims are "'outside the agency's expertise'" (hereinafter, the "*Free Enterprise* factors").

Gray cannot get meaningful review in the administrative forum. If federal court jurisdiction is precluded, Gray will be forced to endure the very harm that it seeks to avoid. Gray is not seeking to avoid "the expense and disruption of defending itself in protracted adjudicatory proceedings" as the SEC argues. *FTC v. Standard Oil Co. of California,* 449 U.S. 232, 246-47, 101 S. Ct. 488, 496-97 (1980). Rather, Gray seeks to prevent the irreparable harm of being brought before an unconstitutional tribunal. Once that harm occurs it cannot be remedied.

Despite its burden, the SEC failed to address, let alone dispute, the two remaining *Free Enterprise* factors. Gray's claims are wholly collateral to the

administrative action the SEC eventually filed over eight months after preliminarily concluding that Gray had violated the federal securities laws and over three months after Gray filed the constitutional challenge in the district court. Gray alleges that the SEC ALJs appointment and removal processes[2] violate the Constitution, Article II. Constitutional challenges that are unrelated to the underlying substantive law or underlying substantive claim in the administrative proceeding – like those here – are wholly collateral to an administrative action. Where courts have found preclusion, the plaintiffs' claims were inextricably bound up with the underlying statutes or were related to the specific agency proceeding. *See, e.g.*, *Thunder Basin Coal Co. v. Reich* , 510 U.S. 200, 213-14, 114 S. Ct. 771, 779-780 (1994); *Doe v. FAA*, 432 F.3d 1259, 1263 (11th Cir. 2005); *Jarkesy v. SEC*, No. 14-5196, 2015 WL 5692065, at *12 (D.C. Cir. Sept. 29, 2015); *Bebo v. SEC*, No. 15-1511, 2015 WL 4998489, at *2 (7th Cir. Aug. 24, 2015); *Duka v. SEC*, No. 15 Civ. 357 (RMB)(SN), 2015 WL 1943245, at *6 (S.D.N.Y. Apr. 15, 2015) (hereinafter "*Duka I*").

The SEC fails to address the final *Free Enterprise* factor, "competence and expertise." The Supreme Court has already held that Appointments Clause violations and separation of power issues are "outside the [SEC's] competence and expertise." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561

[2] The removal argument is not part of this appeal.

U.S. 477, 491, 130 S. Ct. 3138, 3151 (2010). In sum, the district court did not err in its analysis and conclusion that each of the *Free Enterprise* factors was established.

The district court also correctly determined that SEC ALJs are "inferior officers" of the United States because they exercise significant authority and because the powers and duties of SEC ALJs are substantially similar to the powers and duties performed by other inferior officers, such as Special Trial Judges, and therefore there is a likelihood of success on the merits. *See Freytag v. C.I.R.*, 501 U.S. 868, 111 S. Ct 2631 (1991). SEC ALJs are not mere employees as the SEC argues. The SEC's reliance on *Landry v. FDIC*, 204 F.3d 1125, 1132-34 (D.C. Cir. 2000), is unpersuasive because *Landry* examined inapposite FDIC ALJs, not SEC ALJs, and because it incorrectly concluded that the authority to render final decisions is determinative of inferior officer status. *See, e.g.*, *Freytag*, 501 U.S. at 881, 111 S. Ct. at 2640. Because the SEC ALJs are inferior officers and the SEC has conceded that they are not appointed by the SEC Commissioners, the district court did not err in finding a likelihood of success on the merits of Gray's Appointments Clause claim.

Finally, the district court did not abuse its discretion in assessing the remaining factors as favoring a preliminary injunction. Gray will suffer irreparable harm if forced to endure an unconstitutional administrative proceeding that cannot

be undone in the future because it will have already occurred. The public interest and balance of equities also favor an injunction. The public has "an overriding interest in assuring that the government remains within the limit of its constitutional authority." *Nat'l Treasury Emps. Union v. U.S. Dep't of Treasury*, 838 F. Supp. 631, 640 (D.D.C. 1993). All the harms the SEC alleges are self-inflicted and could be remedied easily by the SEC itself. But rather than properly appointing its ALJs, having its Commissioners preside over the administrative case, filing its enforcement case as a counterclaim in the pending court case, or utilizing any of its other tools under the federal securities laws, the SEC asks the Court to dismiss this action. It is nonsensical to claim the public is at risk when no client has suffered any financial loss due to any of Gray's actions. (R:28:8-9). Given that the SEC has the power to cure any harm, while the constitutional harm Gray faces is unremediable, the district court did not abuse its discretion in granting the preliminary injunction.

ARGUMENT

The district court did not abuse its discretion in granting the preliminary injunction. *See Unique Fin. Concepts*, 196 F.3d at 1198. The district court correctly determined that it has jurisdiction, that Gray is likely to succeed on the merits, and that a preliminary injunction is proper. For the reasons set forth herein, this Court should affirm.

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT JURISDICTION IS PROPER.

The district court correctly determined that subject matter jurisdiction exists under 28 U.S.C. § 1331; the Complaint pleads claims "arising under" the Constitution and the "laws [] of the United States," namely that the SEC ALJs' removal and appointment violates Article II. (R:56:10-11; R: 28:-2, 23-27, 30-33); 28 U.S.C. § 1331. The relative burdens for establishing and precluding jurisdiction are critical to this analysis, yet they were not addressed by either the Seventh or D.C. Circuits and were actually reversed by some of the district courts. *Jarkesy*, 2015 WL 5692065 (failing to mention the burdens or the presumption of reviewability); *Bebo*, 2015 WL 4998489 (same); *Tilton v. SEC*, No. 15-CV-2472(RA), 2015 WL 4006165, at *4, 10 (S.D.N.Y. June 30, 2015) (incorrectly reversing the burdens), *appeal docketed*, No. 15-2103 (2d Cir. July 1, 2015); (R:49-3), *Spring Hill Capital Partners, LLC v. SEC*, 15-cv-4542 (ER), (S.D.N.Y. June 26, 2015).

Gray has the initial burden of showing that the district court has jurisdiction, which Gray met by citing section 1331. The burden then shifts to the SEC to prove congressional intent to divest the district court of jurisdiction. The SEC does not dispute that it has this "heavy burden of overcoming the strong presumption" of district court jurisdiction. *See Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 671-72, 106 S. Ct. 2133, 2136 (1986) (citing *Dunlop v. Bachowski*, 421

U.S. 560, 567, 95 S. Ct. 1851, 1857 (1975)). The SEC must thus prove both (i) that Congress's intent to force a litigant to proceed exclusively through a statutory scheme of administrative and judicial review is "'fairly discernible in the statutory scheme,'" and (ii) that the litigant's claims are "'of the type Congress intended to be reviewed within the statutory structure.'" *Jarkesy*, 2015 WL 5692065, at *4 (quoting *Thunder Basin.* 510 U.S. at 207, 212, 114 S. Ct. at 776, 778-79). The second part of this two-step approach requires the SEC to demonstrate the absence of all three of the *Free Enterprise* factors: namely that (1) "'a finding of preclusion would foreclose all meaningful judicial review'"; (2) "the suit is 'wholly collateral to a statute's review provisions'"; and (3) "the claims are 'outside the agency's expertise.'" *Id*. at *6 (quoting *Free Enterprise,* 561 U.S. at 489–90). With the aid of these factors, "[courts] are to 'presume' that Congress wanted the district court to remain open to a litigant's claims." *Id*. Regardless of the burden on the SEC, the district court correctly found that all three factors were present.

A. The District Court Correctly Concluded that Congress Did Not Intend to Preclude Review.

Congress rarely intends to preclude review; rather, judicial review is presumed. *See Bowen*, 476 U.S. at 670; *Jarkesy*, 2015 WL 5692065 at *4. Because Gray established jurisdiction through section 1331, the burden shifts to the SEC to overcome the presumption and to show that congressional intent to preclude judicial review is "'fairly discernible in the statutory scheme.'" *Bowen*,

476 U.S. at 673, 106 S. Ct. at 2137 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 310, 349, 351, 104 S. Ct. 2450, 2456, 2457 (1984)). To determine whether congressional intent to preclude such review is fairly discernible, courts consider "the statute's language, structure, and purpose, [] legislative history and whether the claims can be afforded meaningful review." *Thunder Basin*, 510 U.S. at 207, 114 S. Ct. 776 (citing *Block*, 467 U.S. at 345, 104 S. Ct. 15 2453).

The Supreme Court has already rejected the SEC's argument that the Securities Exchange Act's administrative review statute, 15 U.S.C. § 78y, is exclusive and divests the district court of jurisdiction where, as here, Gray challenges the constitutionality of the SEC's administrative process and not any final SEC order or rule, or interpretation thereof. *Free Enterprise,* 561 U.S. at 489, 501, 130 S. Ct. at 3150, 3157 (noting that '"structural protections [namely "the power of appointing, overseeing and controlling those who execute the laws"] against abuse of power [are] critical to preserving liberty'") (quoting *Bowsher v. Synar*, 478 U.S. 714, 730, 106 S. Ct. 3181, 3190 (1986)); *McNary v. Haitian Refugee Ctr. Inc.*, 498 U.S. 479, 492, 494, 111 S. Ct. 888, 896-97 (1991) (constitutional challenge to INS practices and procedures did not fall within scope of review provision). The Supreme Court in *Free Enterprise* held that § 78y "does not expressly limit the jurisdiction that other statutes confer on district courts. Nor does it do so implicitly." 561 U.S. at 489, 130 S. Ct. at 3150.

Moreover, § 78bb(a)(2), which was enacted along with § 78y as part of the Securities Exchange Act, provides that "the rights and remedies provided in this chapter shall be *in addition to* any and all other rights and remedies that may exist at law or in equity." 15 U.S.C. § 78bb(a)(2) (emphasis added). Savings clauses such as this one show that Congress intended that administrative review provisions to be non-exclusive. *Abbott Labs v. Gardner*, 387 U.S. 136, 144, 87 S. Ct. 1507, 1513 (1967); *Thunder Basin*, 510 U.S. at 212, 114 S. Ct. at 778-79 (holding that administrative review provisions were exclusive, in part, due to the absence of savings clause).

In addition to the text of the relevant statutes, the legislative history demonstrates that preclusion was not intended. The committee reports to the 1975 amendments of the securities laws note that a person adversely affected by any regulations could challenge them either through the administrative process or in federal district court under the antitrust laws. *See* Securities Act Amendments of 1975, 179 Pub. Laws 94-29; H.R. Rep. No. 94-299, 121 Cong. Rec. H4258, H4285 (daily ed. May 19, 1975) (Conf. Rep.).

Here, the district court correctly applied the presumption of reviewability and accurately concluded that "Congress's purposeful language allowing *both* district court and administrative proceedings shows a different intent," than for the statutory review scheme to be the exclusive path for judicial review for this case.

(R:56:11-13) (emphasis in original). Although Congress authorized the SEC to bring an enforcement action in either forum, it did not authorize the SEC to bring an unconstitutional administrative proceeding when there is a pending district court case, especially one that has been pending for over three months. *See* 17 C.F.R. § 202.5(b).

Sackett v. E.P.A., 132 S. Ct. 1367 (2012), is instructive. In that case, the Supreme Court concluded that because Congress had established a "choice of forum" for agency proceedings, Congress likely did not intend to preclude jurisdiction for constitutional claims. *Id*. at 1373. The *Sackett* Court rejected the same argument the SEC advances here, that "because Congress gave the EPA the choice between a judicial proceeding and an administrative action, it would undermine the Act to allow judicial review of the latter." *Id.* As the *Sackett* Court noted, "if the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome" the presumption of judicial review, "it would not be much of a presumption at all." *Id.*

In sum, the SEC has failed to meet its burden of proving the first step in the two-step test for preclusion, namely that congressional intent to preclude judicial review is fairly discernible in the statutory scheme. Hence, the district court correctly concluded that Congress did not intend to preclude judicial review.

B. The District Court Properly Concluded that it Has Jurisdiction Under the *Free Enterprise* Factors.

Only if the SEC first demonstrates that Congress intended to preclude judicial review, as evidenced from the statute's language, structure, purpose, and legislative history, is it necessary to consider the three *Free Enterprise* factors. *See Thunder Basin*, 510 U.S. at 207-215, 144 S. Ct. at 776-80; *Bowen*, 476 U.S. at 672, 106 S. Ct. at 2136. Preclusion is inappropriate (1) when a finding of preclusion could foreclose all meaningful judicial review, (2) when the suit is "'wholly collateral to a statute's review provisions'", and (3) when the claims are "'outside the agency's expertise.'" *Free Enterprise*, 561 U.S. at 489, 130 S. Ct. at 3150 (quoting *Thunder Basin*, 510 U.S. at 212–13, 114 S. Ct. at 771).

These considerations help courts identify whether Congress would have intended a plaintiff's claims to be reviewed exclusively through the administrative procedure or whether judicial review is also appropriate. *See Elgin v. U.S. Dep't of Treasury*, 132 S. Ct. 2126, 2136 (2012); *Thunder Basin*, 510 U.S. at 212, 114 S. Ct. at 77-779; *Free Enterprise*, 561 U.S. at 490, 130 S. Ct. at 3150-3151; *Jarkesy*, 2015 WL 5692065, at *4.

The factors are not exclusive. Indeed, in *Thunder Basin*, the Court noted that it "previously has upheld district court jurisdiction over claims considered wholly collateral to a statute's review provisions and outside the agency's expertise . . . particularly where a finding of preclusion could foreclose all meaningful

judicial review." 510 U.S. at 212-13, 114 S. Ct. at 778-79 (collecting cases where fewer than all three factors were present); *see also Duka I* 2015 WL 1943245, at *4-7 (jurisdiction proper); *Gupta v. SEC*, 796 F. Supp. 2d 503, 512-14 (S.D.N.Y. 2011) (same); *Arjent LLC v. SEC*, 7 F. Supp. 3d 378, 384 (S.D.N.Y. 2014) (same); *Jarkesy*, 2015 WL 5692065, at *6 (addressing all the factors, but incorrectly narrowing them); *but see Bebo*, 2015 WL 4998489, at *8 (finding one factor sufficient). The district court below applied the correct analysis, analyzed all three factors and found all three to be present, and so properly concluded it has jurisdiction. (R:56:14-25).

1. Forcing Gray to bring its constitutional challenge to the administrative forum will preclude meaningful judicial review because it will produce the very constitutional harm Gray is seeking to avoid.

As the district court properly recognized, Gray should not be forced to endure the precise constitutional harm it is trying to avoid prior to obtaining judicial review. In *Free Enterprise*, the plaintiffs claimed that the Public Company Accounting Oversight Board's (the "PCAOB") dual for-cause removal provisions violated Article II separation of powers and challenged the manner of PCAOB's appointment. 561 U.S. at 486-87, 130 S. Ct. at 3148-49. The Supreme Court concluded that the petitioners could not meaningfully pursue their constitutional claims in the administrative forum because the challenge was directed at the PCAOB's existence, not to any specific PCAOB rule or action. *Id*. at 490, 130 S.

Ct. at 3150-51. Gray challenges the SEC ALJs' existence, not any SEC order, rule, or substantive interpretation.

Similarly in *Duka I*, Judge Richard Berman held that plaintiffs should not have to endure harm to challenge that harm. 2015 WL 1943245, at *4-7. In that case, like Gray, the plaintiff had filed suit alleging that the SEC ALJs violated Article II. *Id*. at *3. Addressing the first *Free Enterprise* factor, whether meaningful judicial review was available, Judge Berman concluded that a review through the SEC's administrative process would not be meaningful because, as the court put it, "you can't unscramble an egg." *Id.* at *5 & n.10; *see also Gupta*, 796 F. Supp. 2d at 514 (without judicial review of constitutional claim, the plaintiff "would be forced to endure the very proceeding he alleges is the device by which unequal treatment is being visited upon him").

Like the plaintiffs in *Free Enterprise,* Gray filed its district court constitutional challenge before the SEC filed its administrative enforcement proceeding and while the SEC was still investigating. *See Free Enterprise,* 561 U.S. at 487, 490, 130 S. Ct. at 3149, 3150-51; *cf. Jarkesy*, 2015 WL 5692065, at *9 (finding that plaintiff "[was] already properly before the Commission" because he filed in district court after the SEC brought administrative proceedings); *Bebo*, 2015 WL 4998489, at *2 (holding that because plaintiff filed the district court action when the administrative hearing had concluded, jurisdiction was precluded);

see also Fed. R. Civ. P. 15(c)(1)(B) (amended complaint relates back to date of original pleading). The only difference between Gray and the plaintiff in *Free Enterprise* is that here, the SEC responded to Gray's lawsuit by filing an administrative proceeding more than three months after Gray filed. Instead of filing a counterclaim in the pending district court case, the SEC went forum shopping, bypassed the pending district court case, and brought a separate collateral action against Gray in the very administrative forum that Gray was already arguing was unconstitutional. Like the plaintiff in *Free Enterprise*, Gray cannot get meaningful review in the administrative forum because the harm will have occurred before the claim can be heard. *See* 561 U.S. at 490, 130 S. Ct. at 3150.

The SEC heavily relies upon *Bebo,* a case from the Seventh Circuit not involving an Appointments challenge, which the SEC cites more often than any other authority in its brief; but, as the district court found, the facts in *Bebo* differ significantly from the facts here. (R:76:4). "[T]he key factor" in *Free Enterprise* was timing; the plaintiffs sued while an investigation was ongoing but before an administrative action had been initiated. *Bebo*, 2015 WL 4998489, at *3, 9. In contrast, Bebo filed her constitutional challenge only after she was already a respondent in a pending administrative proceeding. *See* Appellant's Br. p. 26 (quoting *Bebo* and citing *Free Enterprise*). For the Seventh Circuit, this timing

distinction was determinative, a point the Seventh Circuit noted no fewer than seven times. 2015 WL 4998489, at *1 ("Rather than wait for a final decision in the administrative enforcement proceeding ... Bebo filed suit in federal district court …"), *2 (same), *2 (Bebo's final administrative hearing was scheduled to conclude and ALJ decision to be issued), *3 ("Bebo … was subject to a pending enforcement action when [she] filed [her] complaint"), *8 (unlike *Free Enterprise*, Bebo's administrative action was pending when she sued), *9, *10. The fact that Bebo had actively participated in the SEC's administrative proceeding before she filed her district court case was critical to the Seventh Circuit's analysis of the "meaningful review" factor. *Id.* at *1-2 (emphasis added); *see also* (R:76:4) (distinguishing *Bebo*). Although the Seventh Circuit considered all three *Free Enterprise* factors, the court concluded that "the most critical thread in the case law is the first *Free Enterprise* factor: whether the plaintiff will be able to receive meaningful judicial review without access to the district courts." *Bebo*, 2015 WL 4998489, at *8. The Seventh Circuit found that factor met because the hearing in *Bebo* had already occurred. Notably, no other court that has examined the *Free Enterprise* factors has held that the meaningful review factor alone "negate[s] jurisdiction," and, indeed, the court in *Jarkesy* specifically rejected this approach. *Jarkesy*, 2015 WL 5692065, at *11; *see Thunder Basin*, 510 U.S. at 214-215, 114 S. Ct. at 780 (focusing primarily on the agency expertise factor).

The D.C. Circuit Court also found the timing of the plaintiff's filing to be determinative. *Jarkesy*, 2015 WL 5692065, at *9. In *Jarkesy*, like in *Bebo*, the plaintiff filed his district court action – which did not involve an Appointments claim – long after the SEC had initiated administrative proceedings. *Id*. Importantly, the D.C. Circuit observed that "[t]he result might be different if a constitutional challenge were filed in court *before the initiation of any administrative proceeding*." *Id*. (emphasis added). In fact, this is a distinction that the SEC itself makes in its appeal in *Hill*. *See* Def.-Appellant's Reply Brief, *Hill v.* SEC, No. 15-12831, at 9 (Oct. 2, 2015). More importantly, that is exactly what Gray did; it filed its district court action over three months *before* the SEC initiated an administrative proceeding, but while one was threatened. Gray should not have to wait until the SEC administrative action is filed because it is "well-established that injunctive relief is appropriate 'to prevent a substantial risk of serious injury from ripening into actual harm.'" *Thomas v. Bryant*, 614 F.3d 1288, 1318 (11th Cir. 2010) (citing *Farmer v. Brennan,* 511 U.S. 825, 845, 114 S. Ct. 1970, 1983 (1994)).

The SEC ignores the very purpose of a preliminary injunction and argues that the law does not support what it unfairly calls "a preemptive action against as yet non-existent administrative proceeding." *See* Def.-Appellant's Reply ISO Stay Pending Appeal, p. 7. Under the facts of this case, the characterization is

misleading, as is describing Gray as "jumping the gun" or "rushing to the courthouse." Gray properly brought an action in district court to protect its right to be heard in a constitutional tribunal. Significantly, the SEC waited eight months after making the preliminary determination that Gray had allegedly violated the federal securities laws before filing the administrative proceeding. After more than three months elapsed after Gray filed in district court, the SEC finally filed its response in the form of a collateral administrative case rather than file counterclaims in the pending district court case.

The two cases the SEC cited – *Thunder Basin* and *Doe* – do not support its position. Those cases declined district court jurisdiction *in spite of* the plaintiffs filing suit prior to commencement of the administrative proceeding, because the nature of the claims were "inescapably intertwined" with the underlying statutes and agency processes; in contrast Gray's claims challenge SEC procedures that violate "structural protections" guaranteed by the Constitution. *See Doe*, 432 F.3d at 1263; *Thunder Basin*, 510 U.S. at 213-14, 114 S. Ct. at 779; *LabMD, Inc. v. FTC*, 776 F.3d 1275, 1278, 1280 (11th Cir. 2015) (considering how "'inescapably intertwined' the constitutional claims are to the agency proceeding"); *see also infra* pp. 33, 37. Significantly, the Court in *Thunder Basin* emphasized that it was only a matter of time before the agency filed its administrative action – the agency was "required" to commence enforcement proceedings. 510 U.S. at 216, 114 S. Ct. at

781. In contrast, when Gray filed in federal court, the SEC's investigation was continuing and the SEC in its discretion could have filed its action in federal court or not filed at all. (*See* R:14-1:10).

The SEC wants to play a game of "heads I win, and tails you lose." In an SEC world, if a party files in district court to prevent the irreparable harm that will come when the SEC initiates an unconstitutional administrative proceeding, the district court lacks jurisdiction because the plaintiff has allegedly acted "prematurely," and the case is not yet ripe. On the other hand, according to the SEC, if the party waits until the SEC initiates an administrative action before filing in district court, the district court lacks jurisdiction because the plaintiff has allegedly waited too long. Either way, the party loses its ability to have its constitutional claims heard in district court. Even still, the SEC has not begun to address what happens in its world if, upon review, a court of appeals rules that in fact the ALJ is an inferior officer who was not appointed in accordance with Article II. That should render the underlying administrative proceeding to be unconstitutional and a nullity. Any other result would, by definition, result in a lack of meaningful judicial review.

Regardless, the SEC implicitly contends that its single act of filing the administrative proceeding somehow divests the district court of jurisdiction. *See* Appellant's Br. pp. 12, 26. But the SEC's position flies in the face of the very

concept of a preliminary injunction where, as here, there is a threat of irreparable harm caused by the likely filing of an unconstitutional administrative proceeding – a threat the SEC ultimately made good on. What the SEC is advancing is that Gray should have sat on its constitutional rights for months, waiting for the SEC to bring (or not bring) its claim in an unconstitutional forum, presumably so Gray would then fall into the same trap as did Bebo and Jarkesy. Under the SEC's analysis of this issue, Gray would need to force the SEC to initiate an administrative action, endure an unconstitutional proceeding, and lose before ever getting to court to argue that that very process should never have occurred. *See Free Enterprise*, 561 U.S. at 490, 130 S. Ct. at 3150-51. Such a scenario is not "a 'meaningful' avenue of relief" because constitutional challengers need not "bet the farm" by risking sanctions in an administrative proceeding "before 'testing the validity of the law.'" *Free Enterprise,* 561 U.S. at 490-91, 130 S. Ct. at 3150-51 (citations omitted); *see also McNary*, 498 U.S. at 496-97, 111 S. Ct. at 898-99 (upholding district court jurisdiction over collateral constitutional challenge where otherwise, aliens could only get judicial review by having deportation proceedings initiated against them, which "is tantamount to a complete denial of judicial review").

Additionally, the SEC's administrative proceeding precludes meaningful judicial review because the record cannot be developed with the paltry discovery

permitted to Gray.[3] When an adequate record cannot be developed, a proceeding is "the practical equivalent of a total denial of judicial review." *McNary*, 498 U.S. at 497, 111 S. Ct. at 898-99. In *McNary*, the Supreme Court concluded that because of limited discovery in an administrative proceeding, an agency and the court of appeals would "have no complete or meaningful basis upon which to review" the plaintiff's constitutional claims. *Id*. at 496-97, 111 S. Ct. at 898-99; *see also Burdue v. FAA*, 774 F.3d 1076, 1085 (6th Cir. 2014) (stating that district courts should hear constitutional claims that require factual development); *cf. Elgin*, 132 S. Ct. at 2138-39 (finding meaningful review where agency could "administer oaths, examine witnesses, take depositions, issue interrogatories, subpoena testimony and documents, and otherwise receive evidence") (citation omitted).

In the SEC's administrative proceeding, Gray could not obtain discovery in support of its constitutional challenge because discovery is limited, highly circumscribed, and directed solely to the merits of a securities enforcement proceeding. *See, e.g.*, 17 C.F.R. § 201.230(a)(1). Gray would have no right to propound interrogatories or document requests to the SEC or third parties, conduct depositions, make requests for admission, issue subpoenas, or make discovery-

[3] Even the SEC has admitted that the limited discovery afforded to respondents in its home court proceedings is inadequate and cries out for reform. *See* Press Release, SEC Proposes to Amend Rules Governing Administrative Proceedings (Sept. 24, 2015), http://www.sec.gov/news/pressrelease/2015-209.html.

related motions. *See* 17 C.F.R. §§ 201.154, 201.232(b), 201.233; *In re Griseuk*, SEC Rel. No. 440, 1994 WL 485047, at *1 (Aug. 31, 1994). The facts relevant to resolve Gray's constitutional challenges relate to the SEC ALJs' status as inferior officers – their authority (*e.g.*, their training, expertise, responsibilities, and charges) and their supervision and direction by others (*e.g.*, hiring, termination, salary information, assignments, and duties). Gray has already sought discovery on these issues in district court, which the SEC has refused to provide. (R:8; R:15: R:18).

Reconfirming that discovery into the constitutional challenge for Gray would be foreclosed in an administrative proceeding is the Commission's recent decision in *In re Raymond J. Lucia Cos., Inc.*, SEC Rel. No. 4190, 2015 WL 5172953 (Sept. 3, 2015). In *Lucia,* three of the five Commissioners rejected Lucia's Article II constitutional challenge, concluding that the appointment of ALJs is not even governed by the Constitution. 2015 WL 5172953, at *21-23. Although *Lucia* is substantively lacking in analysis, an ALJ is bound to follow it because it is a decision of the Commission. (*See* R:14-1:28) (citing *Nash v. Bowen,* 869 F.2d 675, 680 (2d Cir. 1989)). Since the Commission has already rejected the constitutional issue, any attempted discovery on this topic would be viewed as irrelevant and immaterial. *See, e.g.*, *Jarkesy*, 2015 WL 5692065, at *11 (ALJ denying Jarkesy's requests for the issuance of subpoenas regarding his

challenges). As a result, there will be no factual record developed in an administrative proceeding on Gray's constitutional claims.

2. Gray's constitutional claims are wholly collateral to the securities laws.

The district court correctly found that Gray's claims are wholly collateral to the SEC's later-filed administrative action, an essential point that the SEC does not address, let alone dispute. (R:56:21-24). Where a constitutional claim is unrelated to the underlying substantive law or claim – like it is here – that claim is wholly collateral to the administrative action and agency review provision. Gray challenges the very validity of the SEC's ALJ hearing, not any securities statutes or regulations.

"This inquiry [for this factor] is claim-specific." *Bebo*, 2015 WL 4998489, at *3. In other words, the nature of the claims is dispositive. *Thunder Basin*, 510 U.S. at 213-14, 114 S. Ct. at 779-80; *Doe*, 432 F.3d at 1263; *Jarkesy*, 2015 WL 5692065, at *12; *Bebo*, 2015 WL 4998489, at *3; *Duka I*, 2015 WL 1943245, at *6. In these cases, the courts declined district court jurisdiction because the claims were inextricably bound up with the underlying statutes or the specific agency proceeding. *See Thunder Basin*, 510 U.S. at 213-14, 114 S. Ct. at 779-80; *Doe*, 432 F.3d at 1263.

For example, and as the district court recognized, the constitutional challenges Jarkesy raised related directly and solely to the specific proceeding against him. Jarkesy attacked:

> the Commission's decision to place *him* in administrative proceedings in the first place, the Commission's alleged prejudgment of *his* case by accepting the settlement of *his* co-respondents; the Commission's alleged ex parte communications with the SEC Enforcement Division; and the Division's alleged *Brady* violations.

Jarkesy, 2015 WL 5692065, at *12 (emphasis added); R:56:20 n.6. These claims, the D.C. Circuit noted, are "inextricably intertwined with the conduct of the very enforcement proceeding the statute grants the SEC the power to institute and resolve as an initial matter" and "arise from actions the Commission took in the course of that [proceeding]." *Jarkesy*, 2015 WL 5692065, at *13. Additionally, the only broad constitutional claim Jarkesy made, challenged the very statute under which he was being "prosecuted": namely, the Dodd-Frank Act. *Id*. at *6-8. Bebo similarly challenged the constitutionality of the Dodd-Frank Act. *Bebo*, 2015 WL 4998489, at *2. For purposes of this appeal, Gray does not make these or any other statutory challenges, a key distinction.

Similarly, in *Duka I,* the court found the plaintiff's Article II challenge was "wholly collateral" to the SEC adjudication because the plaintiff did not attack any order that might be issued; rather, she challenged the administrative proceeding itself. 2015 WL 1943245, at *6. In *Gupta*, the court explained that the plaintiff's

constitutional claim "would state a claim even if [the plaintiff] were entirely guilty of the charges made against him in the" SEC proceeding. *Gupta*, 796 F. Supp. 2d at 513; *accord Live365, Inc. v. Copyright Royalty Bd.*, 698 F. Supp. 2d 25, 34 (D.D.C. 2010) (constitutional challenge to appointment of agency judges was "wholly independent of any action actually taken or expected to be taken in the future by [those] judges"). Even the Seventh Circuit in *Bebo* acknowledged that a constitutional claim "can reasonably be characterized as 'wholly collateral' to the statute's review provisions and outside the scope of the agency's expertise ...." 2015 WL 4998489, at *1.

The Article II infirmities at issue here exist regardless of what administrative action the SEC might bring against Gray or anyone else. In fact, if the SEC had never filed its administrative proceeding against Gray (which the SEC conveniently argues gives it the sole power to have the district court case dismissed), there would be no question that the district court has jurisdiction. In short, the existence of an administrative proceeding is completely irrelevant and, therefore, wholly collateral to the constitutional claims.

In *Free Enterprise*, the petitioners' Article II claim was wholly collateral to the underlying securities laws because the "petitioners object[ed] to the [PCAOB'S] existence, not to any auditing standards." 561 U.S. at 490, 130 S. Ct. at 3150-51. As with *Free Enterprise*, Gray's constitutional claims are unrelated to

the federal securities laws; and Gray is not seeking to reverse an adverse SEC action, nor challenge any SEC statute or regulation.

While not necessarily dispositive in determining whether a claim is wholly collateral, courts often consider whether the claim raises a facial challenge to the legitimacy of the agency structure or an as-applied challenge to targeted agency action. *See Mace v. Skinner*, 34 F.3d 854, 858 (9th Cir. 1994); *Chau v. SEC*, 72 F. Supp. 3d 417, 426 (S.D.N.Y. 2014), *appeal docketed*, No. 15-461 (2d Cir. Feb. 13, 2015). An as-applied claim "relates to factual issues that are the subject of a pending administrative adjudication," making it less collateral to that proceeding. *Chau*, 72 F. Supp. 3d at 426. In contrast, because facial challenges to agency procedural structure, like the one in this case, are unrelated to any particular plaintiff's personal situation, they are deemed collateral to the agency review statute. *See Mace*, 34 F.3d at 858-59.

The SEC not only does not expressly address the "wholly collateral" issue, but relies upon authorities where constitutional claims directly related to the substantive law in the agency proceedings, logically leading those courts to reject district court jurisdiction. For example, in *Elgin*, Elgin's claim was premised on the underlying statutes, and he sought to reverse an adverse agency decision. Elgin was terminated from employment for failing to register for selective service, as required by statute. 132 S. Ct. at 2131. Only after appealing his termination to the

independent Merit System Protection Board ("MSPB") and after the ALJ issued a decision, did Elgin challenge the constitutionality of the statutes and file a claim for reinstatement and back-pay in district court. *Id.* at 2131, 2139. The Court held that the employment claims were "precisely the type of personnel action regularly adjudicated by the MSPB" and that reinstatement and employment compensation were "precisely the kinds of relief [the statute] empowers the MSPB" to provide and, therefore, the claims were not wholly collateral. *Id*. at 2140.

Similarly, the claims in *Thunder Basin* were directed at the agency's interpretation of a statute and regulations that it was charged with enforcing, and not a challenge to the existence of the administrative proceeding itself. *See* 510 U.S. at 204-05, 218 n.22, 114 S. Ct. at 775, 781 n.22. In *Doe*, the aircraft mechanics' claims that the FAA infringed on their due process rights "necessarily require[d] a review of the procedures and actions taken by the FAA with regard to the" mechanics. 432 F.3d at 1263. Similarly, in *LabMD*, the Court found that the facts supporting the plaintiff's due process claims were "indistinguishable from those relating to the procedures and merits of the FTC action" because the plaintiff alleged that the FTC's administrative action violated its due process rights to notice and a fair hearing. 776 F.3d at 1278, 1280. In sharp contrast, Gray's Appointments challenge has no relationship to the merits or procedures of the SEC administrative action alleging securities laws violations.

Likewise, the other cases the SEC cites on pages 19 and 22 of its brief do not involve "wholly collateral" claims or constitutional claims. *See, e.g., E. Bridge, LLC v. Chao,* 320 F.3d 84, 89, 91 (1st Cir. 2003) ("constitutional claim is really just a re-characterization of their administrative claim"; challenge required interpretation of the agency's "organic statute"); *Sturm, Ruger & Co. v. Chao*, 300 F.3d 867, 874 (D.C. Cir. 2002) (challenge is not "wholly collateral" as it "require[s] interpretation of the parties rights and duties" under the substantive agency provisions); *Frito-Lay, Inc. v. FTC,* 380 F.2d 8, 9-10 (5th Cir. 1967) (not constitutional challenge); *Am. Gen. Ins. Co. v. FTC,* 496 F.2d 197, 200 (5th Cir. 1974) ("question in this case is purely one of statutory interpretation and application. No constitutional provision is at issue."). Or they involve plaintiffs who brought both a facial and as-applied challenge to the statute being enforced. *Nat'l Taxpayers Union v. U.S. Soc. Sec. Admin.,* 376 F.3d 239, 243-244 & n.3 (4th Cir. 2004) (includes facial and as applied constitutional challenge to "substantive provision" of the underlying statute in administrative proceeding, not "wholly independent of the agency's enforcement of a substantive provision").

Finally, the SEC's argument that a court of appeals has "exclusive" jurisdiction over suits that might affect the court of appeals' future jurisdiction does not apply to this case. *See* Appellant's Br. pp. 22-23. At its root, the SEC and the authorities it cites rely on *Telecommunications Research & Action Ctr.*

("TRAC") v. FCC, 750 F.2d 70, 75 (D.C. Cir. 1984), but the D.C. Circuit subsequently held that *TRAC* does not apply to a facial constitutional challenge "directed to the source of putative agency authority," as is the case here. *See Time Warner Entm't Co., L.P. v. F.C.C.*, 93 F.3d 957, 965 (D.C. Cir. 1996). These cases also all predate *Free Enterprise*. In contrast, because Gray raises "*systemic*" challenges that are not intertwined with the merits of the SEC administrative proceeding, the district court is not deprived of jurisdiction here. *See George Kabeller, Inc. v. Busey*, 999 F.2d 1417, 1419-22 (11th Cir. 1993) (per curiam) (emphasis in original) (declining jurisdiction because plaintiff's suit did not allege "*systemic*" defects in the agency process).

3. Gray's constitutional claims are beyond the SEC's competence and expertise.

The SEC does not address the "competence and expertise" factor, let alone dispute that its ALJs lack the necessary expertise to resolve Article II constitutional questions. Because the claims are not within the agency's competence and experience, jurisdiction must remain with the district court.

The Supreme Court has already held that Article II issues are "outside the [SEC's] competence and expertise." *Free Enterprise*, 561 U.S. at 491, 130 S. Ct. at 3151; *accord*, *Jarkesy*, 2015 WL 5692065, at *18 (stating that "[t]he Commission arguably has less experience with issues like Jarkesy's non-delegation challenge," but noting that this factor was not dispositive because Jarkesy

challenged constitutionality of Dodd-Frank Act); *Bebo*, 2015 WL 4998848, at *1 ("Bebo's suit can reasonably be characterized as … outside the scope of the agency's expertise….").

While agency review may be appropriate when technical or industry expertise is required, constitutional issues "are particularly suited to the expertise of the judiciary." *Whitney Nat. Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420, 85 S. Ct. 551, 557 (1965); *Gupta*, 796 F. Supp. 2d at 512 (citation omitted); *see also Weinberger v. Salfi*, 422 U.S. 749, 765, 95 S. Ct. 2457, 2466-67 (1975). In fact, two of the five SEC Commissioners recently decided, completely opposite to what the SEC states here, that Article III federal judges and not the SEC should ultimately decide whether the SEC ALJs were appointed in a manner consistent with the Appointments Clause of the Constitution. Opinion of Commissioner Gallagher and Commissioner Piwowar, dissenting from the opinion of the Commission, *In re Raymond J. Lucia Cos., Inc.* (Oct. 2, 2015), http://www.sec.gov/news/statement/dissenting-opinion-gallagher-piwowar.html; *see also In re Hill*, SEC Rel. No. 2675, 2015 SEC LEXIS 1899, at 14 (May 14, 2015) (SEC ALJ expressing "doubt" that he has authority to resolve constitutional claims like the one made in this case). Unlike Bebo and Jarkesy, Gray *does not challenge* the statutory claims the SEC has raised against it nor the constitutionality of the Dodd-Frank Act (nor any other securities statute).

In contrast, the cases that have found this factor not satisfied all involved claims based on either the administrative hearing procedures used in the specific case (such as in *Jarkesy*) or on the underlying statute (*Thunder Basin* and *Elgin*). *Jarkesy*, 2015 WL 5692065, at *13 ("Jarkesy's constitutional and [Administrative Procedure Act ("APA")] claims do not arise "outside" the SEC administrative enforcement scheme—they arise from actions the Commission took in the course of [its proceeding against Jarkesy]"); *Thunder Basin*, 510 U.S. at 214-15, 114 S. Ct. at 780 (finding that petitioner's claims required interpretation of the Mine Act and its implementing regulations; hence, the claims fell squarely within the agency's expertise); *Elgin*, 132 S. Ct. at 2131, 2140 (finding that petitioners challenged an employment statute that the MSPB regularly administered, which was within the agency's expertise).

In addition, the respective *Thunder Basin* and *Doe* courts emphasized that the agencies reviewing the administrative action in those cases were separate agencies from those that prosecuted the challenged enforcement action. *Doe*, 432 F.3d at 1263; *Thunder Basin*, 510 U.S. at 215, 114 S. Ct. at 780. That distinction does not exist here; the agency bringing the enforcement action is the same agency that will review the constitutionality of its own actions. Regardless, the district court did not err in its analysis and jurisdiction is proper.

II. THE DISTRICT COURT CORRECTLY FOUND A LIKELIHOOD OF SUCCESS ON THE MERITS.

The Appointments Clause of the Constitution provides that "Congress may by Law vest the Appointment of such inferior Officers … in the President alone, in the Court of Law, or in the Heads of Department." U.S. Const. art. II, § 2, cl. 2. The SEC has conceded that its ALJs were not appointed as required by Article II. (*See, e.g.*, R:35-1) ("ALJ Elliot was not hired through a process involving the approval of the individual members of the Commission"). The SEC, however, maintains that its five hand-picked ALJs, whose opinions can result in life-altering penalties for those who come before them, are not "inferior officers" but are "mere employees" of the SEC, and, therefore, the SEC need not comply with the Appointments Clause. However, the district court correctly determined that, "[b]ecause SEC ALJs are inferior officers, Plaintiffs have established a likelihood of success on the merits of their Appointments Clause claim." (R:56:35). Of the four preliminary injunction factors, the "likelihood of success on the merits" is generally considered to be the most important in the Eleventh Circuit. *See Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986).

Congress drew a clear distinction between ALJs and other employees in the Securities Exchange Act. *See* 15 U.S.C. § 78d-1 (stating the SEC may delegate its authority to, among others, "an administrative law judge, or an employee or employee board"); *see also* 5 U.S.C. § 4301(2)(D) ("'employee'" means an

individual employed in or under an agency, but does not include… an administrative law judge appointed under section 3105 of this title."). The SEC concedes that "[if] doubt existed as to the ALJs' status, the Court would also properly consider Congress's own assessment of its statutory creations." Appellant's Br. p. 38. If Congress intended for ALJs to be mere employees, then there would be no need to categorize ALJs separately from employees in this manner. To interpret the language otherwise would render the term "administrative law judge" superfluous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 448-49 (2001) (declining to treat statutory terms as mere surplusage and stating "[i]t is a cardinal principal of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (quotation marks and citations omitted). Further, Congress has explicitly provided under the APA that agencies shall appoint ALJs. *See* APA, 5 U.S.C. § 3105 ("Each agency shall appoint as many administrative law judges as are necessary for proceedings…"). Thus, Congress' judgment shows ALJs are separate and not synonymous with mere employees.

Moreover, the district court correctly found that "SEC ALJs exercise 'significant authority' and are thus inferior officers." (R:56:32-33), *citing Freytag*, 501 U.S. 868 (considering the significance of the tasks Special Trial Judges

("STJs") performed and degree of discretion exercised); *see also Buckley v. Valeo,* 424 U.S. 1, 126, 96 S. Ct. 612, 685 (1976) (finding an officer is a person who exercises "significant authority pursuant to the laws of the United States."). In determining officer status, courts consider the nature of a person's position, including the tenure, duration, pay, and duties; the significance of the matters the officials resolved; the discretion they exercise in reaching their decisions; and the finality of those decisions. *See e.g., U.S. v. Germaine*, 99 U.S. 508 (1878); *Tucker v. C.I.R.*, 676 F.3d 1129 (D.C. Cir. 2012); *Com. of Pa., Dept. of Public Welfare v. U.S. Dept. of Health and Human Services*, 80 F.3d 796 (3rd Cir. 1996).

Because the constitutional status of SEC ALJs requires an analysis of the specific position, comparisons to ALJs in other agencies, although arguably helpful, is not determinative. *See e.g., Edmond v. U.S.*, 520 U.S. 651, 661-66, 117 S. Ct. 1573, 1580-82 (1997). Nevertheless, the Supreme Court has found the following government workers to be inferior officers: attorneys; federal marshals; military judges; judges in Article I courts; district court clerks; "thousands of clerks" in the Departments of the Treasury, Interior, and other departments who are responsible for "the records, books, and papers appertaining to the office"; a clerk to "the assistant treasurer"; an "assistant-surgeon" and a "cadet-engineer" the Secretary of the Navy appointed; and election monitors. *See Free Enterprise*, 561 U.S. at 540, 130 S. Ct. at 3179 (Breyer, J., dissenting, with whom JJ. Stevens,

Ginsburg, and Sotomayor joined) (collecting cases); *Edmond*, 520 U.S. at 661, 117 S. Ct. at 1580 (collecting cases).

Congress established the position of SEC ALJs and set forth the duties, salary, and means of appointment in the APA. *See* 5 U.S.C. §§ 556, 557, 3105, 5311; 15 U.S.C. § 78d-1. That the APA does not require the SEC to use ALJs is irrelevant to the issue of whether the ALJs exercise significant authority. *See Freytag,* 501 U.S. at 871, 111 S. Ct. at 2635 (finding STJs to be inferior officers even though the Chief Judge of the Tax Court was not required to use them). Further, the fact that 17 C.F.R. § 201.101(a)(5) provides that a "[h]earing officer" can be an ALJ, a panel of Commissioners, an individual Commissioner, or any other person duly authorized to preside at a hearing does not show that ALJs are not inferior officers, as the SEC suggests, but it does show that even principal officers (*i.e.*, Commissioners) can serve as hearing officers under SEC regulations. *See* Appellant's Br. p. 33.

The district court correctly determined that SEC ALJs' powers are "nearly identical" to the STJs' powers in *Freytag* and that the STJs' powers are "independently sufficient" to find inferior officers status. (*See* R:56:32). The court found further support in other Supreme Court precedent, namely *Butz v. Economou*, 438 U.S. 478, 513, 98 S. Ct. 2894, 2914 (1978) ("There can be little doubt that the role of the . . . administrative law judge . . . is 'functionally

comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions."); *Freytag*, 501 U.S. at 910, 111 S. Ct. at 2655 (Scalia, J., concurring in part and concurring in judgment, joined by O'Connor, Kennedy, & Souter, JJ.) (finding that all ALJs are "executive officers"); and *Edmond*, 520 U.S. at 663, 117 S. Ct. at 1581 ("[W]e think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.").[4]

Like STJs, SEC ALJs perform more than ministerial tasks: they take testimony, conduct trials, rule on the admissibility of evidence, issue subpoenas, and make substantive rulings and findings. 17 C.F.R. § 201.111; *accord Duka v. SEC*, No. 15-civ-357(RMB), 2015 WL 4940057, at *2 (S.D.N.Y. Aug. 3, 2015) (hereinafter, "*Duka II*") (relying on *Freytag* to rule "that SEC ALJs are 'inferior officers'"). SEC ALJs regulate the course of proceedings, control the record of the case, preside over the testimony of witnesses, and determine credibility issues. Indeed, the SEC has specifically chosen to give its five hand-picked ALJs as much

[4] As one scholar concluded, five current Supreme Court Justices have suggested that ALJs are inferior officers. *See* Kent Barnett, *Resolving the ALJ Quandary*, 66 Vand. L. Rev. 797, 800 (2013) (citing Justice Scalia's *Freytag* concurrence and Justice Breyer's *Free Enterprise* dissent, in which Justices Stevens, Ginsburg, and Sotomayor joined).

power as possible under the APA. 17 C.F.R. § 201.111 ("No provision of these Rules of Practice shall be construed to limit the powers of the hearing officer provided by the Administrative Procedure Act, 5 U.S.C. 556, 557."). The SEC confirms the breadth of responsibility and depth of importance of its ALJs on the SEC website: "[ALJs] are independent judicial officers" who "conduct public hearings at locations throughout the United States in a manner similar to non-jury trials in the federal district courts. Among other actions, they issue subpoenas, conduct prehearing conferences, issue defaults, and rule on motions and the admissibility of evidence." *See* U.S. Securities and Exchange Commission, Office of Administrative Law Judges, "About the Office," http://www.sec.gov/alj.

Moreover, like STJs, SEC ALJs exercise significant discretion when carrying out their duties. *See*, *e.g.*, 17 C.F.R. § 201.111 ("The hearing officer shall have the authority to do all things necessary and appropriate to discharge his or her duties."); 17 C.F.R. § 201.232 (discretion to issue subpoenas); 17 C.F.R. § 201.320 (discretion to receive and exclude evidence); 17 C.F.R. § 201.360 (duty to prepare an initial decision, including "[f]indings and conclusion, and the reasons or basis therefor, as to all the material issues of fact, law or discretion on the record"). In short, SEC ALJs have significant authority and substantial discretion in interpreting the federal securities laws.

The SEC is mistaken when it states that "an ALJ can never render a final decision in an administrative proceeding." Appellant's Br. p. 35. In the view of the Commission itself, certain ALJ decisions, including those imposing default judgments and cease and desist orders and monetary penalties, are final without any action by the Commission. *See In re Alchemy Ventures, Inc.,* SEC Release No. 70708, 2013 WL 6173809 (Oct. 17, 2013). SEC ALJ initial decisions become an SEC final order without review. *See* 17 C.F.R. § 201.360; 17 C.F.R. § 201.411. In fact, in the vast majority of SEC administrative enforcement proceedings, there is no review; thus, the SEC ALJ's initial decision becomes the final order. *See* U.S. Securities and Exchange Commission, *ALJ Initial Decisions: Administrative Law Judges*, http://www.sec.gov/alj/aljdec/aljdecarchive/aljdecarc2014.shtml (approximately 94% of SEC ALJ decisions in 2014 became a final order without Commission review). SEC ALJs also make final credibility determinations, which are upheld absent overwhelming evidence to the contrary, much like the credibility determinations made by the STJs. *See In re Clawson*, SEC Rel. No. 48143, 2003 WL 21539920, at *2 (July 9, 2003); *see also* Tax Court Rule 183(c), 26 U.S.C.A. (2005). All SEC ALJ initial decisions make factual determinations and legal conclusions and are published in the SEC Docket and the SEC's website, and can be retrieved through standard legal research techniques, just like federal court decisions. *See* 17 C.F.R. § 201.360(b), (c).

The SEC has misplaced reliance on *Landry*, a case which was factually limited to the role of FDIC ALJs, and for that reason, does not apply to SEC ALJs. *See* Br. for Resp't in Opp'n, *Landry v. FDIC*, No. 99-1916, 2000 WL 34013905, at 7.

Further, and as the district court correctly noted, *Landry* was based on an alternative holding from *Freytag* but not on the principal holding. (*See* R:56:30-31). In finding that FDIC ALJs were employees rather than inferior officers, the D.C. Circuit contrasted the FDIC ALJs' decision-making authority with the *Freytag* STJs' decision-making authority. *Landry*, 204 F.3d at 1132, 1134. In fact, and significantly, the *Landry* court acknowledged that "it is, to be sure, uncertain just what role the STJs' power to make final decisions played in *Freytag.*" *Id.* at 1133. FDIC ALJs issue recommended decisions, not initial decisions, and *recommended* decisions can never be final decisions. *Id*. (citing 12 C.F.R. § 308.38); *cf.* 17 C.F.R. § 201.360 and 5 U.S.C. § 557(b) (initial decisions under the APA "becomes the decision of the agency without further proceedings"). As the district court aptly noted, "On this ground alone, FDIC ALJs are different from SEC ALJs." (R:56:31-32). The FDIC Board of Directors then renders a final decision based on a *de novo* review of the entire record. *Landry*, 204 F.3d at 1132-33 (citing 12 C.F.R. § 308.40). For this reason alone, the D.C. Circuit held that FDIC ALJs were employees. *Id*.

Importantly, unlike the D.C. Circuit in *Landry*, the Supreme Court has not decreed that the absence of final decision-making authority is preclusive of officer status. *See, e.g., Freytag*, 501 U.S. at 881, 111 S. Ct. at 2640; *Ryder v. United States*, 515 U.S. 177, 187-88, 115 S. Ct. 2031, 2038 (1995) (examining factors to hold that appellate military judges were inferior officers); *Edmond*, 520 U.S. at 666, 117 S. Ct. at 1582 (judges of Coast Guard Court of Criminal Appeals were inferior officers); *see also Dep't of Transp. v. Assoc. of Am. R.R.'s*, 135 S. Ct. 1225, 1239 (2015) (Alito, J., concurring) (noting that "[i]nferior officers can do many things, but nothing final should appear in the Federal Register unless a Presidential appointee has at least signed off on it"). In fact, in *Edmond*, the Supreme Court found it "significant" that the judges of the Coast Guard Court of Criminal Appeals had "no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers" when finding the judges were inferior officers. 520 U.S. at 665, 117 S. Ct. at 1582. The SEC's argument that final decision-making authority is determinative is unsupportable.

Contrary to the SEC's position here and *Landry*, the Department of Justice ("DOJ") concluded that Department of Education ("DOE") ALJs are inferior officers because of their executive policy-making role, not because of the finality of their orders. *Sec. of Ed. Review of Admin. Law Judge Decisions*, 15 U.S. Op. Off. Legal Counsel 8, 14, 1991 WL 499882 (Jan. 31, 1991). "By deciding a series

of cases, the ALJ presumably would develop interpretations of the statute and regulations and fill statutory and regulatory interstices comprehensively with his own policy judgments." *Id*. To ensure that DOE ALJs were not principal officers, the DOJ concluded that these ALJ "final opinions" must be reviewable by the Secretary. *Id*. at 15-16.

The district court's Order is consistent with DOJ guidance, which states "that any position having the two essential characteristics of a federal 'office' is subject to the Appointments Clause. It is a federal office if (1) it is invested by legal authority with a portion of the sovereign powers of the federal Government; and (2) it is 'continuing.'" U.S Dep't of Justice, Office of Legal Counsel, *Officers of the United States Within the Meaning of the Appointments Clause*, 2007 WL 1405459, at *33 (Apr. 16, 2007).

Further, whether SEC ALJs may be part of the competitive service similarly misses the mark because that system includes all positions in "the Government of the United States … including [principal officers] subject to Senate confirmation." *Free Enterprise,* 561 U.S. at 537, 130 S. Ct. at 3177-78 (Breyer, J, dissenting) (citing 5 U.S.C. §§ 2101, 2102(a)(l)(B), 2104); *Cf. Com. of Pa., Dept. of Public Welfare v. U.S. Dept. of Health and Human Services*, 80 F.3d 796, 804 (3rd Cir. 1996) (noting that title is not determinative of officer status; rather it is the nature of a position that must be considered). In fact, the "competitive service" includes,

with limited exclusions not applicable here, "all civil service positions in the executive branch." 5 U.S.C. § 2102. "Civil service" encompasses a vast group of federal employees, including civil "officer[s]" up to and including those who are subject to Senate confirmation. 5 U.S.C. § 2104; *see also* 5 U.S.C. § 2101. Moreover, the SEC ultimately makes compensation determinations, not the Office of Personnel Management. Federal law provides that the SEC may offer an ALJ a higher rate of pay than the minimum rate "because of prior service or superior qualifications." 5 C.F.R. § 930.205(f); *see also* 5 U.S.C. § 5372; OPM Pay Administration "Fact Sheet: Administrative Law Judge Pay System", https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/administrative-law-judge-pay-system/. Similarly, the SEC may pay an ALJ more if the ALJ has "added administrative and managerial duties and responsibilities." 5 C.F.R. § 930.205(g). Therefore, it is the SEC that makes the final decisions regarding its ALJs' compensation. Nevertheless, of the factors courts consider in determining inferior officer status (*see* discussion *supra* pp. 39-42), no court has considered placement in the civil service system.

Finally, any comparison of SEC ALJs to non-ALJ hearing examiners from a 1947 Attorney General's Manual the SEC cited is irrelevant here. There is a marked difference between ALJs and non-ALJ hearing examiners "in terms of independence, training, experience, and compensation." *See* Burrows, Vanessa K.,

Cong. Research Serv., RL34607, *Administrative Law Judges: An Overview* 1, 10 (2010). Moreover, in 1947, the DOJ viewed ALJs (then called hearing examiners or officers) as "subordinate officers" consistent with their status as "inferior officers" rather than "employees." Attorney General's Manual on the Administrative Procedure Act at 83-84 (1947).[5]

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE REMAINING FACTORS SUPPORT A PRELIMINARY INJUNCTION.

"[T]he abuse of discretion standard allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment," and this Court will affirm the decision of the lower court even if the appellate court would have decided another way. *Gray ex rel. Alexander v. Bostic*, 720 F.3d 887, 893 (11th Cir. 2013) (citations omitted). The SEC has failed to show that the Gray Order to enjoin the SEC was in clear error of judgment. *See Broadcast Music, Inc. v. Evie's Tavern Ellenton, Inc.*, 772 F.3d 1254, 1257 (11th Cir. 2014) (quoting *In re Rasbury*, 24 F.3d 159, 168 (11th Cir. 1994)). There was no abuse of discretion and the Gray Order should be affirmed.

[5] *See* http://archive.law.fsu.edu/library/admin/1947vii.html.

A. Gray Will Suffer Irreparable Harm If Forced to Undergo the SEC's Unconstitutional Administrative Proceeding.

The district court did not abuse its discretion in concluding that "Plaintiffs will be irreparably harmed if this injunction does not issue because if the SEC is not enjoined, Plaintiffs will be subject to an unconstitutional administrative proceeding, and would not be able to recover monetary damages for this harm because the SEC has sovereign immunity." (R:56:36) (citing *Odebrecht Const., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013)); *see also Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285-86 (11th Cir. 1990) (stating that when injuries have an "intangible nature," rather than a "chiefly . . . economic" one, those injuries are presumptively irreparable); *Jolly v. Coughlin,* 76 F.3d 468, 482 (2d Cir. 1996) ("[A] presumption of irreparable injury ... flows from a violation of constitutional rights."); *United Church of the Med. Ctr. v. Med. Ctr. Comm'n,* 689 F.2d 693, 701 (7th Cir. 1982) ("subjection to an unconstitutionally constituted decisionmaker" is an "irreparable injury" even if the ultimate decision is subject to review in the courts); *Statharos v. New York City Taxi and Limousine Comm'n,* 198 F.3d 317, 322 (2d Cir. 1999) ("[Where] plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary").

The SEC mischaracterizes the harm Gray faces absent injunctive relief as no more than "[m]ere litigation expense," when the harm is that Gray will be denied

the only forum where an injunction is available – in district court. *See* Appellant's Br. p. 44. If the SEC has its way, Gray will be subjected to the very proceeding that the court found is likely unconstitutional, and Gray will be unable to obtain the relief it is seeking because this Court will "not be able to enjoin a proceeding which has already occurred." (R:56:37). By the time Gray could seek judicial review of a final adverse Commission decision, the constitutional damage will have already been irreparably done. *See*, e.g., *United Church of the Med. Ctr.,* 689 F.2d at 701; *Touche Ross & Co. v. SEC,* 609 F.2d 570, 577 (2d Cir. 1979) (noting exhaustion of the administrative process would be futile "when the very administrative procedure under attack is the one the agency says must be exhausted.") (citations omitted); *cf. Mathews v. Eldridge*, 424 U.S. 319, 324-25, 331, 96 S. Ct. 893, 897-98, 901 (1976) (statute's provision for a hearing only after plaintiff was deprived of disability benefits could damage plaintiff in a way not recompensable through retroactive payments); *United States v. Hastings*, 681 F.2d 706, 709 (11th Cir. 1982) (allowing interlocutory review where the appellant asserted the right to be free from prosecution on separation of powers grounds, "which would be wholly deprived of meaning if he were forced to undergo trial before he could assert" that right); *R.I. Dep't of Envtl. Mgmt. v. United States,* 304 F.3d 31, 43 (1st Cir. 2002) (finding jurisdiction to hear state's sovereign immunity claim because undergoing an unconsented-to administrative adjudication would

itself deprive the state of its "immunity from being haled before a tribunal by private parties").

The SEC mistakenly relies on *Standard Oil Co.*, 449 U.S. at 244, 101 S. Ct. at 495, for the proposition that the mere financial or economic expense alone of litigating before an agency does not constitute irreparable harm. *See* Appellant's Br. pp. 14-15, 29, 44. That of course is not the harm that is at issue here, and neither is the corresponding time delay needlessly incurred as a result of undergoing an unconstitutional administrative proceeding. *Standard Oil* is also inapposite because it did not involve constitutional challenges, let alone one to the existence of the very administrative process at issue.

Unlike the *Standard Oil* plaintiffs who unsuccessfully sought relief from having to stand trial, Gray asks the federal courts to ensure a constitutionally consistent adjudicator from the outset. In the interest of judicial economy, the sensible goal is to avoid the parties facing trial twice simply because the SEC prefers to use its own improperly appointed home court ALJs, which two federal courts have deemed likely unconstitutional and as having an infirmity the SEC could have easily fixed. (*See* R:56:38); *Duka II*, 2015 WL 4940057, at *3; *Duka v. SEC*, No. 15 Civ. 357(RMB)(SN), 2015 WL 4940083, at *2 (S.D.N.Y. Aug. 12, 2015) ("*Duka III*"). The ultimate result if the SEC's position was realized would be to burden the legal system with piecemeal litigation from constitutionally

invalid proceedings. *See Touche Ross*, 609 F.2d at 576 ("[A]n injunction may be issued 'if an agency [proceeding] . . . is being conducted in a manner that cannot result in a valid order . . . .'"); *Cent. Hudson Gas & Elec. Corp. v. EPA*, 587 F.2d 549, 556 (2d Cir. 1978) (Given the cost when "courts ultimately declare [administrative] proceedings a nullity . . . it may be desirable . . . to have some form of judicial review . . . at an early stage.").

This Court's decision in *Siegel v. LePore,* 234 F.3d 1163, 1177-78 (11th Cir. 2000) (en banc) (per curiam), does not compel a different result. In *Siegel*, candidates George Bush and Dick Cheney challenged the Florida election procedures used during the 2000 election. This Court ruled that the district court did not abuse its discretion in denying the injunction because the candidates could not demonstrate a threat of continuing irreparable harm in large part because they had already been certified as the winners of Florida's electoral votes notwithstanding the alleged defects in the election. *Id.* at 1177-78. Although unnecessary to the ruling, this Court also said that a constitutional challenge does not *per se* result in a finding of irreparable injury, but also did not say that a finding of irreparable injury was necessarily precluded when Article II or other specific constitutional challenges were at issue. This Court left the door wide open on a case-by-case basis to determine that the harm from a constitutional violation

like the one in this case could constitute irreparable harm, and there are no Eleventh Circuit cases to the contrary.

The remaining cases the SEC cited concerning irreparable harm are likewise inapposite. First, in *Imperial Carpet Mills, Inc. v. Consumer Prods. Safety Comm'n*, 634 F.2d 871 (5th Cir. 1981) (per curiam), the court remarks *in dicta* that reputational harms and litigation expenses will not make a challenge to agency action ripe for review, but Gray alleges greater harm than this. Second, in relying on *In re Al-Nashiri*, 791 F.3d 71 (D.C. Cir. 2015), the SEC fails to mention that the military commission in that case was subject to a *specific statute* expansively stripping district courts of jurisdiction and that the court there was weighing its mandamus power, an extraordinary remedy where the irreparable harm is held to a higher standard than a preliminary injunction. 791 F.3d at 76, 78-79.

Moreover, the SEC's argument that this Court's *de novo* review would address the harmful impact of any alleged violations rings hollow. If this were so, all administrative proceedings with *de novo* review would escape judicial review no matter the defect. *See Landry*, 204 F.3d at 1132 (stating that "[i]f the process of final *de novo* review could cleanse the violation of its harmful impact, then all such arrangements would escape judicial review. . .").

B. The Balance of Equities and the Public Interest Favor a Preliminary Injunction.

The SEC can show no "clear error of judgment" by the district court in concluding that the balance of equities and the public interest favor Gray. (R:56:37); *see Broadcast Music*, 772 F.3d at 1257. As the district court correctly noted, it is never "in the public interest for the Constitution to be violated." (R:56:37). "The public has an interest in assuring that citizens are not subject to unconstitutional treatment by the Government, and there is no evidence the SEC would be prejudiced by a brief delay to allow [the district court] to fully address Plaintiffs' claims." *Id.*

The SEC's cries of feigned concern of "public harm" based on Gray continuing to do business with a handful of investment advisory clients is certainly too little, too late, but is more likely just plain disingenuous. As a start, the unproven and untested allegations before this Court are far broader, more serious and more salacious than the SEC itself alleged in the formal charging document, the OIP. There, the SEC alleged nothing more than that a handful of Georgia clients made an investment that the SEC claims did not comply with a brand new and untested Georgia state law, with no corresponding reported client losses. There is no legitimate explanation as to why the SEC now suddenly has a heightened level of concern over Gray beyond that stated in the OIP.

Additionally, the SEC did not get around to filing a formal enforcement case until over eight months after preliminarily concluding Gray had violated the securities laws and over three months after Gray sued in district court. If the SEC had the level of concern for the investing public as it now claims about Gray, it would have immediately sought an emergency injunction in district court, a remedy which is unavailable in an administrative proceeding. *See, e.g.*, 15 U.S.C. §§ 78(u), 78(o). "In situations where there is a need for emergency proceedings or relief – where the alleged violative conduct is ongoing … only a federal district court can issue the necessary emergency relief to protect investors." *See* Div. of Enforcement Approach to Forum Selection in Contested Actions, p. 1, http://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf. Moreover, if bringing an enforcement case against Gray is in the public interest, there has been nothing precluding the SEC from doing so as a counterclaim in Gray's pre-existing lawsuit; that would have been a more efficient outcome than filing a separate, collateral administrative proceeding.

But if pursuing Gray in an administrative proceeding truly were essential, as the SEC purports it to be, the SEC would have first taken the easy steps to fix its appointments defect and avoided the delays and cost associated with this litigation. Other agencies appoint their ALJs in accordance with the Appointments Clause. *See e.g.*, 8 C.F.R. § 1003.10 (Immigration Court judges appointed by Attorney

General acting as "Head" of Department of Justice); 20 U.S.C. § 1234(b) (ALJs within the Department of Education appointed by Secretary of Education); 35 U.S.C. § 6(a) (administrative patent judges appointed by the Secretary of Commerce). Appointing the ALJs would have been less costly than trying to justify an unconstitutional forum through protracted litigation. Indeed, Judge Berman in *Duka* gave the SEC an opportunity to make a proper appointment of its ALJs before he would issue a preliminary injunction on Article II grounds, and the SEC flatly refused. *Duka II*, 2015 WL 4940057, at *3; *Duka III*, 2015 WL 4940083, at *2. The district court likewise found these SEC arguments to be unpersuasive. If anything, the consequences of the SEC not appointing ALJs properly is a self-inflicted wound. (*See* R:56:37-38; R:76:4).

To be sure, the greater concern in this case is whether rights guaranteed by the Constitution are preserved. *See Nat'l Treasury Emps. Union*, 838 F. Supp. at 640 (noting there is "an overriding [public] interest in assuring that the government remains within the limit of its constitutional authority"); *see also White v. Baker*, 696 F. Supp. 2d 1289, 1313 (N.D. Ga. 2010) (finding that an injunction would advance the public interest "because a constitutional right is at issue"). The public interest in enforcing the Constitution in this case is paramount and cannot be sidestepped at the SEC's whim. Accordingly, the district court did not abuse its discretion in finding the remaining factors weigh in favor of enjoining the SEC.

CONCLUSION

Gray respectfully requests that this Court affirm the district court's order granting the Motion for a Preliminary Injunction.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because, according to the word count function of Microsoft Word, used the prepare the brief, the brief contains 13,690 words, including headings, footnotes and quotations, but excluding the Cover Page, Certificate of Interested Persons and Corporate Disclosure Statement, Statement Regarding Oral Argument, Tables of Contents and Citations, Statement of Jurisdiction, this Certificate of Compliance and the Certificate of Service dictated by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

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

This 5th day of October, 2015.

/s/Terry R. Weiss
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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2015, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I also certify that this brief is being served this day on all counsel of record listed below via electronic transmission generated by CM/ECF.

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