IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

TIMBERVEST, LLC, *et al.*, *Plaintiffs*, v. U.S. SECURITIES AND EXCHANGE COMMISSION, *Defendant*.	No. 15-cv-2106

DEFENDANT'S OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

In September 2013, the Securities and Exchange Commission (the "SEC" or "Commission") initiated an administrative enforcement proceeding against Plaintiffs for violations of the federal securities laws. The presiding SEC Administrative Law Judge ("ALJ") issued an initial decision finding Plaintiffs liable in August 2014. The Commission has heard oral argument in the appeals from the SEC ALJ's initial decision, including argument on Plaintiffs' Appointments Clause challenge. Now, almost two years after their administrative proceeding was initiated before an ALJ and ten months after the ALJ issued his initial decision, Plaintiffs have suddenly demanded that this Court issue emergency relief. Plaintiffs challenge the 10-month-old initial decision as "invalid" and seek a temporary restraining order and preliminary injunction to prevent the Commission's completion of the administrative proceeding, including its consideration of the very claims Plaintiffs raise here. This Court should decline Plaintiffs' request to intervene at the eleventh hour.

The Commission must be permitted to complete its review of Plaintiffs' Article II challenges. If Plaintiffs are aggrieved by the Commission's decision, Plaintiffs' recourse lies with a court of appeals, not this Court. As the Supreme Court and the Eleventh Circuit have held, district courts lack jurisdiction over challenges to agency action where, as here, a statutory review scheme channels claims through the agency and then to a court of appeals. *Elgin v. Dep't of Treasury*, 132 S. Ct. 2126 (2012); *Doe v. FAA*, 432 F.3d 1259 (11th Cir. 2005).

Because the federal securities laws provide for judicial review exclusively in the court of appeals, Plaintiffs cannot press their claims here.

In addition, Plaintiffs fail to establish that preliminary relief is necessary to avoid irreparable harm. Plaintiffs' belated request for emergency relief appears to be driven by a desire to take advantage of this Court's ruling in another action. Not only does their own inaction belie any claim of irreparable harm, but their argument fails on its own terms because if, as they allege, the harm of proceeding before an improperly appointed ALJ has already occurred, it cannot be enjoined now. In any case, there is no constitutional violation, let alone a violation of the type that can serve as the basis for finding that plaintiffs will suffer *per se* irreparable harm in the absence of preliminary relief. Plaintiffs allege two other irreparable harms – business losses and reputational damage – but they lack evidentiary support and a legal foundation.

Finally, even if this Court had jurisdiction, and even if Plaintiffs had established irreparable harm, this Court should still deny Plaintiffs' motion because Plaintiffs cannot demonstrate a likelihood of success on the merits. Plaintiffs' Article II claims depend on SEC ALJs being officers under the Constitution's Appointments Clause, but SEC ALJs are mere agency employees. They are subject to the Commission's plenary authority and subordinate to the agency on matters of law and policy. Their functions are limited and do not include issuing final decisions (which only the Commission can do). Congress has long treated ALJs as employees by establishing a method for appointing them that does not track the requirements for appointing constitutional officers

and by placing them within the competitive civil service. It is therefore unsurprising that the only court of appeals to have addressed the constitutional status of any agency's ALJs decided that the ALJs in question there were employees, not officers. *Landry v. FDIC*, 204 F.3d 1125, 1132-34 (D.C. Cir. 2000). Moreover, even if SEC ALJs were constitutional officers, Plaintiffs are unlikely to show that their tenure protections violate the separation of powers, as this Court has already recognized. *Hill v. SEC*, No. 15-cv-1801 (N.D. Ga. June 8, 2015), ECF No. 28, Slip Op. at 42 n.12, *appeal pending*, No. 15-12831-C (11th Cir.).

For these reasons, and those stated below, Defendant requests that this Court deny Plaintiffs' motion, as every court but this one has done when facing requests for injunctive relief in cases raising the same or similar Article II claims. *See, e.g.*, *Spring Hill v. SEC*, 15-cv-4542 (S.D.N.Y. June 26, 2015) (oral ruling denying motion for preliminary injunction and dismissing case); *Duka v. S.E.C.*, 2015 WL 1943245, at *9-10 (S.D.N.Y. April 15, 2015); *Bebo v. SEC*, No. 15-c-3, 2015 WL 905349, at *4 (E.D. Wis. Mar. 3, 2015), *appeal pending*, No. 15-1511 (7th Cir.).

BACKGROUND

I. THE PENDING SEC ADMINISTRATIVE PROCEEDING

As part of its mission to protect investors and maintain fair, orderly, and efficient markets, the SEC investigates possible violations of the federal securities laws and enforces those laws in civil actions and administrative proceedings. Plaintiffs challenge an administrative proceeding initiated against them by the SEC pursuant to the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 *et seq.*, and the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 *et seq.*

Plaintiffs are Timbervest, LLC—an investment advisory firm registered with the SEC—and its officers and owners. Compl. ¶¶ 12-18. On September 24, 2013, the SEC issued an Order Instituting Administrative and Cease-and-Desist Proceedings against Plaintiffs, alleging violations of the anti-fraud provisions of the Investment Advisers Act. *Id.* ¶¶ 22-23. The Commission directed that an ALJ be the hearing officer, and Chief ALJ Brenda P. Murray initially designated herself to preside. *Id.* ¶ 25; *see* 17 C.F.R. § 201.101(a)(5). On December 16, 2013, Chief Judge Murray designated ALJ Cameron Elliot to preside. Compl. ¶ 25.

On August 20, 2014, ALJ Elliot issued an initial decision finding that Timbervest violated the Investment Advisers Act and that the other Plaintiffs aided and abetted Timbervest's violations. *Id.* ¶ 30; Pls.' Mot. for a TRO and PI at 5 (June 12, 2015), ECF No. 3 ("Pls.' Mot."); *see* 17 C.F.R. § 201.360(a)(1) (providing that SEC ALJs can issue only "initial decision[s]"). ALJ Elliot's initial decision proposed the issuance of a cease-and-desist order and disgorgement of approximately $1.9 million, plus prejudgment interest, Compl. ¶ 31, but over the objection of the SEC's Division of Enforcement ("Enforcement"), ALJ Elliot did not include, in his initial decision, association bars against the individual respondents or revocation of Timbervest's adviser's registration.[1] Because ALJ Elliot's initial decision is not final, these sanctions have yet to take effect; only the Commission can issue the final decision of the agency. *See* 17 C.F.R. § 201.360(d). On October 30, 2014, Plaintiffs appealed ALJ Elliot's initial decision to the

[1] AP Brief Supporting Enforcement's Petition for Review at 2 (Oct. 31, 2014) (available at https://www.sec.gov/litigation/apdocuments/ap-3-15519.xml).

Commission. In addition to multiple challenges to the factual findings and legal conclusions in the initial decision, Plaintiffs also argued that SEC ALJs are inferior officers whose tenure protections violate Article II. Compl. ¶ 33; *see* 17 C.F.R. § 201.410. Enforcement cross-appealed, seeking additional remedies.

After the parties' cross-appeals were fully briefed, the Commission ordered supplemental briefing on Plaintiffs' Article II challenge to SEC ALJs' tenure protections.[2] On May 20, 2015, Plaintiffs filed a motion seeking leave to submit additional evidence and to add a new claim, that SEC ALJs are "inferior Officers" who have not been appointed by the "Head[] of [the] Department[]" in violation of the Appointments Clause. U.S. Const., Art. II, § 2, cl. 2. The Commission held oral argument on June 8, 2015, and has ordered supplemental briefs on Plaintiffs' Article II challenges due on July 1, 2015.

The Commission reviews its ALJs' initial decisions *de novo*. 17 C.F.R. §§ 201.411(a), 201.452. The Commission "may affirm, reverse, modify, [or] set aside" an initial decision "in whole or in part" and "may make any findings or conclusions that in its judgment are proper and on the basis of the record." *Id.* § 201.411(a). The Commission may also "remand for further proceedings," *id.*, "remand . . . for the taking of additional evidence," or "hear additional evidence" itself, *id.* § 201.452. Indeed, both Enforcement and Plaintiffs have filed motions with the Commission to supplement the record in the pending cross-appeals.[3] If

[2] AP Order Regarding Supplemental Briefing at 1 (Jan. 20, 2015) (available at https://www.sec.gov/litigation/apdocuments/ap-3-15519.xml).

[3] *See* http://www.sec.gov/litigation/apdocuments/3-15519-event-108.pdf; http://www.sec.gov/litigation/apdocuments/3-15519-event-130.pdf.

a majority of participating Commissioners does not agree to a disposition, the ALJ's "initial decision shall be of no effect, and an order will be issued [by the Commission] in accordance with this result." 17 C.F.R. § 201.411(f).

In similarly worded provisions, the federal securities laws provide for review of final orders of the Commission in the courts of appeals. *E.g.*, 15 U.S.C. §§ 77i(a), 78y(a)(1), 80a-42(a), 80b-13(a). The court of appeals has "exclusive" jurisdiction to affirm, modify, or set aside the Commission's order in whole or in part. *E.g.*, *id.* § 78y(a)(3). The comprehensive review scheme in the federal securities laws also establishes what constitutes the agency record, *id.* § 78y(a)(2); the standard of review of the Commission's factual findings, *id.* § 78y(a)(4); the process for seeking a stay of the Commission order either before the Commission or in the court of appeals, *id.* § 78y(c)(2); and the process for seeking leave from the court of appeals to adduce additional evidence or requesting that the court of appeals remand the matter to the Commission, *id.* § 78y(a)(5).

Rather than await the Commission's final order and petition a court of appeals for review, Plaintiffs filed the instant suit seeking an injunction to prevent the Commission from disseminating or publicizing a final order in their administrative proceeding or, in the alternative, to halt the administrative proceeding; to stay the effect of any relief entered against them in a final decision in the administrative proceeding; and to require the SEC to remove ALJ Elliot's initial decision from the SEC's web site and to prohibit the SEC from disseminating or publicizing that decision. Compl. at 26-27; Pls.' Mot. at 24-25.

II. THE SEC'S ADMINISTRATIVE LAW JUDGES

The SEC has used ALJs since the Commission's early days. *See Charles Hughes & Co. v. SEC*, 139 F.2d 434 (2d Cir. 1943). The SEC's enabling statute provides the SEC discretion to use ALJs, permitting the SEC to delegate any of its functions to an ALJ provided that the agency "retain[s] a discretionary right to review" any action taken pursuant to such delegation. 15 U.S.C. § 78d-1(a), (b). The SEC may appoint as many ALJs as is warranted. *See* 5 U.S.C. § 3105. SEC ALJs are subordinate to the Commission on questions of policy and interpretation of law. *See, e.g.*, *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989).

At the SEC, as throughout the federal government, ALJs are civil service employees in the "competitive service" system. 5 C.F.R. § 930.201(b). The competitive service is the most basic category within the civil service; it includes positions such as corrections officers, human resources specialists, and paralegals, among others. *See* 5 U.S.C. § 2102; 5 C.F.R. § 212.101.

The Civil Service Reform Act of 1978 (the "CSRA"), 5 U.S.C. §§ 1101 *et seq.*, governs federal civil-service employment, including SEC ALJs' employment. *See, e.g.*, *Mahoney v. Donovan*, 721 F.3d 633, 635 (D.C. Cir. 2013). The CSRA regulates SEC ALJs' employment as it does that of other federal employees by, *inter alia*: setting merit systems principles to guide agency personnel management, 5 U.S.C. § 2301; describing the bases on which personnel actions against employees, including ALJs, are prohibited, *id.* § 2302; and specifying the administrative and judicial remedies available in response to such prohibited personnel practices, *id.* §§ 1204, 1212, 1214, 1215, 1221.

The Office of Personnel Management ("OPM"), which oversees federal employment for ALJs and other civil servants, administers a detailed civil service system for selecting ALJs, including conducting examinations for ALJ candidates, *see id*. §§ 1104, 1302; 5 C.F.R. §§ 930.201(d)-(e), 930.203; ranking ALJ applicants for placement on a register of eligible candidates according to their qualifications and numerical ratings, 5 U.S.C. § 3313; 5 C.F.R. § 332.401; and issuing "certificate[s] of eligibles" from which federal agencies—including the SEC—may select individuals to fill ALJ vacancies, 5 U.S.C. §§ 3317, 3318; 5 C.F.R. §§ 332.402, 332.404. OPM oversees each agency's "decisions concerning the appointment, pay, and tenure" of ALJs, *id.* § 930.201(e)(2), and establishes classification and qualification standards for the ALJ positions, *id.* § 930.201(e)(3).

Like other employees, an ALJ who believes that his employing agency has engaged in a prohibited personnel practice can seek redress either through the Office of Special Counsel or the Merit Systems Protection Board ("MSPB"). *See* 5 U.S.C. §§ 1204, 1212, 1214, 1215, 1221. The employing agency, on the other hand, may propose certain specified personnel actions (*i.e.*, removal, suspension, etc.) against an ALJ. *Id.* § 7521; 5 C.F.R. §§ 930.211, 1201.137. The MSPB then determines, after an opportunity for a hearing, whether "good cause" exists to take the proposed personnel action. 5 U.S.C. § 7521(a).

ARGUMENT

I. STANDARD OF REVIEW

A party seeking the drastic remedy of a preliminary injunction must establish "a substantial likelihood of success on the merits," that "irreparable

injury will be suffered unless the injunction issues," that his "threatened injury . . . outweighs whatever damage the proposed injunction may cause the opposing party," and that, "if issued, the injunction would not be adverse to the public interest." *Pine v. City of West Palm Beach*, 762 F.3d 1262, 1268 (11th Cir. 2014) (quotations omitted).

II. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS

A. This Court Lacks Jurisdiction

Plaintiffs cannot show that this Court has jurisdiction. The federal securities laws establish a "statutory scheme of administrative and judicial review," *Elgin*, 132 S. Ct. at 2132, that channels claims like Plaintiffs' through the Commission's administrative process and then directly to an appropriate court of appeals that has "exclusive" jurisdiction. *E.g.*, 15 U.S.C. §§ 80a-42(a), 80b-13(a). This scheme displaces this Court's jurisdiction under 28 U.S.C. § 1331 because it "displays a 'fairly discernible' intent to limit jurisdiction, and because the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212 (1994)). In its Order in *Hill v. SEC*, No. 15-cv-1801 (N.D. Ga. June 8, 2015), this Court held that it had jurisdiction over constitutional challenges to another SEC administrative proceeding. Defendant respectfully submits that this Court's holding in *Hill* was in error, and that there are additional reasons in this case for the Court to decline to upend the on-going agency proceedings.

1. The Federal Securities Laws Establish The Exclusive Remedial Scheme For Challenges To SEC Administrative Proceedings

Plaintiffs do not argue as a general matter that district court jurisdiction exists over challenges to pending SEC administrative proceedings. And for good reason. The securities laws "mandate[]" a "four-step process" whereby

> (1) charges are brought by the SEC's Enforcement Division before an ALJ; (2) the [respondents] have the opportunity to be heard and present evidence challenging the charges; (3) the [respondents] may appeal an adverse ALJ decision to the SEC Commissioners; and (4) if the [respondents] are aggrieved by the resulting final order, [they] may appeal to a federal Court of Appeals.

Jarkesy v. SEC, 48 F. Supp. 3d 32, 37-38 (D.D.C. 2014), *appeal pending*, No. 14-5196 (D.C. Cir.). This process is "virtually identical" to the Mine Act's, *id.* at 37, which the Supreme Court held in *Thunder Basin* provides the only path to challenge the constitutionality of the Mine Administration's actions, *see* 510 U.S. at 205, 207-16. Thus, the Second Circuit and numerous other courts have held that this process establishes "the jurisdictional route that [plaintiffs] must follow" to raise constitutional challenges to SEC enforcement proceedings.[4]

That conclusion is reinforced by statutory provisions that allow respondents in SEC administrative proceedings to obtain district court review of temporary cease-and-desist orders, a form of preliminary relief not relevant here.

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[4] *Altman v. SEC*, 687 F.3d 44, 45-46 (2d Cir. 2012) (per curiam), *aff'g*, 768 F. Supp. 2d 554 (S.D.N.Y. 2011); *see, e.g.*, *Spring Hill v. SEC*, 15-cv-4542 (S.D.N.Y. June 26, 2015); *Bebo v. SEC*, No. 15-c-3, 2015 WL 905349, at *4 (E.D. Wis. Mar. 3, 2015), *appeal pending*, No. 15-1511 (7th Cir.); *Chau v. SEC*, -- F. Supp. 3d --, 2014 WL 6984236, at *6 (S.D.N.Y. 2014), *appeal pending*, No. 15-461 (2d Cir.); *Jarkesy*, 48 F. Supp. 3d at 37-38; *CleanTech Innovations v. NASDAQ*, No. 11-cv-9358, 2012 WL 345902, at *1 (S.D.N.Y. Jan. 31, 2012).

See 15 U.S.C. §§ 80a-9(f)(4); 80b-3(k)(4); *see also* S. Rep. No. 101-337 at 14-15 (1990) (differentiating between district court review of temporary cease-and-desist orders and review of "permanent cease-and-desist order[s]" that "may be appealed to a U.S. Court of Appeals *in the same way as any other SEC order entered under the securities laws*"); H.R. Rep. No. 101-616 at 26 (1990). Only in challenges to such orders does the ordinary administrative and judicial review process "not apply." 15 U.S.C. §§ 80a-9(f)(4)(D); 80b-3(k)(4)(D); *see Elgin*, 132 S. Ct. at 2134 (explaining that an exception to the ordinary review process that permits district court jurisdiction "[i]n only one situation" "demonstrates that Congress knew how to provide alternative forums for judicial review based on the nature of [a plaintiff's] claim").

In *Hill*, the Court observed that the SEC may initiate enforcement actions in district court or in administrative proceedings, slip op. at 11-14, and held that "[t]here can be no 'fairly discernible' Congressional intent to limit jurisdiction away from district courts when the text of the statute provides the district court as a viable forum," *id.* at 13. This reasoning conflates whether the SEC has a choice of forum for initiating enforcement actions with whether a party defending itself in an enforcement action has a similar choice. *Thunder Basin* illustrates the error. The Mine Act "expressly . . . empower[ed] the *Secretary* . . . to coerce payment of civil penalties" by filing actions in district court but offered regulated entities "no corresponding right." 510 U.S. at 209. The Supreme Court inferred from this statutory structure that pre-enforcement claims by regulated entities are subject to the exclusive jurisdiction of the agency and the court of

appeals. *See id.* at 207-16. Thus, courts have cited statutes authorizing district court jurisdiction over actions *filed by an agency* as supporting the conclusion that district courts lack jurisdiction over actions *filed by private parties*. *See, e.g.*, *Nat'l Taxpayers Union v. U.S. Soc. Sec. Admin.*, 376 F.3d 239, 243 (4th Cir. 2004); *Sturm, Ruger & Co., Inc. v. Chao*, 300 F.3d 867, 873 (D.C. Cir. 2002). This Court erred in drawing the opposite inference.

2. Plaintiffs Will Have Meaningful Judicial Review Of Their Claims, Which Are Of The Type Congress Intended To Be Reviewed Within The Statutory Scheme

Plaintiffs argue (at 8) that the Court should not require them to follow the exclusive review scheme because their case allegedly falls within a narrow exception permitting district court jurisdiction where (1) "a finding of preclusion [would] foreclose all meaningful judicial review"; (2) the plaintiff's suit "is wholly collateral to a statute's review provisions"; and (3) the plaintiff's "claims are outside the agency's expertise." *Free Enterprise*, 561 U.S. at 489. Plaintiffs cannot establish any of these factors, let alone all three.

First, the statutory scheme permits meaningful judicial review. Plaintiffs do not dispute that review of their claims is available in the court of appeals if they are aggrieved by the Commission's final order. *See Bebo*, 2015 WL 905349, at *4 (separation of powers challenge to SEC ALJ appointment); *see also, e.g.*, *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (invalidity of hearing officer's appointment may be basis for vacating final order); *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000) (addressing Appointments Clause challenge on review

of final agency order). Under Supreme Court precedent, that is all that is required. *See Elgin*, 132 S. Ct. at 2136-37; *Thunder Basin*, 510 U.S. at 215.

Plaintiffs invoke *Hill* for the proposition that court of appeals review would come too late to be "meaningful." Pls.' Mot. at 11-12. But, as explained below with respect to irreparable harm, the alleged constitutional violation is not irremediable. Rather, the constitutional infirmities alleged by plaintiff can be cured on appeal from the administrative proceeding. *See* Part III *infra*. Even if *Hill* were correct, it is inapplicable on these facts. In *Hill*, the plaintiff argued that without immediate judicial review he would "be[] forced to litigate in an unconstitutional forum." Slip op. at 15. In this case, by contrast, the litigation in the allegedly unconstitutional forum has already ended; all that remains of the administrative process is review of the ALJ's initial decision by the Commission, whose constitutionality Plaintiffs do not question. Although Plaintiffs speculate that they may feel "the impact" of the Commission's order before the court of appeals rules on their claims, Pls.' Mot. at 11, that speculation provides no basis for distorting the statutory scheme because the court of appeals has its own means of preventing such harm. *See* Fed. R. App. P. 18.

In any event, *Hill* misconceives the "meaningful judicial review" standard. *Hill* rests on the premise "that administrative respondents need not wait for actual adjudication of their cases in order to challenge their legality." *Chau*, 2014 WL 6984236, at *12. But courts have consistently "rejected precisely this argument." *Id.* "Where, as here, the 'injury' inflicted on the party seeking review is the burden of going through an agency proceeding, . . . the party must

patiently await the denouement of proceedings within the Article II branch." *USAA Fed. Sav. Bank v. McLaughlin*, 849 F.2d 1505, 1510 (D.C. Cir. 1988); *see also Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 12-13, 22-23 (2000) (allowing circumvention of channeling requirement "simply because [a] party shows that postponement would mean added inconvenience or cost in an isolated, particular case" would undermine the purpose of such a requirement). Significantly, Plaintiffs do not claim to be similarly situated to the plaintiffs in *Free Enterprise*, in which the Supreme Court found that the plaintiffs lacked access to meaningful judicial review because they would have needed either to challenge a "random" rule or induce an enforcement proceeding in order to obtain review of their claim. 561 U.S. at 490-91.

In addition, despite having asked the Commission to consider their Article II claims, Plaintiffs now argue that they cannot "meaningfully litigate these constitutional claims in that forum" because it would be "difficult" for the Commissioners to consider "in a neutral and objective way" the validity of the SEC ALJ's appointment. Pls.' Mot. at 11. That argument conflicts with Supreme Court precedent establishing that parties may not wait until they are in court to raise a "defect in the . . . appointment" of the official who issued the agency's initial decision but must first raise the issue with the agency. *L.A. Tucker*, 344 U.S. at 38; *see also In re DBC*, 545 F.3d 1373, 1377-81 (Fed. Cir. 2008) (applying *L.A.*

Tucker to Appointments Clause claim); *Altman*, 768 F. Supp. 2d at 562 n.8 (claim of bias "irrelevant to the Court's analysis of the jurisdictional issue").[5]

Second, Plaintiffs' suit is not "wholly collateral" to the statutory review scheme; it is an effort to obtain premature review of an adverse initial decision and to short-circuit the appeals process. Plaintiffs' characterization of their claims as "'facial,' rather than 'as-applied' challenges," Pls.' Mot. at 9, does not help, because the Supreme Court has explicitly rejected the argument that "facial constitutional challenges" should be "carve[d] out for district court adjudication" when Congress has created an exclusive review scheme. *Elgin*, 132 S. Ct. at 2135. And the D.C. Circuit has held that plaintiffs seeking to raise "a facial constitutional challenge" under Article II "must exhaust their *nonconstitutional* defenses in the ongoing administrative proceeding before bringing their *constitutional* challenge to the agency's authority in federal court." *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 732 (D.C. Cir. 1987). Plaintiffs' effort to distinguish between "challenging an agency decision" and challenging its "ability to *make* that decision," Pls.' Mot. at 9, also does not withstand scrutiny because the facts underlying their claim "relat[e] to the procedures . . . of the [agency's enforcement] action." *LabMD, Inc. v. FTC*, 776 F.3d 1275, 1280 (11th Cir. 2015); *see*

[5] Plaintiff's reliance (at 9 n.2) on *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991), is also misplaced. *McNary* involved "the practical equivalent of a total denial of judicial review," 498 U.S. 479, 497 (1991), not—as here—the postponement of review pending an administrative proceeding. *See Elgin*, 132 S. Ct. at 2139 n.11 (distinguishing *McNary*); *Bebo*, 2015 WL 905349, at *3 (same).

also id. (requiring administrative exhaustion even if "later developments in the administrative proceeding . . . have no bearing" on the constitutional claim).[6]

Third, the Commission can bring its expertise to bear on Plaintiffs' claims, as can the court of appeals. The Commission itself may entertain constitutional claims and is presently considering Plaintiffs' Article II claims in the very administrative appeal that Plaintiffs now seek to enjoin.[7] Moreover, as the Supreme Court recognized in *Elgin*, there are "many threshold questions that may accompany a constitutional claim and to which [an agency] can apply its expertise." 132 S. Ct. at 2140. Here, Plaintiffs' own brief (at 13-21) demonstrates that the answer to the question whether SEC ALJs are inferior officers turns in part on antecedent questions about ALJs' powers under the securities laws and

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[6] Plaintiffs also cite *Chau v. SEC* for the proposition that "'courts are more likely to sustain pre-enforcement jurisdiction over broad facial and systematic challenges.'" Pls.' Mot. at 8 (quoting 2014 WL 6984236, at *6). But the Supreme Court rejected the premise of that argument in *Thunder Basin*, noting that the plaintiff's "claims [we]re 'pre-enforcement' only because the company sued before a citation was issued," and holding that a plaintiff may not "evade the statutory-review process by enjoining the Secretary from commencing enforcement proceedings," 510 U.S. at 216, and Plaintiffs, who challenge an adverse initial decision made in the course of an ongoing enforcement proceeding, can hardly be said to raise a "pre-enforcement" claim in any event.

[7] *See* Order Requesting Additional Submissions, *In the Matter of Timbervest, LLC, et al.* (SEC May 27, 2015), http://www.sec.gov/litigation/opinions/2015/ia-4096.pdf. Plaintiffs cite (at 10-11) a decision of an SEC ALJ in another proceeding as support for their argument that their Article II claims fall outside the Commission's expertise, but Plaintiffs fail to note that the SEC ALJ *did* address a claim identical to Plaintiffs', despite his reservations about his authority to do so. *See In the Matter of Charles L. Hill, Jr.* (SEC ALJ May 14, 2015) ("*Hill* AP Order"), http://www.sec.gov/alj/aljorders/2015/ap-2675.pdf.

regulations, which the SEC is expert at interpreting. *See Thunder Basin*, 510 U.S. at 214-15; *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975). The SEC's interpretation "could alleviate constitutional concerns" about SEC ALJs' status, or the Commission could resolve the proceeding in Plaintiffs' favor, thus avoiding the constitutional issues altogether. *See Elgin*, 132 S. Ct. at 2140; *see also FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 n.11 (1980) ("[T]he possibility that [the] challenge may be mooted in adjudication warrants the requirement that [the plaintiff] pursue adjudication, not shortcut it.").

Finally, regardless of the Commission's expertise, Plaintiffs' claims can be heard in the court of appeals, which is fully competent to resolve them. *See Elgin*, 132 S. Ct. at 2136-37; *Thunder Basin*, 510 U.S. at 215.

3. The Court Also Lacks Jurisdiction In This Case Because The SEC ALJ Has Already Issued An Initial Decision

Plaintiffs' decision to wait to file this action until after the SEC ALJ issued an initial decision finding them in violation of the securities laws distinguishes their case from *Hill* and provides an additional reason not to deviate from the statutory review scheme. Plaintiffs attack the SEC ALJ's initial decision as "invalid." Pls.' Mot. at 3. Initial decisions are not subject to judicial review, however, but must instead be appealed to the Commission. *See* 17 C.F.R. § 201.410(e) ("a petition to the Commission for review of an initial decision is a prerequisite to the seeking of judicial review"). Plaintiffs have filed such an appeal, and the Commission has already heard argument on Plaintiffs' claims. "Judicial intervention into the agency process" at this point would only "den[y] the agency an opportunity to correct its own [alleged] mistakes," *Standard Oil*,

449 U.S. at 242, or to otherwise obviate the constitutional issues altogether. And because Plaintiffs' pending administrative appeal raises nonconstitutional arguments in addition to the Article II arguments they raise here, entertaining Plaintiffs' suit would "lead[] to piecemeal review [of the initial decision] which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary." *Id.*

B. Plaintiffs Are Not Likely To Succeed On Their Article II Claims

Plaintiffs allege (at 12-21) that SEC ALJs have not been properly appointed under the Appointments Clause and that their tenure protections violate the Constitution's separation of powers. The Appointments Clause, U.S. Const., art. II, § 2, cl. 2., governs the appointments of principal and inferior officers, but does not speak to government employees falling below the officer threshold. *See Buckley v. Valeo*, 424 U.S. 1, 126 & n.162 (1976). Similarly, while the Constitution's separation of powers limits Congress's ability to restrict the President's authority to remove constitutional officers, *e.g.*, *Free Enterprise*, 561 U.S. at 492, Congress's ability to provide tenure protections for employees is not so restricted. Thus, Plaintiffs can succeed on their Article II claims only if SEC ALJs are officers. But SEC ALJs are mere employees, and because their tenure protections are constitutional in any event, this Court should deny Plaintiffs' motion for a preliminary injunction, even if it determines that it has jurisdiction.

1. SEC ALJs Are Employees, Not Inferior Officers

The Supreme Court has said that whether government personnel are officers or employees is determined by "the manner in which Congress has

specifically provided for the creation of the . . . positions, their duties and appointment thereto." *Burnap v. United States*, 252 U.S. 512, 516 (1920); *see Freytag v. Comm'r*, 501 U.S. 868, 881 (1991). The Court has also held that government personnel qualify as officers only if they "exercis[e] significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 125-26. Although few cases address the line between officers and employees, the Court has emphasized that the vast majority of government personnel are the latter, or "lesser functionaries subordinate to officers of the United States." *Id.* at 126 & n.162. As discussed below, the SEC's discretion whether and how to use ALJs, the ALJs' role within the SEC's decision-making scheme, and Congress's creation and placement of the ALJ position within the competitive service system all reflect that SEC ALJs are "mere aids" to the SEC, *Samuels, Kramer & Co. v. Comm'r*, 930 F.2d 975, 985-86 (2d Cir. 1991), and that Congress intended ALJs to be employees—a judgment that is entitled to significant deference. Indeed, the only court of appeals to have addressed the status of any agency's ALJs concluded that they are employees. *Landry*, 204 F.3d at 1132-34.

a. SEC ALJs Do Not Exercise "Significant Authority" of the United States

A review of the SEC's regulatory scheme shows that SEC ALJs are "lesser functionaries subordinate to officers of the United States." *Buckley*, 424 U.S. at 126 n.162. As an initial matter, SEC ALJs' powers are contingent on Commission action. While Congress created the ALJ position and made ALJs available for agencies' use, it did not impose ALJs on the Executive Branch. Rather, agencies such as the SEC decide whether to use ALJs and what functions to delegate to

them. *See* 5 U.S.C. § 3105; 15 U.S.C. § 78d-1. Consistent with the APA, which provides that a "presiding employee[]" for a hearing on the record need not be an ALJ, see 5 U.S.C. § 556(b), the Commission need not use ALJs to conduct its administrative proceedings. An SEC "[h]earing officer" can be an ALJ, "a panel of Commissioners constituting less than a quorum of the Commission, an individual Commissioner, or any other person duly authorized to preside at a hearing." *See* 17 C.F.R. § 201.101(a)(5). In instituting an administrative proceeding, the Commission thus also decides whether an ALJ is to be the hearing officer. *Id.* § 201.110.

The Commission has plenary power to review matters before its ALJs, *see* 15 U.S.C. § 78d-1, and is not bound by anything an SEC ALJ decides. As the Commission has stated, the Commission "retains plenary authority over the course of its administrative proceedings and the rulings of its law judges—both before and after the issuance of the initial decision and irrespective of whether any party has sought relief." *In the Matter of Michael Lee Mendenhall*, 2015 WL 1247374, at *1 (SEC Mar. 19, 2015). The Commission may, for example, order interlocutory review *sua sponte* of any matter that is still pending before an ALJ. 17 C.F.R. § 201.400(a).

An ALJ prepares only an "initial decision" subject to the Commission's *de novo* review. *Id*. § 201.360(a)(1).[8] In enacting the APA, Congress envisioned an

[8] In conducting its *de novo* review, the Commission "may affirm, reverse, modify, [or] set aside" the initial decision "in whole or in part" and "may make any findings or conclusions that in its judgment are proper and on the basis of the record." 17 C.F.R. § 201.411(a). The Commission may also "remand for further

ALJ's "initial decision" as "advisory in nature"; it would merely "sharpen[] . . . the issues for subsequent proceedings." Attorney General's Manual on the Administrative Procedure Act at 83-84 (1947) ("AG Manual"). Thus, the APA provides that in reviewing an ALJ's initial decision the agency "retains 'all the powers which it would have in making the initial decision.'" *Nash*, 869 F.2d at 680 (quoting 5 U.S.C. § 557(b)). That is, an "agency is in no way bound by the [initial] decision," AG Manual at 83; *see also JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995); *Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986).

Plaintiffs' argument (at 17-21) that SEC ALJ decisions can become final without further review by the Commission is simply wrong. *See* 17 C.F.R. §§ 201.360(d)(2), 201.411(c). SEC ALJs have themselves recognized that they lack the authority to issue final decisions. *E.g.*, *Hill* AP Order at 7 n.8 ("A Commission [ALJ] is powerless to cause his or her initial decision to become a final decision."). And in *Hill*, upon which Plaintiffs otherwise rely, this Court recognized that "SEC ALJs do not have final order authority." Slip op. at 38 n.10.

The above discussion demonstrates that all final agency determinations are those of the Commission, not of its ALJs. Under *Landry*, therefore, SEC ALJs are not inferior officers. 204 F.3d at 1133-34. In *Landry*, the D.C. Circuit found that the ALJs of the Federal Deposit Insurance Corporation are not constitutional officers because they issue only recommended decisions and "can never render the

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proceedings," *id.*, "remand . . . for the taking of additional evidence," or "hear additional evidence" itself. *Id.* § 201.452.

decision of the FDIC"; "final decisions are issued only by the FDIC Board of Directors." *Id.* at 1133; *see id.* at 1132 (FDIC ALJs possess "purely recommendatory power, i.e., one followed . . . by de novo review"); *see also Free Enterprise*, 561 U.S. at 507 n.10 (unlike PCAOB, many ALJs "possess purely recommendatory powers" or "perform adjudicative rather than enforcement or policymaking functions").

Freytag is not to the contrary. There, the Supreme Court held that special trial judges of the Tax Court are inferior officers. *Freytag*, 501 U.S. at 880-81. As the D.C. Circuit found in *Landry*, special trial judges are distinguishable from FDIC ALJs because they are able to issue final decisions in certain categories of cases—a fact that "was critical to the [*Freytag*] Court's decision" that they were inferior officers. *Landry*, 204 F.3d at 1134; see *Freytag*, 501 U.S. at 882 (noting that IRS Commissioner had conceded that special trial judges "act as inferior officers"). Additionally, special trial judges have significant discretion in cases over which they do not have final decision-making authority, including the authority to make factual findings to which the Tax Court is required to defer. *Landry*, 204 F.3d at 1133. In contrast, neither the FDIC Board nor the Commission defers to ALJs' factual findings. *Id.*; 17 C.F.R. 201.411(a).

Plaintiffs' motion relies, in part, on this Court's decision in *Hill,* where, despite finding that SEC ALJs have no final-decision making authority, the Court concluded that SEC ALJs' "powers" are "nearly identical" to those of the Tax Court's special trial judges, slip op. at 40. The Court noted that both "take testimony, conduct trial, rule on the admissibility of evidence, and can issue

sanctions, up to and including excluding people (including attorneys) from hearings and entering default." *Id.* at 38. The Court, however, ignored an important, fundamental distinction: in performing these tasks, a special trial judge is "exercis[ing] a portion of the judicial power of the United States," *Freytag*, 501 U.S. at 891, whereas an ALJ performs these tasks merely in aid of its employing agency's exercise of executive power. In other words, in assessing SEC ALJs' authority, it is inadequate to simply list the tasks SEC ALJs perform. Those duties must be viewed in the context of the Commission's plenary authority over the entire administrative process. That is, as discussed before: the Commission is not bound by any decision an SEC ALJ makes; the SEC ALJ's role within the agency's decision-making scheme is merely to "sharpen[] . . . the issues for subsequent proceedings." AG Manual at 84. Moreover, ALJs are also "subordinate" to their employing agencies "in matters of policy and interpretation of law." *Nash*, 869 F.2d at 680 (collecting cases). Thus, while a special trial judge is an officer because he "exercises a portion of the judicial power of the United States," *Freytag*, 501 U.S. at 891, an ALJ is merely an employee aiding her employing agency in the exercise of its executive power.

SEC ALJs' power pales in comparison to that of special trial judges because SEC ALJs do not possess the judicial powers associated with judges who are inferior officers. Special trial judges, like federal district court judges, have the powers "to punish contempts by fines or imprisonments," "to grant certain injunctive relief," and "to order the Secretary of the Treasury to refund an overpayment determined by [the special trial judge]." *Freytag*, 501 U.S. at 891. In

contrast, SEC ALJs have no power to grant any injunctive relief. Nor does the entry of default or imposition of sanctions by an SEC ALJ have any independent force or effect absent further action by the Commission. Further, SEC ALJs' power to punish contemptuous conduct is limited and does not include any ability to impose fines or imprisonment. *See* 17 C.F.R. § 201.180 ("Sanctions") (hearing officer may exclude a person from a hearing or suspend that person from representing others in the proceeding). And while SEC ALJs, like special trial judges, may issue subpoenas, the Commission itself needs to seek an order from a federal district court to compel compliance. *See* 15 U.S.C. § 78u(c). In sum, the substantive authority SEC ALJs exercise is significantly less weighty than that exercised by special trial judges.

b. The History of the ALJ System and the Statutory Provisions Regarding ALJs' Appointments and Placement Within the Competitive Service Confirm that Congress Intended ALJs to be Employees

To the extent there is any doubt that SEC ALJs are mere employees, this Court should defer to Congress's long-standing judgment that ALJs are employees. *See Weiss v. United States*, 510 U.S. 163, 194 (1994) (Souter, J., concurring) ("in the presence of doubt" whether military judges are principal or inferior officers, "deference to the political branches' judgment is appropriate"). The Constitution assigns to Congress the authority to determine, in the first instance, whether a position it creates is that of an officer or of an employee, *see* U.S. Const. art. II, § 2, cl. 2, and "[t]hat constitutional assignment to Congress counsels judicial deference," *In re Sealed Case*, 838 F.2d 476, 532 (D.C. Cir.) (R.B.

Ginsburg, J., dissenting), *rev'd sub nom. Morrison v. Olson*, 487 U.S. 654 (1988). Its judgment "is owed a large measure of respect—deference of the kind courts accord to myriad constitutional judgments" made by the Legislative Branch. *Id.*

Congress is presumed to know the requirements of the Appointments Clause. *E.g., Cannon v. Univ. of Chicago*, 441 U.S. 677, 697 (1979). In fact, when Congress created the modern ALJ in 1946, the method of appointment generally determined the status of the position. At that time, the Supreme Court had long characterized appointments pursuant to the methods prescribed in the Appointments Clause as a "well established definition of what it is that constitutes [an officer of the United States]." *United States v. Mouat*, 124 U.S. 303, 307 (1888). Yet Congress specified in the APA that it is the "agency"—not the President, the department head, or the Judiciary—that appoints ALJs. Pub. L. No. 79-404, 60 Stat. 237, 244 (1946); *see* 5 U.S.C. § 3105. Except in rare situations for particular agencies, in the seven decades since creating the position of ALJ, Congress has not changed their method of appointment.

Congress's judgment that ALJs are not officers is also reflected in Congress's having placed ALJs—along with tens of thousands of other federal employees— in the competitive service, which is the most basic category within the civil service system. *See Myers v. United States*, 272 U.S. 52, 173 (1926); 5 U.S.C. § 2102. The Supreme Court's examination of the Civil Service Commission's regulations of hearing examiners—the precursor of ALJs—was also consistent with the view that ALJs are not constitutional officers. *See Ramspeck v. Fed. Trial Exam'rs Conference*, 345 U.S. 128, 130 (1953).

Hearing examiners, like other government employees of that period, were originally subject to the Classification Act of 1923 and dependent on their agency's ratings for compensation and promotion. *Id.* In 1946, as a result of complaints about hearing examiners' perceived partiality, Congress enacted the APA and "separat[ed] adjudicatory functions and personnel from investigative and prosecution personnel in the agencies," by placing hearing examiners under the jurisdiction of the Civil Service Commission in a merit-based civil service system for federal employees, and by vesting the Civil Service Commission with control of the ALJs' compensation, promotion, and tenure. *See id*. at 131. Section 11 of the APA specified, for example, that hearing examiners were removable by the employing agency only for "good cause" established and determined by the Civil Service Commission. 60 Stat. at 244.

In enacting these measures, Congress gave no indication that it meant to elevate ALJs' status above that of the investigative and prosecution personnel of the agency. To the contrary, Congress explicitly "retained the examiners as classified Civil Service employees." *Ramspeck*, 345 U.S. at 133. Thus, on the question of whether hearing examiners' tenure protection precluded an agency from removing them due to a reduction in force, the Supreme Court said that "Congress intended to provide tenure for the examiners in the tradition of the Civil Service Commission," namely that "[t]hey were not to be paid, promoted, or discharged at the whim or caprice of the agency or for political reasons." *Id.* at 142. This meant that hearing examiners could be subject to the agency's reduction in force, like other employees. *Id.* at 140-41; *see also* 5 U.S.C. § 7521(b); 5

C.F.R. § 930.210 (ALJs are subject to reduction in force). The Court also found that the Civil Service Commission could set various salary grades to reflect the competence and experience of the examiners in each grade—again, like others in the civil service. *Ramspeck*, 345 U.S. at 136.

Today, OPM is responsible for promulgating rules relating to ALJs and for administering the process by which ALJs are screened for positions across federal agencies. An agency may appoint an individual as an ALJ only with prior approval of OPM, except when it makes its selection from OPM's list of eligibles. 5 C.F.R. § 930.204. The MSPB has jurisdiction over major personnel actions against ALJs. *See* 5 U.S.C. § 7521; 5 C.F.R. §§ 1201.137 *et seq.* The MSPB process is part of the CSRA's comprehensive remedial scheme for federal personnel disputes. *Gray v. Office of Pers. Mgmt.*, 771 F.2d 1504, 1510 (D.C. Cir. 1985) (refusing "to confer special status on ALJs beyond that expressly provided by Congress"). Congress provided no special remedial routes for ALJs to challenge most personnel disputes, even when the ALJ alleges interference with his decisional independence. *See, e.g., Mahoney*, 721 F.3d at 636-37; *Brennan v. HHS*, 787 F.2d 1559, 1562-63 (Fed. Cir. 1986). Congress required that an ALJ's removal, suspension, reductions in grade or pay, and furlough of certain length be based on "good cause" established and determined by the MSPB, 5 U.S.C. § 7521, the same adjudicative body that handles employment disputes for other employees. In contrast, employees who occupy confidential, policy-determining, or policy-making positions in the "excepted service" may be removed without cause. 5 U.S.C. § 7511(b)(2); *see also id.* § 2302(a)(2)(B)(i).

In sum, SEC ALJs are not constitutional officers. And, at a minimum, Congress views them as standing on a different constitutional footing than inferior officers, who "determine[] the policy and enforce[] the laws of the United States." *Free Enterprise*, 561 U.S. at 484; *see id.* at 506-07 (noting that "[s]enior or policymaking positions in government may be excepted from the competitive service to ensure Presidential control," and emphasizing that "nothing in [the Court's] opinion, therefore, should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies").

2. Even If SEC ALJs Are Officers, There Is No Separation of Powers Violation

Even if SEC ALJs are constitutional officers, their tenure protections do not violate the separation of powers. The Constitution permits Congress to place restrictions on the removal of inferior officers so long as they do not unduly interfere with the President's exercise of the Executive power. *See, e.g.*, *Myers*, 272 U.S. at 161; *United States v. Perkins*, 116 U.S. 483, 485 (1886). Plaintiffs nonetheless argue that SEC ALJs' tenure protections deprive the President of the ability to execute the laws. Pls.' Mot. at 13-14. Plaintiffs rely on *Free Enterprise*. 561 U.S. at 485, 504-08. But *Free Enterprise* did not announce a blanket rule that a removal framework is *per se* unconstitutional if more than one layer of tenure protection separates the President from an inferior officer. *See id.* at 506; *Duka*, 2015 WL 1943245, at *8. Indeed, the *Free Enterprise* Court explicitly excluded ALJs from its holding. 561 U.S. at 507 n.10. And as the *Duka* court held in rejecting an identical

Article II challenge to SEC ALJs, 2015 WL 1943245, at *8-10, the President retains adequate control here.[9]

First, the constitutionality of limits on the President's removal power "depend[s] upon the character of the office" at issue, *Humphrey's Executor v. United States*, 295 U.S. 602, 631 (1935); here, the adjudicative functions that the Commission has assigned to SEC ALJs are limited in scope and fall outside core executive authority. They involve the application of the law to a discrete set of facts in a particular case. Unlike the PCAOB in *Free Enterprise*, the ALJ here will not promulgate standards applicable to an entire sector of the economy, *cf.* 561 U.S. at 508, or make policy-laden decisions about enforcement priorities, *cf. id.* at 484. Rather, the SEC ALJ will issue an initial decision, subject to review by the Commission, about whether Plaintiffs violated the securities laws. *See Free Enterpri*se, 561 U.S. at 507 n.10.

Second, the Supreme Court's "removal cases [are] designed . . . to ensure that Congress does not interfere with the President's exercise of the 'executive power,'" *Morrison*, 487 U.S. at 689-90 (footnote omitted), but there has been no encroachment by Congress here. Congress has not imposed ALJs on the Executive Branch. Rather, it is the Commission that has elected to hire ALJs, and it is the Commission that has empowered ALJs to carry out certain limited

[9] Though this Court did not decide the issue in *Hill*, it expressed "serious doubts" that ALJ's tenure protections violate Article II, "as ALJs likely occupy quasijudicial or adjudicatory positions, and thus [their] two-layer protections likely do not interfere with the President's ability to perform his duties." *S*lip op. at 42 n.12 (quotation omitted).

functions – and the Commission can disempower them. That Congress has permitted executive agencies to use, or not to use, ALJs as the agencies see fit is not an encroachment on executive authority.

Third, because the Commission retains ultimate authority over administrative proceedings, the Commission exercises sufficient control over SEC ALJs regardless of the limitations placed upon their removal. SEC ALJs do not choose the cases that they adjudicate; the Commission decides whether a matter will initially be heard before an ALJ. And, as already discussed, the Commission has plenary authority over its ALJs. In *Free Enterprise*, by contrast, the Supreme Court concluded that the SEC lacked such power over the PCAOB's activities, certain of which were for all practical purposes entirely outside of the SEC's control. 561 U.S. at 504-05. Moreover, the tenure protections applicable to SEC ALJs are less robust than those that were applicable to the PCAOB. ALJs enjoy ordinary "good cause" tenure protection, 5 U.S.C. § 7521, whereas the standard for removing a member of the PCAOB was "unusually high" and thus more threatening to the President's authority. *Free Enterprise*, 561 U.S. at 502-03.

Finally, the Executive Branch's use of tenure-protected ALJs for nearly seventy years establishes a gloss on the Constitution that supports the current removal framework. *See Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981). Unlike the PCAOB, which was only a few years old when first challenged, SEC ALJs have operated under a removal framework similar to that which currently applies for almost seven decades. "[A] systematic, unbroken, executive practice,

long pursued . . . may be treated as a gloss on Executive Power vested in the President," *id.* at 686 (quotation omitted).

III. PLAINTIFFS WILL NOT BE IRREPARABLY HARMED ABSENT AN INJUNCTION

The source of Plaintiffs' alleged irreparable harm is the administrative hearing before the ALJ that has already taken place. *See* Pls. Mot. at 21. Nothing can be done to prevent that hearing. The question, then, is whether entering an injunction now would serve a remedial function that cannot be served by any injunction that the Court could enter at final judgment. *See United States v. Lambert*, 695 F.2d 536, 538 (11th Cir. 1983) (upholding denial of a preliminary injunction where a permanent injunction could provide relief). The answer to that question is "no."

Plaintiffs suggest otherwise by arguing that "a 'presumption of irreparable injury . . . flows from a violation of constitutional rights.'" Pls.' Mot. at 21 (quoting *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996)). But Plaintiffs' argument fails on its own terms. If Plaintiffs were right about both the merits (*i.e.*, that the hearing before the ALJ violated their constitutional rights) and the presumption of irreparable harm, then their motion should be denied because a preliminary injunction would serve no useful purpose. Courts may issue injunctions only if they will remedy ongoing or future harm, *Gomez v. Dade County Federal Credit Union*, 2015 WL 2082213, *3 (11th Cir. 2015), but, by definition, an irreparable harm already suffered would be not be redressable. Indeed, this Court's reasoning in *Hill* confirms that Plaintiffs' own argument dooms their request for an injunction, as the Court (relying on similar premises) stated, "[i]f the

administrative proceeding is not enjoined, Plaintiff's requested relief here would also become moot as the Court of Appeals would not be able to enjoin a proceeding which has already occurred." *Hill*, slip op. at 42-43.

In fact, however, both premises of Plaintiffs' argument are flawed. First, there is no constitutional violation here. Second, even if Plaintiffs' constitutional rights have been violated, there is no irreparable harm. The Eleventh Circuit has rejected the proposition that a "violation of constitutional rights always constitutes irreparable harm." *Siegel v. LePore*, 234 F. 3d 1163, 1177-78 (11th Cir. 2000). It has recognized *per se* harm only in a narrow category of constitutional cases (such as those involving certain First Amendment claims), which does not include cases involving Appointments Clause claims or claims related to the President's removal authority. *See id.* And there is no reason to extend the *per se* harm presumption to encompass Plaintiffs' claims, which assert the right to an administrative proceeding whose initial stage is presided over by (in their view) a constitutionally sound decision maker. Indeed, courts have routinely reasoned that analogous constitutional violations do not cause irreparable harm. *See, e.g.*, *In re al-Nashiri*, No. 14-1203, 2015 WL 3851966, at *7 (D.C. Cir. June 23, 2015) (separation-of-powers challenge to adjudicator does not cause irreparable harm); *MedImmune, Inc. v. Genentech, Inc.*, No. 03-cv-2567, 2008 WL 616250, at *3 (C.D. Cal. March 6, 2008) (Seventh Amendment violation not irreparable); *In re Sandahl*, 980 F.2d 1118, 1120 (7th Cir. 1992) (same).[10]

[10] This structure might impose additional litigation costs, but even unrecoverable litigation costs cannot be the basis of a finding of irreparable harm. *Standard Oil*, 449 U.S. at 244.

In *Hill*, this Court concluded that the plaintiff had established irreparable harm because "if the SEC is not enjoined, Plaintiff will be subject to an unconstitutional administrative proceeding, and he would not be able to recover monetary damages for this harm because the SEC has sovereign immunity." Slip op. at 42. The SEC respectfully disagrees because, as explained above, there is no constitutional violation and, in any case, the alleged violations are not of the sort that constitute *per se* harm. In addition, the unavailability of monetary damages is not important because a permanent injunction would offer plaintiffs the full relief to which they might be entitled.

Plaintiffs also identify two fact-based harms, namely, business losses and reputational harm. Pls.' Mot. at 22-23. But Plaintiffs offer no evidence to establish these harms (*i.e.*, they have attached no declarations attesting to such harms), and naked factual assertions do not suffice to establish irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 88-89 (1974); 11A C. Wright & A. Miller, Fed. Practice & Proc. § 2949 (3d ed. 2014). Moreover, binding circuit precedent rejects the argument that "bad publicity" stemming from agency enforcement proceedings justifies judicial intervention. *Imperial Carpet Mills, Inc. v. CPSC*, 634 F.2d 871, 874 (5th Cir. 1981). And to the extent Plaintiffs' arguments hinge on an adverse ruling from the Commission, the alleged harm is too speculative to support the issuance of a preliminary injunction. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (holding that plaintiffs have the obligation "to demonstrate that irreparable injury is *likely* in the absence of an injunction").

Finally, Plaintiffs' motion must be denied because Plaintiffs' delay in seeking relief "is suggestive of a lack of irreparable harm." *Calhoun v. Lillenas Publ'g*, 298 F.3d 1228, 1235 n.1 (11th Cir. 2002) (Birch, J., specially concurring) (collecting cases). Here, the SEC initiated administrative proceedings against Plaintiffs in September 2013, and Plaintiffs raised the first of their two Article II challenges to SEC ALJs before the Commission in October 2014. Yet Plaintiffs waited until June 2015 to file the present action and seek emergency relief from this Court. This delay alone demonstrates that Plaintiffs have not met their burden to establish irreparable harm, for Plaintiffs' "failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995).

IV. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST ARE IN THE GOVERNMENT'S FAVOR

Both the public interest and balance of equities support denying Plaintiffs' motion. Entering the preliminary injunction sought by plaintiffs would undermine Congress's decision in the Dodd-Frank Act to expand the SEC's authority to conduct administrative proceedings. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (quotation marks omitted)). Congress has recognized the importance of "enabl[ing] the SEC to move quickly in administrative proceedings, particularly in those situations where investor funds are at risk." S. Rep. 101-337 (1990), *reprinted in* 1990 WL 263550 (Leg. Hist.). Here, the

Commission has already invested a considerable amount of resources to seek to enforce the securities laws in the administrative process. Thus, the injunction sought would allow the collateral proceeding in this Court to interfere with the Commission's significant enforcement efforts and result in the type of delay that Congress has sought to avoid by empowering the SEC to use administrative proceedings in a wider variety of cases. Moreover, Congress also made a determination that the public interest would be served by allowing the SEC to pursue a process in which legal issues—including constitutional issues—would be resolved on direct review by the court of appeals, and not by a district court.

Plaintiffs argue (at 24) that "it is indubitably in the public interest for SEC enforcement proceedings to comport with the Constitution," but as demonstrated above, Plaintiffs have not established a constitutional violation and, in any event, such arguments may, pursuant to the federal securities laws' exclusive remedial scheme, be brought in the court of appeals if necessary.

CONCLUSION

Defendant respectfully requests that the Court deny Plaintiffs' motion.

Dated: June 29, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Local Rule 7.1(D), that the foregoing has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1(C).

/s/ Jean Lin
JEAN LIN

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2015, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Jean Lin
JEAN LIN