No. 15-997

IN THE

Supreme Court of the United States

LAURIE A. BEBO,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR MARK CUBAN AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Mark Cuban is a successful businessman and investor who defeated an attempt by the U.S. Securities and Exchange Commission (the "SEC" or "Commission") to sanction him as an "insider trader" based on an incorrect legal theory and defective facts. As a first-hand witness to and victim of SEC overreach, Mr. Cuban has an interest in supporting Laurie A. Bebo's petition for writ of certiorari, and, in particular, demonstrating that the prohibitive financial and personal burdens of protracted litigation with the SEC, as a practical matter, effectively deny to most litigants "meaningful judicial review" of jurisdictional and constitutional challenges to SEC administrative proceedings. Where, as here, the Circuit Court below has conceded that the issues at hand are (1) wholly collateral to the subject matter of the relevant administrative proceeding and (2) outside the scope of agency expertise, common sense and basic fairness militate against forcing Ms. Bebo to endure the costs of litigating collateral issues in an administrative proceeding that is ill equipped to decide them. Judicial review of collateral issues is not meaningful if it only comes at an exorbitant personal and financial price.

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1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.2(a), both parties received timely notice of the intent to file this brief and they have consented to the filing of this brief.

Mark Cuban was lucky enough to have the resources to fight the SEC's defective action against him and was afforded the procedural, legal, and judicial protections of federal court that empowered him to defeat the SEC. Nevertheless, the pressure to settle was enormous—the SEC offered to settle his case for a fraction of the amount that he spent to clear his name. Many litigants in his position would have been unable to withstand that pressure and would have capitulated. For a litigant like Ms. Bebo, forced to endure the very process that she challenges, the pressure to settle is magnified exponentially. In other words, as a practical matter, she will not have the benefit of meaningful review of her constitutional objections to enduring a defective process if she can only be heard in federal court after the process has been endured. Mr. Cuban is uniquely positioned to explain that the review posited by the Seventh Circuit is far from meaningful.

The SEC is well aware that most litigants do not have the resources or ability to defend a principle and would be forced to capitulate rather than endure the years of litigation and the extreme resource drain necessary to obtain a fair federal court review of an administrative proceeding. As the Director of the SEC's Division of Enforcement admitted, "there have been a number of cases in recent months where we have threatened administrative proceedings, it was something we told the other side we were going to do and they settled." *See* Brian Mahoney, *SEC Could Bring More Insider Trading Cases In-House*, Law360, June 11, 2015, 6:53 PM.[2] In other words, the SEC is aware that experienced defense counsel perceive

2. http://www.law360.com/articles/547183/sec-could-bring-more-insider-trading-cases-in-house.

the SEC's in-house proceedings to be less fair, and the SEC uses this fact to reduce the number of its cases that are tested in the crucible of federal court, even if only on appeal. As a practical matter, therefore, while federal court litigation against the SEC is not for the faint of heart (or the resource-constrained), if the price of admission to federal court on jurisdictional and constitutional issues is enduring a multi-year slog through the SEC's in-house administrative proceeding and Commission review in every case, the prospect of obtaining any judicial review of many important foundational issues, let alone meaningful review, is vanishingly small. The Seventh Circuit's decision exacts just such a price.

Given the serious constitutional and statutory defects that litigants have identified in the SEC's administrative process, one might have thought that the SEC would have sought to promote clarity in the law by pressing for an early and definitive legal ruling on the important foundational issues raised by Ms. Bebo and others. Instead, the SEC has fought all efforts to present the merits of these disputes to federal courts and has sought to funnel them into its own in-house process. This too shows that the SEC believes that it has a practical advantage in funneling even challenges to the limits of its constitutional authority through its own administrative process. In fact, as discussed below, the SEC has made clear its intention to argue in any direct appeal of a final SEC order that any constitutional defect in Administrative Law Judge ("ALJ") appointments—one of the issues raised by Ms. Bebo in her collateral challenge—is harmless error because the Commission reviews ALJ decisions *de novo*. In effect, the SEC hopes to force Ms. Bebo into a futile challenge of the ALJ appointment process in its in-house proceeding

with the hope that all judicial review will be foreclosed as a result.

Yet again, the SEC, in its zeal to win, has lost sight of its mission. According to its website, "[t]he mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[3] This mission can only be achieved if the securities laws are clear, well-defined, and applied in a fair, consistent, and unbiased manner. When the laws are applied inconsistently or the process by which they are enforced is rigged to favor the SEC, capital formation is impeded because market participants do not have clear rules for understanding their investment risks. Just as investing in the capital markets should not be a game in which anything goes, enforcement of the securities laws should not be a game in which anything goes and any procedural advantage should be pursued.

SUMMARY OF ARGUMENT

Effectively, the Seventh Circuit turned the *Free Enterprise* factors on their head. It turned a presumption that Congress did not intend to limit jurisdiction of federal courts into a presumption that it did, and did so in a way that, as a practical matter, exacts a prohibitive price for obtaining any federal court review of collateral constitutional issues. Mr. Cuban defended the SEC enforcement action filed against him before a neutral and independent judicial officer with the stature to ensure

3. U.S. Securities and Exchange Commission, What We Do, http://www.sec.gov/about/whatwedo.shtml (last visited Mar. 5, 2016).

that both he and his adversary (the SEC) stood before the tribunal as equals. Thus, when Mr. Cuban challenged the SEC's legal theory, its factual claims, and its failure to produce to him decisive exculpatory evidence, a neutral arbiter, not an employee of his adversary, decided the issues. Even then, Mr. Cuban had to expend enormous resources, suffer significant reputational harm, and withstand several years of litigation in order to prevail. Had he first been required to litigate in an in-house administrative proceeding, where his claims were heard first by an employee of the Commission, and second by the Commission itself, the expenditures and harms would have been multiplied, and his meritorious challenges to the SEC would likely have fallen on deaf ears. This is even more true of wholly collateral foundational constitutional challenges to the administrative forum itself, such as those brought by Ms. Bebo. BBringing those challenges first to an ALJ and then to the Commission is futile, imposes a crushing cost burden, and delays the opportunity for a fair federal court hearing for years. What that means in practical terms is that forcing these collateral issues through an administrative proceeding will often mean no judicial review happens at all because litigants will be forced to capitulate before they can raise their constitutional claims to a neutral arbiter—a federal court.

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION TURNED THE PRESUMPTION OF JURISDICTION INTO A PRESUMPTION OF NO JURISDICTION

In significant measure, the Court's three-factor analysis for determining whether Congress intended

to divest district courts of jurisdiction over challenges to administrative proceedings is a practical approach. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489-90 (2010). It rests on the general notion that "when Congress creates procedures 'designed to permit agency expertise to be brought to bear on particular problems,' those procedures 'are to be exclusive.'" *Id.* at 489 (quoting *Whitney Nat. Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965)). The focus of the inquiry, in other words, is whether agency expertise is relevant to resolving a dispute. Underlying this analysis is the idea that, as a practical matter, Congress has an express interest in the efficient functioning of the administrative state, in light of which a congressional command to channel a dispute involving agency expertise into an administrative forum is eminently reasonable and must be obeyed. Implicitly, however, if Congress does not clearly set up a process designed to bring agency expertise to a resolution of a dispute, one needs to look for evidence of express congressional intent to limit jurisdiction of federal courts. *See id.* This Court will, therefore, *presume* that "Congress d[id] not intend to limit jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims 'are outside the agency's expertise.'" *Id.* (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994)).

The Seventh Circuit correctly conceded that Ms. Bebo's challenges to the SEC administrative process can fairly be characterized as "wholly collateral" to the review provisions of 15 U.S.C. § 78y and outside of the agency's expertise. (App. to Brief for Petitioner at 2a,

Bebo v. SEC, 799 F.3d 765 (7th Cir. 2015), *petition for cert. filed* (U.S. Feb. 3, 2016) (No. 15-997).) It conceded, in other words, that Ms. Bebo's constitutional and jurisdictional claims are not intertwined with the merits of the SEC case against her and that the SEC forum is not the most competent forum for resolving these claims. Nevertheless, the Seventh Circuit denied jurisdiction primarily because, in its view, Ms. Bebo can obtain "meaningful judicial review" by appealing to a circuit court of appeals following the SEC administrative process. (*Id.* at 2a-3a, 17a.; *see also id.* at 18a ("After the pending enforcement action has run its course, she can raise her objections in a circuit court of appeals established under Article III. The first, and in our view most important, *Free Enterprise Fund* factor weighs directly against her.").)

It appears that the driving force behind the Seventh Circuit opinion is the fear that every administrative action will be challenged by litigants unhappy to find themselves in an administrative forum. This fear is misplaced. The Seventh Circuit gave short shrift to the cost of defending against the SEC in an administrative proceeding as an impediment to obtaining meaningful judicial review. (*Id.* at 19a.) For example, the Seventh Circuit dismissed Ms. Bebo's concerns about the substantial costs of litigating in an improper forum, claiming that any defendant can make that claim. (*Id.* at 19a ("This point is fundamental to administrative law. Every person hoping to enjoin an ongoing administrative proceeding could make this argument, yet courts consistently require plaintiffs to use the administrative review schemes established by Congress.").) But this observation misses the point; as detailed below, the costs of defending an SEC action are so considerable and potentially devastating—they can run

into millions of dollars, not to mention the reputational damage attendant to being charged by the SEC—that a frivolous collateral challenge to the administrative process could prove fatal to a defendant's ability to fight the SEC on the merits.

In this regard, the Seventh Circuit's reliance on *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232 (1980), is entirely misplaced. In that case, Standard Oil and several other major oil companies sought to avoid going through an administrative proceeding because, they alleged, the administrative complaint filed against them by the Federal Trade Commission ("FTC") was not well-founded. *Id.* at 234-38. Specifically, while an administrative proceeding against them was pending and after failing to persuade the FTC to withdraw its administrative complaint, these companies brought an action in federal district court seeking an order declaring that the issuance of the complaint was unlawful and requiring that the complaint be withdrawn. *Id.* In short, Standard Oil and the other companies attacked the FTC administrative complaint on the merits and sought substantive federal court intervention before the administrative proceeding had run its course. *Id.* at 235-36. Standard Oil would have been required to litigate the merits of its dispute with the FTC in either forum: the proof that the FTC's complaint was baseless would have largely been the same as the proof that Standard Oil was not liable. It was against that background that this Court rejected Standard Oil's argument that the cost of the administrative proceeding was prohibitive and constituted irreparable harm, noting that mere litigation expense does not constitute irreparable injury. *See id.* at 244.

Most defendants do not have the resources of Standard Oil and its codefendants, whose cries of irreparable harm may have struck the Court as overblown, particularly because the resolution of their dispute with the FTC required analysis of the same facts in either forum. In any event, the issue here is not whether Ms. Bebo is irreparably harmed for purposes of a declaratory action. The issue is whether she and other individuals like her are deprived of meaningful review of their constitutional and jurisdictional claims if they are drained of resources by submitting to a forum that is not equipped to resolve their claims and where there is no factual overlap between the jurisdictional and constitutional claims and the substance of the SEC's complaint.

II. THE BURDEN OF LITIGATING AN SEC ENFORCEMENT ACTION IS ENORMOUS

Mr. Cuban knows first-hand the enormous burden of litigating an SEC enforcement action, a burden that would have been magnified if he had been forced to litigate against the SEC in front of an SEC employee, rather than a neutral federal judge and jury.

Mr. Cuban had to go to enormous expense and use every available procedural tool to fight the SEC on the merits of the case it brought against him. To begin, Mr. Cuban was forced to challenge the untested and defective legal theory initially adopted by the SEC. The SEC initially alleged that Mr. Cuban violated the law by trading his shares of an Internet search company called Mamma.com after purportedly promising to keep certain information about a PIPE transaction involving Mamma.com confidential. Complaint, *SEC v. Cuban*, No. 3:08-cv-02050 (N.D. Tex.

Nov. 17, 2008), ECF No. 1, at ¶¶ 16, 26. The SEC's position was untested and was apparently designed to "confront" the limits of insider trading law as articulated by the courts.[4] Because no federal statute expressly prohibits insider trading, the SEC pursues insider trading claims under the "catchall" fraud provisions of Section 10(b) of the Exchange Act and SEC Rule 10b-5. Of course, what Section 10(b) "catches must be fraud." *Chiarella v. United States*, 445 U.S. 222, 234-35 (1980). Although the Supreme Court has determined that there is no general prohibition on the trading of securities based on material, nonpublic information,[5] the SEC has often disagreed with this view, and has argued that, regardless of the nature of the source or other circumstances, any recipient of material, nonpublic information has potential insider trading liability. *See, e.g.*, *SEC v. Switzer*, 590 F. Supp. 756, 762 (W.D. Okla. 1984) (SEC brought suit against investor who traded on information he overheard at a high school track meet). The Court has rejected such broad insider-trading liability and required that in an insider trading case, a fraud occurs *only if* trading occurs on the basis of insider information obtained as a result of a breach of fiduciary or similar relationship of trust and confidence. *Chiarella*, 445 U.S. at 233-35.

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4. Linda C. Thomsen, *Opening Remarks to the Securities Industry and Financial Markets Association Regulatory Symposium on Insider Trading*, May 19, 2008, http://www.sec.gov/news/speech/2008/spch051908lct.htm (last visited Mar. 6, 2016) (in a speech shortly before the enforcement action was brought against Mr. Cuban, arguing that "duty is not what [Section 10(b)] requires").

5. *Id.* at 235 ("We hold that a duty to disclose under § 10(b) does not arise from the mere possession of nonpublic market information.").

In other words, throughout the development of the law of insider trading, the SEC and the federal judiciary have not been aligned; the SEC has consistently and overtly attempted to expand the scope of insider-trading liability, and the courts often have rejected those attempts. The case against Mr. Cuban was just such a test case.

The SEC alleged that Mr. Cuban had agreed to keep certain information confidential, and that such an agreement itself created a fiduciary or fiduciary-like duty to the source of the information and thus refrain from trading. Complaint, *SEC v. Cuban*, No. 3:08-cv-02050 (N.D. Tex. Nov. 17, 2008), ECF No. 1, at ¶ 26. Mr. Cuban filed a motion to dismiss, arguing that the SEC had failed to state a cause of action. Memorandum of Law of Mark Cuban In Support of Motion to Dismiss, *SEC v. Cuban*, No. 3:08-cv-02050 (N.D. Tex. Jan. 14, 2009), ECF No. 12, at 1. That motion proved key to clarifying the SEC's legal theory. The District Court dismissed the complaint, holding that the SEC failed adequately to plead that Mr. Cuban "entered into an express or implied agreement with Mamma.com not to disclose material, nonpublic information about the PIPE offering and not to trade on it or otherwise use the information," as required to establish liability. *SEC v. Cuban*, 634 F. Supp. 2d 713, 727 (N.D. Tex. 2009). While the Fifth Circuit reversed, it did so because it found that the allegations provided "a plausible basis to find" that Mr. Cuban had entered into an agreement with Mamma.com not to trade. *SEC v. Cuban*, 620 F.3d 551, 557 (5th Cir. 2010). In other words, the Fifth Circuit agreed with Mr. Cuban's exposition of the law of insider trading but ruled that it was a question of fact for the jury to decide whether Mr. Cuban had violated the law.

These court opinions provided what the SEC complaint did not—a clear articulation and narrowing of the SEC's theory in Mr. Cuban's case—and, thus, these decisions formed the necessary framework to guide Mr. Cuban's discovery and trial preparation. Many litigants would not have had the resources to litigate these issues and might have been forced to capitulate, despite a defective legal theory. The likelihood of such a capitulation is increased dramatically for litigants facing an untested and defective SEC legal theory within the SEC's in-house forum, for the resource burden must be weighed against the futility of convincing an employee of the SEC that charges that have been approved by the Commission itself (the ALJ's employer and the body that will sit in review of the ALJ's decision) are legally defective.

Similarly, Mr. Cuban used discovery to decimate the SEC's factual case, but the costs of discovery resulted in a mounting financial and personal burden. The SEC did not produce voluntarily to Mr. Cuban the discovery to which he was entitled. Instead, Mr. Cuban was forced to file a motion to compel, which eventually resulted in the SEC's production of portions of internal notes and summaries from interviews it conducted while investigating Mamma.com that mentioned Mr. Cuban or related to his case. Memorandum Opinion and Order, *SEC v. Cuban*, No. 3:08-cv-02050 (N.D. Tex. Mar. 15, 2013), ECF No. 180. As a result of this litigation, the SEC eventually produced the notes of an SEC attorney's interview of Mr. Cuban immediately after the sale in question. This critical set of notes had previously been reported as lost. The notes showed that Mr. Cuban told the SEC, the day after the transaction, why he sold the stock and that he had confirmed the propriety of the sale with his broker's

compliance department. App. to Third Mot. to Compel and Mot. for Recons. of the Ct.'s Ruling at 170, *SEC v. Cuban*, No. 3:08-cv-02050 (N.D. Tex. June 6, 2012), ECF No. 141. Simply put, these interview notes were critical and decisive contemporaneous proof of Mr. Cuban's good faith. Mr. Cuban would not have received them had he not undertaken the financial costs of litigating a motion to compel.

The burdens carried by Mr. Cuban in uncovering the evidence that cleared him did not stop there. Mr. Cuban had to pursue secondary litigation against the SEC under the Freedom of Information Act ("FOIA"), in order to receive other exculpatory evidence. *See Cuban v. SEC*, No. 1:09-cv-00996-RBW (D.D.C. May 28, 2009). Two years after the filing of the complaint, the district court ordered the SEC to conduct additional searches for records responsive to the FOIA requests and to produce various categories of records it had withheld on the basis of purported exemptions, documents which proved useful to Mr. Cuban's defense. *See Cuban v. SEC*, 744 F. Supp. 2d 60, 92 (D.D.C. 2010), *on reconsideration in part*, 795 F. Supp. 2d 43 (D.D.C. 2011).

In sum, in order to obtain and use key exculpatory evidence, Mr. Cuban not only had to engage in the normal discovery procedures outlined in the Federal Rules of Civil Procedure, but he also had to litigate a motion to compel and undertake the additional costs of secondary litigation. Many litigants would not have had the resources or stamina to pursue this evidence, and instead would have had to fold, even in the face of SEC factual claims that they knew were incorrect and incomplete. Had Mr. Cuban been a regular SEC respondent with limited resources who had

wasted his resources fighting the SEC on its home turf first, he might not have had the wherewithal to do all that it took to defend himself on the merits in federal court even if his direct challenge to the SEC process proved successful.

III. RAISING CONSTITUTIONAL CLAIMS IN AN ADMINISTRATIVE PROCEEDING IS OFTEN FUTILE

The Seventh Circuit's decision requires litigants to shoulder these enormous resource burdens and to endure the entire administrative process before ever having an opportunity to raise in federal court wholly collateral constitutional arguments. What the Seventh Circuit's opinion ignores is that any such challenge is futile in the SEC in-house court. Assuming that some litigants can mount the defense necessary to contest an SEC enforcement action, very few litigants can afford to waste the resources to do so if the result is foregone and decided the day the constitutional claims are raised. Recent commentary has shown that the SEC wins virtually all of its in-house administrative proceedings. *See, e.g.*, Jean Eaglesham, *SEC Wins with In-House Judges*, Wall St. J., May 6, 2015, 10:30 PM.[6] This result is hardly surprising when one considers that the Commission has dictated that its own employees preside over the administrative hearings. *In re Raymond J. Lucia Cos., Inc.*, SEC Release No. 4190, 2015 WL 5172953 (Sept. 3, 2015), at *2, *21 ("a Commission ALJ is a 'mere employee'"). As background, before an enforcement action is brought, the Division of

6. http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803.

Enforcement drafts a memorandum to the Commission recommending that an action be brought, wherein the Division recites its understanding of the facts and relevant law. SEC Division of Enforcement, Enforcement Manual, § 2.5.1 at 22 (2015).[7] After closed-door hearings with SEC staff, the Commission then votes on the Enforcement Division's recommendation, and in those cases where it decides to go forward, sets forth an order instituting a proceeding. *Id.* § 2.5.2.1 at 23. In other words, the ALJ receives an order of the Commission instituting proceedings that recites a set of facts and concludes that those facts constitute a violation. Whatever findings the ALJ makes are then reviewed on appeal by the Commission *de novo*. Given the Commission's view that its ALJs are mere employees similar to its aides, it is no wonder that the Commission's views of the facts and law almost always prevail before an ALJ. *See In re Raymond J. Lucia Cos., Inc.,* 2015 WL 5172953, at *23 (comparing the SEC ALJs to FDIC ALJs, whom they describe "as aides who assist the Board in its duties, not officers who exercise significant authority independent of the Board's supervision"); *In re Timbervest,* SEC Release No. 4197, 2015 WL 5472520 (Sept. 17, 2015), at *24 (same).

The Commission's *Lucia* decision gives a further taste of the Orwellian nature of the SEC administrative proceedings that are the price of admission to federal court, under the Seventh Circuit's decision. Several litigants, including Ms. Bebo, have raised arguments that the SEC violated the Appointments Clause when it failed to appoint its ALJs as inferior officers as required

7. *Available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

by Article II of the Constitution. Those forced to litigate this issue in an administrative proceeding rather than in federal court must first raise this issue with the subject at issue—the ALJ—and then with the agency accused of violating the Constitution—the Commission—on appeal. All of these steps must be taken, according to the Seventh Circuit, despite the fact that the SEC has already ruled that it has not violated the Constitution. *In re Raymond J. Lucia Cos., Inc.*, 2015 WL 5172953, at *2, *21.

The Commission's decision on this issue in *Lucia* was entirely predictable. The Commission itself has decided that its ALJs are not inferior officers but mere employees. The Commission itself has refused to appoint them as officers, even though at least two federal district court judges have expressly invited the Commission to do so. *See Duka v. SEC*, No. 15 Civ. 357 (RMB), 2015 WL 4940057 (S.D.N.Y. Aug. 3, 2015); *Hill v. SEC*, 114 F. Supp. 3d 1297, at 1320 (N.D. Ga. 2015) ("the ALJ's appointment could easily be cured by having the SEC Commissioners issue an appointment or preside over the matter themselves"). The Commission itself has made the decision to send cases to the administrative forum, even though cases of similar complexity and importance in years past have all been sent to federal court. *See* Daniel Wilson, *SEC Administrative Case Rules Likely Out Of Date, GC Says*, Law360, June 17, 2014, 5:55 PM.[8] The Commission itself has caused a brief to be filed in federal court that claimed that there is no requirement that hearings be held before officers, without even mentioning that the securities laws' provisions governing Cease-and-Desist hearings uniformly require that those hearings must be conducted by the Commission

8. http://www.law360.com/articles/548907/sec-administrative-case-rules-likely-out-of-date-gc-says.

or "an officer or officers of the Commission designated by it." Brief for SEC, *Charles L. Hill, Jr. v. SEC*, No. 15-12831 (11th Cir. Aug. 4, 2015); *but cf.* Securities Act of 1933, 15 U.S.C. § 77u ("All hearings shall be public and may be held before the Commission or an officer or officers of the Commission designated by it, and appropriate records thereof shall be kept."); Securities Exchange Act of 1934, 15 U.S.C. § 78v ("Hearings may be public and may be held before the Commission, any member or members thereof, or any officer or officers of the Commission designated by it, and appropriate records thereof shall be kept."); Investment Advisers Act of 1940, 15 U.S.C. § 80b-12 (same); Investment Company Act of 1940, 15 U.S.C. § 80a-40 (same). And the Commission itself has dismissed this plain language with no meaningful analysis, and claimed that Congress intended that ALJs be mere employees, despite unambiguous legislative history demonstrating the opposite. *In re Raymond J. Lucia Cos., Inc.*, 2015 WL 5172953, at n.122 ("We do not find any relevance in the fact that the federal securities laws and our regulations at times refer to ALJs as 'officers' or 'hearing officers.'"); *but see* Brief of Mark Cuban as *Amicus Curiae* In Support of Petitioners, *Raymond J. Lucia Cos., Inc. v. SEC*, No. 15-1345 (D.D.C. Feb. 8, 2016) (cataloguing legislative history demonstrating that Congress specifically intended ALJs to be constitutional officers and was keenly aware of Appointments Clause issues).

The manner in which the administrative forum is constituted creates only a veneer of independence; well short of endowing ALJs with the stature of constitutional officers, as mentioned, the SEC treats them as mere employees whose role is to assist the SEC in fact gathering and nothing more. Thus, it is also not surprising that in a recent *Wall Street Journal* article one former SEC

ALJ was quoted saying she felt pressured to favor the division of enforcement in administrative proceedings. Eaglesham, *supra*. According to this retired ALJ, the Commission expects in-house judges to place "the burden [] on the people who were accused to show that they didn't do what the agency said they did." *See* Jean Eaglesham, *SEC Judge Declines to Submit Affidavit of No Bias*, Wall St. J., June 11, 2015, 7:11 PM.[9] In short, neither the SEC nor the ALJs themselves view ALJs as sufficiently independent to satisfy constitutional and congressional dictates of impartiality and fairness.

Forcing Ms. Bebo to litigate her challenges to the tribunal's validity within that very tribunal and before the Commission that has refused to comply with the statutory command to hold hearings before "officers of the Commission" is a farce and sets the price of admission to federal court on these important collateral issues at a level that may well be prohibitive. This is not meaningful judicial review. Moreover, the price exacted by the Seventh Circuit's decision is not only monetary; it is also a costly payment in time. This is because any slog through the administrative process will take several years, and will, through delay, drain any meaning from eventual judicial review. Jean Eaglesham, *SEC Appeals Process on the Slow Track*, Wall St. J., Dec. 21, 2015, 7:12 PM.[10]

Moreover, the Seventh Circuit decision does not take account of the fact that the SEC has repeatedly indicated its intention to block any consideration of the constitutional

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9. http://blogs.wsj.com/moneybeat/2015/06/11/sec-judge-declines-to-submit-affidavit-of-no-bias.

10. http://www.wsj.com/articles/sec-appeals-process-on-the-slow-track-1450743130.

defects even on a direct appeal from the Commission by claiming that any defects in its ALJ process are harmless error. Thus, in *Lucia*, the Commission wrote: "[G]iven our 'de novo review' and our 'thorough rejection of [Respondents'] various claims of error' on the merits, Respondents 'suffered no prejudice' from the manner of appointment of our ALJs.'" *In re Raymond J. Lucia Cos., Inc.*, 2015 WL 5172953, at n.115 (quoting *Landry v. FDIC*, 204 F.3d 1144 (D.C. Cir. 2000) (Randolph, J., concurring)). And, the SEC recently indicated to the Second Circuit that it may well argue harmless error in any appeal from a Commission order rejecting a constitutional challenge, such as that raised here by Ms. Bebo. *See* Letter on Behalf of Appellee, *Tilton v. SEC*, No. 15-2103 (2d Cir. Sept. 23, 2015), ECF No. 82. (in response to a request from the panel that it disclaim an intent to rely on harmless error, the SEC stated: "At this juncture, we cannot state which arguments the government might make in the event that plaintiffs were to receive an adverse decision from the Commission and then seek judicial review in the court of appeals."). Of course, judicial review is not "meaningful" if Ms. Bebo and others must bear the risk that the SEC will convince a circuit court of appeals that the harmless error doctrine blocks any review of the underlying constitutional claim.

In sum, funneling wholly collateral issues, such as the constitutional defects identified by Ms. Bebo, into the SEC's in-house process serves not only to place a prohibitive price on obtaining judicial review, but it delays that review by years, and potentially limits any review to one for harmless error. This is not meaningful judicial review.

CONCLUSION

Because the Seventh Circuit's decision, as a practical matter, creates an unreasonably high barrier to raising constitutional issues in federal court, this Court should grant the petition and reverse the Seventh Circuit's decision. There is no meaningful judicial review of these collateral issues if it is delayed for years by a costly and futile administrative proceeding.

Respectfully submitted,

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