No. 19-56101

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND J. LUCIA COMPANIES, INC.; RAYMOND J. LUCIA, SR.,

Plaintiffs-Appellants,

v.

U.S. SECURITIES & EXCHANGE COMMISSION; JAY CLAYTON, in his official capacity as Chairman of the U.S. Securities and Exchange Commission; WILLIAM P. BARR, Attorney General,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California, No. 3:18-cv-02692-DMS-JLB
(Hon. Dana M. Sabraw)

BRIEF OF THE CATO INSTITUTE, AMERICANS FOR PROSPERITY FOUNDATION, AND THE COMPETITIVE ENTERPRISE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute ("Cato"). Cato was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, issues the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts.

Americans for Prosperity Foundation ("AFPF"). AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas are the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF has a particular interest in this case because it believes businesses and individuals are entitled to a meaningful review of their claims that the government has violated the separation of powers and should not be

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[1] The parties have consented to the filing of this brief. No part of the brief was authored by counsel for a party, and no person other than the *amici*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief.

forced to endure administrative proceedings of dubious constitutional legitimacy before being able to obtain review from Article III courts.

The Competitive Enterprise Institute ("CEI"). CEI, founded in 1984, is a non-profit public policy organization dedicated to advancing the principles of free enterprise, limited government, and individual liberty. CEI frequently publishes original research and commentary on business and finance, as well as related government policies and regulations. It also regularly participates in litigation, as both a party and an *amicus curiae*, concerning the scope and application of financial rulings and the federal agencies that promulgate them.

This case is important to *amici* because it involves core separation-of-powers issues, the democratic accountability of executive officers, and threats to federal court access when citizens have legitimate complaints about unconstitutional governmental action.

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal district courts are generally presumed to have plenary jurisdiction when private citizens allege colorable claims that federal executive-branch agencies and officials are pursuing punitive governmental action against them without legitimate constitutional authority. Such claims present quintessential federal questions falling within the jurisdictional grant of 28 U.S.C. § 1331, which directs that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution … of the United States." *Id.; see also* 5 U.S.C. § 702 (authorizing judicial relief, including injunctive relief, when a person is "suffering legal wrong because of agency action, or [is] adversely affected or aggrieved by agency action"). The exercise of federal court jurisdiction is essential to protecting constitutional commitments to the rule of law, separation of powers, due process, individual liberty, and political accountability. *See generally Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) ("injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally"); *Bell v. Hood*, 327 U.S. 678, 684 (1946).

In certain cases — most notably *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), and *Elgin v. Department of Treasury*, 567 U.S. 1 (2012) — the Supreme Court has recognized in the administrative law context a limited exception to this presumption of federal question jurisdiction. The cases hold that if Congress has enacted a statute providing for delayed, post-agency appellate review of adverse agency action, and if Congress's intent to strip district courts of their presumptive jurisdiction is either explicit or "'fairly discernible,'" the district courts may lack jurisdiction to adjudicate at least some kinds of challenges to agency action notwithstanding Section 1331. *Thunder Basin*, 510 U.S. at 207.

The court below held that Section 25 of the Securities Exchange Act of 1934, 15 U.S.C. § 78y, qualifies as a jurisdiction-stripping statute. It therefore found that it lacked jurisdiction to adjudicate plaintiff-appellants' complaint that the Securities and Exchange Commission ("SEC") is pursuing them (for a second time) in an administrative law-enforcement proceeding overseen by an SEC administrative law judge ("ALJ") who lacks legitimate constitutional authority to conduct the proceeding or to issue binding orders and commands against them.

In dismissing plaintiff-appellants' complaint, the court below relied on five appellate decisions outside the Ninth Circuit as persuasive authority. But those non-binding decisions from other circuits suffer from at least two fundamental defects. *First*, they misconstrued and trivialized the serious, ongoing constitutional injury that plaintiffs had alleged by conflating the victim's underlying injury with the burden and expense of administrative litigation or the punitive statutory sanctions that might be imposed if securities law violations were ultimately proved.

Second, they overlooked the reality that victims of this type of constitutional injury, if limited to delayed post-agency appellate review under Securities Exchange Act Section 25, may never be afforded an opportunity to seek or obtain meaningful redress for their constitutional injury.

Because this case alleges a colorable constitutional claim of ongoing *ultra vires* government action, and because Section 25 does not strip district courts of jurisdiction over such a claim, this Court should reverse the decision below and allow the case to proceed on its merits.

ARGUMENT

I. The Constitutional Injury Alleged Here Involves a Serious Ongoing Harm That is Entirely Distinct from the Ordinary Burden of Litigation.

Plaintiff-Appellants' complaint asserts their right not to be forced, without their consent, to participate in adjudicative proceedings conducted by an ALJ who lacks proper constitutional authority. They are not challenging the SEC's general authority to prosecute them or to impose sanctions for securities law violations if they are ultimately proven to have occurred. Nor are they questioning in their complaint the merits of the SEC's claims or the severity of the sanctions that could be imposed against them, although they have asserted defenses to those claims in the pending SEC administrative proceeding.

For purposes of their complaint, it makes no difference whether plaintiff-appellants ultimately win or lose on the merits at the SEC administrative level —

they suffer the same constitutional injury regardless of the outcome of that proceeding. Moreover, if they succeed on their claims in the district court, the administrative process would not be thwarted. The relief they request from the district court would only oblige the SEC to adjust its administrative processes to comply with constitutional requirements, perhaps by adjudicating the administrative proceeding itself rather than relying on an administrative law judge.

The gravamen of the constitutional harm that the complaint seeks to avoid is thus entirely distinct from any sanctions that might be imposed against plaintiff-appellants in the administrative proceeding. In particular, the complaint asserts that the executive-branch officer assigned by the SEC to oversee the administrative proceeding is acting *ultra vires*. It claims the ALJ has no legitimate constitutional authority to conduct the proceeding because the ALJ (like other SEC ALJs) is currently insulated by at least two layers of protection from removal by the President.

If plaintiff-appellants are right, this constitutional injury is very serious. *See Collins v. Mnuchin*, 938 F.3d 553, 588 (5th Cir. 2019) (en banc) (agreeing with and reinstating relevant portion of panel decision at 896 F.3d 640, 659–75 (5th Cir. 2018) discussing the essential role of the presidential removal power in preserving separation of powers and ensuring executive-branch accountability); *see also id.* at 596–97 (Oldham and Ho, JJ, concurring in relevant part). The constitutional injury is also occurring in each of many dozens of other pending and future SEC administrative proceedings assigned to the SEC's ALJs. The claim therefore can and should be promptly adjudicated on its merits. Indeed, because plaintiff-appellants have lodged a colorable constitutional claim, federal courts have a duty to address it, rather than letting their injury persist until it is too late to provide meaningful relief. *Cf. New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358–59 (1989) (citing cases dating back to 1821 for the proposition that when federal jurisdiction is present, federal courts cannot "abdicate" their obligation to exercise that jurisdiction).

McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991), is instructive. There, several pro-immigration groups and unsuccessful applicants for an amnesty program challenged as unconstitutional the practices and procedures used by the federal agency responsible for administering the program. Despite the availability of delayed, post-agency review of final agency determinations, and despite an explicit statutory bar against other forms of judicial review of such final determinations (the kind of bar not found in the Securities Exchange Act's relevant provisions), the Supreme Court upheld the district court's jurisdiction to challenge the constitutionality of the "practices and policies" adopted by the agency in evaluating amnesty applications.

The Court emphasized the crucial distinction between challenges to the overall manner in which an agency adjudicates claims and individualized decisions reached on the merits. It held that the post-agency appellate review provision in the relevant statute "applies only to review of denials of individual [amnesty] applications," and that because the district court complaint "[did] not seek review on the merits of a denial of a particular application, the District Court's general federal-question jurisdiction under 28 U.S.C. § 1331 to hear this action remain[ed] unimpaired by [the relevant post-agency appellate review statute]." *McNary*, 498 U.S. at 494. As the Court explained:

> [T]he individual respondents in this action do not seek a substantive declaration that they are entitled to [amnesty] status. Nor would the fact that they prevail on the merits of their purportedly procedural objections [in the district court] have the effect of establishing their entitlement to [amnesty] status. Rather, if allowed to prevail in this action, respondents would only be entitled to have their case files reopened and their applications reconsidered in light of the newly prescribed [agency] procedures.

Id. at 495.

The Court also emphasized the singular focus of the applicable statutory provision authorizing post-agency appellate review, which applied only to "'*a determination* respecting *an [amnesty] application*.'" *Id*. at 491–92 (quoting statute, with Court adding emphasis). It held that "the reference to 'a determination' describes a single act rather than a group of decisions or a practice or procedure employed in making decisions," indicating Congress's intent that post-agency appellate review should apply only to "individual denials" of amnesty status and not to "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." *Id*. at 492; *cf. Jennings v. Rodriguez*, 138 S. Ct. 830, 839–41 (2018) (upholding jurisdiction, notwithstanding statutory limitations, in case challenging the extent of "the Government's detention authority under the 'statutory framework' as a whole," and "contesting the constitutionality of the entire statutory scheme under the Fifth Amendment").

The same logic applies here. Post-agency appellate review under Section 25 of the Securities Exchange Act is singularly focused on the "final order" that is issued at the conclusion of a proceeding. 15 U.S.C. § 78y(a). The statutory language does not imply any intent to force litigants who object to the constitutional legitimacy of the proceeding itself to wait for a final order. Nor does it imply any intent to bar collateral challenges to the constitutionality of the practices and procedures used by the SEC to adjudicate its proceedings.

The Second Circuit's decision in *Touche Ross & Co. v. SEC*, 609 F.2d 570 (2d Cir. 1979), is also instructive. There, an accounting firm and several of its individual accountants were charged in an SEC administrative proceeding with securities law violations arising from services they performed as auditors of corporate financial statements, and the respondents filed a complaint in district court challenging the legitimacy of the proceeding itself. After the district court dismissed the complaint for failure to exhaust administrative remedies, the Second Circuit affirmed in part and reversed in part, carefully distinguishing between those parts of the complaint that challenged the underlying merits of the SEC claims and the part that separately challenged the SEC's authority to conduct the proceeding at all.

Although affirming dismissal of the former parts of the complaint, the court concluded that the district court had jurisdiction to adjudicate the latter. *Id*. at 574-77 (citing *Leedom v. Kyne*, 358 U.S. 184 (1958) and other cases). It did so because, as to the challenge to the SEC's authority to conduct the proceeding, (1) "there is no need for further agency action to enable us to reach the merits of [that] challenge," *id*. at 574; (2) "to require appellants to exhaust their administrative remedies would be to require them to submit to the very procedures which they are attacking," *id*. at 577; (3) "the issue is one of purely statutory interpretation," *id*.; and (4) "[w]hile the Commission has the power to declare its own rule invalid, it is unlikely that further [administrative] proceedings would produce such a result," *id*. Each of these reasons is equally applicable to the present case.

II. The Sister-Circuit Rulings Followed by the District Court Erred in Applying *Thunder Basin* and its Progeny.

Numerous federal jurists have issued thoughtful and comprehensive opinions reaching the same conclusions that *amici* urge here. *See, e.g., Tilton v. SEC*, 824 F.3d 276, 292–99 (2d Cir. 2016) (Droney, J., dissenting); *Gupta v. SEC*, 796 F. Supp. 2d 503 (S.D.N.Y. 2011) (Rakoff, J.); *Duka v. SEC*, 103 F. Supp. 3d 382 (S.D.N.Y. 2015) (Berman, J.), *abrogated*, *Tilton*, 824 F.3d 276; *Hill v. SEC*, 114 F. Supp. 3d 1297 (N.D. Ga. 2015) (May, J.), *vacated and remanded*, 825 F.3d 1236 (11th Cir.

2016); *Ironridge Global IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294 (N.D. Ga. 2015) (May, J.); *accord* Adam M. Katz, Note, *Eventual Judicial Review*, 118 COLUM. L. REV. 1139, 1162–72 (2018) (thoughtful analysis consistent with cases cited above and with positions taken in this amicus brief). And in a case now pending that raises issues nearly identical to those in the present case, the Fifth Circuit, after full briefing, ordered a stay of the underlying SEC administrative proceeding pending its further consideration of the merits of the appeal. *Cochran v. SEC*, No. 19-10396 (5th Cir. Sept. 24, 2019) (*per curiam* order granting appellant's motion for injunction pending appeal).

Instead of following these well-reasoned decisions, the district court here followed cases from sister circuits that have held in various contexts that Section 25 of the Securities Exchange Act implicitly divests district courts of jurisdiction to adjudicate challenges to the constitutionality of SEC administrative proceedings. *See Bennett v. SEC*, 844 F.3d 174, 188 (4th Cir. 2016); *Hill v. SEC*, 825 F.3d at 1241; *Tilton v. SEC,* 824 F.3d at 291; *Bebo v. SEC*, 799 F.3d 765, 767 (7th Cir. 2015); *Jarkesy v. SEC*, 803 F.3d 9, 12 (D.C. Cir. 2015). Those cases purported to apply the reasoning of *Thunder Basin*, *Free Enterprise*, and *Elgin* to the kind of post-agency appellate review authorized by Section 25. Each of these out-of-circuit cases was wrongly decided for essentially the same reasons, and they should not be followed.

Thunder Basin, *Free Enterprise*, and *Elgin* set forth a framework for determining whether and when a post-agency appellate review statute strips district courts of jurisdiction. The essential test is whether Congress's intent to divest jurisdiction is "fairly discernable" from the statutory review scheme and whether Congress intended the types of claims at issue to be exclusively channeled into post-agency review. In making this determination, courts consider the statute's language, structure, and purpose, along with whether the claims can be afforded "meaningful review" on post-agency review. Two important factors are whether the claim falls within the agency's area of expertise and whether it overlaps legally or factually with the type of dispute the agency is authorized to hear.

A. Securities Exchange Act Section 25 Evidences No Congressional Intent to Divest Jurisdiction.

When a private citizen colorably challenge the constitutional legitimacy of an executive-branch officer assigned to adjudicate a law-enforcement proceeding that threatens to brand them wrongdoers and impose punitive sanctions, the *Thunder Basin* analysis points decidedly against a conclusion that Congress intended to divest district courts of subject matter jurisdiction. Indeed, the Supreme Court has already specifically declared, in *Free Enterprise*, that *the very same statute at issue here* — Securities Exchange Act Section 25 — evidences *no* such congressional intent:

> [T]he text [of Section 25] does not expressly limit the jurisdiction that other statutes confer on district courts. *See, e.g.,* 28 U.S.C. § 1331. *Nor does it do so implicitly*.

Free Enter., 561 U.S. at 489 (emphasis added). Although it purported to distinguish the facts of *Free Enterprise*, Order at 6 n.3 (Doc. 28), the court below made no attempt to reconcile the unequivocal statement from *Free Enterprise* quoted above — that Section 25 does *not* implicitly limit jurisdiction under 28 U.S.C. § 1331 — with its own contrary conclusion.

Beyond that significant discrepancy, the district court misconstrued the text of Section 25 and its surrounding statutory scheme. Post-agency appellate review under Section 25 is explicitly permissive and not mandatory. *See* 15 U.S.C. § 78y(a)(1) (an aggrieved litigant "may" seek post-agency review in a court of appeals). The statute's permissive language should also be read in conjunction with a nearby provision that preserves "any and all" other avenues of relief. *See id.* § 78bb(a)(2) ("the rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity"). Although Section 25 states that an appellate court's jurisdiction is "exclusive," it also makes clear that its exclusive jurisdiction attaches only after the SEC issues a final order and an aggrieved litigant chooses to pursue an appeal by filing a petition. *See id.* § 78y(a)(1), (3). Even then, jurisdiction does not attach — and become exclusive — until after the SEC files its administrative record with the court. *See id.* § 78y(a)(3) (noting that the court's jurisdiction "becomes exclusive on the filing of the record"). Read together, these statutory provisions confirm that the federal courts of appeals have exclusive jurisdiction only when reviewing final orders entered by the Commission. There is no evidence Congress intended to divest district courts of jurisdiction under 28 U.S.C. § 1331 to adjudicate colorable constitutional challenges raised many months or even years before any final order is issued. When a party seeks review in district court, it is not asking the court to review the Commission's final order issued after proceedings have taken place; instead, it is objecting more fundamentally to the legitimacy of the proceedings themselves. That constitutional objection can and should be considered at the outset — before the constitutional injury becomes irreparable.

B. The SEC Has No Specialized Expertise in Addressing the Stand-Alone Constitutional Claims Here.

There is also no factual or legal overlap between the complaint in this case and the underlying merits of the SEC claims against plaintiff-appellants in the administrative proceeding. Nor does the SEC possess special expertise in resolving the constitutional removal question at the heart of this case. There is no reason or other benefit in allowing the SEC to resolve the constitutionality of the executive-branch officer it has already decided to assign to oversee the administrative proceeding. To the contrary, these are standard questions of administrative and constitutional law that are appropriately resolved by courts.

As to this lack of specialized expertise, this Court need look no further than the Supreme Court's earlier opinion in this very case, *Lucia v. SEC*, 138 S. Ct. 2044

(2018). There, the Solicitor General took the unusual step of confessing error in the SEC's longstanding insistence that its ALJs were properly appointed, and the Supreme Court ultimately agreed that the SEC had gotten it wrong all along. *See id.; see also Free Enter.*, 561 U.S. at 491. As the Supreme Court explained, considering the constitutional standing of executive officers requires no technical agency expertise and presents "standard questions of administrative law, which the courts are at no disadvantage in answering."[2]

C. Delayed Post-Agency Review Under Securities Exchange Act Section 25 Provides No Meaningful Remedy for the Ongoing Constitutional Injury Alleged Here.

In large part because it misconstrued the nature of the constitutional injury that plaintiff-appellants assert here, the district court erroneously concluded that the injury can be adequately remedied on post-agency review under Securities Exchange Act Section 25. That is plainly not the case. In the real world, most SEC administrative respondents are never afforded *any* opportunity to seek meaningful post-agency review under Section 25. Even for the relatively few who are able to

[2] As one commentator has observed, the approach taken by the out-of-circuit cases relied on by the district court erroneously treats these two important *Thunder Basin* factors — lack of factual overlap and lack of agency expertise — as essentially irrelevant whenever a statute provides any subsequent opportunity for judicial review, and then compounds that error by interpreting "'meaningful judicial review'" to require only some form of "*any* eventual judicial review." Katz, *supra*, 118 COLUM. L. REV. at 1162–72 (emphasis in original).

seek post-agency review, the review comes far too late to provide meaningful relief for the type of constitutional injury alleged here.

As the district court itself tacitly acknowledged, post-agency review under Section 25 is categorically unavailable to litigants who ultimately prevail in the administrative process, because the statute allows review only to litigants who are "aggrieved" by the SEC's "final order." 15 U.S.C. § 78y(a)(1). According to published empirical analyses, SEC administrative litigants prevail in at least ten percent of fully adjudicated cases. *See* Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315, 346–53 (2017); Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015), https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803; *see, e.g., In re Tilton*, Initial Decision Release No. 1182, 2017 SEC LEXIS 3051 (ALJ Sept. 27, 2017) and Investment Advisers Act Release No. 4815, 2017 SEC LEXIS 3707 (Nov. 28, 2017) (litigant previously denied access to federal court to challenge constitutional authority of ALJ appointment ultimately prevailed after ALJ hearing but before Supreme Court held in its earlier opinion in this case that SEC ALJs were not constitutionally appointed).

Although successful administrative litigants undoubtedly welcome their escape from the threat of punitive sanctions, Section 25 provides no remedy for the constitutional injury they have already endured from having been forced for many months (or, in this case, for more than seven years) to obey the *ultra vires* commands of a federal officer. Nor do they have any incentive to devote additional time and expense to pressing ahead with their constitutional claims, because by that point the constitutional injury cannot be undone or meaningfully remedied by a court of appeals. Accordingly, under the district court's interpretation of Section 25, a successful defense on the underlying merits does nothing to remedy the *constitutional* injury already suffered or, as the SEC argued in the district court, to "moot" that injury. In fact, the district court's position puts litigants in an impossible position. By winning on the merits, they forfeit their constitutional claim. A successful defense on the merits terminates the case in their favor and prevents them from challenging the constitutional injury of being subjected to proceedings before an ALJ who has not been constitutionally appointed.

Section 25 likewise offers no relief to the large portion of SEC administrative litigants who agree to settle with the SEC before a final order is entered in their case. Although many litigants settle before an ALJ is even assigned to their case, others settle during or after the ALJ phase of the proceeding. *See, e.g.*, *In re Timbervest, LLC*, Investment Advisers Act Release No. 5093, Investment Company Act Release No. 33340, 2018 SEC LEXIS 3633 (Dec. 21, 2018) (Commission final settlement order dropping fraud charges more than five years after initiation of administrative proceeding and more than four years after an unconstitutional ALJ, following a hearing, had imposed fraud-based penalties that were then upheld on initial appeal to SEC); *see also* Velikonja, *supra*, 92 WASH. L. REV. at 340, 346, 364–65 (noting that many SEC litigants settle at some point after contested litigation is underway but before a final judgment or order is entered). Moreover, it is reasonable to conclude that at least some administrative litigants who settle immediately — that is, before an ALJ is appointed — do so partially out of concern about the perceived unfairness of ALJ proceedings and the knowledge that independent oversight by any Article III judicial officer is unlikely to occur for years, if ever. *See* Velikonja, *supra*, 92 WASH. L. REV. at 365 (noting that "willingness to settle may be affected by their perception that ALJs are less fair," and that "[t]he SEC has reportedly threatened investigated parties with litigation before ALJs if they are unwilling to settle").

Regardless of when they settle, however, none of these settling administrative litigants have any hope of obtaining federal appellate review of their case under Section 25, because SEC rules and policy require them to waive their right to "[j]udicial review by any court." SEC Rules of Practice, Rule 240, 17 C.F.R. § 201.240(c)(4)(v). Section 25 thus offers no more help to these settling litigants than it does to successful litigants, because in either case their constitutional injury becomes permanent, irreversible, and unreviewable. Stated another way, if an administrative litigant settles after enduring proceedings before an unconstitutional ALJ, the SEC gets away with that constitutional violation, scot-free.

Nor is it a practical option for SEC administrative litigants to stand on principle and refuse to participate in what they believe to be *ultra vires* proceedings under the control of a federal officer who lacks lawful authority to conduct the proceeding or to issue them commands. Even if a litigant nominally preserves the constitutional objection for later appeal, otherwise declining to participate in the proceeding would mean "betting the farm" on the constitutional objection, *cf. Free Enter.*, 561 U.S.at 490, because refusing to obey the ALJ would inevitably lead to a default on the merits of the SEC's underlying securities law claims, with associated punitive sanctions imposed. *See generally* SEC Rules of Practice, Rule 155, 17 C.F.R. § 201.155 (default if litigant fails to appear at a hearing or conference, fails to answer or respond to a motion, or fails to timely cure a deficient filing), Rule 180, 17 C.F.R. § 201.180(b)–(c) (default if litigant fails to make a required filing or to timely cure a deficient filing), Rule 220, 17 C.F.R. § 201.220(f) (default if litigant fails to file an answer), Rule 221, 17 C.F.R. § 201.221(f) (default if litigant fails to appear at a prehearing conference), and Rule 310, 17 C.F.R. § 201.310 (default if litigant fails to appear at a hearing). And that default would be virtually impossible to undo later without ultimately winning the constitutional argument, because the SEC would almost certainly affirm the default if appealed, and unless the court of appeals ultimately sustained the constitutional objection, the court would likely be required by Section 25 to uphold the default on the underlying merits. *See* 15 U.S.C.

§ 78y(c)(1) ("No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so"); *id*. § 78y(a)(4) (SEC factual findings are "conclusive" as long as supported by "substantial evidence").[3]

All of which leaves the relatively few SEC administrative litigants who have the fortitude and resources (or *pro bono* counsel) to endure the entire SEC administrative process (in plaintiff-appellants' case for a second time) but ultimately lose on the merits. Then and only then can they finally seek the limited appellate relief promised by Section 25. As noted by one academic who has conducted exhaustive research on SEC enforcement case statistics:

> Only a small minority of enforcement actions are contested to the end and ultimately decided by a dispositive motion or after trial. Of the cases that are not filed as settled, more than half ultimately settle. Of the remainder, most are decided by default or voluntarily dismissed because the defendant died, ceased to exist, could not be served, or

[3] Arguing the constitutional issue to the SEC commissioners would be futile considering the SEC's many adjudicative opinions already rejecting this argument. *See, e.g., In re optionsXpress, Inc.*, Securities Act Release No. 10125, Exchange Act Release No. 78621, 2016 SEC LEXIS 2900, at *75–79 (Aug. 18, 2016) (Opinion of the Commission); *In re Timbervest, LLC*, Investment Advisers Act Release No. 4197, Investment Company Act Release No. 31830, 2015 SEC LEXIS 3854, at *46–49 (Sept. 17, 2015) (Opinion of the Commission); *cf. In re Raymond J. Lucia Co.*, Exchange Act Release No. 75837, 2015 SEC LEXIS 3628, at *76–89 (Sept. 3, 2015) (earlier SEC opinion in plaintiff-appellants' underlying administrative proceeding in which the Commission erroneously rejected constitutional appointments clause argument later found meritorious by Supreme Court).

> some similar reason, and only a sliver are contested to the end and decided by a judge, a jury, or an ALJ.

Velikonja, *supra*, 92 WASH. L. REV. at 340.

In any event, under the district court's approach, even if the plaintiff-appellants eventually prevail on their constitutional claim in the appeals court, by that time the constitutional injury has already been fully suffered and is effectively irreversible. The court of appeals cannot undo or meaningfully remediate it at that point. Indeed, ironically, the most likely outcome would be the Pyrrhic victory of a remand to the SEC to start all over again from square one, before yet another ALJ purporting to be cleansed of all constitutional infirmity, as happened when the Supreme Court previously held in this very case that SEC ALJs had not been constitutionally appointed. *See Lucia*, 138 S. Ct. at 2055–56 (2018) ("the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official" (citation omitted)); *In re Pending Admin. Proceedings*, Securities Act Release No. 10536, Exchange Act Release No. 83907, 2018 SEC LEXIS 2058 (Aug. 22, 2018) (reassigning more than 100 then-pending administrative proceedings pursuant to *Lucia*). That would be virtually meaningless relief for plaintiff-appellants here, because it would simply force them to expend further time and money relitigating — for the *third* time — an administrative proceeding that has already dragged on for nearly eight years and is based on facts dating back as far as the mid-2000s.

In sum, far from guaranteeing a meaningful remedy for the type of constitutional injury alleged by plaintiff-appellants here, post-agency appellate review under Section 25 is a largely empty promise for most SEC administrative litigants. All those who settle with the SEC or prevail on the merits in the administrative proceeding are completely deprived of any opportunity to seek such review and, even for those who lose on the merits or default, any review comes far too late or carries far too much litigation risk to be meaningful. To effectively protect private citizens from the irreparable constitutional harm inflicted by a constitutionally illegitimate law-enforcement proceeding launched against them, district courts must be available and stand ready to intervene before the injury becomes effectively irremediable. The district court's erroneous conclusion that Section 25 provides adequate or meaningful post-agency relief, and thus strips it of its presumptive subject-matter jurisdiction, should be reversed.

CONCLUSION

For these reasons, the Court should reverse the judgment of the district court.

Respectfully submitted,

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February 5, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 19-56101

I am the attorney or self-represented party.

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CERTIFICATE OF SERVICE

I certify that on February 5, 2020, I caused the foregoing amicus brief to be filed with the Court electronically using the CM/ECF system, which will send a notification to all counsel of record.

/s/ *Ashley C. Parrish*
ASHLEY C. PARRISH