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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Axon Enterprise, Inc.,

Plaintiff,

v.

Federal Trade Commission, et al.,

Defendants.

No. 2:20-cv-00014-PHX-DWL

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I. THIS COURT HAS JURISDICTION.

It is remarkable to suggest that a party must go through an undisputedly unconstitutional process and obtain a final agency order before entitlement to Article III review. Yet, that is exactly what the FTC argues here, having failed to address the merits of Axon's constitutional claims. Those claims must now be taken as true for the purpose of this motion. Thus, it is undisputed that the violation of Axon's constitutional rights originated with an uncodified, black box "clearance" process through which the FTC and the DOJ divvy up merger investigations thereby arbitrarily subjecting similarly situated companies to vastly different rights, standards, and consequences. And it is further undisputed that when a company loses the clearance coin toss and ends up in the FTC's biased home court, the FTC never loses—an historical statistic for more than two decades that emboldened the FTC to make its pre-suit "blank check" demand of Axon.

Still, the agency claims this Court lacks the power to do anything about it, asserting that the FTC Act strips this Court's jurisdiction in favor of an "exclusive review scheme" for *all* constitutional challenges—including a "clearance" process that is nowhere mentioned in the Act itself. Dismissing the significance of the clearance decision, the FTC insists that Axon's constitutional claims arise solely out of a 15 U.S.C. § 45 administrative enforcement action—one that did not exist at the time this suit was filed. But the due process, equal protection, and Article II consequences described in the Complaint were fully on display well before the administrative complaint was ever filed. Accordingly, all the cases cited by the FTC about suits arising solely out of enforcement actions are of little relevance here. Instead, the operative precedent is *Free Enterprise*, in which the Supreme Court confirmed district court jurisdiction and injunction authority over an agency constitutional challenge.

See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 489, 491 n.2 (2010). Accordingly, this Court has jurisdiction to decide this important issue of first impression[1]—which has never been addressed, let alone decided, by a reported federal case—on the merits and to enjoin the FTC from acting unconstitutionally in the meantime.

A. *Free Enterprise* Governs This Case.

This case is materially indistinguishable from *Free Enterprise*. That case—just like this one—involved a district court action raising constitutional challenges to an agency after it had "beg[u]n a formal investigation" of the plaintiff. 561 U.S. at 487; *see also* Compl. ¶ 25. There, as here, the government argued that a statutory review scheme—one whose provisions were, in the Commission's words, "largely the same" as the FTC Act's, Opp. 5—barred that suit.[2] *Free Enterprise*, 561 U.S. at 489. The Court rejected that argument, holding that those provisions "did not prevent the District Court" from hearing the constitutional challenge to the agency's authority to pursue the investigation in the first place. *Id.* The same result should obtain here. Indeed, as explained below, all three reasons that the Court gave for finding jurisdiction in *Free Enterprise* apply with full force to Axon.

The FTC rejects *Free Enterprise* in favor of decisions from "six courts of appeals" it claims hold that "a statute's exclusive review scheme applies to constitutional claims." Opp. 10-11 (citing *Bennett v. SEC*, 844 F.3d 174 (4th Cir. 2016); *Hill v. SEC*, 825 F.3d 1236 (11th

[1] To be clear, Axon is not challenging the mere fact of concurrent jurisdiction, *see* Opp. 14, n.12, but rather the arbitrary way in which the agencies determine which of two vastly different (and often outcome-determinative) procedures will be applied to a particular company.

[2] *Compare* 15 U.S.C. § 45(d) ("Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside order of the Commission shall be exclusive."), *with* 15 U.S.C. § 78y(a)(3) ("On the filing of the petition,

Cir. 2016); *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016); *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015); *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015); *Bank of La. v. FDIC*, 919 F.3d 916 (5th Cir. 2019)). But those cases do not hold, as the FTC suggests, that all "constitutional claims" must be brought within "a statute's exclusive review scheme." Nor could they: *Free Enterprise* itself reached exactly the opposite conclusion. 561 U.S. at 489. Instead, those cases hold (at most) that no district court jurisdiction exists where the plaintiff has "brought []his action after the Commission had initiated its enforcement proceeding against him, and he seeks to challenge multiple aspects of that ongoing proceeding"—while recognizing that "[t]he result might be different if," as here, "a constitutional challenge were filed in court before the initiation of any administrative proceeding." *Jarkesy*, 803 F.3d at 23; *see also Tilton*, 824 F.3d at 289; *Bebo*, 799 F.3d at 774; *Bennett*, 844 F.3d at 186; *see also* Opp. 2 (acknowledging comprehensive statutory process "springs into action" "[w]hen the Commission files an administrative complaint").[3]

What's more, the "six courts" argument is overstated. At least one of those courts, the Fifth Circuit, recently granted an injunction pending appeal where the sole question was district court jurisdiction. *Cochran v. SEC*, No. 19-10396 (5th Cir. injunction granted Sept. 24, 2019). That court thus indicated it believes there is a "strong showing that" jurisdiction is "likely" over a constitutional challenge to an administrative action pending at the time the

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the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.").

[3] This is not to suggest that all these cases necessarily turned on a race to the courthouse. The operative question remains whether the claims arise out of an administrative enforcement proceeding (as in the cases cited by the FTC) or not (as in *Free Enterprise* and here). Whether a district court lawsuit was first filed will often be an indicator as to that answer, but is not necessarily dispositive. *See Hill*, 825 F.3d at 1249 & n.6 (the "critical fact" is whether respondents "can seek full postdeprivation relief" regardless of the timing).

lawsuit was filed. *See Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016); *see also* Ex. 1, *Cochran* Oral Arg. Tr. (5th Cir. argued Nov. 5, 2019). *Cf. Cirko v. Comm'r of Social Sec.*, 2020 WL 370832, at *2 (3d Cir. 2020) (plaintiff may challenge constitutionality of SSA ALJs "without having exhausted those claims before the agency").

The FTC similarly overreads *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), as holding that plaintiffs are "required to follow [a statutory] review scheme even though they raise[] a constitutional claim and even though [the agency] believe[s] it lacks the authority to declare a federal statute unconstitutional." Opp. 5. Once again, a pronouncement that sweeping cannot be squared with *Free Enterprise*, which also involved a constitutional claim and an agency that lacked the power to invalidate a federal statute. Instead, *Elgin* was far more limited, holding only that a provision of the Civil Service Reform Act (CSRA) requiring an "employee against whom an action is taken" to pursue a grievance before the "Merit Systems Protection Board" (MSPB) applied to all employment-action grievances, even those alleging that an action was unconstitutional. 567 U.S. at 12-13. That decision was hardly surprising. The statutory text applied to any "employee against whom an action is taken," 5 U.S.C. § 7513(d)—and defined a "covered" action as any "removal," "suspension for more than 14 days," "reduction in grade" or "pay," or "furlough of 30 days or less," *id.* § 7512(a)—without any "exemption … for challenges" based on the Constitution. 567 U.S. at 12-13. And for good reason: Such an exception would allow any federal employee to circumvent the MSPB by alleging that the basis for an employment action was unconstitutional (an easy maneuver, given that many common bases for challenging an employment action, e.g., race or sex discrimination, have a constitutional dimension when the employer is the government). Such a reading would also have contravened the CSRA's

legislative history, which made clear that Congress was specifically trying to eliminate district court actions by employees. S. Rep. 95-969 at 63, U.S. Cong. Admin. News 1978, p.2785.

Elgin thus has little to say about whether the FTC Act strips jurisdiction here. For one thing, the FTC Act's judicial-review provisions do not resemble the CSRA's "elaborate" regime specified with "painstaking detail." 567 U.S. at 11. And far from the CSRA's facial application to all employment actions, the FTC Act's provisions apply only to a "cease and desist" order, 15 U.S.C. § 45(c), not unconstitutional precursor clearance decisions nowhere mentioned in the Act. *See Hill*, 825 F.3d at 1243 ("[A]lthough the text of §78y cover[s] all Commission *orders*, it d[oes] not cover all PCAOB *action*." (emphasis added)). Additionally, the purpose of the FTC Act differs markedly from the CSRA. Whereas the CSRA feared opening the floodgates for district court action, no similar justification exists here, both because a ruling on the constitutionality of the clearance process will decide the issue for all similarly situated companies, and because the process affects relatively few transactions. *See* Mot. Ex. 2A Chart (identifying 36 FTC enforcement actions filed in the 5-year period). Nor does the FTC point to legislative history for the FTC Act that is similar to the CSRA's.

With the FTC's irrelevant caselaw swept away, all that remains is a straightforward application of the three *Thunder Basin* factors as articulated in *Free Enterprise*. Here, the FTC Act affords no meaningful judicial review of Axon's claims outside of this lawsuit; those claims are wholly collateral to any proceeding under that Act; and they are well outside the FTC's expertise.

1. There Is No Meaningful Judicial Review Outside This Court.

In *Free Enterprise*, the Supreme Court held that the analogous statutory review provisions under the Securities Exchange Act did not provide for "meaningful" review of

the plaintiffs' constitutional claims. 561 U.S. at 489-91. That was because, under the review scheme, "not every Board action" was "encapsulated in a final … order or rule" that is "subject to judicial review." *Id.* at 490. The statute, for instance, provided no administrative mechanism for challenging the agency's "uncomplimentary inspection report" (which "damaged" the plaintiffs' "professional reputation") or its investigation into the plaintiffs (which cost them significant "legal fees"). *See id.*; *Free Enter.* Compl. ¶ 80 (Case 1:06-cv-00217-RMU, Doc. 1). So a district court action was necessary to challenge the agency's authority to engage in those activities.[4] That the plaintiffs could have, in theory, "ignor[ed] Board requests for documents," "incur[red]" an adverse order from the agency, and then raised its constitutional challenges in a subsequent appeal, was immaterial. *Id.* at 490-91. Such an "avenue" would unfairly "require plaintiffs" to "tak[e] … violative action before testing the validity of the law," and so it "d[id] not" qualify as "meaningful" judicial review. *Id.*

Axon is in exactly the same position here. As with the Exchange Act, "not every [Commission] action" is "encapsulated in a final … order or rule" that is "subject to judicial review" under the FTC Act. *Id.* at 490. That is true, most notably, of the clearance decision, which put the FTC, rather than the DOJ, in charge of the Axon/Vievu merger and resulted in the FTC's subsequent "blank-check" shakedown. Compl. ¶¶ 3, 30. Similar to the agency actions in *Free Enterprise*, the clearance decision here (and the FTC's subsequent investigation) caused Axon real harm before any administrative action was filed. Axon was subjected to unreasonable demands by the FTC, an agency whose power is subject to neither Article II (political accountability) and Article III (a neutral tribunal and the accompanying

[4] As the district court in *Free Enterprise* recognized, the harm from "being regulated by" an agency unconstitutionally gives rise to injury-in-fact for standing purposes. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 2007 WL 891675, at *3 (D.D.C. 2007).

due process guarantees associated with federal court litigation). Compl. ¶ 29-43. The lack of political accountability—with its commissioners protected from presidential removal, and its judges doubly so—made the FTC unduly aggressive in its investigation of the merger. *See* Compl. ¶¶ 8-10, 28, 36-41. The lack of due process on the back end only exacerbates that problem: The FTC knows that, as a practical matter, most of its actions will never be subject to judicial review. Instead, parties simply fold when faced with the prospect of submitting to an expensive administrative proceeding guaranteed to conclude in the FTC's favor with only highly deferential review by a court of appeals somewhere down the line. Compl. ¶¶ 6-7, 32-33. Accordingly, as in *Free Enterprise*, Axon is entitled to immediate district court review of the agency's constitutional authority to undertake those actions in the first place. *See Bennett*, 844 F.3d at 179, 182 (discussing *Free Enterprise*).

Additionally, it is irrelevant that Axon could, in theory, raise its constitutional claims on appeal from an adverse Commission order. It does not matter that instead of producing "more than 262,000 documents" and making "multiple executives [available] for investigational depositions," Compl. ¶ 10, 26, Axon could have "ignor[ed] Board requests for documents and testimony," "incur[red]" an adverse order from the agency, and then raised its constitutional challenges in an appeal from that order. 561 U.S. at 490-91. After all, the same was true in *Free Enterprise*. Nor is it relevant (*contra* Opp. 7) that Axon did, eventually, refuse the FTC's particularly egregious demand for a "blank check" to create a new competitor with Axon's own IP.[5] Compl. ¶ 27. As *Free Enterprise* explained, the kind of

[5] Although under *Free Enterprise*, Axon could have filed its lawsuit as soon as the FTC began investigating it, it did not enter into such a decision lightly. Instead, it cooperated with the Commission for 18 months, reasoning that a mutually agreeable resolution, even with an agency unconstitutionally regulating it, was preferable to litigation. But when an emboldened

delayed review that comes only after drawing an unfavorable agency action is too little, too late, to count as "meaningful." 561 U.S. at 491. That demand, also, put Axon in the same position as the *Free Enterprise* plaintiffs: comply with the agency's command, or ignore them, draw an unfavorable agency order, and hope to prevail on appeal years down the line. That is not meaningful review, much less something contemplated by Congress when it enacted the FTC Act.

In fact, that kind of review would be even less meaningful here than in *Free Enterprise*. That is because Axon's equal-protection claim, for instance, involves details of the clearance progress—how and why the process originated, how it operates, what the FTC and DOJ believe to be its legal basis, etc.—and a factual record the Commission's administrative process is ill equipped to discover. Indeed, the Commission rules do not allow Axon to depose the DOJ officials who participated in the clearance process without first getting the permission of the FTC-appointed ALJ. *See* 16 C.F.R. § 3.36. As a result, there will be no guarantee of an administrative record that will allow a reviewing court to decide those claims. Whatever review Axon may ultimately obtain, it would not be "meaningful" as the Court used that term in *Free Enterprise*.

2. Axon's Claims Are "Wholly Collateral" To the FTC Act.

In *Free Enterprise*, the Court held that because the plaintiffs' constitutional challenge was to the agency's authority, it was "collateral" to any specific "orders or rules from which review might be sought." 561 U.S. at 490. So, too, here. The FTC does not dispute that

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FTC that never loses in its administrative forum refused a substantial divestiture remedy that would have restored allegedly missing competition to the market years sooner and demanded instead an outrageous "blank check," Axon was forced to file this suit to protect its own intellectual property (with development costs in excess of 10 years and $200 million dollars) from an unconstitutional government taking.

Axon's constitutional claims "are unrelated to the merits of the merger." Opp. 10. Instead, those claims (just like those in *Free Enterprise*) go to the agency's constitutional authority.

Nevertheless, the FTC insists that Axon's claims are not collateral because they "arise[] out of the enforcement proceeding and provide[] an affirmative defense in that proceeding." Opp. 10 (quoting *Bennett*, 844 F.3d at 187). This Court need not decide whether Axon's constitutional claims could be raised as affirmative defenses, because the FTC's argument fails the first requirement: Axon's claims do not "arise[] out of" an enforcement proceeding; instead, they arise out of the unconstitutional clearance decision, which made Axon subject to the FTC's regulation, not the DOJ's.

The FTC's argument to the contrary is all based on a single assertion: that "the sole object of [Axon's] constitutional claim is to stop the Commission's enforcement proceedings." Opp. 9. But the very thing the FTC cites for support, the Complaint's Prayer for Relief, shows the opposite. Indeed, the Complaint lists no fewer than six forms of relief—leading off with a declaration that "the FTC's structure [is] unconstitutional"—with injunctive relief from any agency administrative enforcement action coming in fourth. Compl. at 28. In any event, the fact that Axon's complaint seeks such relief is hardly remarkable. After all, the complaint in *Free Enterprise* sought an "order and judgment enjoining the Board and its Members from carrying out any of the powers delegated to them," "from taking any further action against Plaintiff[s]," and "nullifying and voiding any prior adverse action against" Plaintiffs—which obviously would have blocked any enforcement proceedings. *Free Enter.* Compl. 23. Thus, the FTC identifies no basis for distinguishing this case from the Supreme Court's controlling *Free Enterprise* precedent.

3. The FTC Will Not "Apply Its Expertise" To Axon's Claims.

As *Free Enterprise* explained, claims generally fall "outside the Commission's competence and expertise" when they "do not require technical considerations of agency policy." 561 U.S. at 491. That is exactly the case here: The FTC concedes that Axon's "constitutional claims do not concern the industry-specific issues that the FTC typically addresses." Opp. 10. The FTC nevertheless maintains that it can still "apply its expertise" to resolve Axon's claims, since it is expert on "other" issues (i.e., the merits of the merger), which if resolved "'in [Axon's] favor might fully dispose of the case.'" Opp. 10. (quoting *Elgin*, 567 U.S. at 22-23). "[B]ecause [Axon] could prevail on the underlying claims and thereby moot the constitutional claim[s]," the FTC argues, "the latter f[a]ll within [its] expertise." *Id.* But it is simply not true that Axon "could prevail on the merits." As explained in Axon's motion—and as the FTC does not contest, *see* Opp. 12—the agency enjoys a 100% win rate in its biased administrative proceedings. The possibility that existed in *Elgin* and in the SEC cases on which the FTC relies—that the agency could apply its expertise to other issues to dispose of the constitutional ones—does not exist here.

B. There Is No "Finality" Problem.

The FTC asserts that this Court separately lacks jurisdiction because there is no "final agency action" within the meaning of the APA. 5 U.S.C. § 704. Opp. 12-14. According to the FTC, § 704 is essential here because it provides (1) Axon's cause of action; and (2) Axon's sovereign immunity waiver. Opp. 13-14. The FTC is wrong on both counts. First, the Constitution itself provides the cause of action, *see Free Enter.*, 561 U.S. 477 at 491 n.2, so § 704 is unnecessary. Second, the APA's sovereign immunity waiver applies to any case seeking injunctive relief from a federal agency, and thus this is not limited to those brought

under § 704. *E.V. v. Robinson*, 906 F.3d 1082, 1094 (9th Cir. 2018) ("waiver applies even where there is not 'final agency action' under APA section 704").

II. ALL INJUNCTION FACTORS ARE SATISFIED.

Because the FTC failed to address the merits of Axon's constitutional claims, they are uncontested thereby conclusively establishing a likelihood of success on this motion. Moreover, it is "well established" that "deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The FTC concedes that is true of First and Second Amendment rights, but claims that Axon's due process, equal protection, and separation of powers rights somehow count less. Courts have said otherwise. *See, e.g.*, *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (due-process and equal-protection case holding that "a prospective violation of a constitutional right constitutes irreparable injury"); 11A Wright & Miller Federal Practice & Proc. § 2948.1 n.26 (3d ed. 2019) (collecting cases).

The FTC further asserts that the public's interest in lower prices outweigh due process and equal protection deprivations borne out of an uncodified clearance process. Opp. 24. But once again, the law is to the contrary: It is "always in the public interest to prevent the violation of a party's constitutional rights." *E.g., Am. Bev. Assoc. v. City and County of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019). Indeed, "the Constitution is the ultimate expression of the public interest." *Gordon*, 721 F.3d at 653.

For all these reasons and those stated in Axon's motion, the Court should accept jurisdiction and grant the requested preliminary injunction.

Dated: January 30, 2020

Respectfully submitted,

/s/ Pam Petersen
Pamela B. Petersen

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2020, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's CM/ECF system upon all counsel of record in the above-captioned case.

/s/ Pam Petersen

Exhibit 1

Deposition of:

Audio Transcription

January 22, 2020

In the Matter of:

Cochran, Michelle Vs. SEC, Et Al

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UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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MICHELLE COCHRAN, :

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Plaintiff, :

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vs : CASE NO. 19-10396

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SECURITIES AND EXCHANGE :

COMMISSION, et al., :

:

Defendants. :

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Recorded Hearing

Tuesday, November 5, 2019

Job No.: 3955110

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A P P E A R A N C E S

ON BEHALF OF PLAINTIFF:

MARGARET A. LITTLE, ESQUIRE

NEW CIVIL LIBERTIES ALLIANCE

ON BEHALF OF DEFENDANTS:

DANIEL J. AGUILAR, ESQUIRE

U.S. DEPARTMENT OF JUSTICE

C O N T E N T S

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Ms. Little 4

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E X H I B I T S

(None.)

P R O C E E D I N G S

FEMALE JUDGE 1: The Securities and Exchange Commission.

MS. LITTLE: May it please the court, I am Margaret Little of the New Civil Liberties Alliance representing appellant Michelle Cochran. Michelle Cochran asks this court today to find jurisdiction and remand to the district court. Article 3 courts have the power and the duty to enjoin the SEC subjecting Americans to serial unconstitutional administrative proceedings destined to be set aside.

Michelle Cochran endured one such proceeding pro se in 2016, and now the SEC has set a second administrative proceeding into motion before a judge that the government itself has argued enjoys unconstitutional multiple layers of tenure protection.

All Americans have the right to demand a lawful court. They should not be subjected to serial to be vacated hearings that impose enormous professional, reputational and financial costs on

respondents, that create costly and prejudicial years long delays that impair the ability of respondents to defend. Further, they constitute a profligate waste of public resources.

MALE JUDGE: What do you mean when you say to be vacated because, you know, our Umbong (phonetic) court just said that if there is indeed a problem with the removal power that the remedy is not to vacate everything that happened before, it's just to say going forward under the statute the president has full removal authority.

MS. LITTLE: Well, I -- certainly in context of the FHFA that is true.

MALE JUDGE: Right.

MS. LITTLE: One of the problems in this case is you have a different statutory scheme and you have multiple layers of tenure protection. In addition, the situation is factually different in terms of where the plaintiffs stand and what the remedy might be, so I agree with your interpretation of the Collins case, but this is in a different posture and it is entirely possible

that a court could determine that the same remedy that was afforded in the Lucia case ought to be applied here as well.

Free Enterprise Fund provides the rule of decision on both jurisdiction and the merits. The supreme court interpreted this exact same statutory scheme and concluded that, quote, nothing in 78Y expressly or implicitly limits jurisdiction that other statutes confer on district courts. The inquiry for this court should end right there.

This is why this court should not accept SEC's invitation to fall into error as five circuits have done. Free Enterprise Fund had already cycled through the Thunder Basin factors and reached a different destination as to every single point. The way the analysis works is a two-part test and then to assist the court in determining part two there's another three tests, so something like five tests.

The problem with the SEC ALJ cases is that they neglect or gloss over completely the

very first and determinative question, which is is it fairly discernable from the text of the statutory scheme that congress intended to consign this type of claim to an administrative proceeding. The Free Enterprise Fund court says of the same statute that is at stake here the text does not expressly limit the jurisdiction that other statutes confer on district courts, nor does it do so implicitly.

The second part of the inquiry is is the claim of the type that congress intended to be adjudicated. If I can convey one thing today I think it is hard to make a case at all that congress ever intended anyone in an administrative agency or an administrative law judge to be deciding structural constitutional questions such as that presented here having to do with the complex removal protections that are afforded to SEC ALJ judges.

But to the point in Free Enterprise Fund when they reach the part of the analysis about whether this is -- the claims are of the

type congress intended to be adjudicated here's what they say, and this again is a direct quote, petitioner's claims are outside the commission's competence and expertise. Competence is an important word.

Then to assist a court in determining whether they are of the type there are three factors familiar to you I'm sure from the extensive briefing in this matter. Two of those factors, whether the claim is wholly collateral or also outside the expertise of the SEC or its ALJ. Free Enterprise Fund conclusively determines that they are outside those expertise and are wholly collateral.

In addition and tellingly, many of the five SECs ALJ cases also conclude the same, so we're left with one --

MALE JUDGE: What do you do if -- Free Enterprise did not involve an enforcement proceeding. There was as yet no enforcement proceeding, and so the supreme court says there's no way to challenge this, they're just under

investigation by this board.

I mean, that's the -- the Bank of Louisiana decision from earlier this year, the FDIC case out of our court, distinguishes Free Enterprise in that way, so how do you --

MS. LITTLE: I don't think that's a --

MALE JUDGE: How do you respond to Bank of Louisiana?

MS. LITTLE: Excuse me. Sorry. I don't think that's a distinguishing factor that had any bearing on the jurisdictional question at stake here, and also the issue of whether there was preclusion.

MALE JUDGE: But doesn't it go to the core issue of whether -- the first question under the three-part test is is there an alternative way to raise this, and if there's an enforcement proceeding you can raise it whether effectively or not in an enforcement proceeding, whereas when you're just under investigation there's no vehicle whatsoever to raise a challenge to that absent going to federal district court.

MS. LITTLE: Which makes Michelle Cochran's case all the more compelling because what you have in the Free Enterprise Fund is somebody who isn't harmed by the public company accounting and oversight board at all. They were not subject to any kind of sanctions, any kind of action by the board. Nonetheless, the supreme court which binds this court said you can come in and challenge the removal protections.

Here we have somebody harmed by the -- and dragged into the proceeding before it, an unconstitutional administrative law judge, so Michelle Cochran's case is far more compelling than that presented in Free Enterprise Fund.

MALE JUDGE: So why wouldn't every point you're making be true of the Bank of Louisiana decision Judge Duncan wrote earlier this year --

MS. LITTLE: Right. That --

MALE JUDGE: -- which raised separation of powers challenges --

MS. LITTLE: The Bank of --

MALE JUDGE: -- among other things.

MS. LITTLE: Sure. I'm sorry. The Bank of Louisiana case decided a statutory question under a different statute, 78 -- not 78Y, but section 1818 of the FDIC statute. Now, Thunder Basin is a doctrine and a tool of statutory interpretation. The United States Supreme Court has already interpreted 78Y.

In addition, in the Bank of Louisiana case they were interpreting a statute that had a provision that said that the review only after the administrative proceedings to this circuit court was exclusive and it provided for no injunctive relief at all, and that's why the panel came out the way they did.

FEMALE JUDGE 1: What was the separation of powers issue in Bank of Louisiana? Was it the same as the one here?

MS. LITTLE: Well, that's really hard to tell from the record. In an earlier panel hearing on motions that issue came up because it's barely mentioned in Bank of --

FEMALE JUDGE 1: I did not see it in the Bank of Louisiana case.

MS. LITTLE: Yeah, it's barely mentioned in the Bank of Louisiana case. Judge Jones expressed some concern about, you know, whether it was even in the case at all, and I'm sure my esteemed counsel for the Securities and Exchange Commission will address that point, but I -- one thing the court does say is the only claims that they were seriously pressing by the time of the court of appeals decision did not appear to include a separation of powers question.

And so the Bank of Louisiana case is inapposite and irrelevant to the decision this court has to make today. It does not bind this court in any way. So getting back to the analysis of -- the five-point analysis, there's one factor we have not discussed yet, and that's the meaningful judicial review, and essentially those five SEC ALJ cases hang their decisions on that one thin thread, but Free Enterprise Fund says we do not see how petitioners could meaningfully

pursue the constitutional claims under the government's theory. Not every board action is encapsulated in a final commission order or rule.

Now, we are not -- we are not challenging a commission order. There's no final order at stake here and we're not challenging a commission rule. We are challenging the unconstitutional removal protections that protect SEC AL -- administrative law judges. Free Enterprise Fund again says we do not consider eventual judicial review to be a meaningful avenue of relief on the removal question, and that -- that is really what this case comes down to.

Five circuit courts do not examine the actual statute, 78Y. They fly in the face of controlling supreme court authority that holds otherwise. Further, those decisions were all issued prior to the Lucia decision, and I think that makes a difference. It's before the SEC ALJs were found to be inferior officers. It was also -- those five SEC ALJ cases were issued before the government admitted that SEC ALJs sit in violation

of article 2.

And here's the direct quote from the solicitor general's submission in the Lucia case, that the limitations that the provision imposes on removal of the commission ALJs would be unconstitutional if the interpretation that they were offering to the supreme court could not be reconciled with the statute. That's a pretty strong admission from the government and an important one for the purposes of this case.

Also a distinction that applies to Michelle Cochran here, in none of the five SEC ALJ cases had the plaintiff been put through one unconstitutional proceeding that the SEC had every reason to know was unconstitutional and then was poised to go through that process a second time with the possibility of accoutre or other remedy that would make that whole proceeding a futility.

Also crucially not one of the SEC ALJ cases considered the fact that removal may only be cured either by congress or a federal court with a power to sever, so because those courts did not

even consider this question they don't provide even persuasive authority to this court in deciding this question for Michelle Cochran.

Moving to the question of why she should be entitled to injunctive relief, she will be subjected to an unconstitutional administrative proceeding and unable to recover money damages because of the SEC's sovereign immunity. As quoted in our brief, that is per se irreparable harm. I see my -- oh, no, that's my warning light. Okay. She also has already been barred for two years inflicting irreparable professional reputational irreversible harm on her.

The pending enforcement action also inflicts immediate and lasting reputational consequences for her employment in the industry. Further, witness memories, documents, evidence, testimony is becoming weaker and more unavailable, and circuit court eventual review cannot restore any of that. Plaintiff's requested relief would also become moot because the court of appeals cannot enjoin a hearing that has already occurred.

Further, the public has a compelling interest in insuring that its citizens are not subjected to unconstitutional treatment by their government. Finally, Lucia said in the supreme court decision that they wanted lower courts to address removal. The SEC could have brought an action against the plaintiff either in federal district court or before the commission, and it still could bring an action against her before the commission.

It chose to bring the action before an unconstitutionally appointed ALJ and the SEC was aware of the potential constitutional problems with its ALJs, problems so significant that the Department of Justice took the extraordinary step of confessing error before the supreme court. Having clung to its erroneous position that the SEC was properly appointed, the SEC must live with the consequences of its choice to bring this action before an ALJ who is improperly protected from removal by multiple layers of tenure protection.

Wright and Miller and other authorities provide that post hoc adjudication of constitutional questions is inadequate with respect to constitutional --

FEMALE JUDGE 1: Your time --

MS. LITTLE: -- injuries. Thank you.

FEMALE JUDGE 1: Your time has now expired.

MS. LITTLE: Thank you so much.

MR. AGUILAR: May it please the court, Daniel Aguilar for the Securities and Exchange Commission. As this court explained in Bank of Louisiana five different courts of appeals have held that respondents in ongoing SEC proceedings can raise constitutional challenges as part of those proceedings, and then if agreed by a final order seek judicial review in the courts of appeals.

FEMALE JUDGE 1: But I did not read Bank of Louisiana to touch top side or bottom the question of whether the ALJ in an SEC proceeding was constitutionally appointed or authorized to

conduct the proceeding.

MR. AGUILAR: So two responses to that, Your Honor, is one that the court in Bank of Louisiana, page -- I think it's 930 says there's a separation of powers challenge to the ALJ here, and in the agency decision which we cited in our brief, I believe it's at page --

FEMALE JUDGE 1: It did not resolve that challenge.

MR. AGUILAR: No, it did not, and we're not claiming that it did. The point here is that we're not here on the merits, right. We are here on the sole issue of jurisdiction, can you bring a suit raising constitutional claims to enjoin an SEC proceeding which is already ongoing into which you are already a respondent in district court, and so that's where the Thunder Basin analysis comes in, right.

I'm just pointing out page 13 of the FDIC opinion it raises out the two separate claims that they raise to the ALJ of the FDIC. One is an appointments clause challenge and the other is a

multiple layers of tenure protection challenge, but -- so when --

FEMALE JUDGE 2: But you agree it's quite a different statute that was at issue in Bank of Louisiana.

MR. AGUILAR: Well, it's a different statute in that it also contains --

FEMALE JUDGE 2: It's worded quite differently.

MR. AGUILAR: Well, so the statute has two different parts, right. One is something that says you can come to -- if you don't like a decision of the FDIC you can appeal to the courts of appeals and they'll have jurisdiction, and then I believe it's also -- that comes exclusive upon filing with the record, and then it also has a separate provision that says and nobody else has jurisdiction.

So the SEC statute mirrors that first one, right. It says if you don't like a decision of the SEC you can come to the court of appeals, we have jurisdiction, and when you file the record

that becomes exclusive. That's materially indistinguishable from the judicial review statute that was also at issue in Thunder Basin where the supreme court said we can fairly discern that --

FEMALE JUDGE 2: Yeah, but I'm just talking about Bank of Louisiana, not Thunder Basin.

MR. AGUILAR: Sure. So in Bank --

FEMALE JUDGE 2: The statute at issue is different.

MR. AGUILAR: The statute at issue is different, and then what the court says on page 925, footnote 10, is that there is this extra part to the statute about whether 1818-I2I or 1819-I, you know, that exclusive bar really applies, and at the end of that footnote the court says in any event we don't need to resolve that issue because of our holding that the statutory scheme, i.e. that first part about whether or not you can implicitly discern, that there's not district court jurisdiction here, our holding on that part of the statutory scheme withdraws district court

jurisdiction implicitly.

So you're right, it is a different statute, but that's not dispositive, right. A lot of statutory schemes are going to have different wordings and different phrasings. The key question under Thunder Basin and the supreme court's decision in Elgin is whether or not you can discern that congress meant to implicitly divest district courts of jurisdiction, and then whether or not the plaintiff's claims are the kind that congress meant to be heard in the courts of appeals.

So plaintiffs are relying a lot on Free Enterprise Fund, but I think the dispositive fact that the court in Bank of Louisiana recognized there and every other court of appeals has recognized, too, is that Free Enterprise Fund involved a freestanding challenge to the public company oversight accounting board. There were no ongoing administrative proceedings.

And so what the supreme court said is we are not going to have you randomly challenge a

rule that this agency promulgates. We are not going to have you voluntarily incur a violation of law so that you can enter into this statutory review scheme, but in every one of these case and in Bank of Louisiana itself that came after Free Enterprise Fund.

What the court has recognized is ah, you already are in an enforcement proceeding. That will culminate in judicial review in the courts of appeals, and so we can read from that statutory scheme that it is fairly discernable that congress didn't want people coming into district court to collaterally challenge their ongoing SEC proceedings, so then the question is okay, what are the kinds of claims that you're raising.

And so that's where the analysis under Thunder Basin, those three different factors, kicks in, and what this court has said in Bank of Louisiana is, quote, the supreme court has held that congress provides meaningful judicial review by authorizing a review of challenges to a final

agency order by a federal circuit court. That's at page 925, and so here you clearly have that, right.

They can and have raised their constitutional and statute of limitations challenges in the SEC proceedings. Those are preserved. They can raise them again before the commission and have the commission consider them. If they are aggrieved by a final order of the commission they can reiterate that on judicial review, and of course the court of appeals would have authority to consider both of those claims in their entirety, right.

So then there are the two other factors, is it wholly collateral to the review scheme, and can the agency bring its expertise to bear on it. So one, is it wholly collateral? Well, no, because it's not a freestanding challenge, right. Not everybody in the world has a grievance with an ALJ's removal restrictions, right. You have -- you're able to raise that claim when you are in an administrative proceeding

that is before an ALJ.

And at that point congress says okay, here's how that review goes. The ALJ hears the case, then the commission does, and then if you're aggrieved we apply 15 USC 78Y and we allow the court of appeals and not the district court to have jurisdiction, and then on the agent's expertise what the supreme court explained in Elgin versus Department of Treasury is that that's -- you're not using the common sense terms of like can the agency bring its expertise to bear.

FEMALE JUDGE 1: How many of these cases involve the question of whether the ALJ or the adjudicatory body had -- was constitutionally appointed or --

MR. AGUILAR: Sure.

FEMALE JUDGE 1: -- empowered to decide the case, not a -- constitutional issues come in all stripes, I get that, but where the charge is -- the challenge is you do not have authority, you're not properly empowered to decide any case, how many of the cases you're deciding dealt with

that issue?

MR. AGUILAR: Sure, so that would be the second circuit's decision in Tilton. That was an appointments clause challenge. The fourth circuit's decision in Bennett was an appointments clause challenge and a removal challenge. The seventh circuit's decision in Devo (phonetic) was a removal challenge, and the eleventh circuit's decision in Hill was both an appointment and a removal challenge.

FEMALE JUDGE 1: I get that. Go ahead. Go ahead.

MR. AGUILAR: I'm sorry. I thought that was answering your question.

FEMALE JUDGE 1: No, that was not the question, but I'll be more precise, but go ahead.

MR. AGUILAR: Well, then I'd also just also point out because this also gets into the issue of, you know, they're claiming that this person doesn't have authority to hear my case. That also goes to the ripeness analysis which we've pointed out that this court has encountered

in Energy Transfer Partners and Total Gas, right.

What -- in those cases what they were alleging is that they were being forced to be part of an administrative proceeding being held before an ALJ, and that there's no adequate remedy through going through that proceeding, right, and this court and both of those cases said that's not a ripe claim for adjudication because you might prevail on the merits of the administrative action.

You might not have violated any statutes or regulations and that would moot the judicial challenge, and what the court said in Energy Transfer Partners on page 141 is the possibility that plaintiff may prevail warrants the requirement that plaintiff pursue administrative adjudication, not shortcut it, and the court reiterated that holding in Total Gas saying that essentially if you're going to raise it -- and there was an appointments clause challenge to the administrative law judge in the FERC, Federal Energy Regulatory Commission.

And there what the court said, well, even if you're raising an appointments clause challenge to that ALJ ultimately that rests on a series of contingencies. You have to believe that the ALJ is eventually going to rule against you and that the commission is going to rule against you and then that -- you would want to seek judicial review. Those might not all happen.

And so your claim rests on a series of contingencies and accordingly is not ripe, and it's the same analysis sort of factors into that third Thunder Basin consideration, can the agency bring its expertise to bear, because what the supreme court explained in Elgin is that we'll assume that an agency can't decide a constitutional claim, that the only body that's going to give you relief on that is a court.

Nevertheless, the agency can bring its expertise to bear on that claim by essentially mooting out the issue. If the agency finds in your favor on the merits of the action whether or not you violated a statute or more common routine

statutory applications that it gives and here they're raising a statute of limitations challenge, right. If -- the commission is well versed in its statute of limitations and could afford them relief if they're meritorious.

FEMALE JUDGE 2: Doesn't that go against the basic principle that, for example, we can't -- sometimes we have appeals where the merits issue is really straight forward, really very simple to dispose of, but there's a very complex jurisdictional issue. We're not allowed to go oh, well, if we had jurisdiction we'd rule against you anyway, so it doesn't really matter if we have jurisdiction.

We have to decide the jurisdiction, so you're kind of flipping the idea that well, maybe they won't hurt you that much. They don't have jurisdiction but they won't hurt you that much if they rule for you, okay, but that seems inconsistent with the notion that jurisdiction is key.

MR. AGUILAR: Well, so --

FEMALE JUDGE 2: We don't get to rule for or against you if we don't have jurisdiction.

MR. AGUILAR: Well, so to be clear the question here is whether or not the district court has jurisdiction.

FEMALE JUDGE 2: No, I understand that, but you are -- they are challenging the ALJ's, right, the ALJ's constitutional structuring and whether they have the power to decide because they're unconstitutionally appointed. That's jurisdictional.

MR. AGUILAR: No, I don't think it is, Your Honor.

FEMALE JUDGE 2: You don't.

MR. AGUILAR: The statutes give the SEC jurisdiction to initiate enforcement actions, and the statutes give the SEC the right to delegate that down to an ALJ. What they're raising is a separate --

FEMALE JUDGE 2: But if that ALJ -- you don't think it would be a question of jurisdiction if I just showed up as some person off the street

and was sitting up here to decide this case?

MR. AGUILAR: No, not on a jurisdictional level, and the best case I'd point you to that is Freytag versus Commissioner. This was an appointments clause challenge to a special trial judge of the tax court. The petitioners in that case said they weren't properly appointed and so therefore everything that happened in the proceeding was basically void, and what the supreme court said is okay, well, you didn't raise that initially and so it's been forfeited.

But it doesn't go to jurisdiction. It goes to a separation of powers challenge and the structure of the constitution so we'll consider it, but the court there made very clear that a separation of powers challenge is not jurisdictional, and here all of the --

MALE JUDGE: Here there's not an appointment clause challenge, right?

MR. AGUILAR: Correct.

MALE JUDGE: They're challenging the insulation from removal.

MR. AGUILAR: And so usually removal is tied up with or correlated with the appointment power.

MALE JUDGE: Except for we've said recently the remedy is different.

MR. AGUILAR: Yeah, so the remedy is -- but just to the point about whether it goes to the SEC's jurisdiction or the ALJ's jurisdiction.

FEMALE JUDGE 2: It's more the ALJ. That's my question --

MR. AGUILAR: Right.

FEMALE JUDGE 2: -- and you're saying no, it's not. I'll look at that, but I also want to distinguish a little bit. Collins versus Manuchin (phonetic) was not dealing with adjudicative cases and, in fact, that's a distinction that adjudicative cases are perhaps different. Whether I have jurisdiction or not in your world if I just showed up here having not gone through the senate and president and all that stuff and started ruling on your case I think they would have to set aside that ruling.

That's different from Collins versus Manuchin which didn't involve a ruling. It involved a policy decision and implementation of a policy that was disagreed with, so I'm not sure that that necessarily answers the question of how you address an unconstitutionally appointed ALJ, however you want to term it.

MR. AGUILAR: Again, I don't know of a perfect analogy, but the other case that I'd point you to is Wynn versus United States. It's not cited in the briefs. I just know it. I'm trying to be helpful and answer your question. It was decided in the late '90s and there it was a territorial judge from Guam sat on a panel for the ninth circuit that affirmed a criminal conviction, and there was no objection at the time.

It went up through the supreme court and the supreme court said you're right, it's forfeited. It's not a jurisdictional issue, but we're going to address it anyway because it's one of extreme importance, it goes to the composition of the court. So again the issue is not whether

or not the ALJ has jurisdiction. The statutes that congress have enacted provide the SEC the ability to initiate these actions and to assign them to ALJs.

Now, they might say ah, there's a fundamental flaw in that that relates to the separation of powers. Look, if they want to pursue that claim they definitely can and they can get meaningful judicial review in the courts.

FEMALE JUDGE 1: Yeah, but the question is does the federal district court have jurisdiction. Whether the ALJ does or not does the federal district court have jurisdiction to adjudicate at this point in time whether those ALJs are properly constitutionally appointed? In other words, do they have -- are they too insulated from a removal?

And what I meant to ask you when you were talking about Elgin, or Elgin, that did not involve that kind of issue, and you pointed us to the Energy case, or the Energy Partners case. That was pre Free Enterprise. I mean, to me Free

Enterprise kind of changed the landscape here, and I frankly have a very difficult time distinguishing Free Enterprise Fund from the facts in front of us.

MR. AGUILAR: So I think --

FEMALE JUDGE 1: You've got a very thin read, it seems to me, that you're hanging on here.

MR. AGUILAR: Well, I disagree, Your Honor, and I'd point to two things initially and then we can discuss further if that's helpful, but initially I'd point out that what makes Free Enterprise Fund different and what this court recognized in Bank of Louisiana, there were several paragraphs --

FEMALE JUDGE 1: It did not -- not on this issue it did not. Bank of Louisiana did not touch on separation of powers in this context in any kind of meaningful way. I'm going to go back and look at the briefing and see what was raised, but the opinions certainly did not address this in any detail at all.

MR. AGUILAR: I wasn't addressing

separation of powers, Your Honor. What I was addressing is why these kind of claims can be channeled through section 78Y.

FEMALE JUDGE 1: Bank of Louisiana doesn't talk about this kind of claim being channeled through before you can get to district court.

MR. AGUILAR: But what Bank of Louisiana does say, and I agree it's not on this claim but I'm just talking about claims generally, is that -- and it analogizes to the SEC cases from all of the other circuits on this, is that -- excuse me, my voice is getting a little low, is that --

FEMALE JUDGE 1: I know what it holds. You don't have to sit here and tell me what it holds. I read it. I think it's different. They're challenging did they constitutionally do this, did they deprive me of these constitutional rights which is fundamentally different from saying the ALJ at the SEC is not constitutionally there.

MR. AGUILAR: So what I would point you to then on the second one was the supreme court's decision in Elgin which postdates Free Enterprise Fund because there --

FEMALE JUDGE 1: I thought Elgin was before it.

MR. AGUILAR: No, Free Enterprise Fund I believe is from 2010 and Elgin is from 2012.

FEMALE JUDGE 1: Okay.

MR. AGUILAR: It's a later decision, and so that's why the supreme court used that opportunity in Elgin to clarify what it meant by bringing the agency's expertise to bear and whether or not it's fully collateral, but also in the discussion in Elgin.

FEMALE JUDGE 1: But Elgin didn't involve this kind of case, did it?

MR. AGUILAR: No, I agree it's not a separation of powers concern, but what it did say is that they said the dissent wants to carve out an exception for facial constitutional challenges.

FEMALE JUDGE 1: But this isn't that

either. This --

MR. AGUILAR: Well, I under --

FEMALE JUDGE 1: -- is a whole different animal, and I'm just -- you can keep arguing, but you're wasting your time with me talking about Elgin overruling Free Enterprise in some way or cabining it when we're talking about these kinds of issues. We're totally insulated from the president's removal authority. That's a different animal to me.

MR. AGUILAR: If it's a different animal then what you can think about is that the agency doesn't even need to address the merits of that because the agency could still provide relief on it, right. The agency doesn't -- the commission here doesn't have to delegate the case down to the ALJ.

FEMALE JUDGE 1: But it did.

MR. AGUILAR: It did, but it can still grant meaningful relief even before you get to court because if the agency just said --

FEMALE JUDGE 1: Why -- if that's the

case why in Lucia did the U.S. Supreme Court say send it back to a properly constituted ALJ?

MR. AGUILAR: Because his case at that time had been heard before an ALJ that had not been appointed by the commission and the commission agreed with that ALJ's initial decision and then it went out into the courts of appeals for review.

FEMALE JUDGE 1: And the court had jurisdiction to decide that issue --

MR. AGUILAR: The court of appeals did, yes. Lucia did not --

FEMALE JUDGE 1: -- as did the district court, and here they may lose on the merits of the argument. At least the district court, it seems to me, has jurisdiction to entertain the claim.

MR. AGUILAR: I disagree, Your Honor.

FEMALE JUDGE 1: I know you do.

MR. AGUILAR: And if I can point out why on this it's because if you're thinking about it on the three Thunder Basin factors first you clearly have meaningful judicial review in the

court of appeals. That's what this --

FEMALE JUDGE 1: Well, they would have in Free Enterprise Fund as well.

MR. AGUILAR: But in Free Enterprise Fund critically there was not an ongoing enforcement proceeding, right. There was nothing that would lend the plaintiffs in that case to get into the courts of appeals.

FEMALE JUDGE 2: Isn't this worse?

MR. AGUILAR: No, Your Honor.

FEMALE JUDGE 2: Isn't going through an enforcement process in an unconstitutionally appointed ALJ worse than going through an investigation process with an unconstitutionally appointed investigation?

MR. AGUILAR: Again, the question of whether the district court has jurisdiction doesn't go to the relative merits of the claim.

FEMALE JUDGE 1: But what the court went through in Free Enterprise, it said look, you can get a bad result here and -- but we're not going to wait for that. They acknowledged the

possibility that it could turn into a bad result. They said we're not going to put you through that. You don't have to go through that process to challenge whether the ALJ or in that case the board was properly constituted under the constitution.

MR. AGUILAR: But there what the court was saying was we are not going to make you voluntary incur a sanction just to gin up an enforcement proceeding to seek judicial review, and what this court said in Bank of Louisiana is that's not at stake here. There's already an enforcement proceeding. To the extent you think betting the farm is relative here the farm is already on the table. That's a direct quote from Bank of Louisiana saying that --

FEMALE JUDGE 1: Different context.

MR. AGUILAR: In a different context in a different statute, but critically the analysis still applies here with full force.

FEMALE JUDGE 1: I just disagree, frankly.

MR. AGUILAR: There is --

FEMALE JUDGE 1: I don't think Bank of Louisiana says that, so --

MR. AGUILAR: But if you --

FEMALE JUDGE 1: I'll go look at the briefs, but I don't read it saying that.

MR. AGUILAR: If you think that separation of powers challenges are meaningfully different the appointments clause challenge is still a challenge under the separation of powers who has authority to appoint this person, and under the Thunder Basin analysis there's nothing that makes a removal challenge separate or distinct from any other kind of facial constitutional challenge that could be raised.

It's still susceptible to all of the three factors, is it capable of meaningful judicial review, is it wholly collateral to the proceedings, which it's not because the only reason they can raise it --

FEMALE JUDGE 1: Well, in Free Enterprise Fund they said it was.

MR. AGUILAR: But there again there was no enforcement proceeding.

FEMALE JUDGE 1: That had nothing to do with wholly collateral.

MR. AGUILAR: It does, Your Honor, and if I can just emphasize that point, there their claim was the fact that the board exists and can regulate us is the reason why we want to challenge its constitutionality, and so therefore our claim about its constitutionality is wholly collateral to anything else that the board is currently doing because we are not being subjected to anything, whereas here their claim against the ALJ is premised on the fact that they are currently in an enforcement proceeding, an enforcement proceeding for which congress has allowed judicial review solely in the courts of appeals and not in the district courts.

That's why the wholly collateral factor tilts in our favor, but even if you didn't think that and some of the other courts have said maybe it's a wash, we don't get to that, the fact that

meaningful judicial review is available in the courts of appeals and that the agency can bring its expertise under Elgin which postdates Free Enterprise Fund to explain that we might moot out the constitutional issues by ruling on your favor on other things goes to show that there is no district court jurisdiction.

And that analysis on the last factor also demonstrates why this case is not ripe for judicial review until there is a final order against plaintiff.

FEMALE JUDGE 2: And I just want to clarify my earlier -- I was not suggesting that I thought this was a case about the jurisdiction of the ALJ. I was responding -- I know it's about the district court. I was responding to your contention that trying a case, if you will, in front of somebody who is unconstitutionally appointed is okay.

You're saying that's not a jurisdictional question, and I understand your argument on that but I was just trying to explain

that -- I was just responding to your argument. I wasn't suggesting the issue before us is that. The issue before us is the jurisdiction of the district court. I get that, I know that, and I didn't want to create a confusion on that.

MR. AGUILAR: We would ask the court to affirm. Thank you.

FEMALE JUDGE 2: Are you able to texturally walk us through the difference between the statute in Bank of Louisiana and the statute here?

MS. LITTLE: I hope so.

FEMALE JUDGE 2: Okay. So tell us that because if we're bound by Bank of Louisiana that changes things considerably.

MS. LITTLE: Well --

FEMALE JUDGE 2: So tell us why we're not.

MS. LITTLE: The Bank of Louisiana applied an FDIC statute that had a flat jurisdiction stripping bar. It said there's a provision in the statute, 1818, that says no court

shall have the power to enjoin essentially anything that the FDIC would do in the situation of the bank examination.

Here we have an entirely different statute. The SEC statute actually says in 78AA that courts have exclusive jurisdiction under the 34 Act, and we cite that material in our brief. Further, the review that goes to the circuit court under the 78Y provision only applies to final orders and it's permissive, not mandatory.

It says you may appeal the matter to the circuit court, whereas in the 1818 statute it was required. It was exclusive jurisdiction. The word exclusive does not appear anywhere in 78Y or any part of the 34 Act. Finally, the 34 Act has a provision commonly known as a savings clause that says nothing in this statute about the administrative scheme deprives courts of jurisdiction conferred upon them by other statutes.

Jurisdiction is -- there's a presumption in favor of jurisdiction. I would

argue the case law particularly recognizes that in the realm of constitutional questions and in the realm of structural constitutional questions such as that presented here, so the Bank of Louisiana case is simply quite different. It's inapposite and irrelevant.

I would also note that the panel in Bank of Louisiana itself says that going through the Thunder Basin analysis was not necessary. How to read 78Y has already been decided by the United States Supreme Court for all circuits, and we here today are asking this court not to join the insurrection.

FEMALE JUDGE 1: Would we be creating a circuit split, though, if we ruled your way?

MS. LITTLE: Absolutely.

FEMALE JUDGE 1: Okay.

MS. LITTLE: The ripeness argument is a red herring.

MALE JUDGE: You said the Bank of Louisiana court did talk about the statute, but then it did go through the Elgin factors.

MS. LITTLE: Yeah, they said what they were going to do is cycle through --

MALE JUDGE: They said the same result is true under the three Elgin factors.

MS. LITTLE: Well, actually it's five elements and that's why I took some time to go through that earlier in my argument, because they omit the examination of the statute at all. They simply jump to the three --

MALE JUDGE: Who is they, the Bank of Louisiana or Elgin?

MS. LITTLE: The Bank of Louisiana panel. You will search that opinion in vein for any discussion of 78Y or any part of the securities law statute, so they don't even examine that statutory --

MALE JUDGE: Well, they were deciding a different statute.

MS. LITTLE: Precisely, but the point is that it has no bearing upon 78.

MALE JUDGE: But my point is because they did, I mean, alternative holdings are still

precedent, and you acknowledge they did go through the Elgin factors as well.

MS. LITTLE: Yes.

MALE JUDGE: They didn't just rely on the statute.

MS. LITTLE: And the critical points I hope to convey today is the supreme court already cycled through those same factors and reached a different and controlling conclusion. Ripeness is --

MALE JUDGE: But Bank of Louisiana is contrary to the supreme court?

MS. LITTLE: No, because it's interpreting another statute, but in terms of 78Y it is definitely --

MALE JUDGE: Okay. I see what you're -- I understand. I understand what you're saying. 78, okay.

MS. LITTLE: Yes. Now, ripeness is a problem for the SEC in two respects. First they argue here the claim is not ripe yet, but they also parallely argue that once it starts it's too

late putting the SEC in a heads we win, tails you lose situation. Ripeness also nabs it under both the Total Gas and Energy Transfers case.

In both of those cases the companies were raising objections to possible future actions that might be taken. Page 35 through -- 335 through 339 of Total Gas says all of their arguments were predicated on the supposition that FERC might ultimately schedule an AP, administrative proceeding before an ALJ, but had not yet done so.

So the entire factual situation presented in Total Gas is just not present for Michelle Cochran, and on betting the farm I would ask how many times does Michelle Cochran have to put the farm on the table. Federal 78 says that it requires uncommon fortitude for judges to do their duty as faithful guardians of the constitution. We ask today that this court do its duty. Anything less is an abdication --

FEMALE JUDGE 1: Counsel, you're out of time.

MS. LITTLE: -- and so we ask you to find jurisdiction. Thank you, Your Honor.

FEMALE JUDGE 2: That will conclude the arguments for today. The court is adjourned until tomorrow morning.

(The Recorded Hearing was concluded.)

CERTIFICATE OF TRANSCRIBER

I, Bonnie K. Panek, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

/s/ BONNIE PANEK

BONNIE K. PANEK