No. 15-1511

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

LAURIE A. BEBO,

Plaintiff-Appellant,

v.

SECURITIES AND EXCHANGE COMMISSION,

Defendant-Appellee.

On Appeal From the United States District Court
for the Eastern District of Wisconsin
Case No. 15-CV-00003
The Honorable Rudolph Randa, District Judge

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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DISCLOSURE STATEMENT

The undersigned, counsel of record for Laurie A. Bebo, Plaintiff-Appellant, furnishes the following list in compliance with Circuit Rule 26.1:

1. The full name of every party that the attorney represents in the case: the undersigned counsel represents Plaintiff-Appellant, whose full name is Laurie A. Bebo.

2. Plaintiff-Appellant is not a corporation and therefore does not have: (a) a parent corporation or (b) stockholders which are publicly owned companies.

3. The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: Reinhart Boerner Van Deuren s.c.

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JURISDICTIONAL STATEMENT

Appellant Laurie A. Bebo brought an action in the District Court for the Eastern District of Wisconsin for injunctive and declaratory relief against the Securities and Exchange Commission ("SEC") alleging multiple constitutional violations under the Fifth Amendment and Article II of the United States Constitution. The district court had subject-matter jurisdiction under 28 U.S.C. § 1331.

The district court entered a final decision dismissing Ms. Bebo's action for lack of subject matter jurisdiction on March 3, 2015. This Court has jurisdiction under 28 U.S.C. § 1291 to hear Ms. Bebo's appeal from the final decision of a district court of the United States. Ms. Bebo's appeal is timely pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B) because the district court entered judgment on March 3, 2015, and Ms. Bebo filed her notice of appeal on March 10, 2015.

STATEMENT OF THE ISSUE

Whether the district court is deprived of subject matter jurisdiction by the administrative review scheme of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78y(a)(1), for constitutional challenges to the Dodd-Frank Wall Street Reform and Consumer Protection Act and the tenure structure of the SEC's Administrative Law Judges by a litigant against whom the SEC has initiated an administrative enforcement action for alleged violations of the Exchange Act?

STATEMENT OF THE CASE

On January 2, 2015, Ms. Bebo filed a Complaint in the District Court for the Eastern District of Wisconsin alleging that her constitutional rights to due process and

equal protection under the Fifth Amendment had been, and continued to be, violated by a facially unconstitutional act of Congress. (Dkt. 1 ¶¶ 15–16.) Specifically, Ms. Bebo alleged that the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank") granted the SEC unconstitutional, unlimited authority to choose whether a citizen against whom it seeks civil penalties for alleged securities violations will be tried in federal district court, where she can invoke her Seventh Amendment right to a jury, or in its own administrative proceedings, where she cannot. (*Id.* ¶ 91.)

Prior to the passage of Dodd-Frank, the SEC's remedies in administrative proceedings against an unregulated person, like Ms. Bebo, were limited principally to an administrative cease-and-desist order and disgorgement. (*Id.* ¶ 89.) If the SEC sought to punish an unregulated citizen like Ms. Bebo through the imposition of a civil penalty, the SEC was required by law to pursue that punishment in federal district court. (*Id.*) Section 929P(a) of Dodd-Frank changed that, allowing the SEC to seek functionally identical remedies against unregulated citizens in the forum of its choice: federal district court or its own administrative proceedings. (*Id.*)

Ms. Bebo alleged in her Complaint that section 929P(a) of Dodd-Frank is unconstitutional on its face under the Fifth Amendment guarantees of equal protection and due process because it provides the SEC unguided authority to choose which citizens will (and which will not) receive the procedural protections of federal district court, including the right to be tried by a jury, in defending themselves against the same alleged violations for the same potential penalties. (*Id.* ¶¶ 93–95.)

Ms. Bebo also alleged in her Complaint that the SEC's internal administrative proceedings violate Article II's mandate that the President "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, because the Administrative Law Judges ("ALJs") who preside over SEC administrative enforcement actions are separated from the President by multiple levels of protection from removal. (*Id.* ¶¶ 59–61, 88.)

Along with her Complaint, Ms. Bebo also filed a motion for a preliminary injunction to stop the administrative proceedings the SEC instituted against her a month earlier, on December 3, 2014. (App. 1–2.) In those administrative proceedings, the SEC is seeking civil monetary penalties that could amount to millions of dollars and a permanent ban on Ms. Bebo serving as an officer or director of a publicly-traded company. (Dkt. 1 ¶ 3.) Prior to the passage of Dodd-Frank, the SEC would have been required by law to bring its case against Ms. Bebo in federal district court for the type of penalties it seeks. (*Id.* ¶ 4.) And, prior to the passage of Dodd-Frank, Ms. Bebo would have been entitled to have a jury decide whether she has violated securities laws and deserves the imposition of civil monetary penalties. (*Id.* ¶¶ 3–5.) Instead, Dodd-Frank allows the SEC to choose to bring its enforcement action administratively, where an SEC ALJ will decide those questions. (*Id.* ¶ 7.)

Extensive briefing was completed on Ms. Bebo's preliminary injunction motion, and shortly thereafter, the district court entered an order dismissing Ms. Bebo's entire action for lack of subject matter jurisdiction. (*See generally* App. 1–11.) The district court held that although Ms. Bebo's claims are "compelling and meritorious," it cannot consider them because the administrative review scheme set forth in the Exchange Act

requires Ms. Bebo to litigate her constitutional challenges to the SEC's enabling legislation and the removal structure of its ALJs before the SEC itself. (App. 3.) In other words, the district court held that Ms. Bebo must ask the SEC ALJ presiding over her administrative proceedings to decide that those proceedings and his position are unconstitutional. (App. 2–3.)

SUMMARY OF THE ARGUMENT

This appeal is about constitutional separation of powers: whether the executive branch is the appropriate branch of government to review enabling legislation of that branch's power. The SEC is capitalizing on authority granted to it by an (unconstitutional) act of Congress to pursue unregulated citizens for civil penalties in its home court with virtually unblemished success. So far, it has also successfully isolated that act of Congress from judicial review by claiming it can only be challenged within the agency itself—where the agency is the investigator, prosecutor, and judge.

Under the SEC's and the district court's reasoning, a respondent subjected to unconstitutional agency proceedings cannot challenge the legislation enabling those proceedings in district court—for want of subject matter jurisdiction—and cannot press such claims in the agency proceeding—where the Rules of Practice do not entitle her to bring counterclaims. This insulation of a federal law from constitutional scrutiny simply cannot be reconciled with the most basic principles of our constitutional system. *Cf. Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803).

It is federal district courts, not administrative agencies like the SEC, that have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties

of the United States." 28 U.S.C. § 1331. Under this provision, it is "established practice for [the U.S. Supreme Court] to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Bell v. Hood*, 327 U.S. 678, 684 (1946). In light of § 1331, the question in any case is not whether Congress has specifically conferred jurisdiction, but whether it has taken it away. *Whitman v. Dep't of Trans.*, 547 U.S. 512, 514 (2006) (per curiam).

Nothing in the Exchange Act takes authority away from Article III federal district courts to consider facial constitutional challenges to Congressional acts granting arbitrary and unconstitutional power to a federal agency. Rather, it only vests jurisdiction with the SEC and, then, the courts of appeals over actions seeking the "affirmance, modification, enforcement, or setting aside" of "Final [Securities and Exchange] Commission orders." 15 U.S.C. § 78y(a)(1).[1] The district court below held, erroneously, that this administrative review scheme provides the exclusive avenue for Ms. Bebo to raise her claims challenging the constitutionality of the statute enabling the proceedings themselves. (App. 3.)

But the controlling case law (which the district court quotes with approval (*id.* at 4)) instructs that a litigant's claims are precluded from district court review by an administrative review scheme only if "the 'statutory scheme' displays a 'fairly discernable' intent to limit jurisdiction, and the claims at issue 'are of the type Congress

[1] The statute also provides review in the courts of appeals for challenges to certain rules promulgated by the SEC that are not relevant to this case. 15 U.S.C. § 78y(b)(1). The district court below limited its consideration to the provision of the statute providing for review of final SEC orders. (App. 3–4.)

intended to be reviewed within th[e] statutory structure.'" *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212 (1994)).

Ms. Bebo's constitutional claims attacking the constitutionality of Dodd-Frank, which provides the SEC authority to seek civil penalties in its administrative enforcement actions, and the constitutionality of the ALJs who preside over those enforcement actions, are not the "type [of claims] Congress intended to be reviewed within the statutory structure" of § 78y. *Free Enterprise,* 561 U.S. at 489. The statute, by its express terms, applies to Commission orders and rules, not constitutional attacks on the overall authority of the agency. Indeed, the SEC Rules of Practice do not provide a procedural mechanism for a litigant to raise a claim of her own whatsoever; SEC administrative proceedings are tailored to the adjudication of securities laws violations and nothing more. *See In re Hausmann-Alain Banet,* Release No. 556, 2014 WL 345338, at *4 (ALJ Jan. 30, 2014) (ALJ Elliot, who is also presiding over Ms. Bebo's case, decided he could not consider a counterclaim because the "Commission's Rules of Practice do not permit counterclaims"). The Supreme Court has held on several occasions that administrative review schemes like § 78y do not preclude district court jurisdiction over claims that, like Ms. Bebo's, attack the overall authority of the agency and do not relate to the merits of an agency proceeding. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 492 (1991); *Free Enterprise,* 561 U.S. at 490; *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 56 (1993). To require Ms. Bebo to present her claims in the administrative proceeding

"would be to require [her] to submit to the very procedures which [she is] attacking." *Touche Ross & Co. v. S.E.C.*, 609 F.2d 570, 577 (2d Cir. 1979).

Further, the other factors courts consider when determining whether a statutory review scheme precludes district court jurisdiction also counsel in favor of jurisdiction in this case. *See Free Enterprise,* 561 U.S. at 489 (outlining the other indicators courts can consider to determine if Congress intended district court jurisdiction to be precluded). First, if Ms. Bebo is precluded from bringing her claims in district court she will be denied an opportunity for "meaningful judicial review" of her claims. Though § 78y provides for review in the courts of appeals for persons "aggrieved" by an order of the SEC, Ms. Bebo's Complaint does not challenge an SEC order or the merits of the allegations pending against her that will ultimately culminate with an SEC order. Further, a court of appeals, should she reach it, could not provide Ms. Bebo the relief she seeks—an injunction of the unconstitutional administrative proceedings—because the proceedings would have already transpired.

Second, Ms. Bebo's claims are "wholly collateral" to the administrative proceedings pending against her. She does not attack the merits of the allegations pending against her in the administrative proceedings; she contends that her administrative proceedings may not constitutionally take place at all. *See Gupta v. S.E.C.*, 796 F. Supp. 2d 503, 513 (S.D.N.Y. 2011) (where plaintiff "would state a claim even if [he] were entirely guilty of the charges made against him ….").

Finally, Ms. Bebo's constitutional challenges to a federal law are outside the SEC's expertise. Supreme Court precedent on this point is clear: "[A]djudication of the

constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Thunder Basin*, 510 U.S. at 215 (internal citation and quotation marks omitted).

The statutory scheme that governs review of SEC orders in administrative enforcement actions does not preclude Ms. Bebo's constitutional challenges. The district court must exercise its federal question jurisdiction under § 1331.

APPELLATE STANDARD OF REVIEW

The appellate court reviews *de novo* a district court's dismissal for lack of subject matter jurisdiction. *Commonwealth Plaza Condo. Ass'n v. City of Chi.*, 693 F.3d 743, 745 (7th Cir. 2012). In reviewing a district court's dismissal, the appellate court "accept[s] the complaint's well-pleaded allegations as true and draw[s] all favorable inferences for the plaintiff." *Killingsworth v. HSBC Bank Nev., N.A.*, 507 F.3d 614, 618 (7th Cir. 2007).

ARGUMENT

> "It is axiomatic that Congress may not act unconstitutionally, nor may it delegate authority to executive agencies to do so. Furthermore, Congress cannot insist that the executive be immune from judicial review requiring it to act in a constitutional manner. It is the essential function of the judiciary to review and enjoin such illegal action."
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> *Marozsan v. United States,* 852 F.2d 1469, 1477 (7th Cir. 1988).

Federal district courts, not administrative agencies, have original jurisdiction over constitutional challenges to federal statutes. 28 U.S.C. § 1331. And the statutory review provision governing appeals of SEC final orders, 15 U.S.C. § 78y(a)(1), does not display a "'fairly discernable intent,'" *Free Enterprise*, 561 U.S. at 489 (citation omitted), to limit the jurisdiction of district courts to hear challenges to the unconstitutional

enforcement authority granted to the SEC by Section 929P(a) of Dodd-Frank and the unconstitutional tenure structure of SEC ALJs. Further, these constitutional challenges to agency authority and structure as a whole are not "the type Congress intended to be reviewed" within the agency itself. *Id.* (internal citation and quotation marks omitted). For these reasons alone, jurisdiction is proper in the district court for Ms. Bebo's claims.

In addition to examining the text of the statute to discern Congressional intent, courts can also look to other factors in determining whether jurisdiction is proper in the district court: whether "'a finding of preclusion could foreclose all meaningful judicial review,'" whether the suit is "'wholly collateral'" to a statute's review provisions; and whether the claims "'are outside the agency's expertise.'" *Free Enterprise*, 561 U.S. at 489 (citation omitted). Ms. Bebo's claims also satisfy these indicators of Congressional intent not to foreclose district court review, as her constitutional claims do not relate whatsoever to the merits the SEC enforcement action and are outside the expertise (and even the authority) of SEC ALJs. Further, even if Ms. Bebo was to appeal her claims through the agency to a court of appeals under § 78y(a)(1), that court could not grant the relief she seeks in her Complaint—an injunction of the administrative proceedings. Her claims must be heard in a federal district court.

I. The Claims Ms. Bebo Asserts in her Complaint are not the Type Congress Intended to be Reviewed Within the Statutory Scheme of 15 U.S.C. § 78y.

Federal district courts, not administrative agencies like the SEC, have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the

United States." 28 U.S.C. § 1331. The Exchange Act's administrative review scheme[2] strips district courts of this jurisdiction in certain enumerated instances, but not for the claims Ms. Bebo asserts in her Complaint. 15 U.S.C. § 78y(a)–(b) (providing for review in the courts of appeals of actions seeking "affirmance, modification, enforcement, or setting aside" of "Final Commission orders" and "Commission rules"). Ms. Bebo is not seeking review of an order or rule of the Commission. Nor does she seek review of a federal statute she has been charged with violating, which would go to the merits of the allegations pending against her in the agency proceedings. Rather, Ms. Bebo seeks review, for constitutional defects, of the federal statute promulgated by Congress from which the SEC draws its authority to institute enforcement actions in the first place.

A statutory review scheme such as § 78y strips the district courts of jurisdiction in favor of agency review only when "the 'statutory scheme' displays a 'fairly discernable' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Free Enterprise*, 561 U.S. at 489 (quoting *Thunder Basin*, 510 U.S. at 207, 212). The types of claims Congress intended to be reviewed within the structure of § 78y are those brought by "persons aggrieved" by the outcome of an enforcement proceeding (culminating in a final Commission order);

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[2] The district court referred to the Exchange Act's review scheme as "exclusive," but the Supreme Court has already held otherwise. "The Government reads § 78y as an exclusive route to review," the *Free Enterprise* Court noted. "But the text does not expressly limit the jurisdiction that other statutes confer on district courts. *See, e.g.*, 28 U.S.C. §§ 1331, 2201. Nor does it do so implicitly." *Free Enterprise*, 561 U.S. at 489. Rather, the *Free Enterprise* Court explained that federal district courts retain their jurisdiction unless it is discernable from agency review provisions that Congress intended to limit that jurisdiction for certain claims. Congress has not done so for the claims at issue here, which challenge the constitutionality of the enabling legislation, not the agency's actions or rules.

in other words, the review scheme of § 78y applies to review of individual enforcement actions. Throughout its decisions on this issue, the Supreme Court has repeatedly explained that a statutory provision governing the review of individual agency proceedings does not apply to claims that, like Ms. Bebo's, challenge "a practice or procedure employed in making [numerous] decisions." *Reno,* 509 U.S. at 56 (internal citations omitted); *see also Free Enterprise*, 561 U.S. at 490 ("Petitioners' general challenge to the Board is 'collateral' to any Commission orders or rules from which review might be sought.") (citing *McNary,* 498 U.S. at 491–92).

The *McNary* Court rejected an argument advanced by the Immigration and Naturalization Service ("INS") that the judicial review provisions covering the denial of individual Special Agricultural Worker ("SAW") applications, which prescribed exhaustion of administrative remedies prior to review in the federal courts of appeals, barred the plaintiffs from broadly challenging in federal district court the constitutionality of INS procedures for implementing the SAW program. *Id.* at 494. The Court emphasized that the relevant statutory review provision applied to "direct review of individual denials of SAW status," but did not preclude district court jurisdiction over "general collateral challenges to unconstitutional practices and policies[.]" *Id.* at 492. The Court recognized that "the individual respondents in this action do not seek a substantive declaration that they are entitled to SAW status. Nor would the fact that they prevail on the merits of their purportedly procedural objections have the effect of establishing their entitlement to SAW status." *Id.* at 495. Rather, if the plaintiffs were

successful in their challenge to INS procedures, they would be entitled to have the merits of their SAW applications considered under proper and fair procedures. *Id.*

The Supreme Court has since reaffirmed its holding in *McNary*, declaring in *Reno v. Catholic Social Services, Inc.* that a statutory provision governing the review of single agency actions does not apply to challenges to "'a practice or procedure employed in making [numerous] decisions.'" 509 U.S. at 56 (citations omitted); *see also Free Enterprise*, 561 U.S. at 490 ("Petitioners' general challenge to the Board is 'collateral' to any Commission orders or rules from which review might be sought.") (internal quotation marks omitted); *Thunder Basin*, 510 U.S. at 213 (broad constitutional challenges to a program as a whole, which do not require interpretation of the parties' rights under a statute administered by the agency, are reviewable in federal district court).

Numerous courts in this and other circuits have also held that broad challenges to agency authority, procedures, or policies are not precluded by statutes governing review of the merits of individual agency proceedings. *See, e.g., Jewel Cos. v. F.T.C.*, 432 F.2d 1155, 1159 (7th Cir. 1970) (administrative review scheme did not preclude district court jurisdiction "prior to an agency's final order" over a claim seeking review of "the authority of a Commissioner" because it is "inherently a legal [question] and does not involve any factual determinations"); *Burdue v. F.A.A.*, 774 F.3d 1076, 1078, 1084 (6th Cir. 2014) (jurisdiction proper in district court because plaintiff's "broad [constitutional] challenges to FAA procedures … are not contingent on the merits of a particular FAA order" and therefore fall "outside the circuit-court exclusivity provision"); *Gen. Elec.*

Co. v. E.P.A., 360 F.3d 188, 191 (D.C. Cir. 2004) (jurisdiction proper in district court because "GE's due process challenge to CERCLA's administrative orders regime is not a challenge to the way in which EPA is administering the statute in any particular removal or remedial action or order …."); *Mace v. Skinner*, 34 F.3d 854, 859 n.4 (9th Cir. 1994) (vacating the district court's decision that it did not have jurisdiction to hear a challenge to agency practices because "Mace's claims, like those asserted in *McNary*, are not based on the merits of his individual situation, but constitute a broad challenge to allegedly unconstitutional FAA practices"); *Reardon v. United States*, 947 F.2d 1509, 1514 (1st Cir. 1991) (en banc) (in upholding district court's exercise of jurisdiction over constitutional challenge to CERCLA statute despite statute's jurisdictional bar governing review of remedial actions, emphasizing that the case involved a challenge to statute itself as opposed to "merits of any particular removal or remedial action"); *Am. Coal Co. v. Mine Safety & Health Admin.*, No. 08-CV-0814-MJR, 2010 WL 653113, at *5–6 (S.D. Ill. Feb. 19, 2010) (jurisdiction proper in district court because American Coal's "pattern and practice" claim was "outside administrative jurisdiction and wholly collateral to the Mine Act's review provisions"); *Live365, Inc. v. Copyright Royalty Bd.*, 698 F. Supp. 2d 25, 33 (D.D.C. 2010) (jurisdiction proper in the district court to consider injunction of ongoing litigation in front of Copyright Royalty Board because "[t]he plaintiff's Appointments Clause challenge is not a challenge [to the board's determinations on the merits], but rather is an attack on the 2004 amendment of the Copyright Act").

In fact, just last week the Southern District of New York held that it had subject matter jurisdiction over a claim identical to one Ms. Bebo asserts in her Complaint—that the removal provisions for SEC ALJs violate Article II—despite ongoing administrative proceedings because the plaintiff in that case (as here) "contend[ed] that [the] Administrative Proceedings are unconstitutional in all instances." *Duka v. S.E.C.*, No. 15 Civ. 357, Dkt. 33, slip op. at 13 (S.D.N.Y. Apr. 15, 2015). Indeed, the *Duka* court noted the difference between challenges to the merits of an individual SEC enforcement action, jurisdiction for which is proper in the agency under § 78y, and broad facial and systematic challenges to the proceedings themselves, jurisdiction for which is proper in the district courts. *Id.* at 2 n.1 (comparing *Gupta v. S.E.C.*, 796 F. Supp. 2d 503 (S.D.N.Y. 2011) with *Chau v. S.E.C.*, No. 14–cv–1903, 2014 WL 6984236 (S.D.N.Y. Dec. 11, 2014).[3]

Ms. Bebo presents the same challenge as the plaintiff in *Duka* (under Article II), as well as equal protection and due process challenges to a federal statute that is unconstitutional in all instances. That statute, section 929P(a) of Dodd-Frank, grants an agency unprecedented and unconstitutional authority that it exercises in every enforcement action it pursues. Like the plaintiffs in *Duka* and *McNary* and the other cases cited above, Ms. Bebo challenges agency authority as a whole, and her claims are therefore not subject to the statutory scheme intended to streamline review of

[3] The district court in *Gupta* held that it had jurisdiction to hear the plaintiff's claim because, among other reasons, "nothing that happens in the administrative proceeding will bear on this [equal protection] claim …." *Gupta*, 796 F. Supp. 2d at 514. The *Chau* court, on the other hand, declined to exercise jurisdiction over the plaintiff's challenge to SEC procedures as applied in *his* administrative proceeding, noting that "[t]here is an important distinction between a claim that an administrative scheme is unconstitutional in all instances—a facial challenge—and a claim [like Chau's] that it violates a particular plaintiff's rights in light of the facts of a specific case—an as-applied challenge." *Chau*, 2014 WL 6984236, at *6.

individual enforcement decisions. Section 78y only precludes district court jurisdiction over claims related to "Final Commission orders" and "Commission rules." 15 U.S.C. § 78y(a)–(b). Of course, section 929P(a) of the Dodd-Frank Act is not a "Final Commission order" or "Commission rule," and therefore § 78y does not preclude the district court's jurisdiction to hear Ms. Bebo's case.[4]

Further, Congress' presumed knowledge of the procedures applied in hearings subject to § 78y also evidences its intent not to preclude district court jurisdiction for litigants' claims that are unrelated to the merits of an enforcement action. *Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. 353, 382 n.66 (1982) (Congress is assumed to act with knowledge of existing law when it passes new legislation.). The SEC Rules of Practice provide no mechanism for a respondent in an administrative proceeding to file any counterclaims. *See In re Hausmann-Alain Banet,* 2014 WL 345338, at *4. Though Ms. Bebo has raised constitutional challenges in her administrative proceeding as "affirmative defenses"—because she must at least attempt to preserve a record—her constitutional challenges to Dodd-Frank and the SEC's operations pursuant to it are separate claims that do not go to the merits of the Commission's charge that she

[4] A finding that the district court has jurisdiction to hear Ms. Bebo's challenges will not open the floodgates to claims from other SEC enforcement targets. The federal courts can settle "even in a single case" the issue of the constitutionality of the SEC's enforcement authority under Dodd-Frank and Article II, thereby obviating the need for more litigants to lodge the same broad constitutional challenges. *Cf. Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.11 (1986) (explaining that jurisdiction in district court for constitutional challenge to the "method by which" amounts of Medicare Part B benefits are determined will not "open the floodgates" to claims by litigants challenging the "determinations of amounts of benefits" and noting that "the validity of a standard can be readily established, at times even in a single case.") (citations omitted).

violated the Exchange Act. *Cf. United States v. Armstrong*, 517 U.S. 456, 463 (1996) ("A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution."). The administrative review scheme of § 78y does not envisage claims or defenses unrelated to the merits of the SEC's charges. It cannot sensibly be the case that Congress intended litigants to assert improper affirmative defenses in order to have their constitutional challenges heard.

The inquiry should end here—the jurisdictional provision's text does not remove jurisdiction from the district court for the type of claims Ms. Bebo has asserted. But the district court below suggested that in addition to a lack of statutory language removing jurisdiction from the federal court,[5] Ms. Bebo must also satisfy all of the other factors courts consider in assessing whether a district court may exercise jurisdiction: whether "a finding of preclusion could foreclose all meaningful judicial review; if the suit is wholly collateral to a statute's review provisions; and if the claims are outside the agency's expertise." (App. 4 (internal quotation marks omitted).) Of these factors, the

[5] Despite referencing the appropriate standard in its decision—"[p]rovisions for agency review do not restrict judicial review unless the 'statutory scheme' displays a 'fairly discernable' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure'"—the district court did not consider which *types* of claims Congress intended to be reviewed within the structure of § 78y and whether Ms. Bebo's broad challenges to the SEC's unconstitutional authority are such claims. Instead, the district court distinguished the circumstances of Ms. Bebo's case from non-dispositive facts in the case law on which she relies. (*See, e.g.*, App. 5 (distinguishing Ms. Bebo's case from *Free Enterprise* "because in *Free Enterprise*, there was no Board action pending against the petitioners when they brought suit in district court")).

district court focused almost exclusively on what it perceived to be an adequate avenue for meaningful review through the administrative process.

Other circuits, however, have specifically rejected the government's attempts in analogous cases to read into the case law the requirement that "plaintiffs … who seek to bring pattern and practice challenges first show that the statute provides no meaningful judicial review for their claims." *Elk Run Coal Co. v. U.S. Dep't of Labor*, 804 F. Supp. 2d 8, 21 (D.D.C. 2011). "Properly read, … *McNary*'s conclusion that the immigration statute's jurisdiction-stripping provision presented no bar to a pattern and practice suit did not depend on the unavailability of alternative means of judicial review. Instead, it rested entirely on the Court's analysis of the jurisdictional provision's text …." *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 126 (D.C. Cir. 2010).

Regardless, as demonstrated below, Ms. Bebo has also shown that she would not have meaningful judicial review absent jurisdiction in the district court, that her claims are collateral to the review provisions of § 78y, and that the SEC does not have expertise to decide her constitutional challenges.

II. The Other Factors Courts Consider in Assessing Subject Matter Jurisdiction Support the Exercise of Jurisdiction by the District Court in This Case.

The other factors courts consider in determining whether Congress intended to preclude district court jurisdiction in favor of agency review include whether "a finding of preclusion could foreclose all meaningful judicial review," whether the suit is "wholly collateral" to a statute's review provisions; and whether the claims "are outside the agency's expertise." *Free Enterprise*, 561 U.S. at 489; *see also Massieu v. Reno*, 91 F.3d 416,

423 (3d Cir. 1996) (interpreting *McNary* and phrasing these factors in slightly different terms); *Mace*, 34 F.3d at 859 (same). All of these factors counsel in favor of jurisdiction in the district court for Ms. Bebo's claims.

A. A finding of preclusion could foreclose all meaningful review.

Absent jurisdiction in a federal district court, Ms. Bebo will not be able to obtain meaningful judicial review of her constitutional challenges to section 929P(a) of Dodd-Frank and the tenure structure of the SEC ALJs in either the administrative proceedings or, if she is "aggrieved" by an adverse decision from the Commission, in a federal court of appeals.

1. Review in the court of appeals of a final SEC order is not adequate.

Though the courts of appeals eventually would be available to Ms. Bebo after proceeding before the SEC ALJ and then the Commission, a court of appeals will not "be in a position to provide meaningful review of the type of claims raised" in her Complaint. *McNary*, 498 U.S. at 497. The *McNary* Court explained that administrative proceedings regarding individual claims are not conducive to the collection of evidence necessary for a constitutional attack of the administrative process as a whole. *Id.* "Not only would a court of appeals reviewing an individual [case] therefore most likely not have an adequate record as to the pattern of [the agency's] allegedly unconstitutional practices, but it also would lack the factfinding and record-developing capabilities of a federal district court." *Id.* Indeed it "seem[ed] plain to" the *McNary* Court "that restricting judicial review to the courts of appeals as a component of the review of an individual [case pending before the agency] is the practical equivalent of a total denial

of judicial review of generic constitutional and statutory claims." *Id.*; *see also Am. Coal Co.*, 2010 WL 653113, at *5 ("Evidence in [an agency proceeding] is limited to that which is relevant to the individual citation in question. American Coal could not fully present its [constitutional] claim in a citation contest, as evidence irrelevant to a particular citation could easily be relevant in proving the issues raised here. For example, the existence of a quota would not be relevant to proving whether a particular safety hazard existed. The limited jurisdiction and rules of administrative review preclude meaningful review of American Coal's claims.").

Next, a court of appeals could not, upon review of any final SEC order, enjoin the SEC from conducting the administrative proceeding against Ms. Bebo, which is part of the relief Ms. Bebo seeks in her Complaint. (Dkt. 1, ¶¶ 107–11.) And, "while the Court of Appeals could, presumably, vacate an adverse decision (order) by the SEC on constitutional grounds, it would be unable to remedy the harm alleged by Plaintiff in this Court, *i.e.*, the substantial litigation and resource burdens incurred during [the] administrative proceeding, and the reputational harm associated with her defending the Administrative Proceeding." *Duka,* No. 15 Civ. 357, Dkt. 33, slip op. at 10–11 (finding district court jurisdiction proper over constitutional claim identical to one asserted by Ms. Bebo) (internal quotation marks omitted). Because Ms. Bebo's Complaint is not challenging the substantive outcome of her administrative proceeding, the review available to her in the courts of appeals (of an SEC final order on the merits of the SEC's allegations) is not "meaningful review." *Cf. Free Enterprise*, 561 U.S. at 513 ("[Petitioners] are entitled to declaratory relief sufficient to ensure that the reporting requirements and

auditing standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive.").

Further, it is not clear that a court of appeals would even have jurisdiction to hear Ms. Bebo's constitutional claims. As already noted, Ms. Bebo cannot properly press her constitutional claims in the SEC administrative proceeding *at all* because there are no procedures available to file counterclaims. *See In re Hausmann-Alain Banet*, 2014 WL 345338, at *4.[6] Then, because the court of appeals is empowered only to consider issues raised in the agency proceedings, Ms. Bebo's constitutional challenges could fall outside the jurisdiction of the court of appeals. 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.").

The courts of appeals do not have jurisdiction over claims of agency proceeding respondents that do not attack the merits of the agency's order from which the appeal is taken. *Cheng Fan Kwok v. I.N.S.*, 392 U.S. 206 (1968). In *Cheng Fan Kwok*, the Supreme Court considered whether the court of appeals could hear the claim of a deportee who proceeded through the agency, received a deportation order, requested a stay of the deportation order in the agency and then appealed the denial of the stay to the court of

[6] Even if the ALJ decides he can consider Ms. Bebo's constitutional claims as (improper) affirmative defenses, "an administrative agency is generally considered powerless to adjudicate the constitutionality of its governing statute." *Squillacote ex rel. N.L.R.B. v. Int'l Bhd. of Teamsters, Local 344*, 561 F.2d 31, 38 (7th Cir. 1977) (citing *Weinberger v. Salfi*, 422 U.S. 749, 764, 765 (1975); *see also Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring); *Pub. Utils. Comm'n of Cal. v. United States*, 355 U.S. 534, 539 (1958)). Simply, Ms. Bebo will not receive "meaningful review" in the administrative proceeding.

appeals. The Court held that the court of appeals *lacked jurisdiction* because the deportee "did not attack the deportation order itself but instead [sought] relief not inconsistent with it"—*i.e.* a stay of that order. *Id.* at 213 (citation omitted). Here, similarly, if Ms. Bebo was to receive an unfavorable decision from the ALJ and the Commission on the merits of the charges that she violated the Exchange Act, she could appeal that decision to the court of appeals, but her claim regarding the constitutionality of Dodd-Frank and SEC ALJ tenure provisions would be wholly irrelevant to the merits of that order. *See* 15 U.S.C. § 78y(a)(1) (granting courts of appeals jurisdiction over actions seeking the "affirmance, modification, enforcement, or setting aside" of "Final [Securities and Exchange] Commission orders").

Finally, there is a scenario under which Ms. Bebo would have *no possibility* of judicial review of her constitutional challenges: The ALJ presiding over her administrative proceeding could find in her favor on the merits. In that case, Ms. Bebo would not be "aggrieved by an order of the Commission" and would, therefore, be unable to obtain any judicial review of her constitutional claims. *See* 15 U.S.C. § 78y(a)(1) ("A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit"); *see also Duka,* No. 15 Civ. 357, Dkt. 33, slip op. at 12 n.11.[7]

[7] To the extent the district court implied that Ms. Bebo must show she lacks *any* possibility of judicial review in the administrative scheme in order to find jurisdiction with the district court, it was wrong. Indeed, when administrative review scheme does preclude *all* judicial review (unlike § 78y, which ultimately provides review in the court of appeals, though that review is

2. Ms. Bebo should not be required to sustain an adverse agency decision before she can present her constitutional claims to a court competent to hear them.

In finding that Ms. Bebo's exclusive route to review is through her administrative proceedings, the district court distinguished Ms. Bebo's case from the nearly identical facts of *Free Enterprise*, where the Court found jurisdiction was proper in the district court because, without it, the plaintiffs would have no opportunity for meaningful judicial review. At the time the *Free Enterprise* plaintiffs filed their action in district court, no agency proceeding was pending against them—and in this fact the district court found what it believed to be an important distinction from Ms. Bebo's case. "Bebo, of course, does not need to induce an administrative proceeding. Instead, Bebo can raise her arguments before the SEC ALJ and on appeal to the Commission. Then, if the Commission rules against her, Bebo can obtain judicial review in the court of appeals." (App. 6.)

But the fact that the SEC has already instituted an enforcement action against Ms. Bebo does not make the denial of district court jurisdiction for her constitutional claims any less inappropriate than the denial of the same in *Free Enterprise*. The *Free*

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not meaningful for claims like Ms. Bebo's), Supreme Court precedent requires a "heightened showing" that Congress indeed intended to preclude all judicial review. *Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2132 (2012) (quoting *Webster v. Doe,* 486 U.S. 592, 603 (1988)). But when an administrative review scheme does not preclude *all* judicial review (like § 78y), the result is not that jurisdiction in the district court is automatically precluded; the result is simply that the "heightened" showing of Congressional intent is not required. Instead, the court asks whether Congress' intent to preclude district court jurisdiction is "fairly discernible in the statutory scheme." *Elgin*, 132 S. Ct. at 2132. As Ms. Bebo has already demonstrated, Congress did not intend for § 78y to be the exclusive avenue for relief for constitutional claims challenging overall agency authority. *See Free Enterprise*, 561 U.S. at 489 ("[T]he text [of § 78y] does not expressly limit the jurisdiction that other statutes confer on district courts. Nor does it do so implicitly.") (citation omitted).

Enterprise Court explained that plaintiffs should not be required "to bet the farm by taking the violative action [and incurring a sanction] before testing the validity of the law." *Free Enterprise,* 561 U.S. at 490 (citation and internal quotation marks omitted). But that is exactly what the district court's reasoning would require: Ms. Bebo must continue to defend herself on the merits of the SEC's charges and *lose* before she would ever be able to assert her (wholly collateral) constitutional claims in an Article III court.

The decision of this Court in *Jewel Companies, Inc. v. F.T.C.* is instructive. 432 F.2d 1155 (7th Cir. 1970). The plaintiff in *Jewel* brought several claims to the district court regarding an ongoing agency proceeding pending against it. Considering the issue of jurisdiction on appeal, the Court parsed out the litigant's various claims and decided that some of them went to the merits of the proceeding pending against it—and therefore could be meaningfully addressed within the statutory review framework—but that the litigant's claim attacking the Commission's authority was unrelated to any substantive determination by the Commission and could therefore be lodged in district court. *Id.* at 1159 ("The legal obligation of a Commissioner can be determined by the courts without delay and we think the proper approach is to allow such inherently legal attacks prior to an agency's final order.").

B. Ms. Bebo's claims are "wholly collateral" to the administrative proceeding.

Ms. Bebo presents a constitutional challenge to a federal statute that governs agency procedures and to the tenure structure of the ALJs that preside over SEC administrative proceedings. Ms. Bebo's argument is that her administrative proceedings

may not constitutionally take place at all; she does not attack any order that may be issued in her administrative proceedings relating to "the outcome of the SEC action." *Chau*, 2014 WL 6984236, at *13; *see also Gupta*, 796 F. Supp. 2d at 513 (where plaintiff "would state a claim even if [he] were entirely guilty of the charges made against him"). Her claims are therefore "wholly collateral" to the administrative proceeding, the purpose of which is to determine whether she has violated securities laws.

Like the plaintiffs in *McNary*, discussed previously, Ms. Bebo does not seek a finding that she has not committed violations of federal securities laws; she seeks to have the merits of the SEC's charges against her considered under proper and fair procedures. *McNary*, 498 U.S. at 495; *see also Arjent LLC v. S.E.C.*, 7 F. Supp. 3d 378, 384 (S.D.N.Y. 2014) (jurisdiction proper in the district court despite § 78y because "[t]he question of whether the SEC's investigation was properly initiated and maintained has no relation to Arjent's ultimate liability."). For this reason, Ms. Bebo's claims are distinguishable from the claims of the petitioners in *Elgin* and *Altman* (on which the district court relied) where the respective courts decided the petitioners' claims must be brought in agency proceedings, not federal district court. The *Elgin* Court noted that "[a]s evidenced by their district court complaint, petitioners' constitutional claims are the vehicle by which they seek to reverse the removal decisions, to return to federal employment, and to receive the compensation they would have earned but for the adverse employment action." *Elgin v. Dept. of Treasury,* 132 S. Ct. 2126, 2139-40 (2012). Unlike Ms. Bebo, the *Elgin* plaintiffs "request[ed] relief that the [agency] routinely affords." *Id.* at 2139–40. Similarly, the Second Circuit in *Altman* held (in a very short

opinion) that the petitioner was seeking an order "compelling the SEC to vacate its decision sanctioning him with a lifetime ban from practicing before the Commission." *Altman v. S.E.C.*, 687 F.3d 44, 45 (2d Cir. 2012). Conversely, Ms. Bebo's Complaint does not contest the merits of the enforcement action against her; she seeks only to have that enforcement action tried in a fair forum.

C. Ms. Bebo's constitutional challenges are outside the agency's expertise.

Supreme Court precedent is clear that constitutional litigation is outside of agency expertise. *See Thunder Basin*, 510 U.S. at 215 ("[A]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies."); *Free Enterprise*, 561 U.S. at 491 ("Petitioners' constitutional claims are also outside the Commission's competence and expertise …. [T]he statutory questions involved do not require 'technical considerations of [agency] policy.' They are instead standard questions of administrative law, which the courts are at no disadvantage in answering."); *Weinberger*, 422 U.S. at 765 (the "benefit of [agency] experience and expertise" is not applicable when "the only issue is the constitutionality of a statutory requirement"). Indeed, the ALJ presiding over Ms. Bebo's administrative proceeding has already expressed his "grave doubts" about his authority to even consider, let alone apply any expertise to, constitutional challenges to the SEC's enforcement authority. *In re David F. Bandimere & John O. Young*, Release No. 507, 2013 WL 5553898, at *72 (A.L.J. Oct. 8, 2013).

CONCLUSION

The district court below has subject matter jurisdiction to hear Ms. Bebo's action because it "aris[es] under the Constitution, [and] laws … of the United States." 28 U.S.C. § 1331. Her action presents facial challenges to a Congressional act that grants a federal agency arbitrary and unconstitutional power, and to the authority of that agency's officers. Nothing in the Exchange Act takes jurisdiction away from Article III district courts to consider her claims; these claims are distinct from the merits of the SEC's allegations in the agency proceedings, which are subject to administrative review by an ALJ. Without recourse in the district court, Ms. Bebo will be made to endure the very proceedings she claims are unconstitutional.

Because the district court properly has jurisdiction over Ms. Bebo's action, it must hear her case: "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358–59 (1989) (quoting *Willcox v. Consol. Gas Co. of N.Y.*, 212 U.S. 19, 40 (1909)). Ms. Bebo respectfully requests that this Court reverse the district court's dismissal for lack of subject matter jurisdiction and reinstate Ms. Bebo's Complaint for adjudication in that court.

Dated this 20th day of April, 2015.

Respectfully submitted,

s/Mark A. Cameli

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for the Plaintiff-Appellant, Laurie A. Bebo, furnishes the following in compliance with Circuit Rule 32 and Federal Rule of Appellate Procedure 32(a)(7):

I hereby certify that this brief conforms to the rules contained in Circuit Rule 32 and Federal Rule of Appellate Procedure 32(a)(7) for a brief produced with proportionally spaced font. This brief was prepared with Microsoft Word using Book Antiqua font, with 12-point print used in the text and 11-point print used in the footnotes. Measured with the word count feature of the word processing program (including footnotes), the brief has 7,625 words.

Dated this 20th day of April, 2015.

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CIRCUIT RULE 30(d) STATEMENT REGARDING APPENDIX

Pursuant to Circuit Rule 30(d), counsel certifies that all materials required by Circuit Rules 30(a) and (b) are included in the attached Appendix.

Dated this 20th day of April, 2015.

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CERTIFICATE OF SERVICE

The undersigned, counsel for the Plaintiff-Appellant, Laurie A. Bebo, hereby certifies that on April 20, 2015, I electronically filed the Brief and Appendix of Plaintiff-Appellant with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that counsel for the Defendant-Appellee, Securities and Exchange Commission, is a registered CM/ECF user and that service will be accomplished by the CM/ECF system.

Dated this 20th day of April, 2015.

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No. 15-1511

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LAURIE A. BEBO,

Plaintiff-Appellant,

v.

SECURITIES AND EXCHANGE COMMISSION,

Defendant-Appellee.

On Appeal From the United States District Court
for the Eastern District of Wisconsin
Case No. 15-CV-00003
The Honorable Rudolph Randa, District Judge

APPENDIX OF PLAINTIFF-APPELLANT

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

LAURIE A. BEBO,

Plaintiff,

-vs- **Case No. 15-C-3**

SECURITIES AND EXCHANGE COMMISSION,

Defendant.

DECISION AND ORDER

On December 3, 2014, following a two-year investigation, the Securities and Exchange Commission issued an Order Instituting Public Administrative and Cease-and-Desist Proceedings ("OIP") against Laurie A. Bebo, formerly the Chief Executive Officer of Assisted Living Concepts, Inc. ("ALC"). The SEC alleges that a statement in ALC's disclosure documents regarding compliance with a lease agreement was false or misleading. The SEC accuses Bebo of committing securities fraud, potentially subjecting her to hundreds of thousands (or even millions) of dollars in civil monetary penalties, in addition to a permanent ban on serving as an officer or director of a publicly-traded company. The hearing before an SEC Administrative Law Judge is scheduled to begin on April 20, 2015.

On January 2, 2015, Ms. Bebo filed this action and moved for a preliminary injunction. Bebo argues that Section 929P(a) of the Dodd-Frank Wall Street Reform and Consumer Protection of 2010 is unconstitutional on its face. Therein, Congress made the SEC's authority in administrative penalty proceedings "coextensive" with its authority to seek penalties in federal court. H. Rep. No. 111-687, at 78 (2010). This arrangement, according to Bebo, violates equal protection and due process because it gives the SEC unfettered discretion through its choice of forum to provide (if federal) or withhold (if administrative) a citizen's Seventh Amendment jury trial right for the same conduct and the same remedies. Bebo also argues that the SEC's choice of an administrative forum violates her procedural due process rights because certain key witnesses – various members of ALC's Board of Directors – are Canadian citizens beyond the subpoena power of the SEC ALJ. Finally, Bebo argues that the SEC's internal administrative proceedings violate Article II's mandate that the executive "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, because SEC ALJs are separated from the President by multiple levels of protection from removal. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

At Bebo's request, the Court conducted a telephonic status

conference after her motion was fully briefed. The SEC requested oral argument and the opportunity for further briefing. Counsel for Bebo argued that oral argument was not necessary and objected to the request for further briefing. Bebo also alerted the Court to several pre-hearing deadlines that "require the allocation of substantial resources, including a March 13, 2015 deadline for exchanging witness lists and expert reports, and a March 26, 2015 deadline for exchanging exhibits." ECF No. 17. Thus, Bebo's primary concern was obtaining a ruling as soon as possible in advance of these deadlines. The Court denied the SEC's request for oral argument, but granted its request for further briefing. The Court also stated its intention to issue a ruling before March 13, the initial deadline in the lead-up to the administrative hearing.

The Court finds that Bebo's claims are compelling and meritorious, but whether that view is correct cannot be resolved here. This is so because Bebo's claims are subject to the exclusive remedial scheme set forth in the Securities Exchange Act. Bebo must litigate her claims before the SEC and then, if necessary, on appeal to the Court of Appeals for the Seventh Circuit.

***

The Exchange Act provides that a "person aggrieved" by a final SEC

order "may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business." 15 U.S.C. § 78y(a)(1). Review provisions such as this "generally preclude *de novo* review in the district courts, requiring litigants to bring challenges 'in the Court of Appeals or not at all.'" *Altman v. S.E.C.*, 687 F.3d 44, 45-46 (2d Cir. 2012) (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958)). However, "[p]rovisions for agency review do not restrict judicial review unless the 'statutory scheme' displays a 'fairly discernable' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Free Enterprise*, 561 U.S. at 489 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212 (1994)). Thus, a district court may exercise subject matter jurisdiction if "a finding of preclusion could foreclose all meaningful judicial review;" if the suit is "wholly collateral to a statute's review provisions;" and if the claims are "outside the agency's expertise." *Id*.

In *Free Enterprise*, the Court considered an action seeking declaratory and injunctive relief against the Public Company Accounting Oversight Board. The Board was created pursuant to the Sarbanes-Oxley Act of 2002, which placed the Board under the oversight of the SEC and

introduced tighter regulation of the accounting industry. Before holding that Sarbanes-Oxley's dual for-cause limitations on the removal of Board members violates the Constitution's separation of powers, the Court held that § 78y did not deprive the district court of subject matter jurisdiction. *Id.* at 489-91.

Bebo likens her case to *Free Enterprise* because of the nature of her claims. That is, Bebo objects to the existence of the SEC's administrative proceedings themselves and to Dodd-Frank's grant of unfettered discretion to choose the forum in which the SEC will pursue its targets. Similarly, in *Free Enterprise*, the petitioners objected to "the Board's existence, not to any of its auditing standards," and their "general challenge to the Board" was "'collateral' to any Commission orders or rules from which review might be sought." *Id.* at 490. This analogy is not enough to escape the clutches of § 78y because in *Free Enterprise*, there was no Board action pending against the petitioners when they brought suit in district court. Thus, the Court rejected the suggestion that the petitioners should have been forced to "select and challenge a Board rule at random" or "incur a sanction (such as a sizable fine) by ignoring Board requests for documents and testimony." *Id.* "We normally do not require plaintiffs to 'bet the farm … by taking the violative action' before 'testing the validity of the law,' and

we do not consider this a 'meaningful' avenue of relief." *Id.* at 490-91.

Bebo, of course, does not need to induce an administrative proceeding. Instead, Bebo can raise her arguments before the SEC ALJ and on appeal to the Commission. Then, if the Commission rules against her, Bebo can obtain judicial review in the court of appeals. Moreover, the petitioners in *Free Enterprise* could not "meaningfully pursue their constitutional claims" because "Section 78y provides only for judicial review of *Commission* action, and not every Board action is encapsulated in a final Commission order or rule." *Id.* at 490 (emphasis in original). Here, Bebo can seek review of impending SEC action pursuant to § 78y.

Bebo also argues that her case is akin to *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991). In *McNary*, the Court considered the judicial review provisions for the denial of individual Special Agricultural Worker ("SAW") applications, which required exhaustion of administrative remedies prior to review in the federal courts of appeals. *McNary* held that those provisions applied to "the process of direct review of individual denial of SAW status," not "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." *Id.* at 492. Yet in *McNary*, there was "no provision for direct judicial review of the denial of SAW status unless the alien is later apprehended and deportation

proceedings are initiated, …" *Id.* at 496. Thus, "most aliens denied SAW status can ensure themselves review in courts of appeals only if they voluntarily surrender themselves for deportation. Quite obviously, that price is tantamount to a complete denial of judicial review for most undocumented aliens." *Id.* at 496-97.

That distinction aside, Bebo seizes upon the discussion that follows:

> even in the context of a deportation proceeding, it is unlikely that a court of appeals would be in a position to provide meaningful review of the type of claims raised in this litigation. To establish the unfairness of the INS practices, respondents in this case adduced a substantial amount of evidence, most of which would have been irrelevant in the processing of a particular individual application. Not only would a court of appeals reviewing an individual SAW determination therefore most likely not have an adequate record as to the pattern of INS' allegedly unconstitutional practices, but it also would lack the factfinding and record-developing capabilities of a federal district court.

Id. at 497. Therefore, it seemed "plain" in *McNary* that "restricting judicial review to the courts of appeals as a component of the review of an individual deportation order" would be "the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." *Id.* *McNary* does not apply, however, because it was "addressing a statutory review scheme that provided no opportunity for the plaintiffs to develop a factual record relevant to their constitutional claims before the

administrative body and then restricted judicial review to the administrative record created in the first instance." *Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2139 n.11 (2012).

Elgin held that the Civil Service Reform Act provided the "exclusive avenue to judicial review" through the administrative process, subject to review in the United States Court of Appeals for the Federal Circuit, "when a qualifying employee challenges an adverse employment action by arguing that a federal statute is unconstitutional." 132 S. Ct. at 2130. The Court declined to resolve whether the Merit Service Protection Board could decide the constitutionality of a federal law because the issue could be "meaningfully addressed in the Court of Appeals that Congress had authorized to conduct judicial review." *Id.* at 2137 (quoting *Thunder Basin*, 510 U.S. at 215). "Even without factfinding capabilities, the Federal Circuit may take judicial notice of facts relevant to the constitutional question. And, if resolution of a constitutional claim requires the development of facts beyond those that the Federal Circuit may judicially notice, the CSRA empowers the MSPB to take evidence and find facts for Federal Circuit Review." *Id.* at 2138.

Bebo complains that she is limited to raising her constitutional arguments as "affirmative defenses" before the SEC ALJ. Even so, the

administrative record can include evidence relevant to an affirmative defense, *see* 17 C.F.R. §§ 201.220, 201.320; in reviewing the ALJ's initial decision, the Commission can order that the record be supplemented, 17 C.F.R. § 201.452; and just like in *Elgin*, the court of appeals can remand for additional fact-finding, § 78y(a)(5). Nor is it relevant, as in *Elgin*, that the Commission may (or may not) lack jurisdiction to entertain constitutional claims.[1] Appellate review in the court of appeals is sufficient.

Ultimately, Bebo's argument regarding the lack of meaningful judicial review lies in her objection to being subject to a procedure that she contends is wholly unconstitutional. But as one judge observed, district court jurisdiction "is not an escape hatch for litigants to delay or derail an administrative action when statutory channels of review are entirely adequate." *Chau v. SEC*, No. 14-cv-1903 (LAK), --- F. Supp. 3d ----, 2014 WL 6984236, at *6 (S.D.N.Y. Dec. 11, 2014). If the process is constitutionally defective, Bebo can obtain relief before the Commission, if not the court of appeals. *See, e.g., Landry v. F.D.I.C.*, 204 F.3d 1125 (D.C. Cir. 2000) (addressing Article II challenge to FDIC's method of appointing

[1] While the agency in *Elgin* "repeatedly refused to pass upon the constitutionality of legislation,"132 S.Ct. at 2136, the SEC routinely entertains constitutional claims such as those brought by Bebo. *See In the Matter of Timbervest, LLC, et al.*, S.E.C. Release No. 4003, 2015 WL 242393 (Jan. 20, 2015) (ordering supplemental briefing on the Article II claim advanced herein).

ALJs on appeal from a final FDIC Order). Until then, Bebo must "patiently await the denouement of proceedings within the Article II branch." *USAA Fed. Sav. Bank v. McLaughlin*, 849 F.2d 1505, 1510 (D.C. Cir. 1988).

***

This matter is **DISMISSED** for lack of subject matter jurisdiction. The Clerk of Court is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 3rd day of March, 2015.

SO ORDERED:

HON. RUDOLPH T. RANDA
U.S. District Judge

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

EASTERN DISTRICT OF WISCONSIN

JUDGMENT IN A CIVIL CASE

LAURIE A. BEBO,

Plaintiff,

V. CASE NUMBER: **15-C-3**

SECURITIES AND EXCHANGE COMMISSION,

Defendant.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came on for consideration and a decision has Been rendered.

IT IS ORDERED AND ADJUDGED **that the plaintiff's action for a judgment: (1) declaring that the defendant's administrative proceeding is an unconstitutional violation of the plaintiff's rights to due process and equal protection under the U.S. Constitution and declaring Section 929P(a) of Dodd-Frank unconstitutional; (2) declaring unconstitutional the statutory and regulatory provisions providing for the position of SEC Administrative Law Judge and the tenure protections for that position; and (3) enjoining the defendant from carrying out an administrative proceeding against the plaintiff; is DISMISSED for lack of subject matter jurisdiction.**

This action is hereby DISMISSED WITHOUT PREJUDICE.

March 3, 2015
Date

JON W. SANFILIPPO
Clerk

s/ Linda M. Zik
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BARBARA DUKA,

Plaintiff,

-against-

U.S. SECURITIES AND EXCHANGE COMMISSION,

Defendant.

15 Civ. 357 (RMB)(SN)

DECISION & ORDER

"When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." New Orleans Pub. Serv., Inc. v. New Orleans, 491 U.S. 350, 358 (1989) (quoting Willcox v. Consol. Gas Co., 212 U.S. 19, 40 (1909))

I. Introduction

This is one of a series of cases which seeks to enjoin on constitutional grounds the United States Securities and Exchange Commission from adjudicating within that agency alleged civil violations of the securities laws by persons **not** associated with regulated entities. The principal contention of Plaintiff Barbara Duka (and others) is that the administrative law judges who adjudicate such cases pursuant to provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111–203 ("Dodd-Frank"), are insulated unlawfully from oversight by the President who, under Article II of the Constitution, is vested with the "executive power," including the ability to hold executive officers accountable by

removing them from office. The SEC responds that the federal district courts are without subject matter jurisdiction where, as here, the Commission has elected to proceed within the agency.[1]

For the reasons set forth below, the Court finds, first, that it has subject matter jurisdiction to examine Duka's plea that the SEC administrative proceedings against her be

[1] At least two district courts in this Circuit have addressed the issue of subject matter jurisdiction in pre-enforcement challenges to SEC administrative proceedings.

In Gupta v. S.E.C., Judge Jed S. Rakoff held that the district court had subject matter jurisdiction to consider a plaintiff's action to enjoin an SEC administrative proceeding on the ground that the SEC had "single[d] him out for uniquely unfavorable treatment" in violation of his constitutional right to equal protection. 796 F. Supp. 2d 503, 506–07 (S.D.N.Y. 2011). Judge Rakoff found, among other things, that "nothing that happens in the administrative proceeding will bear on this [equal protection] claim, and no administrative record bearing on this claim will be developed for any federal appellate court to review." Id. at 514. Judge Rakoff concluded that "the SEC does not have exclusive jurisdiction over challenges to SEC-related actions that meet certain criteria, arguably present here." Id. at 510

In Chau v. S.E.C., Judge Lewis A. Kaplan concluded that the court lacked subject matter jurisdiction to consider a plaintiff's action to enjoin an SEC administrative proceeding on due process and equal protection grounds. No. 14–cv–1903, 2014 WL 6984236, at *1 (S.D.N.Y. Dec. 11, 2014). Judge Kaplan concluded, among other things, that "[t]here is an important distinction between a claim that an administrative scheme is unconstitutional in all instances—a facial challenge—and a claim that it violates a particular plaintiff's rights in light of the facts of a specific case—an as-applied challenge. As between the two, courts are more likely to sustain pre-enforcement jurisdiction over 'broad facial and systematic challenges.'" Id. at *6 (citation omitted).

Duka's claim presents a facial challenge to the constitutionality of SEC ALJ administrative proceedings. See also, Sarah S. Gold and Richard L. Spinogatti, Constitutional Challenges to SEC Administrative Proceedings, N.Y.L.J., Apr. 8, 2015, at 3. Duka does not assert as-applied equal protection or due process claims.

halted but, second, that Duka is not entitled to preliminarily enjoin the SEC proceedings because she is "unlikely to succeed on the merits" of her constitutional claim.[2] [3]

II. Background

On January 16, 2015, Barbara Duka ("Plaintiff" or "Duka"), formerly a co-manager of the commercial mortgage backed securities group of Standard & Poor's Rating Services ("S&P"), filed a complaint in this Court against the United States Securities and Exchange Commission ("SEC" or "Government" or "Commission") seeking declaratory and injunctive relief. (Compl., dated Jan. 16, 2015 ("Compl."), ¶ 1.) The Complaint seeks to prevent Duka "from being compelled to submit to an [allegedly] unconstitutional [SEC administrative] proceeding" which, in fact, was initiated against her on January 21, 2015. (Compl. ¶¶ 2, 5.) Plaintiff contends that the SEC administrative law judges ("ALJs" or "SEC ALJs") who are responsible for adjudicating SEC administrative proceedings ("Administrative Proceeding(s)") "enjoy at least two layers of tenure protection," which insulate them from Presidential oversight. (Id. ¶ 3.) According to Plaintiff, SEC Administrative Proceedings are, thus, unconstitutional on their face because they violate Article II of the United States Constitution.[4] (Id.)

Administrative Proceedings

The Administrative Procedure Act, 5 U.S.C. § 500 et seq. ("APA"), authorizes executive agencies of the government such as the SEC to conduct Administrative Proceedings before an

[2] During an early case conference, the Court advised the parties as follows: "**I have [not] entered – and intentionally so – on the dockets any interim relief at this time.**" (Hr'g Tr., dated Jan. 29, 2015, at 13:19–24 (emphasis added).)

[3] Any issues raised by the parties not specifically addressed herein were considered by the Court on the merits and rejected.

[4] Article II states that "[t]he executive power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1.

ALJ. ALJs have the authority to "administer oaths and affirmations"; "issue subpoenas authorized by law"; "rule on offers of proof and receive relevant evidence"; "regulate the course of the hearing"; and "decide the case." 5 U.S.C. §§ 556, 557. The ALJ serves as the finder of fact and of law (i.e., there are no juries). (Compl. ¶ 21.) Executive agencies, including the SEC, may appoint "as many administrative law judges as are necessary." Id. § 3105. SEC ALJs are assigned their cases by the Chief Administrative Law Judge of the SEC pursuant to authority delegated to the Chief ALJ by the Commission. 17 C.F.R. § 200.30-10.

Prior to the enactment of Dodd-Frank, the SEC was authorized to impose civil penalties in Administrative Proceedings only against "regulated person[s]" or companies. See Gupta, 796 F. Supp. 2d at 507. Before Dodd-Frank, in order to obtain civil penalties from non-regulated entities, the SEC was required to file a civil enforcement action in federal district court. See id. Dodd-Frank authorized the SEC to elect to impose civil penalties in Administrative Proceedings against "a person if the Commission finds, on the record . . . that such person . . . is violating or has violated any provision of [the Exchange Act], or any rule or regulation issued under [the Exchange Act]." 15 U.S.C. § 77h-1(g).

The defendant in an SEC Administrative Proceeding (such as Duka) may appeal an ALJ's decision to the Commission, which is comprised of five Commissioners (one of whom is Chairman) appointed by the President.[5] 17 C.F.R. § 201.410. Or, the Commission may review an ALJ's decision "on its own initiative." Id. § 201.411(c). The Commission "may affirm, reverse, modify, set aside or remand for further proceedings." Id. § 201.411(a). If a defendant

[5] The Commissioners are appointed "by the President by and with the advice and consent of the Senate" for five-year terms. 15 U.S.C. § 78d(a).

does not appeal and if the Commission does not initiate review on its own, the Commission will issue an order making the ALJ's decision "final." Id. § 201.360(d)(2).

A person who is aggrieved by a final order of the Commission may seek judicial review in the United States Court of Appeals for the circuit in which he or she resides or has his or her principal place of business, **or** before the United States Court of Appeals for the District of Columbia Circuit. 15 U.S.C. § 78y(a)(1).

All ALJs, including SEC ALJs, are removable from employment by their respective agency heads (in this case, the Commission) but only for "good cause." Good cause must be "established and determined" by the Merit Systems Protection Board ("MSPB"), an independent federal agency which handles federal employee appeals of adverse employment actions. 5 U.S.C. § 7521; 5 C.F.R. § 930.211(a). The SEC Commissioners, in turn, "cannot themselves be removed by the President except [for] inefficiency, neglect of duty, or malfeasance in office." Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 487 (2010) (citation omitted).

The SEC Proceeding against Plaintiff

The SEC alleges in its Administrative Proceeding against Duka that during the period 2009 through 2011, Duka was managing director at Standard & Poor's Ratings Services "with responsibility for new issue ratings of Commercial Mortgage Backed Securities." (Order Instituting Administrative and Cease-and-Desist Proceedings, dated Jan. 21, 2015, attached as Ex. 3 to Decl. of Daniel Goldman, dated Jan. 26, 2015 ("Goldman Decl."), ¶ 1.) The SEC contends that "S&P's CMBS Group, acting through and led by Duka, published eight CMBS Presale reports between February and July 2011 in which S&P failed to disclose its relaxed methodology for calculating DSCRs [Debt Service Coverage Ratios]." (Id. ¶ 6.) The result,

according to the SEC, is that "[m]arket participants were . . . misled into believing that the ratings at issue were more conservative than they actually were." (Id.) According to the SEC, "Duka willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibits fraudulent conduct in the offer and sale of securities and in connection with the purchase or sale of securities." (Id. ¶ 49.) The SEC also contends that Duka "should be ordered to cease and desist from committing or causing or aiding and abetting violations of and any future violations of Section 17(a) of the Securities Act," and should be ordered to pay a civil penalty and "pay disgorgement." (Id. at 11.)

On January 22, 2015, the SEC designated ALJ Cameron Elliot to preside over Plaintiff's Administrative Proceeding.[6] Plaintiff was ordered to appear at a (scheduling) hearing on February 23, 2015. (Order Scheduling Hearing and Designating Presiding Judge, dated Jan. 22, 2015, attached as Ex. 4 to Goldman Decl.) ALJ Elliot issued an order scheduling the adjudicatory hearing in Plaintiff's Administrative Proceeding to begin on September 16, 2015. (See, Order Following Prehearing Conference, dated Feb. 26, 2015, attached as exhibit to Letter from Nelson A. Boxer to Hon. Richard M. Berman, dated Feb. 27, 2015.)

[6] ALJ Elliot has a distinguished biography: Mr. Elliot graduated from Yale University in 1987 with a Bachelor of Science degree in physics and applied physics, and he graduated from Harvard Law School in 1996. He served as a law clerk for U.S. District Judge Edward Reed (D. Nev.) from July 1996 to August 1998. Mr. Elliot spent the next eight years at the U.S. Department of Justice, during which time he served as an Assistant U.S. Attorney in the Southern District of Florida and in the Eastern District of New York. He subsequently practiced as an attorney at the law firm of Darby & Darby P.C. in New York, where he handled intellectual property litigation, until his June 2008 appointment as an ALJ for the U.S. Social Security Administration. Mr. Elliot was appointed to the SEC in April 2011. ("SEC Announces Arrival of New Administrative Law Judge Cameron Elliot," (Apr. 25, 2011), https://www.sec.gov/news /press/2011/2011-96.htm.)

Plaintiff's District Court Claim

Plaintiff contends here, as noted, that the Administrative Proceeding initiated against her is unconstitutional under Article II (The President "shall take care that the laws be faithfully executed . . . ."). According to Plaintiff, Article II requires that "executive officers, who exercise significant executive power, be unprotected from removal by their superiors at will, when those superiors are themselves protected from removal by the President at will."[7] (Compl. ¶ 51.) [8]

Plaintiff's January 26, 2015 motion seeks to "temporarily restrain and preliminarily enjoin the SEC from continuing and prosecuting the administrative proceeding it initiated against

[7] There are two categories of "executive officers," namely "principal officers" and "inferior officers." Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 510 (2010) ("Free Enterprise"). "[I]nferior officers are officers whose work is directed and supervised at some level by [principal] officers appointed by the President with the Senate's consent." Id. (citation omitted).

[8] Plaintiff relies heavily upon Free Enterprise, the case in which the Supreme Court invalidated the statutory tenure protections of members of the Public Company Accounting Oversight Board ("PCAOB" or "Board"). The PCAOB is a regulatory body created by the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7211, and placed under the supervision of the SEC. The petitioners' claim in Free Enterprise was that "Board members were insulated from Presidential control by two layers of tenure protection: Board members could only be removed by the Commission for good cause, and the [SEC] Commissioners could in turn only be removed by the President for good cause." Free Enterprise, 561 U.S. at 477–78. The Supreme Court concluded that "dual for-cause limitations on the removal of Board members" violated the President's implied power of removal contained in Article II of the Constitution because such limitations deprived the President of "the ability to oversee the Board." Free Enterprise, 561 U.S. at 492, 496.

The majority in Free Enterprise confined its holding by stating that "[t]he only issue in this case is whether Congress may deprive the President of adequate control over the Board." Id. at 508. It declined to consider the applicability of its holding to other federal employees because "none of the[se other] positions . . . are similarly situated to the Board." Id. at 506. Of significance here, the majority specifically excluded ALJs from its holding, stating: **"[O]ur holding also does not address that subset of independent agency employees who serve as administrative law judges . . . Whether administrative law judges are necessarily "Officers of the United States" is disputed . . . And unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions . . . or possess purely recommendatory powers."** Id. at 507 n.10 (emphasis added). (See also discussion, infra, at pp. 17–20.)

her." (Mem. of Law in Supp. of Pl.'s Mot., dated Jan. 26, 2015 ("Pl. Mem."), at 1.) It argues, among other things, that: (1) this Court has subject matter jurisdiction because "dismissing Ms. Duka's Complaint would foreclose meaningful judicial review of her constitutional claim"; "Ms. Duka's claim . . . is wholly collateral to the Administrative Proceeding"; and Duka's claim is "outside the SEC's expertise"; (2) Plaintiff is likely to succeed on the merits of her claim because "SEC ALJ s, as inferior Officers, are protected from removal by at least two levels of 'good-cause' tenure protection" and, thus, the President cannot oversee SEC ALJ s in accordance with his Article II responsibilities; (3) "Ms. Duka will suffer irreparable harm, because she will be compelled imminently to participate in the unconstitutional Administrative Proceeding"; and (4) "[t]he balance of equities and the public interest strongly favor Ms. Duka." (Pl. Mem. at 5–6, 15, 17, 19.)

In its opposition, the SEC asserts that: (1) federal district courts lack jurisdiction over suits, like Duka's, "that attempt to bypass an exclusive remedial [SEC] scheme established by Congress"; (2) "the [for cause] removal provisions applicable to [ALJs] do not raise separation of powers concerns" because the Supreme Court "has repeatedly held that the Constitution permits Congress to place reasonable restrictions on the removal of inferior officers"; (3) "an allegation that the President of the United States does not have sufficient control over some of his underlings describes, at best, a highly attenuated harm that does not warrant the drastic remedy of an injunction"; and (4) an injunction "would delay the SEC's efforts to protect investors and ensure the integrity of the securities markets." (Mem. of Law in Opp'n. to Pl.'s Mot. ("Gov't. Opp'n.") at 7, 20, 24–25.)

On February 9, 2015, Plaintiff filed a Reply to the Memorandum in Opposition. (See Reply Mem. of Law in Supp. of Pl.'s Mot., dated Feb. 9, 2015.) On February 11, 2015, the Court heard (helpful) oral argument. (See Hr'g Tr., dated Feb. 11, 2015.)

II. Legal Standard

"[I]t is established practice . . . to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." Free Enterprise, 561 U.S. at 491 n.2 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)). "[I]njunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001).

"Where, as here, a party seeks a preliminary injunction against government action taken in the public interest pursuant to a statutory scheme, a moving party must demonstrate that (1) he is likely to succeed on the merits of the underlying claim, (2) he will suffer irreparable harm absent injunctive relief, and (3) the public interest weighs in favor of granting the injunction." Pope v. Cnty. of Albany, 687 F.3d 565, 570 (2d Cir. 2012); see Local 1814, Int'l Longshoremen's Ass'n v. N.Y Shipping Ass'n, Inc., 965 F.2d 1224, 1228 (2d Cir. 1992) (The "standards which govern consideration of an application for a temporary restraining order . . . are the same standards as those which govern a preliminary injunction.").

Where Plaintiff fails to establish a likelihood of success on the merits, the Court "need not reach" the remaining elements. Greenlight Capital, L.P. v. Apple, Inc., No. 13 Civ. 900, 2013 WL 646547, at *13 (S.D.N.Y. Feb. 22, 2013).

III. Analysis

(1) The Court has Subject Matter Jurisdiction

A federal district court has jurisdiction over pre-enforcement challenges to agency action if three criteria are met: (1) the absence of jurisdiction in the district court "could foreclose all meaningful judicial review [of the plaintiff's claim]'"; (2) the plaintiff's claim is "wholly collateral" to "any Commission orders or rules from which review might be sought"; **and** (3) the plaintiff's claim is "outside the agency's expertise." Free Enterprise, 561 U.S. at 489–90 (quoting Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212–13 (1994))).

The Court concludes that all three of these criteria are met in this case. The Court notes (again) that the issue being reviewed here is whether the Court has subject matter jurisdiction over Plaintiff's constitutional claim for injunctive and declaratory relief. That issue is separate and apart from a federal court's jurisdiction to review any orders which may be issued by the SEC in the Administrative Proceeding.

Meaningful Judicial Review

Plaintiff argues that the "[t]he availability of an appeal after an administrative proceeding to a federal circuit court of appeals does not address th[e] [alleged] harm because the . . . damage [would] already substantially and harmfully [be] done." (Compl. ¶ 58.) The Government counters that "should Plaintiff be found liable before the Commission, a court of appeals will adjudicate her constitutional claim." (Gov't Opp'n. at 8.)

The Court concludes that the absence of subject matter jurisdiction "could foreclose all meaningful judicial review" of Plaintiff's claim. Free Enterprise, 561 U.S. at 489 (quoting Thunder Basin, 510 U.S. at 212–13). The Court of Appeals obviously would not be able, upon appellate review of any final SEC order, to enjoin the SEC from conducting the Administrative

Proceeding, as Duka asks this Court to do. And, while the Court of Appeals could, presumably, vacate an adverse decision (order) by the SEC on constitutional grounds, it would be unable to remedy the harm alleged by Plaintiff in this Court, i.e., the "substantial litigation and resource burdens incurred during [the] administrative proceeding," and the "reputational harm" associated with her defending the Administrative Proceeding.[9] (Compl. ¶¶ 57–59.)

Plaintiff is not here challenging the outcome of her Administrative Proceeding or any order(s) issued by the SEC. Rather, Plaintiff seeks to enjoin the proceeding itself, and the (injunctive and declaratory) relief she seeks is to prevent the Administrative Proceeding from occurring in the first place. See Bond v. United States, 131 S.Ct. 2355, 2365 (2011) (recognizing "an injured person's standing to object to a violation of a constitutional principle that allocates power within government" where "individuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations"); see also Free Enterprise, 561 U.S. at 513 ("[Petitioners] are entitled to declaratory relief sufficient to ensure that the reporting requirements and auditing standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive."). If Plaintiff were required, as the Government urges, to await the completion of the Administrative Proceeding to seek (any) judicial intervention, important remedies could be foreclosed.[10] That is, her claim for injunctive

[9] The Government argues that reputational harm and litigation expense do not constitute irreparable injury. (Gov't Opp'n. at 24.) Second Circuit precedent makes clear, however, that such alleged harms **are** sufficient for purposes of Article III standing. See Mental Disability Law Clinic, Touro Law Center v. Hogan, 519 F. App'x. 714, 717 (2d Cir. 2013) ("This Court has explicitly rejected the argument that litigation expenses are insufficient to demonstrate an injury in fact for the purposes of Article III standing." (citing Nnebe v. Daus, 644 F.3d 147, 157 (2d Cir. 2011)); Gully v. Nat'l Credit Union Admin. Bd., 341 F.3d 155, 161 (2d Cir. 2003) ("The Supreme Court has long recognized that an injury to reputation will satisfy the injury element of standing.").

[10] The American Heritage New Dictionary of Cultural Literacy, 3d. Ed. (2005), defines the colloquial expression "you can't unscramble an egg" to mean "some processes are irreversible."

and declaratory relief would likely be moot at that stage because the allegedly unconstitutional Administrative Proceeding would have already taken place. Simply put, there would be no proceeding to enjoin. See Ortiz v. Meissner, 179 F.3d 718, 722 (9th Cir. 1999) ("The legal issue would be moot. District court jurisdiction is therefore available . . . ."); Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) ("[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed." (internal quotation marks omitted)); Fox v. Bd. of Trs. of State Univ. of N.Y., 42 F.3d 135, 140 (2d Cir. 1994) (where "[t]he relief sought in the Complaint could provide no legally cognizable benefits to Plaintiffs once they had left the SUNY system"); Martin–Trigona v. Shiff, 702 F.2d 380, 386 (2d Cir. 1983) ("The hallmark of a moot case or controversy is that the relief sought can no longer be given or is no longer needed.").[11]

Wholly Collateral

Plaintiff argues that her claim is "wholly collateral" to the Administrative Proceeding because she "asserts a facial challenge to the very 'existence' of the Administrative Proceeding . . . ." (Pl. Mem. at 4–5.) The Government responds that Plaintiff's claim is not collateral because "Plaintiff's object is to halt that proceeding." (Gov't Opp'n. at 10.)

The Court concludes that Plaintiff's claim for injunctive and declaratory relief is "wholly collateral" to "any Commission orders or rules from which review might be sought" in the Court of Appeals. Free Enterprise, 561 U.S. at 490 (internal quotation marks omitted)). In Free

[11] The Government also fails to consider that ALJ Elliot may ultimately find in favor of Plaintiff or, alternatively, that the parties may settle prior to an appealable order being issued by the Commission. In either event, Plaintiff likely would not be "aggrieved by an order of the Commission" and would, therefore, be unable to obtain any judicial review of her Article II claim. See 15 U.S.C. §§ 77i(a) ("Any person aggrieved by an order of the Commission may obtain a review of such order in the court of appeals of the United States . . . .").

Enterprise, the Supreme Court found that the petitioners' Article II claim was collateral because "petitioners object[ed] to the Board's existence, not to any of its auditing standards." Id. at 490. Similarly, Duka contends that her Administrative Proceeding may not constitutionally take place, and she does not attack any order that may be issued in her Administrative Proceeding relating to "the outcome of the SEC action." Chau, 2014 WL 6984236, at *13; see Gupta, 796 F. Supp. 2d at 513 (where plaintiff "would state a claim even if [he] were entirely guilty of the charges made against him . . . .").

Unlike the plaintiffs in Chau, Duka does not assert an "as-applied" challenge to agency action "in light of the facts of a specific case." Chau, 2014 WL 6984236, at *6. Rather, she contends that Administrative Proceedings are "unconstitutional in all instances—a facial challenge." Id. As Judge Kaplan noted in Chau, "courts are more likely to sustain pre-enforcement jurisdiction over broad facial and systematic challenges." Id. (internal quotation marks omitted).

The Supreme Court's holding in Elgin v. Dep't. of the Treasury, 132 S.Ct. 2126 (2012), cited by the Government in its opposition, is distinguishable. The petitioners in Elgin had been terminated from their (civil service) jobs for failing to register for selective service as required under the Military Selective Service Act, 50 App. U.S.C. § 453. Rather than appealing their terminations to the MSPB or to the Court of Appeals for the Federal Circuit, as required under the Civil Service Reform Act ("CSRA"), the petitioners initiated a case in federal district court in Massachusetts, arguing that the statutory basis for their termination was unconstitutional. The Supreme Court concluded that the petitioners' constitutional claim was not "collateral to the CSRA scheme" because the petitioners had "request[ed] relief that the CSRA routinely affords," i.e., the review and reversal of their terminations. Id., at 2139–40; see also Merritt v. Shuttle,

Inc., 245 F.3d 182, 189 (2d Cir. 2001) ("[T]he mere overlap of evidence and testimony adduced in the two proceedings . . . are insufficient to preclude the district court from hearing a given claim. Such overlap is relevant only if the claim attacks the matters decided by the administrative order.").

Outside the Agency's Expertise

Plaintiff argues that her claim is "indistinguishable from the claim asserted and adjudicated in federal courts in Free Enterprise, where the Article II challenge was held outside the SEC's expertise." (Pl. Mem. at 5.) The Government responds that "Plaintiff's claim raises questions of statutory and regulatory interpretation relating to the Commission's Rules of Practice." (Gov't Opp'n. at 11.)

Without in any way diminishing ALJ Elliot's exceptional legal background, the Court concludes that the constitutional claim posed in this injunctive/declaratory judgment case is outside the SEC's expertise. This aspect of executive agency practice is governed by clear Supreme Court precedent. See Thunder Basin, 510 U.S. at 215 ("[A]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies."); see also Free Enterprise, 561 U.S. at 491 ("Petitioners' constitutional claims are also outside the Commission's competence and expertise . . . . [T]he statutory questions involved do not require 'technical considerations of [agency] policy' . . . . They are instead standard questions of administrative law, which the courts are at no disadvantage in answering.").[12]

[12] The Government argues unconvincingly that a party in Ms. Duka's shoes "must patiently await the denouement of proceedings within the [administrative agency].'" (Gov't Opp'n. at 10 (quoting Chau, 2014 WL 6984236, at *12).) Second Circuit precedent appears to refute such a rule. Touche Ross & Co. v. S.E.C., 609 F.2d 570, 577 (2d Cir. 1979) ("[T]o require appellants to

Thus, the Court concludes that it has subject matter jurisdiction to evaluate Plaintiff's application for declaratory and injunctive relief.

(2) Plaintiff's Motion for Preliminary Injunctive Relief is Denied

The issue remaining is whether Plaintiff is entitled to preliminary injunctive relief. That is, whether Plaintiff (1) is likely to succeed on the merits of her claim, (2) will suffer irreparable harm absent injunctive relief, and (3) the public interest weighs in favor of granting the injunction. Pope, 687 F.3d at 570. The Court concludes that Plaintiff has not demonstrated a likelihood of success on the merits and, accordingly, Plaintiff's motion for preliminary injunctive relief must be denied. See Greenlight Capital, L.P., 2013 WL 646547, at *13. [13]

Likelihood of Success on the Merits

Plaintiff argues that "SEC ALJs, as inferior Officers, are protected from removal by at least two levels of 'good-cause' tenure protection" and, therefore, "the President cannot oversee SEC ALJ s in accordance with Article II." (Pl. Mem. at 15, 17.) The Government responds that "[t]he Supreme Court has repeatedly held that the Constitution permits Congress to place reasonable restrictions on the removal of inferior officers without unduly infringing upon the President's exercise of the Executive power." (Gov't Opp'n. at 20.)

The Court finds that Duka is unlikely to succeed on the merits of her claim. Plaintiff's claim appears to be based upon her interpretation of the Supreme Court's decision in Free

exhaust their administrative remedies would be to require them to submit to the very procedures which they are attacking.").

[13] Even assuming, arguendo, that Plaintiff had demonstrated a likelihood of success, the Court would likely find that she has failed to demonstrate that the public interest weighs in favor of granting a preliminary injunction. See United States v. Wittig, 575 F.3d 1085, 1105 (10th Cir. 2009) ("A primary duty of the SEC is to protect investors and maintain the integrity of the securities markets.").

Enterprise. (See discussion, supra, at n.8.) According to Plaintiff, "[i]n Free Enterprise, the Supreme Court held that if inferior officers . . . under Article II can only be removed from office for good cause, then the decision to remove the inferior officers cannot be vested in other officials (in that case, SEC Commissioners) who also enjoy good-cause tenure." (Pl. Mem. at 1.) Plaintiff contends both that SEC ALJs are inferior officers within the meaning of Article II of the Constitution and that SEC ALJs enjoy at least two levels of ("good cause") tenure protection.

Inferior Officers

"Whether administrative law judges are necessarily 'Officers of the United States' is disputed." Free Enterprise, 561 U.S. at 507 n.10. Duka argues that SEC ALJs exercise "significant authority pursuant to the laws of the United States." (Pl. Mem. at 15.) The Government contends that "whether and how to use ALJs, the ALJs' role within the SEC's decision-making scheme, and the history of the ALJ system . . . all reflect that SEC ALJs are 'mere aids' to the SEC and not officers exercising 'significant authority.'" (Gov't Opp'n. at 12.)

The Supreme Court's decision in Freytag v. Commissioner, 501 U.S. 868 (1991), which held that a Special Trial Judge of the Tax Court was an "inferior officer" under Article II, would appear to support the conclusion that SEC ALJs are also inferior officers. See Freytag, 501 U.S. at 881–82 ("[S]pecial trial judges perform more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.").

The Court concludes that it need not resolve the issue of whether ALJs are inferior officers because, as discussed below, the statutory restrictions on ALJs' removal from office are both appropriate and constitutional.

Levels of Tenure Protections

The Court finds that Free Enterprise clearly did not establish, as Duka suggests, a categorical rule forbidding "two levels of 'good-cause' tenure protection." See Free Enterprise, 561 U.S. at 536 (Breyer, J., dissenting) ("The Court fails to create a bright-line rule because of considerable uncertainty about the scope of its holding"). Rather, as stated by the majority, "[t]he only issue in this case is whether Congress may deprive the President of adequate control over the Board. . . ." Id. at 508. The Court refused to consider the applicability of its holding to other federal employees because "none of the[se] positions . . . are similarly situated to the Board." Id. at 506 ("The dissent itself, however, stresses the very size and variety of the Federal Government . . . and those features discourage general pronouncements on matters neither briefed nor argued here.").

And, as noted, the majority specifically excluded ALJs from the reach of its holding. Id. at 507 n.10 ("**For similar reasons, our holding also does not address that subset of independent agency employees who serve as administrative law judges.**" (emphasis added)).

Supreme Court precedent supports a functional test to determine whether and when statutory limitations on the President's power to remove executive officers violate Article II—and the conclusion that there is no such violation here. "The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II.'" Morrison v. Olson, 487 U.S. 654, 689–90 (1988). In Free Enterprise, the Supreme Court likewise focused upon whether the statutory restrictions on removal of PCAOB members were so structured as to infringe the President's

constitutional authority by "depriv[ing] the President of adequate control over the Board." Free Enterprise, 561 U.S. at 508. Courts must determine "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty . . . ." Morrison, 487 U.S. at 691.

In cases involving (only) one layer of tenure protection, the Supreme Court has focused upon "the nature of the function that Congress vested in the [executive officer]," Wiener v. United States, 357 U.S. 349, 353 (1958), and has distinguished between officials whose functions are "purely executive" and those whose work is "quasi-judicial" or "adjudicatory." Humphrey's Executor v. United States, 295 U.S. 602, 628–29, 631–32 (1935). For reasons having to do with judicial independence, restrictions upon the removal of quasi-judicial officials have rarely resulted in finding an Article II violation.

In Humphrey's Executor, the Court upheld the constitutionality of a statute forbidding the President from removing commissioners of the Federal Trade Commission ("FTC") except for "good cause." The Court's analysis turned upon the fact that the FTC is an independent agency vested with "quasi judicial" and "quasi legislative" power. It "cannot in any proper sense be characterized as an arm or an eye of the executive." Id. at 628. The Court concluded that "[w]ere the President to have the power to remove FTC Commissioners at will, the 'coercive influence' of the removal power would 'threate[n] the independence of [the] commission.'" Morrison, 487 U.S. at 687–88 (quoting Humphrey's Executor, 295 U.S. at 630)).

Similarly, in Wiener, the Court upheld restrictions upon the President's power to remove members of the War Claims Commission. The Commission was tasked with adjudicating claims for compensation by individuals who had suffered personal injury or property damage during World War II. The Court found dispositive the facts that the Commission was established as an

"adjudicating body" and was meant to be "entirely free from the control or coercive influence, direct or indirect, of either the Executive or the Congress." Wiener, 357 U.S. at 354–56 (internal quotations and citations omitted)).

The upshot is that congressional restrictions upon the President's ability to remove "quasi judicial" agency adjudicators are unlikely to interfere with the President's ability to perform his executive duties. See Morrison, 487 U.S. at 691–92 ("Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.").

The Supreme Court's decision in Free Enterprise also supports the conclusion that restrictions upon the removal of agency adjudicators, as opposed to agency officials with "purely executive" functions, generally do **not** violate Article II. The majority emphasized the PCAOB's "expansive powers to govern an entire industry" and its "substantial executive authority," including the authority to "promulgate[] auditing and ethics standards, perform[] routine inspections of all accounting firms, demand[] documents and testimony, and initiate[] formal investigations and disciplinary proceedings." Free Enterprise, 561 U.S. at 485, 505. The Court described these functions as "executive activities typically carried out by officials within the Executive Branch." Id. at 504. It described the PCAOB itself as "the regulator of first resort and the primary law enforcement authority for a vital sector of our economy." Id. at 508. The Court's analysis was limited to whether "the President [may] be restricted in his ability to remove a principal officer [i.e., an SEC commissioner], who is in turn restricted in his ability to remove an inferior officer [i.e., a Board member], even though that inferior officer **determines**

the policy and enforces the laws of the United States." Id. at 484 (emphasis added). The Court concluded that the particular tenure protection scheme applicable to PCAOB members was "contrary to Article II's vesting of the executive power in the President." Id. at 496. But it expressly excluded ALJs from its holding because "**many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions.**" Id. at 507, n.10 (emphasis added).

This Court finds no basis for concluding, as Duka urges, that the statutory restrictions upon the removal of SEC ALJs are "so structured as to infringe the President's constitutional authority." SEC ALJs perform solely adjudicatory functions, and are not engaged in policymaking or enforcement. "There can be little doubt that the role of the modern federal hearing examiner or administrative law judge . . . is 'functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions." Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 756 (2002) (quoting Butz v. Economou, 438 U.S. 478, 513 (1978)); see also Neomi Rao, Removal: Necessary and Sufficient for Presidential Control, 65 Ala. L. Rev. 1205, 1248 (2014) ("Executive branch **adjudicators** are not generally thought to have discretion in th[e] sense [of one engaged in rulemaking or enforcement actions], but rather like other judges to be applying the law to particular facts." (emphasis added)). The challenged (good cause) limitations upon the removal of an SEC ALJ will in no way "impede the President's ability to perform his constitutional duty." Morrison, 487 U.S. at 691.

Indeed, invalidating the "good cause" restriction upon the removal of SEC ALJs—the so-called "second layer" of tenure protection—would undermine the ALJs' clear adjudicatory role

and their ability to "exercise[] . . . independent judgment on the evidence before [them], free from pressures by the parties or other officials within the agency." Butz, 438 U.S. at 513–14. That same layer of good cause protection is provided for in the APA and applies to ALJs across numerous federal agencies. (See Gov't Opp'n. at 5.) It exists "to guarantee the independence of hearing examiners."[14] As Supreme Court Associate Justice Elena Kagan has written, "[i]n this context [of agency adjudication], presidential participation in administration, of whatever form, would contravene procedural norms and inject an inappropriate influence into the resolution of controversies . . . The consequence here is to disallow the President from disrupting or displacing the procedural, participatory requirements associated with agency adjudication, thus preserving their ability to serve their intended, special objectives." Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2363 (2001).

Because Plaintiff has failed to demonstrate a likelihood of success on the merits of her claim, the Court need not decide whether there would be irreparable harm absent injunctive relief, and whether the public interest weighs in favor of granting an injunction. Greenlight Capital, L.P., 2013 WL 646547, at *13. (See, supra, n.13.)

[14] Butz, 438 U.S. at 513–14 ("Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because they were required to perform prosecutorial and investigative functions as well as their judicial work, and because they were often subordinate to executive officials within the agency" (internal citations omitted)); see also Portland Audubon Society v. Endangered Species Comm., 984 F.2d 1534, 1546 (9th Cir. 1993) ("It is a fundamental precept of administrative law that when an agency performs a quasi-judicial (or a quasi-legislative) function its independence must be protected. There is no presidential prerogative to influence quasi-judicial administrative agency proceedings through behind-the-scenes lobbying.").

IV. Conclusion & Order

For the reasons stated herein, Plaintiff's motion for a preliminary injunction and temporary restraining order [#9] is denied.

Dated: New York, New York
April 15, 2015

RMB

RICHARD M. BERMAN, U.S.D.J.