NO. 15-2584

United States Court of Appeals

for the

Fourth Circuit

DAWN J. BENNETT; BENNETT GROUP FINANCIAL SERVICES, LLC,

Plaintiffs-Appellants,

– v. –

U.S. SECURITIES AND EXCHANGE COMMISSION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND AT GREENBELT

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

ANDREW J. MORRIS
MORVILLO LLP
1101 17th Street, NW, Suite 705
Washington, D.C. 20036
(202) 803-5850

Attorneys for Plaintiffs-Appellants

Of Counsel:
GREGORY MORVILLO
EUGENE INGOGLIA
ELLEN M. MURPHY

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INTRODUCTION

The SEC's brief is most notable for what it does not do: It does not respond to Bennett's central argument. That argument focuses on the "type" of claim at issue, as *Thunder Basin* says to do. Thus our opening brief explained that Bennett's Appointments Clause challenge is a specific type of claim: It alleges a *structural* constitutional defect in the administrative forum itself. We then analyzed this structural claim in light of the relevant statute and the elements of the *Thunder Basin* framework.

Our analysis reviewed the Supreme Court's strong and repeated statements about structural claims: that they are especially fundamental to our constitutional order; that they protect interests in constitutional integrity that transcend the specific litigant; and—perhaps most critical to the *Thunder Basin* test—that they are forward-looking and preventative rather than backward-looking and remedial. The constitutional defects they expose must be remedied up front or they cannot be remedied at all. Structural claims also form a distinctly "limited" class of claims, so that affording them district-court review does not open the door for other types of claims.

Our opening brief then explained that Bennett's is the same type of claim addressed, under the same statute, in *Free Enterprise Fund v. PCAOB,* 561 U.S. 477 (2010). There the Supreme Court held that the Securities Exchange Act did not

divest district courts of their jurisdiction over such a claim. We also explained that Bennett's claim is different from those in cases where district courts lacked jurisdiction, because those claims did not attack the forum itself. The primary examples are *Thunder Basin Coal Co. v Reich*, 510 U.S. 200 (1994) , and *Elgin v. Department of Treasury*, 132 S. Ct. 2126 (2012). In sum, we argued, Bennett's structural claim is like the claims in cases where a district court had jurisdiction, and different from the claims in cases where a district court lacked jurisdiction. This is Bennett's central argument.

But the SEC's brief makes no attempt to respond to it. At a general level, the SEC does not even address our account of the distinctive nature of structural claims. Nor does the SEC dispute any particular aspect of our discussion, including the point most critical to the *Thunder Basin* analysis: that unless Bennett's claim receives review in the district court, no court can provide the preventative remedy that is necessary to address this type of claim. So denying Bennett review in the district court denies the substance of her claim.

Instead of discussing the specific type of claim at issue, the SEC puts its effort into re-interpreting the legal framework at a wholesale level. Under the SEC's re-interpretation, the *Thunder Basin* test is not the context-sensitive, multi-factor framework that the Supreme Court has carefully crafted. Rather, it is a flat, blanket ban on *all* claims relating to administrative proceedings—regardless of the

relevant statute and regardless of the specific type of claim. This proposed blanket ban would require respondents in unconstitutional SEC proceedings to endure them without any possible access to a court, no matter how fundamentally a proceeding violates the Constitution. This view of the law distorts *Thunder Basin* beyond recognition. It also flouts the Supreme Court's statements that structural claims are inherently prophylactic. The SEC's view should be rejected, as we explained in Bennett's opening brief and we review below.

ARGUMENT

I. SECTION 87y DOES NOT EVIDENCE AN INTENT TO DIVEST DISTRICT COURTS OF JURISDICTION OVER THE TYPE OF CLAIM ASSERTED BY BENNETT

A. The SEC's Brief Ignores Or Misunderstands The "Type" Of Claim That Bennett Asserts, Which Is Structural And Therefore Prophylactic

Under the *Thunder Basin* line of cases, the starting point is the "type" of claim the plaintiff asserts. *Thunder Basin Coal Co.*, 510 U.S. at 207, 212-13; *see also Free Enterprise*, 561 U.S. at 489, and *Elgin*, 132 S. Ct. at 2136. Bennett's Appointments Clause claim is a structural one, as our opening brief explained at length. We also explained that structural claims are different from other types of claims in several important ways.

A structural claim typically attacks the constitutionality of the forum itself. *See* Opening Brief ("DB Br.") at 19. This type of claim advances two distinct

interests: the litigant's personal right to a forum that is constitutional, and a general interest in the integrity of our constitutional system. *See* citations at *id*.

Structural claims also are different because they are forward-looking and "prophylactic." *See* DB Br. 29-30. This means that they can be vindicated only by injunctive relief, which implicates the district courts' longstanding role in issuing injunctions to prevent governmental violations of the Constitution. *Id*. at 30-31. And because structural claims typically attack the forum itself, they do not require the district court to inquire into the facts of the underlying case. *Id.* at 40. Nor do they require technical substantive expertise. *Id.* Because of the unusual importance of structural claims, they are not subject to the harmless-error rule, and they cannot be waived. *Id*. at 19. These various features distinguish structural claims from the other types of claims at issue in the *Thunder Basin* cases, including other types of constitutional claims. *Id.* at 18-20, 29-31.

All of this is explained in our opening brief. But the SEC barely acknowledges that discussion—indeed, the SEC appears to misunderstand it. The SEC characterizes our argument as contending that structural challenges "*fall outside* the scope of the principles set out in *Thunder Basin*." SEC Brief ("SEC Br.") 24 (emphasis added). That is not our argument. To the contrary, our entire brief applied the *Thunder Basin* framework to Bennett's structural claim. We

explained why that framework dictates that the statute in question did not disturb the district court's jurisdiction over this type of claim.

The SEC further misunderstands our argument—or ignores it—when the SEC lumps Bennett's claim together with entirely different types of claims. In some places, the SEC places Bennett's structural claim into a generic class that the SEC labels "constitutional claims." SEC Br. 3, 8, 12, 14, 15, 17, 18, 20, 22, 24, 25, 26, 27. Elsewhere, the SEC confuses Bennett's claim, which challenges the forum itself, with challenges to rules governing primary conduct (as in *Thunder Basin* and *Elgin*). *Id.* at 12-13, 24, 26. In still other places, the SEC incorrectly equates Bennett's claim with statutory challenges that are facial. *Id*. at 24. And sometimes the SEC equates Bennett's claim with challenges to specific rulings made by individual administrative law judges (as in *Jarkesy*). *Id.* at 13.

In sum, the SEC never acknowledges the distinction between challenges to the forum itself (as Bennett asserts) and the various other kinds of claims discussed in the case law, almost all of which seek to alter the substantive outcome of the relevant enforcement proceeding. Yet this distinction is critical. Because Bennett's claim challenges the forum itself, her claim is like the claim in *Free Enterprise Fund*, as well as those in *McNary* v. *Haitian Refugees Center, Inc.*, 498 U.S. 479 (1991), and *Mathews v. Eldridge*, 424 U.S. 319 (1976); each of these cases found jurisdiction in the district court. By contrast, Bennett's claim is different from the

claims in cases that do not involve challenges to the forum itself; those cases found no jurisdiction in district court. These include *Thunder Basin* and *Elgin* (and *Jarkesy*, which we return to below).

The SEC also declines to respond to our explanation of why a focus on the specific type of claim is critical to the proper application of *Thunder Basin*. As our opening brief explained, when the separate elements of the *Thunder Basin* framework are applied to a claim that is structural, they uniformly point toward district-court jurisdiction. Precisely because Bennett's claim is structural, and therefore prophylactic, the "meaningful" review requirement requires judicial review before the administrative process runs its course. We discuss this point further in part II.A., below. Also because Bennett's claim is structural—it challenges only the forum—it is wholly collateral to the SEC's enforcement proceeding. *See* part II.B, below. And because Bennett's claim is grounded *solely* in the Constitution, it lies outside the SEC's expertise in the securities laws. *See* part II.C, below. Finally, because Bennett's claim is structural it matches the critical features of existing exceptions to exhaustion requirements, where the law holds that immediate review is necessary to protect an important right. *See* DB Br. 35-37 and below at part II.A.1.

B. The SEC Is Unable To Account For The Statute's Savings Clause

Our opening brief also discussed the statute's savings clause, which provides that the "rights and remedies" established by the Exchange Act are "*in addition to* any and all other rights and remedies" that already "exist at law or in equity." *See* 15 U.S.C. § 78bb(a)(2) (emphasis added). We pointed out that the *Thunder Basin* Court specifically highlighted the importance of savings clauses in the context of statutory review schemes. The Court explained that the savings clause was a significant reason for the different outcomes in *Abbott Laboratories* and *Thunder Basin*. In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 144 (1997), the administrative scheme contained a savings clause and the Supreme Court concluded that the scheme did not disturb district-court jurisdiction; in *Thunder Basin*, the statute did not contain a savings clause and the Supreme Court concluded that the scheme eliminated that jurisdiction. *Thunder Basin*, 510 U.S. at 212.

The SEC does not dispute that, in *Huddleston & MacLean v. Huddleston*, 459 U.S. 375, 383 (1983), the Supreme Court gave effect to the Section 78y savings clause—the same one at issue in our case. The SEC also does not appear to dispute that the basic purpose of a savings clause is to instruct courts that new remedies created by a statute are not exclusive. The SEC contends only that a savings clause does not confer district-court jurisdiction if Congress "has otherwise

channeled judicial review to the courts of appeals." SEC Br. 23. That is doubtless true, but it merely begs the question in this appeal, which is whether the statute does channel judicial review for the "type" of claim at issue away from the district court. And nothing in the Securities Exchange Act says that the statute does so. This statutory silence is especially telling—and cuts against the SEC's position—in light of the long-established role of district courts in hearing injunction cases where citizens sue to prevent unconstitutional conduct by the government. *See* DB Br. 18.

C. *Free Enterprise* Does Not Establish A Blanket Prohibition On District-Court Challenges To SEC Administrative Proceedings

Our opening brief explained that, in *Free Enterprise Fund*, the Supreme Court addressed a structural claim asserted under the same statute at issue here. The Court held that the statute did not divest district courts of their traditional jurisdiction over an Appointments Clause challenge to agency authority. 561 U.S. at 489-91. *See* DB Br. 15-16. Our opening brief explained why *Free Enterprise* indicates that the district court has jurisdiction over Bennett's claim. DB Br. 15-16.

The SEC responds by trying to transform *Free Enterprise*: from an affirmative holding that permits a district-court structural challenge into a negative holding that prohibits all district-court challenges. Here the SEC is like the celebrated lawyer who was faced with a legal brick wall and turned it into a

triumphal arch, except that the SEC is faced with an archway—the *Free Enterprise* decision—and tries to turn it into a brick wall.

The SEC attempts this feat by contending that the Supreme Court did not decide *Free Enterprise* based on the type of claim at issue (which is the proper focus under *Thunder Basin*), or based on the Exchange Act itself (which the Supreme Court said does not disturb district-court jurisdiction). According to the SEC, the Supreme Court decided the case based on its procedural posture—on the fact that it was filed pre-enforcement. Under this reading of *Free Enterprise*, the only reason the Court permitted the plaintiffs to sue in district court was that they had filed suit without waiting for the PCAOB to file an enforcement proceeding against them.

This approach misreads *Free Enterprise*, as we explained in Bennett's opening brief. DB Br. 21. To begin, the SEC's account of the case does not even acknowledge the Court's statement that Section 78y does not "explicitly" or "implicitly" "limit district-court jurisdiction." *Free Enterprise,* 561 U.S. at 489. This is a statement by the Supreme Court about the specific statute at issue. It should not be simply ignored.

The Court made this statement—its reading of the statute—*before* the Court even reached the case's procedural posture. 561 U.S. at 489. When the Court did address the procedural posture, it did so as part of a discussion of several *Thunder*

Basin factors. *Id*. at 489-91. The Court did not say that the pre-enforcement posture was the most significant of those factors, much less that it was determinative of the entire case. *Id*.

And by no means did the Court say—as the SEC contends it did—that the claim's pre-enforcement posture was *necessary* for district-court jurisdiction. The Court said only that the elements of the case, which included a structural claim and a pre-enforcement posture, were *sufficient* to support district-court jurisdiction. *Id*. The Court did not say that these same facts are *necessary* for district-court jurisdiction in any other case. *Id.*

Nor, as the SEC suggests, did the Court's discussion of the "meaningful review" requirement suggest that agency jurisdiction would be exclusive once the agency initiated an enforcement action. The Court's reasoning was limited to the following point: Where the plaintiffs contended that the PCAOB was unconstitutional, meaningful review would not be possible if the Court prohibited pre-enforcement claims. *Id*. Critically, the Court did *not* say that, once an enforcement action is pending, review in the court of appeals always is "meaningful" review. *Id.* at 490-91.

To the contrary, the Court stated that the plaintiffs should not be required to incur a sanction to obtain judicial review—a point the SEC conspicuously leaves out of its discussion. The SEC quotes the Court's memorable statement that the

regulated parties are not required "to bet the farm * * * by taking the violative action before testing the validity of the law." 561 U.S. at 490 (ellipsis in original). But the SEC omits the point of this sentence, which is that regulated parties should not be required to "incur a sanction" or accept "severe punishment" to obtain judicial review of their claims. *Id*.

The point is not simply having to "tak[e] the violative action," of course; the only reason that action is significant is because it can trigger a sanction. And *Free Enterprise* says that the plaintiff should not have to risk receiving a sanctions order. 561 U.S. at 490. It is the sanction that matters. Here *Free Enterprise* simply applies the principle that a litigant who challenges the constitutionality of an agency forum is not required to endure the administrative process and incur a sanctions order before she has access to a court. The Supreme Court stated this very principle in *Thunder Basin*. *See* 510 U.S. at 212-13 (discussing *Mathews v. Eldridge*, 424 U.S. at 330-31 and *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. at 494-97).

This principle applies with particular force to Bennett's case, because Bennett did not have the option of filing a lawsuit before the SEC initiated enforcement proceedings. In this respect she has fewer options than the plaintiffs in *Free Enterprise*; they had ripe pre-enforcement claims because they were subject to an entire regulatory regime that they contended was unconstitutional. 561 U.S.

at 490-91. But Bennett was not subject to the regime she challenges—the SEC's administrative enforcement regime—until the SEC decided to bring an enforcement proceeding against her.

Had Bennett filed a pre-enforcement suit based on the possibility that the SEC might bring an action against her, the SEC would have moved to dismiss her claim as premature. That is exactly what the SEC recently did in *Gray Financial*. *See* DB Br. 23. As that SEC argument shows, the SEC's real position on the law is not that citizens such as Bennett can challenge the SEC's enforcement forum as long as they do so when no administrative proceeding is pending; the SEC's real position is that citizens can *never* file a district-court challenge to the SEC's enforcement activities. But such a blanket prohibition cannot be squared with *Thunder Basin,* which holds that jurisdiction requires a multi-part analysis that focuses on the specific claim and the specific statute at issue. Nor can the SEC's position be reconciled with the Supreme Court's pronouncements on structural claims, which establish that these claims require a remedy that is prophylactic.

D. The SEC Incorrectly Relies On *Jarkesy* And *Bebo,* While Ignoring Cases That Go The Other Way By Finding District-Court Jurisdiction Over Challenges To SEC Administrative Proceedings

To support its argument that all district-court challenges to SEC enforcement proceedings are prohibited, the SEC relies primarily on two recent cases, *Jarkesy* v. *SEC*, 803 F.3d 9 (D.C. Cir. 2015), and *Bebo v. SEC*, 799 F.3d 765 (7th Cir.

2015)—and ignores district-court cases that go the other way, as we note below. Our opening brief discussed *Jarkesy* and *Bebo* in detail. As we explained, *Jarkesy* is distinguishable on its facts because it did not involve a structural constitutional challenge to the forum, but instead involved various claims that were "inextricably intertwined with the conduct" of the administrative proceeding. 803 F.3d at 14. *See* DB Br. 25-26. *Bebo* did address a structural claim, combined with other claims, but that court did not recognize the distinctive nature of the structural claim or its implications for the *Thunder Basin* analysis. 799 F.3d at 767-68.

As Bennett's brief also explained, even if *Jarkesy* were relevant on its facts, it should not be followed. There are several reasons. To begin, *Jarkesy* ignores—entirely—the *Free Enterprise* Court's statement that Section 78y does not "explicitly" or "implicitly" "limit district-court jurisdiction." 561 U.S. at 489. As we noted above, this is a statement by the Supreme Court interpreting the very statute at issue. It should have been the foundation for *Jarkesy*'s discussion—not something the court disregarded.

Instead of addressing the Supreme Court's statement about the statute at issue, *Jarkesy* constructed an analogy to a different statute—the Civil Service Reform Act, which the Supreme Court had discussed in *Elgin*. The result was the *Jarkesy* "painstaking detail" discussion that, as we explained, was erroneous on several grounds. *See* DB Br. 23-25. The *Jarkesy* court also erred when it re-

interpreted the "meaningful" review requirement so it would, in effect, establish exclusive jurisdiction for the SEC in every case. *See id*. at 32-33. In the same vein, the *Jarkesy* court re-wrote the longstanding meaning of "collateral," again to support exclusive jurisdiction for every SEC administrative proceeding. *See id.* at 41-42.

Bebo should not be followed, either, because it reached its conclusion by following *Jarkesy*—despite expressing some skepticism about that decision. And *Bebo* failed to address the implications of a claim that was structural. DB Br. at 27.

We are not alone in rejecting the outcome reached in *Jarkesy* and *Bebo*. As our opening brief pointed out (at 27-28), decisions from two district courts addressed challenges to SEC administrative proceedings and found jurisdiction in the district court. *See Duka v. SEC*, 103 F. Supp. 3d 382, 384 (S.D.N.Y. 2015), *appeal docketed*, No. 15-2732 (2d Cir. Aug. 27, 2015); *Hill v. SEC*, 2015 WL 4307088, at *5-9 (N.D. Ga. June 8, 2015), *appeal docketed*, No. 15-12831 (11th Cir. June 25, 2015); *Gray Financial Group, Inc. v. SEC*, No. 15-cv-00492, slip op. at 10-25 (N.D. Ga. Aug. 4, 2015), *appeal docketed*, No. 15-13738 (11th Cir. Aug. 20, 2015). *Duka* expressly rejected the Seventh Circuit's decision in *Bebo*, including that court's treatment of *Elgin*. *Duka v. SEC*, 2015 WL 5547463, at *4, S.D.N.Y. (Sep. 17, 2015). The SEC's brief does not even acknowledge these cases.

The SEC does cite *National Taxpayers Union v. United States Social Security Admin.*, 376 F.3d 239, 243-44 & n.3 (4th Cir. 2004), but that case did not involve a challenge to the forum. Rather, the plaintiff in that case challenged a statute prohibiting the use of mailings that deceptively suggest an affiliation with the Social Security Administration. This challenge was within the exclusive jurisdiction of the Social Security Administration, which a review scheme charged with enforcing this statute. *Id.* at 240. The SEC also cites *Virginia v. United States*, 74 F.3d 517, 523 (4th Cir. 1996), but as our opening brief explained (at 43-44), *Virginia* was nothing like our case. Among other things, it was an effort to reverse a final action taken by an agency (the EPA), so that the plaintiff's claim failed all elements of the *Thunder Basin* framework. The SEC's brief does not respond to our discussion of *Virginia*.

The SEC's reference (at 16-17) to the *TRAC* doctrine, articulated in *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984), also is irrelevant. The *TRAC* doctrine is potentially relevant only "where a statute commits review of agency action to the Court of Appeals and thus where interlocutory review of an unreasonable delay claim is necessary to protect [the appeals court's] necessary jurisdiction." *Sierra Club v. Thomas*, 828 F.2d 783, 790 (D.C. Cir. 1987) (internal quotation marks omitted). In our case, there is no

statute that commits the Appointments Clause claim asserted by Bennett to the court of appeals.

The *TRAC* doctrine's irrelevance to our case is confirmed by *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 965 (D.C. Cir. 1996). There the D.C. Circuit held that the *TRAC* doctrine does not apply to "a constitutional challenge that is exclusively directed to the source of the putative agency authority," so that district court jurisdiction is appropriate in such a case. Later, in *National Taxpayers Union*, 376 F.3d 239 (cited by the SEC and addressed below), the Fourth Circuit distinguished *Time Warner Entertainment* as an example of a case where district-court jurisdiction was appropriate. 376 F.3d at 243 n.2. The *National Taxpayers Union* court noted that *Time Warner Entertainment* was distinguishable because that plaintiff "challenge[d] the validity of the agency's enabling statute in an action wholly independent of the agency's enforcement of a substantive provision." *Id*.

II. THE SEC FUNDAMENTALLY MISCONSTRUES *THUNDER BASIN*'S MULTI-PART FRAMEWORK BY ATTEMPTING TO TRANSFORM IT INTO A FLAT BAN ON CHALLENGES TO SEC ACTIONS

A. The SEC Misconstrues Supreme Court Authority When It Tries To Reduce The "Meaningful" Review" Requirement To Mere "Eventual" Review

1. As Bennett's opening brief explained, because Bennett's claim is prophylactic, the "meaningful" review requirement can be satisfied only by immediate district-court review

Because the SEC does not confront the structural nature of Bennett's claim, the SEC never tries to explain why it is permissible to deny Bennett the prophylactic relief that is required for a structural claim. *See*, *e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239-40 (1995). As our opening brief explained (at 28-33), reading Section 78y to strip the district court of jurisdiction would not simply *defer* judicial review of Bennett's claim until the court of appeals provides a proper remedy. Precisely because Bennett's claim is structural, the court of appeals cannot possibly provide the proper remedy, which is an injunction issued before the SEC completes its administrative proceeding. *Id*. The SEC's approach would, therefore, *deny* the relief necessary to vindicate Bennett's claim—thus denying the *substance* of her claim before she is permitted access to a judge.

This approach would violate the *Thunder Basin* requirement that every claim must have access to a court before that claim is moot. *See* 510 U.S. at 213-16. That Court gave examples of cases where (as in our case) a respondent in an administrative proceeding could obtain meaningful review only by suing in district court. *See* 510 U.S. at 213. As examples, it cited *Mathews v. Eldridge*, 424 U.S. at 330-31, and *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. at 494-97. We cited these cases in our opening brief (at 31, 43). The SEC does not respond to this point or even address *Mathews* or *McNary*.

The SEC's approach also would flout the Supreme Court's statements that separation-of-powers claims are prophylactic and a "safeguard"—and specifically are *not* merely a "remedy to be applied" after the fact. *Plaut,* 514 U.S. at 239-40. DB Br. 28-31. It follows that if this structural claim means anything—and the Supreme Court has repeatedly emphasized that this type of claim is unusually important (*see* DB Br. 19, 29)—the remedy cannot be limited to preventing the agency from imposing a sanction after the proceeding runs its course. Rather, the remedy must protect against the unconstitutional process itself. *See Plaut*, 514 U.S. at 239.

The SEC's refusal to acknowledge the type of claim at issue also explains its attempt to brush aside Bennett's claim as involving "[m]ere litigation expense" and "annoyance." SEC Br. 20 (quoting *FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980)). That is not what this case is about, as the above quotations from *Plaut* make clear and as our opening brief (at 30), explained in detail. Our brief also specifically addressed *Standard Oil Co*., explaining why that case does not apply where the allegation is that the forum itself is constitutionally offensive. *See* DB Br. 34. Yet the SEC cites the case without even acknowledging our discussion of it.

2. As Bennett's opening brief explained, *Jarkesy*'s effective nullification of the "meaningful review" requirement should not be followed

The SEC's brief acknowledges none of the problems that would be caused by delayed review. To the contrary, the SEC contends that the *Thunder Basin* "meaningful" review test actually mandates that all respondents accept delayed review, even if delay has the effect of denying their claim. The SEC contends that a respondent is not entitled to district-court review as long as the administrative proceeding might lead to "eventual" review of a final agency order—even if that "eventual" review would come too late to provide the relief required to address the type of claim issue. *See* SEC Br. 11-17. In the SEC's view, therefore, the meaningful-review requirement is satisfied in *every* case in which the plaintiff is a respondent in an administrative proceeding. This approach renders SEC administrative proceedings immune from judicial oversight until they are completed—no matter how fundamentally the SEC proceeding might violate the Constitution.[1]

[1] The SEC's meaningful-review argument fails for the additional reason that it rests on the premise that appellate review of an SEC final order would provide the same review that Bennett would receive in district court. SEC Br. 17-23. That may not be the case, because in the court of appeals the SEC will contend that the interpretation of Section 78y embodied in an SEC final order is entitled to *Chevron* deference. *See Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984); *see also America Online, Inc. v. AT&T Corp.*, 243 F.3d 812, 817 (4th Cir. 2001) (explaining the contours of *Chevron* deference). (*Elgin* did not present this deference problem because there the agency (the Merit Systems Protection

The SEC's attempt to transform the meaningful-review requirement relies primarily on the recent decision in *Jarkesy*. We already explained how *Jarkesy* fundamentally re-wrote this requirement. *See* DB Br. 32-33. In short, *Jarkesy* replaced the requirement for "meaningful" review with permission for the agency to provide for mere eventual review; this change stripped the review requirement of any force in cases involving SEC enforcement actions. *See Jarkesy*, 803 F.3d at 18-19, 24, 27 (stating that the meaningful-review requirement is satisfied as long as judicial review of an SEC order is available "eventually").

As we explained, the words "eventual" and "eventually" do not appear in *Elgin*. As we also explained (at 32-33), *Elgin* does not relax the "meaningful" review requirement; it re-affirms it. 132 S. Ct. at 2132-33. *Elgin* did not say (or suggest) that an administrative proceeding provides "meaningful" review as long as the proceeding eventually will lead to a final order that can be appealed. *See* DB Br. 32-33. On the facts of that case, review in the court of appeals would have been meaningful because of the type of claim at issue, which sought reinstatement and back pay. It was not too late to award that relief when the case reached the court of

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Board) would not decide the legal question at issue, so that the court of appeals would decide it in the first instance. 132 S. Ct. at 2137-38. Although *Chevron* deference should not apply to this issue, if the SEC were to receive *Chevron* deference in the court of appeals, Bennett's claim would not receive the same review it would receive in district court.

appeals. *Id*. The SEC's brief does not contest the descriptions of *Jarkesy* and *Elgin* provided in our opening brief.

Our brief also pointed out that the SEC's relaxed version of the "meaningful review" requirement has been rejected by at least three district courts, each of which takes into account the specific features of structural constitutional claims. *See* DB Br. 31 (citing cases). The SEC does not acknowledge these decisions or explain why it disregards them.[2]

3. The SEC does not respond to Bennett's discussion of categories of cases where interlocutory challenges are permitted because review after a final order would be too late to provide a remedy

It is true that some courts addressing administrative review schemes have expressed concern about opening the door to routine district-court intervention in administrative proceedings. In this vein the SEC notes that, as a general matter,

[2] The SEC twice cites *In re al-Nashiri*, 791 F.3d 71, 79-80 (D.C. Cir. 2015), as establishing that separation-of-powers challenges to administrative proceedings cannot be reviewed in a district court. SEC Br. 22, 24. But *al-Nashiri* was a Guantanamo prisoner's challenge to a "military commission" forum, where a statute explicitly (and very thoroughly) stripped district courts of jurisdiction over such a challenge. 791 F.3d at 76, 78-79. The SEC also tries to distinguish *Bond v. United States*, 131 S. Ct. 2355 (2011), which our opening brief cited for the principle that one of the two interests a structural claim protects is the respondent's personal interest in liberty (along with a general interest in government's structural integrity). *See* DB Br. 19, 34. The SEC does not dispute this principle. And it misdescribes Bond when it says that "[o]nly after [*Bond*] was sentenced was she able to appeal the denial" of her motion to dismiss the indictment. SEC Br. 22 n.7. In fact, the opinion does not indicate that she tried to appeal before she pled guilty. *See* 131 S. Ct. at 2360-61.

defendants in criminal and civil proceedings cannot bring "piecemeal" appeals. SEC Br. 21.[3] This is true, of course—but only as a general matter. There are various well-established contexts where the law permits immediate review of challenges to the validity of ongoing proceedings. *See* DB Br. 35-40.

Our opening brief discussed some of these categories at length, but the SEC does not address our discussion. We also explained in detail why a generic "slippery slope" argument, which is the argument the SEC makes, does not apply to the specific type of claim at issue in our case. DB Br. 35-37. We specifically reviewed *Chau v. SEC*, 72 F. Supp. 3d 417 (S.D.N.Y. 2014) and *Tilton v. SEC*, No. 15-2472, 2015 WL 4006165 (S.D.N.Y. June 30, 2015), two cases from the Southern District of New York that discuss contexts where litigants are not required to wait for a final order before challenging some aspect of an ongoing proceeding.

The discussion in *Tilton* is particularly relevant to a claim like Bennett's, which is prophylactic and therefore warrants injunctive relief. *Tilton* discussed the interlocutory-review statute, 28 U.S.C. § 1292, which permits a party whose injunction motion is denied to obtain "immediate" review. 2015 WL 4006165, at

[3] Here the SEC cites *Aref v. United States*, 452 F.3d 202, 206 (2d Cir. 2006) (per curiam), but that case is inapposite because it did not involve a challenge to the forum. There, a criminal defendant contended that the government was improperly denying him access to certain information and that this denial violated his Sixth Amendment rights. *Id*.

*5 n.2. The reason for that review, the *Tilton* court explained, is "to permit[] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequences." *Id.* That rationale applies here, as Bennett's opening brief explained. *See* DB Br. 35-37. The SEC's brief does not engage with this discussion.

There are other relevant examples as well. At least three circuits have specifically addressed separation-of-powers claims and held that a defendant asserting a separation-of-powers challenge to an indictment is entitled to interlocutory appellate review. *See United States v. Claiborne*, 727 F.2d 842, 844-45 (9th Cir. 1984); *United States v. Hastings,* 681 F. 2d 706, 708 (11th Cir. 1982); *United States v. Myers*, 635 F.2d 932, 935-36 (2d Cir. 1980).

Similarly, it is well-established that interlocutory appeals are permitted for double-jeopardy claims—as even *Jarkesy* acknowledged. *See* 803 F.3d at 26-27 (citing *Abney v. United States*, 431 U.S. 651, 662 (1977)). As the Supreme Court explained, to protect a defendant's right to be free from double jeopardy, it is not sufficient to protect the defendant from a sanction at the end of a second trial; rather, it is necessary to protect the defendant from enduring the second trial itself. *Abney*, 431 U.S. at 660-62. The SEC's brief fails to account for any of these categories of cases where immediate judicial review is available to protect an important right.

B. The SEC Misconstrues Bennett's Claim, Which Challenges Only The Forum And Therefore Is Collateral

The next *Thunder Basin* consideration is whether the claim is collateral to the administrative proceeding. *See Elgin*, 132 S. Ct. at 2139-40. Our opening brief explained the traditional meaning of "collateral," which refers to claims that are separate from the "merits" of an action. *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 105 (2009). Under that long-established meaning, Bennett's claim is indisputably collateral. DB Br. 40-42.

The SEC responds by misdescribing the relief that Bennett seeks, saying that Bennett "seeks to prevail in [her] administrative proceeding." SEC Br. 26 (citations omitted). This characterization misunderstands Bennett's claim. Far from seeking to prevail in her administrative proceeding, Bennett makes no assertions whatever about the merits or conduct of that proceeding. She seeks only to have that proceeding conducted in a forum that is constitutional.

C. The SEC Does Not Dispute That Bennett's Claim Lies Outside The SEC's Expertise In The Securities Industry

The final possible *Thunder Basin* consideration is whether the claim implicates the technical expertise of the relevant agency. *See Elgin*, 132 S. Ct. at 2140. The SEC does not dispute that Appointments Clause claims lie outside the SEC's expertise in the securities laws, as the Supreme Court stated in *Free Enterprise*, 561 U.S. at 491. But the SEC argues that the SEC should be permitted

to decide the Appointments Clause issue because, in short, that issue is bound up with "many threshold questions." SEC Br. 27 (quoting *Elgin*, 132 S. Ct. at 2140). This was true in *Elgin* because, there, the agency could not reach the constitutional issue until the agency first resolved certain employment-law issues. That is, if the plaintiff was not correct that his treatment constituted a discharge—an employment-law question, not a constitutional one—then he could not contend he had suffered a discharge that was unconstitutional. 132 S. Ct. at 2140. It also was possible that the court might resolve the case "in the employee's favor" on employment grounds. *Id*. These employment questions were within the agency's expertise. *Id*.

Here, by contrast, there are no "threshold" securities-law questions for the SEC to consider. Bennett's Appointments Clause challenge is at the threshold of the entire proceeding.

CONCLUSION

The Court should reverse the judgment of the district court and reinstate the complaint.

MORVILLO LLP

/s/ Andrew J. Morris
Andrew J. Morris

Andrew J. Morris
Morvillo LLP
1101 17th Street, NW

Washington, DC 20036
Phone: 202-470-0330
Facsimile: 202-775-5937
amorris@morvillolaw.com

Of Counsel:

Gregory Morvillo
Eugene Ingoglia
Ellen M. Murphy
500 Fifth Avenue, 43rd Floor
New York, NY 10110
Phone: 212-796-6330
Facsimile: 212-240-8267

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I. Type-Volume Limitation

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 6,021 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

II. Typeface and Type Style Requirements

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14, Times New Roman font.

MORVILLO LLP

By: /s/ Andrew J. Morris

Andrew J. Morris

Andrew J. Morris
Morvillo LLP
1101 17th Street, NW
Washington, DC 20036
Phone: 202-470-0330
Facsimile: 202-775-5937
amorris@morvillolaw.com

Of Counsel:

Gregory Morvillo
Eugene Ingoglia
Ellen M. Murphy
Morvillo LLP
500 Fifth Avenue, 43rd Floor
New York, NY 10110
Phone: 212-796-6330
Facsimile: 212-240-8267

CERTIFICATE OF SERVICE

I certify that on April 18, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

MORVILLO LLP

By: /s/ Andrew J. Morris

Andrew J. Morris

Andrew J. Morris
Morvillo LLP
1101 17th Street, NW
Washington, DC 20036
Phone: 202-470-0330
Facsimile: 202-775-5937
amorris@morvillolaw.com

Of Counsel:

Gregory Morvillo
Eugene Ingoglia
Ellen M. Murphy
Morvillo LLP
500 Fifth Avenue, 43rd Floor
New York, NY 10110
Phone: 212-796-6330
Facsimile: 212-240-8267