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

BRIEF FOR PLAINTIFFS-APPELLANTS

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and the Local Rules of this Court, Appellant Bennett Group Financial Services, LLC ("Bennett") submits the following corporate disclosure statement. Bennett is not an affiliate or parent of any corporation. No corporation, unincorporated association, partnership or other business entity, not a party to this case, has a financial interest in the outcome of this litigation.

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants brought an action in the United States District Court for the District of Maryland for injunctive and declaratory relief against the Securities and Exchange Commission alleging multiple violations of Article II of the Constitution. The district court had jurisdiction under 28 U.S.C. § 1331. That court entered final judgment on December 17, 2015 (J.A. A93), and Plaintiffs-Appellants filed a timely notice of appeal four days later, on December 21, 2015. (J.A. A115.) This Court has jurisdiction under 28 U.S.C. § 1291(a)(1).

INTRODUCTION

Dawn Bennett and her investment company, Bennett Group Financial Services, LLC (referred to together as "Bennett") are respondents in an administrative proceeding brought by the Securities and Exchange Commission. Bennett filed a district-court complaint alleging that the proceeding exceeds the SEC's authority. She contended that the forum itself is unconstitutional—that the designated administrative law judge serves in violation of Article II. Bennett asked the court to enjoin the proceeding.

In an expedited decision, initially issued from the bench, the district court held that it lacked subject-matter jurisdiction. The court reasoned that, when Congress authorized the SEC to conduct administrative proceedings, Congress implicitly stripped district courts of jurisdiction over every claim that relates to one

of those proceedings. The district court's ruling is broad and categorical: It prohibits anyone who finds herself a respondent in an SEC proceeding from exercising the time-honored right to see a federal judge and assert that the proceeding is unconstitutional. This prohibition applies no matter how fundamentally the SEC proceeding violates the Constitution, no matter how extensively the SEC overreaches its authority, and no matter how cleanly the constitutional question stands apart from the underlying proceeding.

This rule is erroneous as a matter of law. Even its categorical form—no district-court jurisdiction in *any* case if an SEC proceeding is pending—it conflicts with the Supreme Court's multi-part test for jurisdiction. Under that test, summarized in *Thunder Basin Coal Co. v Reich*, 510 U.S. 200, 207, 212 (1994), jurisdiction depends on the specific statute at issue and the specific "type" of claim asserted. And under that test, the district court in this case has jurisdiction.

The district court erred when it applied the *Thunder Basin* test because it did not recognize the significance of the "type" of claim Bennett asserts. Bennett does not challenge the merits or the details of the specific SEC proceeding. Rather, she alleges that the forum itself has a "structural" constitutional defect. Structural challenges form a "limited" class of claims that are distinctive and, in constitutional terms, especially important. And by definition, they are "prophylactic"—that is, preventative. These claims therefore implicate a

longstanding role of the district courts, which is to issue injunctions to prevent government actors from violating the Constitution.

Because Bennett's complaint asserts a structural claim, it passes the *Thunder Basin* test with flying colors. This test centers on the statutory text; in this case, that text contains a savings clause that preserves district-court jurisdiction. The test also requires that every claim must reach a court before it is moot; for a "prophylactic" claim, this requires access to a district court. And Bennett's claim raises none of the concerns the test is designed to screen out. Her claim does not implicate the securities laws that are the SEC's specialty. It does not overlap with the facts of the SEC's proceeding or encroach on its merits. And because the claim belongs to a unique and limited class of claims, it does not open the door for future respondents to escape from garden-variety enforcement proceedings. The district court's expedited ruling should be reversed.

STATEMENT OF THE ISSUE

The Plaintiffs-Appellants are respondents in an administrative enforcement proceeding brought by the SEC. They sued the SEC in district court, contending that the administrative proceeding is unconstitutional on its face. They contended that the designated administrative law judge lacks authority to conduct the proceeding because he has not been appointed in accordance with the Appointments Clause (U.S. Const. art II, §2, cl. 2) and because he enjoys an

impermissible level of protection from dismissal. The district court, however, ruled that it lacked subject-matter jurisdiction over the complaint because the administrative review scheme created by the Securities Exchange Act eliminated district-court jurisdiction over this claim.

The issue presented is: Whether the Securities Exchange Act implicitly eliminated district-court jurisdiction over claims contending that the SEC's administrative forum is structurally unconstitutional.

STATEMENT OF THE CASE

On October 30, 2015, Bennett sued the SEC in the United States District Court for the District of Maryland. (J.A. A7.) The Complaint contended that an Administrative Proceeding the SEC had brought against her and her investment company, Bennett Group Financial Services, LLC was unconstitutional on its face and beyond the SEC's lawful authority. (J.A. A8.) The Complaint requested an injunction against the proceeding and a declaratory judgment that the proceeding was unconstitutional. (J.A. A8.) Bennett also moved for a preliminary injunction to stop the proceeding from going forward. (J.A. A29.)

On December 10, 2015, the district court dismissed the Complaint for lack of subject-matter jurisdiction. (J.A. A92.) The court held that the administrative review scheme set out in the Securities Exchange Act requires Bennett to assert her

constitutional challenges to procedures adopted by the SEC before the SEC itself. (J.A. A96, A111.)

Bennett filed a timely notice of appeal on December 21, 2015. (J.A. A115.) On December 28, 2015, Bennett filed an emergency motion for expedited consideration and injunction pending appeal. (Bennett's Emergency Motion to expedite decision, December 28, 2015, ECF No. 9.) The motion asked this Court to enjoin the Administrative Proceeding, which was scheduled begin on January 25, 2016. This Court denied that motion by order dated January 22, 2016. (Order denying Motion to expedite decision, ECF No. 19.) The SEC Administrative Proceeding commenced on January 27, 2016. Bennett has chosen not to appear to contest the charges on the merits, relying solely on her constitutional challenge to preserve her right to proceed in a constitutionally appropriate forum in the future.

STATEMENT OF FACTS

Dawn Bennett is the founder of Bennett Group Financial Services LLC, an independent investment firm. (J.A. A9, A11.) (Dawn Bennett and her firm are referred to together as "Bennett.") Dawn Bennett has worked in the securities industry for more than 25 years. (J.A. A10.)

A. The administrative proceeding against Dawn Bennett

In about 2011, the SEC Division of Enforcement began an investigation of Dawn Bennett and Bennett Group Financial Services LLC. (J.A. A8.) The

investigation continued for more than three years, and on September 9, 2015, the SEC issued an Order Instituting Proceedings ("OIP") against Bennett. (J.A. A8, A13.) The OIP alleged that Bennett had violated federal securities laws by making misstatements about assets under management and the performance of clients' accounts. (J.A. A8, A13.) The OIP sought remedies including unspecified disgorgement and civil money penalties. (J.A. A8.)

B. Bennett's complaint alleging that the SEC's administrative process is unconstitutional

Bennett then sued the SEC in United States District Court for the District of Maryland. The Complaint sought a permanent injunction against the administrative proceeding and a declaratory judgment that the proceeding was unconstitutional. The Complaint contended that the SEC's entire "program for administrative enforcement proceedings" violates the Constitution. (J.A. A7.)

The Complaint cited two grounds. First, it contended that ALJs who conduct administrative proceedings are "officers" under the Appointments Clause. (J.A. A7, A8, A16-A23.) As a result, the Complaint contends, Commission's choice to delegate administrative proceedings to ALJs, yet not to appoint the ALJs itself, as the Appointments Clause requires, is a "structural" constitutional "defect in the ALJ program." (J.A. A10, A20-23.) Second, the Complaint contended that ALJs enjoy an unconstitutional degree of protection from removal because they enjoy at least two layers of tenure protection. (J.A. A7, A8, A23-25.) Bennett's Complaint

did not make any claims involving the securities laws, did not seek review of any law Bennett has been charged with violating, and did not challenge any procedural decision the ALJ made in this matter.

The Complaint alleged irreparable harm from being required to submit to an unconstitutional proceeding. (J.A. A25-26.)

C. The Court ruled that it lacks subject-matter jurisdiction

The district court dismissed Bennett's action for lack of subject matter jurisdiction. (J.A. A92.) It held that the administrative review scheme set out in the Securities Exchange Act requires Bennett to assert her constitutional challenges to procedures adopted by the SEC before the SEC itself. (J.A. A96, A111.)

SUMMARY OF ARGUMENT

Bennett's complaint alleges that the ALJ designated to preside over her proceeding serves in violation of Article II of the Constitution. U.S. Const. art. II. The complaint alleges that the ALJ is an "officer" under the Appointments Clause, yet he improperly serves without an appointment by the SEC and he improperly enjoys two levels of protection against removal.

This is a "structural" constitutional claim. Structural claims challenge the constitutionality of the basic forum and, therefore, differ from the types of claims raised in most challenges to administrative proceedings. Structural claims are a "limited" class of claim. They protect two legally recognized interests:

(a) Bennett's personal right to a forum that is constitutional, and (b) an unwaivable interest in the institutional integrity of the constitutional system. A structural claim is a forward-looking, "prophylactic" claim.

I. The question of district-court jurisdiction over this claim is governed by the framework the Supreme Court set out in *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 207, 212-13 (1994). Under *Thunder Basin*, an administrative-review scheme eliminates district-court jurisdiction only if the scheme evidences a "fairly discernible" Congressional intent to eliminate jurisdiction over the specific "type" of claim at issue. *Thunder Basin Coal Co.,* 510 U.S. at 207, 212-13.

II. The district court erred by concluding that the Securities Exchange Act reflects an intent to eliminate district-court jurisdiction over the type of claim asserted by Bennett.

A.1. The *Thunder Basin* framework begins with the statutory text. *Id*. at 207. The Supreme Court already has concluded that the text of the Securities Exchange Act did not divest district courts of jurisdiction over an Appointments Clause challenge to an agency's authority. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 489-91 (2010). That decision governs Bennett's claim, which is an Appointments Clause challenge to the administrative forum itself.

A.2. This conclusion is confirmed by the Exchange Act's savings clause, which preserves all pre-existing "rights and remedies." 15 U.S.C. § 78bb(a)(2). These include the right to seek a district-court injunction against government acts that violate the Constitution—a right that was long-established when Congress passed the Securities Exchange Act. The district court erroneously failed to acknowledge this savings clause.

A.3. The district court erred by attempting to distinguish *Free Enterprise* based solely on *Free Enterprise*'s procedural posture, which was pre-enforcement. The district court misread *Free Enterprise*, which was not decided based solely on the case's procedural posture, but which considered all of the *Thunder Basin* considerations. These began with the text of the Securities Exchange Act, which the court concluded did not foreclose district-court jurisdiction.

The district court also declined to follow the district courts that have addressed Article II challenges to SEC proceedings and have properly concluded that district courts do have jurisdiction. Instead the district court reached its conclusion by following two appellate decisions that declined to find district-court jurisdiction over SEC-related challenges. One decision was a D.C. Circuit case that involved non-structural claims, *Jarkesy v. S.E.C.*, 803 F.3d 9 (D.C. Cir. 2015); the other was a Seventh Circuit decision that did involve a structural, Article II claim

but did not recognize the distinctive nature of such a claim, *Bebo v. S.E.C.*, 799 F.3d 765 (2015).

B. The conclusion that the district court had jurisdiction is confirmed by the three non-textual considerations in the *Thunder Basin* framework. The district court erred in applying these considerations, again because it overlooked the significance of the structural type of claim asserted by Bennett.

B.1.a. Bennett's claim will receive some kind of judicial review if the SEC issues an order sanctioning her, but by that time important elements of her constitutional claim—by definition a "prophylactic" one—will be moot. The district court's order thus denies Bennett her long-established right to have an Article III court hear her injunction claim *before* the government takes an action she challenges as unconstitutional. Denying Bennett that right would violate *Thunder Basin*'s "meaningful review" requirement. It also would violate repeated Supreme Court teaching that structural claims are prophylactic, protective, and unusually important to our constitutional system.

B.1.b. The district court erroneously concluded that the judicial-review requirement is satisfied as long as court-of-appeals review is available "eventually"—that is, after the administrative process runs its course. But this approach (a) fundamentally misreads Supreme Court authority and (b) fails to address the type of claim Bennett makes, which seeks relief that cannot be

provided by the court of appeals. The cases relied on by the district court are inapposite. They involved claimants who sought relief—back pay, for example—that the court of appeals could provide in full.

B.1.c. Even an authority relied on by the district court, *Chau v. S.E.C.*, 72 F. Supp. 3d 417 (S.D.N.Y. 2014), explained that immediate review is appropriate in certain cases challenging the legitimacy of a forum, including in cases seeking injunctions. The *Chau* court cited the interlocutory-review statute, 28 U.S.C. § 1292, which evidences Congress's understanding that delaying review of an injunction request is the same as denying review.

B.1.d. The district court also expressed concern that claims should not provide an "escape hatch" from agency proceedings. This is a slippery-slope argument: It expresses concern about *other* types of claims, in particular claims where litigants challenge an administrative proceedings' merits or challenge specific rulings made in that proceeding. But this concern does not apply to structural claims—a "limited" class that is stoutly fenced off from other kinds of claims.

B.2. The second *Thunder Basin* consideration presumes that Congress is not likely to eliminate district-court jurisdiction over claims that are "wholly collateral" to agency proceedings. A district-court claim is "collateral" if it does

not involve the same facts as the agency proceeding and would not affect its merits. Bennett's claim easily meets this traditional definition.

The district court, however, adopted a radical change in the long-established meaning of "collateral." Under this new definition, no district-court claim is collateral if it could have any effect whatsoever on a pending administrative proceeding. The court thus adopted a "collateral" test that is literally impossible to meet if an administrative proceeding is pending. This reading conflicts with longstanding case law interpreting "collateral" and with *Thunder Basin* and its progeny.

B.3. The third *Thunder Basin* consideration presumes that Congress is likely to preserve district-court jurisdiction over claims that lie outside the agency's expertise. The district court essentially conceded that Bennett's claim has no connection to the SEC's technical expertise in the securities laws. The district court did not give this consideration any force.

STANDARD OF REVIEW

The Court performs *de novo* review of dismissal of a complaint for lack of subject-matter jurisdiction. *Durden v. United States*, 736 F.3d 296, 300 (4th Cir. 2013). In doing so, the Court accepts all well-pleaded allegations as true and draws all reasonable inferences in favor of the plaintiff. *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 418 (2015).

ARGUMENT

The District Court Erred When It Held That Congress Intended To Eliminate District-Court Jurisdiction Over The Type Of Claim Asserted In Bennett's Complaint.

I. The *Thunder Basin* Framework: The Governing Test Is Whether The Statutory Scheme Indicates That Congress Intended To Eliminate District-Court Jurisdiction Over The "Type" Of Claim At Issue.

As a general rule, district courts have jurisdiction to hear "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 USC § 1331. This jurisdiction includes claims seeking "to protect rights safeguarded by the Constitution." *Bell v. Hood*, 327 U.S. 678 (1946). And this includes the jurisdiction to issue injunctive relief to prevent the government from violating the Constitution. Sustaining the jurisdiction of federal courts to issue those injunctions is an "established practice." *Free Enterprise*, 561 U.S. at 491 n.2 (quoting *Bell v. Hood,* 327 U.S. 678, 684 (1946)). The Administrative Procedure Act codified this practice, expressly acknowledging the right of any "person suffering legal wrong because of agency action" to seek an "injunctive decree." 5 U.S.C. § 702.

Congress can eliminate district-court jurisdiction by creating an administrative review scheme. To determine such a scheme's effect on jurisdiction, courts apply the framework the Supreme Court set out in *Thunder Basin Coal Co.,* 510 U.S. at 212. Under this framework, Congress's creation of an administrative scheme eliminates district-court jurisdiction over a particular claim if the scheme

"displays a 'fairly discernible' intent" to eliminate that jurisdiction. *Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2132-33 (2012). Critically, the framework requires courts to interpret the relevant statute in light of the specific "type" of claim at issue. *Id*.

This approach infers Congressional intent from the statute's text and, as relevant, from its structure and purpose. *Elgin*, 132 S. Ct. at 2133. The framework also presumes that Congress did *not* intend to eliminate district-court jurisdiction if: (1) doing so would "foreclose all meaningful judicial review" of the claim; (2) the district-court claim is "wholly collateral to [the] statute's review provisions," and (3) the district-court claim is "outside the agency's expertise." *Elgin*, 132 S. Ct. at 2316 (quoting *Free Enterprise*, 561 U.S. at 489). In our case, the statutory text and all the other *Thunder Basin* considerations point in the same direction, unanimously indicating that the district court has jurisdiction over Bennett's claims.

II. The *Thunder Basin* Criteria Unanimously Dictate That The Securities Exchange Act Did Not Eliminate District-Court Jurisdiction Over A Structural, "Prophylactic" Constitutional Claim.

A. The Statute's Text Establishes That District Courts Continue To Have Jurisdiction Over This Type Of Claim.

1. As the Supreme Court concluded in *Free Enterprise*, the Securities Exchange Act did not eliminate district-court jurisdiction over an Article II challenge to agency authority.

The statutory text is the Securities Exchange Act, 15 U.S.C. § 78a *et seq*. (the "Exchange Act"), through which Congress created the SEC and authorized it to regulate securities transactions. The Exchange Act provides for SEC final orders to be reviewed by a court of appeals. 15 U.S.C. § 78y ("Court review of orders and rules").

The Supreme Court already has considered and rejected the argument that this review provision strips courts of jurisdiction over a constitutional challenge to agency authority. *Free Enterprise Fund*, 561 U.S. at 489-91. In *Free Enterprise*, an accounting firm that was regulated by the Public Company Accounting Oversight Board (known as "the PCAOB") asserted that Board members were serving in violation of the Appointments Clause. *Id.* at 487. Because the PCAOB operates under the oversight of the SEC, any challenge to PCAOB authority would culminate in a final order of the SEC. *Id*. at 489-90. The Government therefore cited the Exchange Act's review provision for final SEC orders, Section 78y. 561 U.S. at 489. The Government argued that, because this provision provided for appellate review of those final orders, the provision eliminated district-court jurisdiction to hear the Appointments Clause challenge. *Id*. This is the same argument the SEC makes in our case.

The Supreme Court rejected that argument. Applying the "fairly discernible" standard of *Thunder Basin*, the Court held that the text of Section 78y does not

"limit the jurisdiction that other statutes confer on district courts." 561 U.S. at 489. The Exchange Act does not do so, the Court added, either "explicitly" or "implicitly." *Id*.

This conclusion should resolve our case. Like the plaintiffs in *Free Enterprise*, Bennett asserts an Article II challenge to the authority of an agency. *See Free Enterprise*, 561 U.S. at 490. As the *Free Enterprise* court concluded, the text of the Exchange Act did not divest the district court of jurisdiction over this type of claim.

2. The Securities Exchange Act's savings clause confirms that the statute did not eliminate district-court jurisdiction over a structural constitutional challenge.

The *Free Enterprise* Court reached its conclusion without seeing a need to identify additional support in the Exchange Act's text, but that text also contains a savings clause that confirms the Court's conclusion. This clause states 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).

The purpose of a savings clause is to instruct courts not to infer that remedies created by the relevant statute are exclusive. *See Huddleston & MacLean v. Huddleston*, 459 U.S. 375, 383 (1983); *see also PMC Inc. v. Sherwin-Williams Co*., 151 F.3d 610, 618 (7th Cir. 1998) (explaining why Congress inserts savings

clauses). Reflecting this purpose, the Supreme Court already has applied this same savings clause to prohibit an inference of exclusivity. In *Huddleston & MacLean v. Huddleston*, the Court held that rights of action expressly created by the Exchange Act and its companion statute, the Securities Act of 1933, were not exclusive. 459 U.S. at 686. The Court assigned a pivotal role to the statutes' savings clauses. *Id*. at 688. By including the savings clauses, the Court explained, "Congress rejected the notion that the express remedies of the securities laws would preempt all other rights of action." *Id.*

The Supreme Court has given similar force to savings clauses in the context of administrative review schemes. *Thunder Basin* (510 U.S. at 212) discussed an earlier decision, *Abbott Labs v. Gardner*, where the relevant statute (the Federal Food, Drug, and Cosmetic Act) contained a savings clause. 387 U.S. 136, 144 (1977). Like the clause in the Securities Exchange Act, this clause stated that the statute's remedies were only "additional" to existing ones. It supported the *Abbott Labs* Court's conclusion that the statute had not eliminated district-court jurisdiction over claims challenging a regulation. 387 U.S. at 144. The situation was reversed in *Thunder Basin* itself—the statute in that case had no savings clause—and this absence supported the conclusion that district-court jurisdiction was eliminated by the review scheme. *Thunder Basin*, 510 U.S. at 212 (addressing the Mine Safety and Health Act).

The presence of a savings clause is particularly significant for types of claims that were long-established by the time of the Securities Exchange Act. Congress is assumed to know existing law, *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010), and when Congress chose to include a saving clause in the Securities Exchange Act, existing law included district-court jurisdiction to enjoin government entities from violating the Constitution. *Free Enterprise* described the longstanding jurisdiction to issue injunctions and cited authorities dating back to *Ex Parte Young*, 209 U.S. 123, 149 (1908). *See Free Enterprise*, 561 U.S. at 491 n.2.

Not only was this judicial authority well-established, the structural provisions that Bennett invokes are among the Constitution's most important, liberty-protecting provisions. (J.A. A10, A21 (alleging structural constitutional defect).) Bennett's Article II claim seeks to vindicate one of the "significant structural safeguards of the constitutional scheme," *Edmond v. United States*, 520 U.S. 651, 659 (1997) (quoting *Buckley v. Valeo*, 414 U.S. 1, 125 (1976)), a "bulwark" that "preserves" the Constitution's "structural integrity." *Ryder v. United States*, 515 U.S. 177, 182 (1995) (internal quotations and citations omitted). The claim vindicates "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." 501 U.S. at 879 (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962)). *See also Freytag v. Commissioner*, 501 U.S.

868, 878-79 (1991) (discussing the structural importance of the Appointments Clause).

Structural claims are unusually important, even among constitutional claims. "[T]he Framers considered structural protections of freedom the most important ones," which is why these protections "alone were embodied in the original Constitution and not left to later amendment." *NFIB v. Sibelius*, 132 S. Ct. 2566, 2576-77 (2012) (joint dissent). Structural claims therefore merit exceptional protections: They warrant "automatic reversal" regardless of their effect on outcome, *Neder v. United States*, 527 U.S. 1, 8 (1999), they are not subject to the harmless-error rule, *id*., and—especially rare—they cannot be eliminated by waiver, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986).

A structural constitutional claim is distinctive for the additional reason that it protects two separate interests. It "protects individual liberty," *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) (collecting cases), which it advances by preventing "abuse of power," *Free Enterprise*, 561 U.S. at 489 (quoting *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)), and it protects "institutional integrity," which it safeguards by preserving the basic structure of the constitutional scheme. *See Schor*, 478 U.S. at 848-49, 851. It is because of this separate interest in institutional integrity that a structural defect cannot be waived, *id*. at 851; this limitation is akin

to the rule that parties cannot confer jurisdiction on federal courts by agreement. *Id.*

This overview of structural constitutional claims—their long history and their foundational place in the constitutional scheme—indicates that this type of claim was preserved by the Exchange Act's savings clause. It is hard to imagine what rights and remedies the savings clause was intended to preserve if it did not preserve the right to ask a district court for protection against a structural constitutional violation. Even if Congress had not inserted a savings clause in the Exchange Act, it still would be hard to imagine that Congress intended—by mere implication—to eliminate these important structural protections. The district court's failure to give effect to this savings clause was an error.

3. The district court erred when it concluded that Congress intended to eliminate district-court jurisdiction over every complaint that relates to an SEC proceeding.

This review establishes that the Exchange Act did not divest the district court of jurisdiction over the type of claim filed by Bennett. The district court erred when it reached the contrary conclusion, which it did based solely on its reading of the statutory text. (J.A. A95.) (The court stated that this text-based conclusion was "reinforced" by the non-textual *Thunder Basin* criteria, which it reviewed separately. *Id.*)

a. The district court erroneously declined to apply *Free Enterprise* to this case. (J.A. A95.) The court read *Free Enterprise* as holding that district-court jurisdiction existed in that case only because the plaintiffs were not yet parties in an administrative proceeding. (J.A. A96 (citing *Bebo*, 799 F.3d at 773-75, and *Jarkesy*, 803 F.3d at 18-24).) The district court thus read *Free Enterprise* as establishing the following categorical rule: A district court can have jurisdiction over a challenge to to agency authority *only if* the challenge is pre-enforcement. This reading of *Free Enterprise* was essential to the district court's conclusion.

But this reading misunderstands *Free Enterprise*, and fundamentally so. *Free Enterprise* held that district-court jurisdiction over an Article II claim survived the Exchange Act, and the Court did not limit that holding to claims brought in a pre-enforcement context. The Supreme Court's discussion of the statutory text indicates the opposite: that the case's pre-enforcement context did *not* determine the Court's reading of the statute. The Supreme Court reached its conclusion about the text *before* it turned to the procedural posture of the claim, 561 U.S. at 489, and the Court never suggested that the statute distinguishes between pre-enforcement and other contexts. *See id*. at 489-91. The *Free Enterprise* Court addressed a pre-enforcement context because that was the case before it; the Court did *not* say that this is the *only* context in which a claim can be

brought in district court. Its opinion therefore provides no support for the district court's categorical conclusion about cases that are *not* pre-enforcement.

The district court's categorical "pre-enforcement only" rule also conflicts with the overall *Thunder Basin* framework, which is the governing test for district-court jurisdiction. The *Thunder Basin* framework is claim-specific and multi-part, not a simple yes-or-no question about whether an action is pre-enforcement.

That is why the *Free Enterprise* Court supported its conclusion by going on to address the full range of *Thunder Basin* considerations, determining that the three non-textual considerations confirmed the conclusion the Court had reached from the text of the statute. *Id*. at 489. The court focused its discussion on the "type" of claim at issue. *Id*. at 490-91. It explained that district-court jurisdiction was necessary to provide "meaningful review" because, in the case's pre-enforcement setting, the plaintiffs did not have access to any review at all unless the district court could hear their claim. *Id*. Continuing with the *Thunder Basin* factors, the Court explained that the claim was "wholly collateral," and that this Appointments Clause claim was not among the "particular problems" on which Congress had anticipated "agency expertise" would "be brought to bear." *Id*. at 489. In light of all of these considerations, the *Free Enterprise* Court concluded, the district court had jurisdiction. *Id*. at 490-91.

Even the SEC does not accept the district court's division between pre-enforcement cases and all other cases. Rather, the SEC objects even if a plaintiff brings an action pre-enforcement, when the SEC protests that the respondent is "jumping the gun." S.E.C. Reply In Support Of Stay Pending Appeal, *Gray Financial Group, Inc. v. S.E.C.,* No. 15-13738 (11th Cir. Aug. 20, 2015) at 7. The SEC's position is that citizens *never* have a right to file a challenge in federal court, pre-enforcement or not. This position cannot be squared with the *Thunder Basin* line of authority—and it further indicates that the district court's division between pre-enforcement and other cases is erroneous.

b. Not only did the district court fail to follow the Supreme Court's *Free Enterprise* decision, it failed even to address the Exchange Act's savings clause. And the district court chose not to follow the district court opinions that found jurisdiction over Article II challenges to SEC administrative proceedings. *See Duka v. S.E.C.*, 103 F. Supp. 3d. 382 (S.D.N.Y. 2015), *appeal docketed*, No. 15-2732 (2d Cir. Aug. 27, 2015); *Hill v. S.E.C.*, 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, Order (N.D. Ga. Aug. 4, 2015), *appeal docketed*, No. 15-13738 (11th Cir. Aug. 20, 2015). Instead, the court relied heavily on two Court of Appeals decisions, *Jarkesy,* 803 F.3d 9, and *Bebo*, 799 F.3d 765, that found no district-court jurisdiction on the facts of those cases.

The district court began this discussion by placing great weight on the existence in the Exchange Act of what *Jarkesy* called "painstaking detail" about "the rules governing the court of appeals' review of Commission action." (J.A. A95 (quoting *Jarkesy*, 803 F.3d at 17).) The district court's reasoning was as follows: Because the statute contains this "painstaking detail," it must have created exclusive jurisdiction for the SEC over all claims relating to an administrative proceeding. (J.A. A95-96.) This leap was very important to the district court's conclusion. But it was mistaken, for at least three reasons.

First, as a matter of logic, it does not follow. The "painstaking" detail cited in *Jarkesy* addresses one specific piece of the statutory scheme: the rules governing court-of-appeals review of SEC final orders. 803 F.3d at 17. The detail in this specific piece does not support the court's conclusion about the scope of the entire statutory scheme. This is because—here is the critical misstep—the fact that the court of appeals conducts a careful review of the SEC's orders tells us nothing about the scope of the SEC's jurisdiction to issue those orders.

This error becomes plain when one traces *Jarkesy*'s "painstaking detail" citation to its origin in *Elgin*, where the reference to "detail" addresses an entirely different part of the statutory scheme. The "detail" discussed by *Elgin* did not address (as *Jarkesy* indicated) the rules for the court-of-appeals review of final agency orders; it addressed the *kind of primary employee conduct covered by the*

administrative scheme. *Elgin*, 132 S. Ct. at 2133-34. It makes sense, as *Elgin* reasoned, to draw on this description of covered employee conduct to determine the scope of the statute. But it does not make sense, as *Jarkesy* did, to start with the premise that the court of appeals performs a careful review of agency orders, and from this premise to infer the scope of the statute.

Second, this reasoning from "painstaking detail" proves far too much. If the mere existence of a detailed review scheme sufficed to strip district courts of jurisdiction over every claim arguably related to that scheme, the opinions in these statutory-scheme cases would be simple and short. There would be no need for the multi-part, context-sensitive framework the Supreme Court has discussed in *Thunder Basin* and its progeny.

Third, the district court's reasoning from "detail" is especially erroneous in our context—it is, in fact, exactly backwards. Although the district court does not mention it (nor does *Jarkesy* or *Bebo*), part of the "painstaking detail" in the Exchange Act is the savings clause discussed above. 15 U.S.C. § 78bb(a)(2). Precisely because statutory detail should be taken seriously, this savings clause should rule out an inference that the Exchange Act eliminated the right to ask district courts to enjoin structural constitutional violations.

In addition to this error relating to "painstaking detail," the district court also erred when it chose to follow *Jarkesy* and *Bebo*. *Jarkesy* is inapposite, because it

did not involve the special type of claim asserted by Bennett. The claims in *Jarkesy* involved the details of one specific proceeding, so that the claims were "inextricably intertwined with the conduct" of that proceeding. *Jarkesy*, 803 F.3d at 13. The plaintiffs contended, for example, that the SEC had singled them out for an administrative proceeding while suing similarly situated actors in federal court, had prejudged this particular case, and had violated *Brady* obligations in discovery. *Id.* at 14, 17. These contentions are different in kind from the challenge asserted by Bennett, which is structural, prophylactic, and entirely separate from the underlying administrative proceeding.

Confirming the differences between *Jarkesy* and our case, *Jarkesy* relied on the Supreme Court's decision in *Elgin*, whose facts are not relevant to a structural claim like Bennett's. The claims in *Elgin* attacked a proceeding's merits and implicated the technical subject-matter entrusted to the agency, so that the district-court challenge was intertwined with the agency proceeding. *Elgin*, 132 S. Ct. at 2131. The petitioners in that case had been dismissed from federal employment for violating a statute that required them to register for the draft. *Id*. They contested their dismissals through the administrative scheme for federal employment claims, arguing to the Merit Systems Protections Board (the "MSPB") that their dismissal was unconstitutional because (among other violations) it constituted gender discrimination. *Id*. The MSPB denied their claims and the respondents, instead of

appealing the MSPB order to the court of appeals, filed suit in federal district court. *Id*. at 2131.

The Supreme Court held that the MSPB had exclusive jurisdiction over the claims. 132 S. Ct. at 2132. This was because, the Court explained, the claims were "precisely the type of personnel action regularly adjudicated by" the Board, and the relief requested—reinstatement and back pay—was the kind of "relief that the [statute] routinely affords." *Id*. at 2131. These respondents' efforts to win on the merits were entirely different from Bennett's structural challenges to the authority of the agency at issue. *Elgin* is inapposite to our case.

The other decision the district court relied on, *Bebo*, also applied *Elgin*. *Bebo*, 799 F.3d at 771. But *Bebo* was unlike *Elgin* (and *Jarkesy*) because the claims in *Bebo* included an Article II challenge, contending that the SEC proceeding was unconstitutional because the ALJ enjoyed two tiers of protection from dismissal. *Id*. at 768. Like the district court in our case, however, the *Bebo* court did not recognize the difference between a structural constitutional challenge and the types of claims asserted in *Elgin* and *Jarkesy*. *Id*. at 771-74. (The *Duka* court pointed out this oversight by the *Bebo* court. *Duka v. S.E.C.*, No. 15-cv-00357, 2015 WL 5547463, *4 (S.D.N.Y. Sept. 17, 2015).) Because the *Bebo* court failed to focus on the "type" of claim asserted, it erroneously concluded that eventual court-of-appeals review would suffice. *Bebo,*799 F.3d at 774-75. The

Bebo court also failed to acknowledge the saving clause in the Securities Exchange Act.

By choosing to follow *Jarkesy* and *Bebo*, the district court chose not to follow district-court decisions that have addressed challenges to SEC enforcement actions and have found district-court jurisdiction. *See Hill,* 2015 WL 4307088, at *5-9; *Duka*, 103 F. Supp. 3d. at 390; and *Ironridge Global IV Ltd. v. S.E.C.*, 2015 WL 7273262, at *6-8 (N.D. Ga. Nov. 17, 2015). These opinions were correctly decided and should have been followed.

B. The Other *Thunder Basin* Factors Confirm That District Courts Continue To Have Jurisdiction Over This Type Of Claim.

As just explained, the first part of the *Thunder Basin* framework—especially the statute's text—establishes that the district court has jurisdiction. The other part of this framework is the three specific *Thunder Basin* considerations that do not look directly at the text; each of these factors supports the above conclusion. The district court erred when it concluded that these factors "reinforce" the court's conclusion that the district court lacked jurisdiction.

1. Absent district-court jurisdiction, Bennett's claim would not receive "meaningful" review.

a. Because Bennett's claim is structural and "prophylactic," critical elements of it will be moot once the SEC issues its final order.

The district court placed great weight on the first consideration, which is the requirement that judicial review must be "meaningful." (*See* J.A. A95). But the district court misapplied this requirement to Bennett's claim, ruling in effect that if an administrative proceeding is pending, this review requirement *always* is satisfied by the possibility of eventual appellate review of an agency order.

If Bennett does obtain a right to appeal, it will be because the SEC has issued a final order concluding that she violated the securities laws. By the time the SEC issues a final order, however, the SEC will have completed the proceeding that violated the structural integrity of our constitutional scheme, and Bennett's injunction claim will be moot. Denying Bennett the possibility of judicial review in district court therefore denies her the substantive right to obtain protection against a constitutional violation relating to an SEC proceeding. Abolishing this right was an error, because "[i]njunctive relief has 'long been recognized as the proper means for preventing government entities from acting unconstitutionally.'" *Free Enterprise*, 561 U.S. at 491 n.2 (quoting *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 (2001)).

Injunctive relief is especially important for a structural constitutional violation. This type of constitutional claim is itself unusually important, as we explained in section II.A.2. above. And structural claims are necessarily forward-looking and preventative, not backward-looking and remedial. As the Supreme

Court explained, "the doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied" after a harm is identified. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) (emphasis in original). The Supreme Court therefore classifies structural claims as "prophylactic" (*id.*)—that is, they precede and "prevent" a constitutional violation. Merriam Webster Online Dictionary (2015), http://www.merriam-webster.com/dictionary/prophylactic (Feb. 9, 2015).

It follows that the only appropriate relief is injunctive. Yet the district court's ruling closes off the possibility of an injunction relating to any SEC proceeding, even when the proceeding rests on structural violation of the Constitution. The district court's ruling thus strips Bennett's structural claim, not only of any forward-looking "safeguard" effect, but of any remedy at all. By eliminating the remedy, the district court essentially abolishes the structural claim itself. This outcome violates the Supreme Court's pronouncements about structural claims. It also violates the basic rule that every federal right warrants a remedy. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162-163 (1803) (stating that every right is supported by a remedy).

And this outcome violates the meaningful-review requirement of *Thunder Basin*, which requires that each plaintiff have a judicial means to "protect and enforce" the specific right the plaintiff asserts. 510 U.S. at 213 (quoting *Leedom v. Kyne*, 358 U.S. 184, 190 (1958)). The *Thunder Basin* Court listed numerous

examples where (as in our case) a respondent in an administrative proceeding could obtain meaningful review only by suing in district court. 510 U.S. at 213. The Court specifically indicated that, where litigants challenge the constitutionality of an agency forum or agency procedures, it is not "meaningful" to provide access to judicial review only after the litigants have been forced to participate in the very proceeding they challenge. *Id*. (discussing *Mathews v. Eldridge*, 424 U.S. 319, 330-31 (1976), and *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991)).

This meaningful-review requirement had been correctly applied in the district-court cases cited above, where the courts addressed Article II challenges to SEC proceedings and concluded that the "meaningful review" requirement dictates jurisdiction in district court. *See Ironridge Global IV Ltd.,* 2015 WL 7273262*,* at *6-8; *Gray Financial Group, Inc. v. SEC*, No. 15-cv-00492, Order (N.D. Ga. Aug. 4, 2015); *Hill*, 2015 WL 4307088, at *6-8; *Duka*, 103 F. Supp. 3d. at 390-91. Because those opinions properly take the specific nature of structural claims into account, they should have been followed in our case.

Finally, some courts' discussions of "meaningful review" take note of whether the claim at issue might be frivolous—in effect applying a kind of quick-look analysis to consider the seriousness of the underlying constitutional claim. *See*, *e.g.*, *Chau*, 72 F. Supp. 3d at 424. While that approach is not necessary here, it makes Bennett's jurisdictional claim all the more compelling because her claim'

substantive merit is obvious. The two courts that have reached the Appointments Clause issue have ruled against the SEC, holding that the SEC forum is unconstitutional. Both are district courts. *See Duka v. S.E.C.*, No. 15-cv-00357, 2015 WL 4940083, at *2 (S.D.N.Y. Aug. 12, 2015); *Hill*, 2015 WL 4307088, at *6-8; *Ironridge Global IV Ltd.,* 2015 WL 7273262, at *18.

b. Cases relied on by the district court involved claims that were not prophylactic and could, therefore, obtain complete relief on appeal.

Contrary to these decisions, the district court concluded that the "meaningful review" test is satisfied as long as appellate review is available "eventually"—that is, after the administrative process has run its course. (J.A. A103, A108, A112.) This conclusion is erroneous. It rests on a serious misreading of *Elgin*, and it fails to take into account the significance of the type of claim that Bennett asserts.

The district court obtained this "eventual review" theory from *Jarkesy*. (*See* J.A. A103 (citing *Jarkesy*, 803 F.3d at 18).) *Jarkesy* attributes the theory to *Elgin*, but *Jarkesy* fundamentally re-casts the meaning of *Elgin*. To begin, *Jarkesy,* 803 F.3d at 18, and the district court place critical importance on the word "eventual" in the phrase "eventual review" (J.A. A103, A108, A112), but "eventual" does not appear in *Elgin;* it was introduced by *Jarkesy*. 803 F.3d at 18. The *Jarkesy* court's introduction of this critical word illustrates the extent to which that court has re-cast *Elgin*, which simply does not say—or suggest—that the meaningful-review

requirement is satisfied as long as the administrative proceeding eventually will lead to a court of appeals.

What *Elgin* does say is that review in the court of appeals is meaningful if that court has the legal authority to review the claim at issue. 132 S. Ct. at 2131. And critically, the premise in *Elgin* was that, in light of the type of claim at issue, the appeals court would have the practical ability to provide the relief requested. *Id*. *Jarkesy* ignores the premise of *Elgin*'s discussion.

This premise was present in *Elgin* because, as summarized above (in section II.A.3.), the respondents were former federal employees who sought reinstatement and back pay. *Id*. On those facts, court-of-appeals review would be meaningful because the court could provide all the relief the claimants sought—reinstatement and back pay. *Id*. *Elgin* did not consider (because it had no reason to) a claim like Bennett's, where delaying judicial review would have the effect of denying the claim.

Even putting *Elgin* aside, the theory the district court accepted—that *any* review satisfies the requirement for *meaningful* review—cannot be right, because it reads the word "meaningful" out of *Thunder Basin*'s "meaningful review" requirement. That approach conflicts not only with *Elgin*, but with *Thunder Basin* and *Free Enterprise* as well.

The district court further overlooked the distinctive type of claim at issue in this case when it cited *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232 (1980), for its holding that mere litigation costs do not constitute irreparable harm. (J.A. A100, A110, A111 (citing *Bebo,* 799 F.3d at 775, and *Jarkesy*, 803 F.3d at 25-26).) This holding is unremarkable, and it also is irrelevant to Bennett's claim. Unlike Bennett, the plaintiffs in *Standard Oil* did not allege a constitutional violation and did not challenge the legitimacy of the agency forum. They were oil companies who contended that the FTC had issued an administrative antitrust complaint against them without sufficient evidence. *Id*. at 234-37. In the district court, the companies alleged that they would suffer irreparable harm from the administrative proceeding because they would be forced to incur litigation costs to defend themselves. *Id*. at 243-44. This led to the Supreme Court's holding that the litigation expense does not constitute irreparable injury. *Id*. at 244.

This holding is irrelevant to our case because litigation cost is *not* the primary harm on which Bennett rests her constitutional claim. (*See* Compl. ¶¶ 75-80.) (J.A. A25-A26.) That claim rests primarily on two kinds of harm, both recognized by the Supreme Court: the injury to Bennett's personal liberty interest, *Bond v. United States*, 131 S. Ct. at 2365, and the injury to the "institutional integrity" of the government's structure, *Schor*, 478 U.S. at 848-49. After the SEC

has issued a final order, it will be too late for a court of appeals to vindicate either interest.

c. Authority relied on by the district court confirms that denials of injunctions are a special category of cases that warrant immediate judicial review.

The district court also reasoned that it would be permissible to delay judicial review of Bennett's claims because "oftentimes in our system, a party challenging the legality of the very proceeding or forum in which she is litigating must 'endure' those proceedings before obtaining vindication." (J.A. A107 (quoting *Tilton v. S.E.C.*, No. 15-2472, 2015 WL 4006165, at *4-*6 (S.D.N.Y. June 30, 2015)). Again, this is true but not relevant to our case. This is apparent from the source of this quotation, *Tilton v. S.E.C.*, which followed its "oftentimes" generalization by noting that there are exceptions: "To be sure, this is not the case in every instance." *Id*. at *5 n.2. That is, the court explained, in some cases parties are *not* required to endure the proceedings they challenge. *Id*.

Before *Tilton* discussed those exceptions, it gave examples of the "oftentimes" cases where parties could not appeal an issue to a collateral forum. Every one of those cases involved a litigant who could obtain complete relief through an appeal after the initial forum issued a final order. They involved challenges to: a pre-trial discovery order (*Mohawk Indus., Inc. v. Carpenter,* 558 U.S. 100, 108-9 (2009)); an order denying qualified immunity, where the immunity

decision depended on facts that were intertwined with the merits (*Merritt v. Shuttle, Inc.,* 187 F.3d 263, 268 (2d Cir.1999)); an order granting a jury trial (*Germain v. Connecticut Nat. Bank,* 930 F.2d 1038, 1040 (2d Cir.1991)); an order transferring an action to another district (*D'Ippolito v. Am. Oil Co.,* 401 F.2d 764, 764-65 (2d Cir.1968)); and an order in which a judge declined to disqualify himself from ruling on an attorney's fee petition (*Rosen v. Sugarman,* 357 F.2d 794, 796 (2d Cir. 1966)). Similarly, other cases that the district court cited for its "oftentimes" statement involved claims that could obtain complete relief on appeal.[1] Not one of the cited cases was like Bennett, because not one asserted a threshold, structural challenge to an entire forum.

What is relevant to Bennett is the *Tilton* discussion of cases where parties can obtain review before a current proceeding is final. 2015 WL 4006165 at *5 n.2. For example, the court wrote, some claims can obtain immediate review under the general interlocutory-review statute. *Id*. (citing 28 U.S.C. § 1292(a)). This statute, the court noted, permits a party whose injunction motion is denied to obtain "immediate" review. 2015 WL 4006165, at *5n. 2. The reason for that review, the

[1] For example, *United States v. Williams*, No. 14-4049 (4th Cir. Dec. 14, 2015) (cited in dist. ct. opinion, J.A. A107), was a post-conviction appeal based on a district court's denial of the defendant's motion to suppress. It did not involve a claim challenging the forum itself as unconstitutional. Similarly, the claimants in *Altman v. S.E.C.* 768 F. Supp. 2d 554, 559-60 (2011), *aff'd*, 687 F.3d 44 (2d Cir. 2012) (cited in dist. ct. opinion, J.A. A107) challenged the merits of the administrative proceeding, not its structure, and the claimant could be made whole by the court of appeals.

Tilton court explained, is "to permit[] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequences." *Id*. (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981) (brackets in *Tilton*)).

Congress adopted this interlocutory-review provision because it recognized that, when the relief sought is an injunction, delaying review is the same as denying review. Congress was concerned that a trial court's denial of injunctive relief may cause irreparable injury before the case reaches the court of appeals. 16 Charles Alan Wright, *et al*., *Federal Practice and Procedure* § 3921 (3d ed. 2015). This is precisely the problem Bennett faces, because her claim cannot receive meaningful review unless it is considered now, before the SEC process runs its course and results in a final order. (*See* section II.B.1.a, above.) Denying Bennett review in the district court runs contrary to Congress's belief that requests for injunctions are sufficiently important to warrant immediate review. In light of the interlocutory-review statute, it is hard to imagine that, when Congress passed the Securities Exchange Act, it intended to abolish access to injunctions if they relate to SEC proceedings—and even if those injunctions relate to the constitutionally critical category of structural claims.

d. The district court's "escape hatch" concern does not apply to structural constitutional challenges, which form a special and discrete class of claim.

The district court further supported its conclusion by expressing a strong concern about "escape hatches." Citing *Chau,* the court worried that taking jurisdiction over Bennett's claim might enable respondents in *future* SEC proceedings to "procure a one-way ticket out of an agency proceeding simply by raising a constitutional allegation." (J.A. A107 (quoting *Chau*, 72 F. Supp. 3d at 425-26).) To the extent the claims asserted in *Chau* raise "escape hatch" concerns, however, those concerns do not apply to the type of claim raised by Bennett.

The *Chau* respondents complained about various actions the SEC took in the course of an administrative proceeding against them. They contended, for example, that the SEC had dumped a large volume of documents on them in discovery, had changed its case at the eleventh hour, and had caused its expert witness to give misleading testimony at the administrative proceeding. 72 F. Supp. 3d at 426-27. These were the kind of complaints that could be raised in many typical SEC proceedings, which is why they prompted the court's concern about "escape hatches" for garden-variety cases. The court itself noted that these claims differed from claims "that an administrative scheme is unconstitutional in all instances." 72 F. Supp. 3d at 426.

Bennett's structural claim does not rest on the kind of garden-variety issues raised in *Chau*, and the district court in our case gave no reason to worry that the "escape hatch" concern applies to Bennett's case. Rather, the district court's concern is about starting down a slippery slope: the concern that, while ruling for Bennett in this case could be acceptable, it could lead to an undesirable decision in some *other* case.

That concern is unjustified. Even if a court places all possible challenges to SEC proceedings on the same figurative slope, Bennett's claim is firmly fenced off by the well-established features that distinguish the "limited" class (*Neder*, 527 U.S. at 8) of structural claims from other possible claims, including other constitutional claims. These well-established limits confine the precedential effect of Bennett's case to other structural claims.

The practical concern reflected in the district court's "escape hatch" reference is further refuted by the interlocutory-appeal statute, which we discussed above. That statute's history demonstrates that permitting immediate appeal of injunction requests does not open a noticeable "escape hatch" from trial-court proceedings.

The real risk in Bennett's case is the *opposite* of the concern about an illegal escape hatch. The real risk is that Bennett will be denied her right of access to an Article III courtroom to seek protection against an agency process that is

structurally unconstitutional. For the reasons explained above, that outcome would violate *Thunder Basin*, the Securities Exchange Act, and abundant Supreme Court authorities emphasizing the importance and the forward-looking nature of structural constitutional claims.

2. Bennett's claim is "wholly collateral" because it is factually and legally separate from the merits of the administrative securities case.

The second *Thunder Basin* consideration also supports district-court jurisdiction, because Bennett's claims are "wholly collateral." *Free Enterprise,* 561 U.S. at 490 (internal quotation marks omitted). Under the well-established definition of this term, a claim is collateral if it is "completely separate from the merits of the action." *Mohawk Indus.*, 558 U.S. at 105.

Bennett's claim meets this definition because it challenges the legality of the forum itself and does not seek to affect the merits of SEC proceeding. A structural constitutional claim always is collateral, because its purpose is to identify a "defect affecting the framework" for the proceeding. *Neder*, 527 U.S. at 8.

Even though Bennett's claim so neatly fits the traditional definition of a collateral claim, the district court still indicated that Bennett's claims are not collateral. (J.A. A112-14.) But it reached this conclusion only by adopting a definition of "collateral" that is fundamentally new. *Id*. Under this new definition, a claim is not collateral if it has *any* effect whatsoever on an administrative

proceeding. *Id*. Under this definition, Bennett's claim would not be collateral—even though the claim has nothing to do with the merits or the conduct of the proceeding—because the claim could cause the SEC to designate a properly appointed ALJ to conduct the proceeding. *Id*. This theory originated in *Jarkesy,* 803 F.3d at 12, and was accepted, though with some doubt, in *Bebo*. (*See* J.A. A102-04.) The district court also followed it, though also after expressing doubt about the new approach. (J.A. 112-13.)

This new definition of "collateral" is wrong as a matter of law, for three reasons. First, it discards outright the long-established meaning of "collateral" as "separate from the merits of the action." *Mohawk Indus.*, 558 U.S. at 105. And it does so without acknowledging this change, much less justifying it.

Second, it proves far too much. Under this new definition, there is no such thing as a collateral case once a claimant is party to an administrative proceeding—"collateral" becomes a null set. Significantly, this new definition of "collateral" has the same effect as the district court's (and *Jarkesy*'s) re-definition of "meaningful" review: Both re-definitions have the effect of eliminating district-court jurisdiction in *every* case where an administrative proceeding is pending. And both clash with the very existence of the context-sensitive *Thunder Basin* test.

So it is no surprise that, third, this new definition rests on another serious misreading of *Elgin*. (*See* J.A. A100-05, A112.) The *Elgin* Court did not say (or

hint) that a claim fails the "collateral" test if the claim has any effect on an administrative proceeding. The respondents' claims in *Elgin* were not collateral under the long-established definition of that term because they went directly to the merits of the administrative proceeding—so that they were not "separate from the merits of the action." *Mohawk Indus.*, 558 U.S. at 105.

This is the point the *Elgin* court was making in the sentence that the district court cites. (J.A. A113). In that passage, the *Elgin* court explained that the plaintiffs were trying to win the *substance* of their administrative case—these were the former employees who sought to get their jobs back, with lost pay. 132 S. Ct. at 2139-40. For this reason their claim was a "vehicle" to win on the merits: "the vehicle by which they [sought] 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." *Id*. These claims were not collateral, the Court went on to say, because the relief they sought "was precisely the kinds of relief the [employment statute at issue] require[d] the [Merit Systems Protections Board] * * * to provide." *Id*. at 2140. Nothing in *Elgin* suggests the Court was introducing the radical re-definition of "collateral" adopted by the district court.

Like *Elgin*, *Thunder Basin* itself applied the traditional definition of collateral. The respondents in *Thunder Basin* disputed the agency decision to impose a citation and a penalty based on the Mine Act; the respondents claims

therefore went directly to the facts and merits of the administrative proceeding. *See* 510 U.S. at 205-06, 214. The same traditional understanding of "collateral" is evident in *Thunder Basin*'s discussion of *McNary*. There, in contrast to the claims in *Thunder Basin*, the claims were collateral, because the respondents made general "challenges to unconstitutional practices and policies." 498 U.S. at 492. Prevailing in their district-court challenge would not have entitled these respondents to relief on the merits; they "would only be entitled to have their case files reopened and their applications reconsidered in light of the newly prescribed INS procedures." *Id*. at 495. In that same vein, *Thunder Basin* discussed *Mathews v. Eldridge*, where the petitioner's claim was collateral because it challenged the procedures for deciding benefits eligibility, but did not address the merits of the benefits claim. 424 U.S. at 330. The claims in *McNary* and *Mathews*—which the Supreme Court deemed collateral—would not have been collateral under the new, null-set definition of collateral advanced by *Jarkesy*.

The district court's discussion of "collateral" also cited this Court's decision in *Com. Of Virginia v. United States*, 74 F.3d 517, 523 (4th Cir. 1996) (*see* J.A. A105, A112-13), though the district court acknowledged that the case is "not directly on point," and the court's own discussion of the case distinguished it from our case. *Virginia* involved an effort to reverse a final action taken by the Environmental Protection Agency, 74 F.3d at 523, so that the claim failed all three

Thunder Basin factors: (1) The agency process already had run its course and the petitioner actually had filed a petition for review in the court of appeals, *id*. at 522; (2) the claims were not collateral because they were identical to the claims decided by the agency and a goal of the litigation was to reverse an agency order on its merits; and (3) the subject matter—actions taken by the EPA under the Clean Air Act—lay at the heart of the EPA's technical expertise, *id*. at 523-25.

3. Bennett's claim lies outside the SEC's expertise in the securities laws.

The district court did not address the third *Thunder Basin* consideration, but Appointments Clause claims lie outside the SEC's expertise in the securities laws. The Supreme Court made this obvious point in *Free Enterprise*, 561 U.S. at 491. The district court's silence on this *Thunder Basin* criterion highlights the fact that, even in the view of the district court, Bennett's claim will not be reviewed by anyone with the necessary expertise until after the procedure she seeks to enjoin has run its course. This contrasts Bennett's case with the Supreme Court cases finding exclusive jurisdiction, where the claims were plainly within the agency's expertise: *Thunder Basin* involved the Mine Safety and Health Administration and claims raising Mine Act issues, and *Elgin* involved the federal-employment agency (the Merit Systems Protection Board) and claims raising federal-employment issues. Our case, by contrast, involves the expert agency on securities regulation,

but a claim involving the separation of powers—the fundamental structure of our constitutional system.

STATEMENT CONCERNING ORAL ARGUMENT

Dawn Bennett and Bennett Group Financial Services, LLC request oral argument. This appeal raises an important and recurring issue that this Court has not previously considered. Oral argument will enable the parties to respond to the Court's questions and address its concerns.

CONCLUSION

The district court erred when it declined to follow the *Free Enterprise* Court's reading of the Securities Exchange Act and it failed to apply that statute's savings clause, both of which establish that the district court had jurisdiction over Bennett's claim. This conclusion is confirmed by the three specific *Thunder Basin* considerations, which show that: (1) absent district-court jurisdiction, Bennett's injunction claim will receive no review at all until it is moot; as a result the district court's holding violates Bennett's right to meaningful judicial review and, in effect, abolishes the right to challenge any SEC proceeding under any circumstances; (2) Bennett's claim is entirely collateral to the securities-enforcement proceeding, so that resolving the claim in district court will not interfere with the enforcement case; and (3) the SEC has no expertise on this

Appointments Clause topic, so that no reason existed for Congress to channel this claim through the SEC before a court can hear it.

Accordingly, Dawn Bennett and Bennett Group Financial Services, LLC respectfully request that the Court reverse the judgment of the district court and reinstate the Complaint.

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STATUTORY INDEX

1. U.S. Const. art. II, §2, cl. 2:

   He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

2. 5 U.S.C. §702:

   Right of review

   A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

3. 15 U.S.C. § 78(y)(a):

Court review of orders and rules

(a) Final Commission orders; persons aggrieved; petition; record; findings; affirmance, modification, enforcement, or setting aside of orders; remand to adduce additional evidence.

(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, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

* * *

4. 15 U.S.C. § 78bb(a)(2):

Effect on Existing Law

(a) Limitation on judgments

(2) Rule of construction

Except as provided in subsection (f), the rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

5. 28 U.S.C. § 1292(a):

Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving

injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)

(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is

involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)

(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of

proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

6. 28 U.S.C. §1331:

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

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 10,825 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.

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CERTIFICATE OF SERVICE

I certify that on February 12, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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