15-2103
Tilton v. SEC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2015

(Argued: September 16, 2015 Decided: June 1, 2016)

Docket No. 15-2103

Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC,
Plaintiffs-Appellants,

v.

Securities and Exchange Commission,
Defendant-Appellee.

Before: NEWMAN, SACK, and DRONEY, *Circuit Judges*.

The appellants, Lynn Tilton and several of her investment firms, are respondents in an ongoing administrative proceeding initiated by the Securities and Exchange Commission and conducted by an administrative law judge. They brought suit in the United States District Court for the Southern District of New York to enjoin the Commission's proceeding before its completion, on the theory that the administrative law judge's appointment violated the Appointments Clause of Article II of the United States Constitution. The district court (Ronnie Abrams, *Judge*) dismissed the suit for lack of subject matter jurisdiction. The appellants now ask us to overturn that dismissal and reach the merits of their constitutional argument. We agree with the district court, however, that Congress implicitly precluded federal jurisdiction over the appellants' Appointments Clause claim while the Commission's proceeding remains pending. The judgment of the district court is therefore

AFFIRMED.

Judge NEWMAN concurs in a separate opinion.

Judge DRONEY dissents in a separate opinion.

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Susan E. Brune (*on the brief*), Brune & Richard LLP, New York, NY, *for Plaintiffs-Appellants*.

MARK B. STERN, Appellate Staff Attorney (Mark R. Freeman and Megan Barbero, Appellate Staff Attorneys, *on the brief*), *for* Benjamin C. Mizer, Principal Deputy Assistant Attorney General, and Beth S. Brinkmann, Deputy Assistant Attorney General, United States Department of Justice, Washington, DC, *for Defendant-Appellee.*

Jeannette A. Vargas (*on the brief*), *for* Preet Bharara, United States Attorney for the

Southern District of New York, *for Defendant-Appellee*.

SACK, *Circuit Judge*:

The Securities and Exchange Commission (the "SEC" or the "Commission") enforces the federal securities laws by, among other things, filing actions seeking monetary penalties against alleged transgressors. Under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376, the SEC's enforcement actions generally may take either of two forms: a civil lawsuit in federal district court, or an administrative proceeding conducted by the Commission or an administrative law judge ("ALJ"). Where both of those alternatives are available, the choice between them belongs to the SEC without express statutory constraint.

In this case, the SEC chose to seek penalties against the appellants, Lynn Tilton and several of her investment firms, by commencing an administrative proceeding conducted by an ALJ. That proceeding is subject to two layers of review: A party that loses before the ALJ may petition for *de novo* review by the Commission, and a party that loses before the Commission may petition for review by a federal court of appeals. Not unlike a lawsuit in district court, therefore, the administrative proceeding ultimately offers the losing party a route to federal appellate review.

The appellants contend that the SEC's administrative proceeding is unconstitutional because the presiding ALJ's appointment violated Article II's Appointments Clause. They have raised that claim as an affirmative defense within the proceeding and will be able to argue the issue in a federal court of appeals if they lose before the Commission. The appellants nevertheless sought more immediate access to federal court: Two days after the administrative proceeding against them began, they filed a separate lawsuit in the United States District Court for the Southern District of New York asserting their Appointments Clause claim and seeking an injunction against the ALJ's adjudication based on its alleged unconstitutionality.

The district court (Ronnie Abrams, *Judge*) dismissed the suit for lack of subject matter jurisdiction. Relying in part on the Supreme Court's decisions in *Elgin v. Department of Treasury*, --- U.S. ---, 132 S. Ct. 2126 (2012), *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), and *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), the court concluded that the appellants' Appointments Clause challenge fell within the exclusive scope of the

SEC's administrative review scheme and could reach a federal court only on petition for review of a final decision by the Commission.

We agree. By enacting the SEC's comprehensive scheme of administrative and judicial review, Congress implicitly precluded federal district court jurisdiction over the appellants' constitutional challenge.

BACKGROUND

Until 2010, the SEC's authority to impose monetary penalties through administrative proceedings was relatively limited. The agency could not, for example, penalize a non-regulated person such as Tilton through administrative channels. The Dodd-Frank Act dramatically expanded the SEC's authority to impose penalties administratively, making it essentially "coextensive with [the SEC's] authority to seek penalties in Federal court." H.R. Rep. No. 111–687, at 78 (2010). Since then, the SEC has reportedly prosecuted an increasing number of cases through administrative proceedings, with a rate of success notably higher than it has achieved in federal district courts. *See* Jean Eaglesham, *In-House Judges Help SEC Rack Up Wins*, Wall St. J., May 7, 2015, at A1.

When the Commission chooses to seek penalties administratively, it must either preside over the proceeding itself or designate a hearing officer — usually an ALJ — to do so. *See* 17 C.F.R. § 201.110. A presiding ALJ has authority to issue an initial decision, which may become final only by order of the Commission. *See id.* § 201.360. If a party petitions for review of the ALJ's initial decision, the Commission ordinarily reviews the decision *de novo* before issuing a final order. *See id.* § 201.411. And a final order issued under the securities laws, including the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 *et seq.*, is in turn subject to judicial review by a federal court of appeals, *see id.* § 80b–13(a) (providing that "[a]ny person or party aggrieved by an order issued by the Commission under [the Investment Advisers Act] may obtain a review of such order in the United States court of appeals within any circuit wherein such person resides or has his principal office or place of business, or in the United States Court of Appeals for the District of Columbia").

During the past year or so, several respondents in ongoing SEC administrative proceedings have asserted that Article II of the United States Constitution bars the agency's ALJs from acting as hearing officers. These respondents have made two distinct constitutional arguments: that the ALJs are impermissibly insulated from presidential removal, and that they were not appointed in accordance with the Appointments Clause.[1] Respondents may raise those arguments as affirmative defenses during the course of their administrative proceedings, subject to potential judicial review in the event of an adverse decision by the Commission. Seeking more immediate judicial scrutiny, however, some respondents — the appellants among them — attempted to raise their Article II claims in parallel actions brought in federal district courts before their administrative proceedings concluded. *See Spring Hill Capital Partners, LLC v. SEC,* No. 15-CV-4542 (S.D.N.Y. 2015) (challenging ALJ's appointment); *Hill v. SEC,* No. 1:15-CV-1801 (N.D. Ga. 2015) (challenging ALJ's appointment and insulation from removal); *Duka v. SEC,* No. 15-CV-357 (S.D.N.Y. 2015) (challenging ALJ's appointment and insulation from removal); *Bebo v. SEC,* No. 15-C-3 (E.D. Wis. 2015) (challenging ALJ's insulation from removal).

[1] The Appointments Clause reads in pertinent part:

> [The President] 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.

U.S. Const. Art. II, § 2, cl. 2.

In the case at bar, the SEC initiated an administrative proceeding before an ALJ in March 2015, alleging that the appellants had violated the Investment Advisers Act. Two days later, the appellants filed this lawsuit in the United States District Court for the Southern District of New York. They sought to enjoin the SEC's administrative proceeding on the ground that, among other things, the presiding ALJ's appointment violated the Appointments Clause.[2] The SEC moved to dismiss the suit, arguing in part — as it has in cases brought by similarly situated respondents — that the district court lacked subject matter jurisdiction over the lawsuit. In the Commission's view, the administrative proceeding at issue, once begun, precluded the appellants' collateral Appointments Clause challenge.

While the district court heard argument and deliberated, several other federal judges reached conflicting decisions on the same jurisdictional issue, creating a split both within and outside the Southern District. *Compare Spring Hill,* No. 15-CV-4542 (S.D.N.Y. June 26, 2015) (bench ruling) (Ramos, *J.*) (concluding that the court lacked jurisdiction over a respondent's Article II

[2] The appellants also argued before the district court that their presiding ALJ was impermissibly insulated from presidential removal. They have not pressed that argument on appeal, although they purport to have "preserve[d]" it. Appellants' Br. at 31 n.10.

challenge to the ALJ conducting an ongoing administrative proceeding), *with Hill v. SEC*, 114 F. Supp. 3d 1297 (N.D. Ga. 2015) (concluding that there was such jurisdiction), *and Duka v. SEC*, 103 F. Supp. 3d 382, 392 (S.D.N.Y. 2015) (same); *see also Bebo v. SEC*, 2015 WL 905349, at *4, 2015 U.S. Dist. LEXIS 25660, at *10 (E.D. Wis. Mar. 3, 2015) (concluding, before the case at bar was filed, that the court lacked jurisdiction over a respondent's Article II challenge to the ALJ conducting an ongoing administrative proceeding), *aff'd*, 799 F.3d 765 (7th Cir. 2015). On June 30, 2015, after weighing the merits of those intervening decisions, the district court decided in favor of the SEC, dismissing the appellants' suit as implicitly precluded by the Commission's statutory scheme of administrative and judicial review. *Tilton v. SEC*, No. 15-CV-2472, 2015 WL 4006165, at *1, 2015 U.S. Dist. LEXIS 85015, at *2-3 (S.D.N.Y. June 30, 2015).

The appellants now ask us to reverse the district court's jurisdictional dismissal of their Appointments Clause claim and rule, on the merits, that the ALJ presiding over their administrative proceeding was unconstitutionally appointed. At the appellants' request, we have stayed the SEC's proceeding pending our decision in this appeal. We review the district court's determination of subject matter jurisdiction *de novo*. *Scelsa v. City Univ. of N.Y.*, 76 F.3d 37, 40 (2d Cir. 1996).

DISCUSSION

The statutes that establish the SEC's scheme of administrative and judicial review, including the Dodd-Frank Act and the Investment Advisers Act, do not expressly preclude federal district court jurisdiction over the appellants' Appointments Clause claim. The crucial jurisdictional issue in this case, therefore, is whether the statutes do so implicitly.

To resolve that issue, we must first determine whether it is "fairly discernible" from the "text, structure, and purpose" of the securities laws that Congress intended the SEC's scheme of administrative and judicial review "to preclude district court jurisdiction." *Elgin*, 132 S. Ct. at 2132-33. That initial inquiry is guided by the proposition that "[g]enerally, when Congress creates procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive." *Free Enterprise*, 561 U.S. at 489 (internal quotation marks omitted).

If we conclude that the SEC's scheme precludes district court jurisdiction, we must then decide whether the appellants' Appointments Clause claim is "of the type Congress intended to be reviewed within th[e] statutory structure." *Id.* (alteration in original) (quoting *Thunder Basin*, 510 U.S. at 207). This second inquiry is guided by the Supreme Court's decisions in *Thunder Basin*, *Free Enterprise* and *Elgin*, which instruct us to "presume" that a claim is not confined to administrative channels "if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Id.* (quoting *Thunder Basin*, 510 U.S. at 212-13). We refer to those considerations as the *Thunder Basin* factors.

Our resolution of these two inquiries — whether Congress intended the SEC's administrative scheme to preclude district court jurisdiction, and whether the scheme encompasses a respondent's Appointments Clause challenge to a presiding ALJ — leads us to conclude that the appellants' lawsuit must be dismissed. Two of our sister circuits recently reached similar conclusions. *See Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015); *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016). We agree in large part with their reasoning.

I

As an initial matter, the text, structure, and purpose of the securities laws make clear that Congress intended the SEC's scheme of administrative review to permit the Commission to bring its expertise to bear in enforcing the securities laws. The scheme enables the SEC's Division of Enforcement to bring statutory charges before an administrative tribunal and affords respondents the opportunity to gather evidence, present a defense, and appeal any adverse rulings in federal court. In *Thunder Basin*, the Supreme Court held that a similar scheme precluded federal district court jurisdiction over challenges to an agency's application of a statute to particular facts. 510 U.S. at 208-09, 216. We reach the same conclusion here. Generally, therefore, persons responding to SEC enforcement actions are precluded from initiating lawsuits in federal courts as a means to defend against them. *See Jarkesy*, 803 F.3d at 16-17 (analogizing the SEC's statutory review scheme to the scheme at issue in *Thunder Basin* and concluding that Congress intended "to preclude suits [in federal courts] by respondents in SEC administrative proceedings in the mine-run of cases").[3]

[3] The *Hill* decision concluded that "[t]here can be no 'fairly discernible' Congressional intent to limit jurisdiction away from district courts when the text of the statute" permits the SEC to initiate enforcement actions in either "district court [or]

II

The appellants do not contest that conclusion. They implicitly acknowledge that an SEC administrative proceeding, once initiated, is the exclusive initial forum for claims "requiring the development of a factual record, the exercise of agency discretion, or the application of a statute to particular facts." Appellants' Br. at 4. They argue, however, that their Appointments Clause challenge is a distinct type of claim: "a threshold constitutional challenge to agency practice." *Id.* at 12. They assert that this type of claim satisfies all three of the *Thunder Basin* factors and so falls outside the exclusive purview of the SEC's administrative review scheme.

The district court held that the appellants' Appointments Clause claim failed to satisfy at least two of the *Thunder Basin* factors: It would be subject to meaningful judicial review within the SEC's administrative scheme, and it was not "wholly collateral" to the scheme. *Tilton*, 2015 WL 4006165, at *4-12, 2015 U.S.

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administrative proceedings." *Hill,* 114 F. Supp. 3d at 1306. We disagree. Congress's decision to vest the SEC with a choice between forums does not imply that the chosen forum should not be exclusive of the other. To the contrary — without such exclusivity, the SEC's statutory power to choose would be illusory. *See Jarkesy*, 803 F.3d at 17 ("Congress granted the choice of forum to the Commission, and that authority could be for naught if respondents . . . could countermand the Commission's choice by filing a court action.").

Dist. LEXIS 85015, at *9-34. The district court also suggested, but did not decide, that the Appointments Clause claim failed to satisfy the remaining *Thunder Basin* factor because it did not fall outside the SEC's expertise. *See id.* at 2015 WL 4006165, at *12-13, 2015 U.S. Dist. LEXIS 85015, at *34-36. Despite leaving a decision as to that factor open, the court concluded that Congress intended the SEC's administrative review scheme to encompass the appellants' Appointments Clause claim, to the exclusion of federal district court jurisdiction.

We agree with that conclusion. The appellants' Appointments Clause claim will be subject to meaningful judicial review through administrative channels, a fact that weighs strongly against district court jurisdiction. *See Bebo*, 799 F.3d at 774-75 (characterizing the availability of meaningful judicial review as the "most important" *Thunder Basin* factor). And although the other two *Thunder Basin* factors present closer questions in this case, they do not persuasively demonstrate that the Appointments Clause claim falls outside the scope of the SEC's overarching scheme.

A. The Availability of Meaningful Judicial Review

Turning in more detail to the application of the *Thunder Basin* factors, we first consider whether the SEC's administrative scheme assures that the appellants have an opportunity for meaningful judicial review of their Appointments Clause claim. The appellants do not dispute that the scheme offers *some* judicial review: an appeal to a federal circuit court from an adverse ruling by the Commission. They argue, however, that such review would not be "meaningful" because it could not provide an adequate remedy for the SEC's alleged violation of the Appointments Clause. That is so, in the appellants' view, because their exposure to the ongoing proceeding — as distinct from any adverse ruling that might result — would itself constitute a grave constitutional injury that could not be redressed after the fact. As precedential support for their position, the appellants cite the Supreme Court's decision in *Free Enterprise* and our decades-old decision in *Touche Ross & Co. v. SEC*, 609 F.2d 570 (2d Cir. 1979).

The appellants' argument is not without force, as demonstrated by its success in several district courts. *See Hill*, 2015 WL 4307088, at *6-8, 2015 U.S. Dist. LEXIS 74822, at *17-19; *Duka*, 103 F. Supp. 3d 382, 390-91. Ultimately, however, we are not convinced. In our view, the appellants' argument misconstrues both *Free Enterprise* and *Touche Ross* and is at odds with the established approach to analogous jurisdictional disputes in federal courts.

i. Free Enterprise

Free Enterprise dealt with the Public Company Accounting Oversight Board (the "PCAOB"), an entity created under the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, to supervise the practices of accounting firms. The PCAOB's five members were to be appointed by the SEC, and some — but not all — of the PCAOB's regulatory actions required SEC approval in the form of a final Commission order. The Sarbanes-Oxley Act, like the Investment Advisers Act before it, permitted losing parties to appeal from an adverse final order to a federal court of appeals. The statute made no provision, however, for federal review of Board actions that did not require SEC approval. *See Free Enterprise*, 561 U.S. at 489-90.

In the *Free Enterprise* case, the PCAOB had, in the course of its supervisory work, "inspected [a particular accounting] firm, released a report critical of its auditing procedures, and [begun] a formal investigation." *Id.* at 487. Those actions were not subject to review by the SEC or approval by final Commission order, and so did not give rise to an administrative route to federal review. *Id.* at 489-90. The accounting firm then filed a lawsuit in federal district court that sought to void the PCAOB's actions on Article II grounds. The firm argued, as the appellants do here, that the SEC had violated the Appointments Clause when it selected the members of the PCAOB, rendering their appointments constitutionally infirm. *Id.* at 487-88.

The Supreme Court held that the district court could exercise jurisdiction over the accounting firm's lawsuit, despite the availability of administrative review regarding some other PCAOB actions. *Id.* at 490-91. The Court reasoned, in part, that the administrative review scheme failed to make any form of judicial review meaningfully accessible to the firm. Because the PCAOB's regulatory actions had not produced a reviewable Commission order, the accounting firm could have raised its constitutional objection in federal court through administrative channels only by manufacturing a new, tangential dispute that *would* require a Commission order, and then using that dispute as a vehicle for its Article II claims. The Court deemed that circuitous option inadequate, and so concluded that meaningful judicial review was not otherwise available to the accounting firm. *Id.* at 490.

The appellants read *Free Enterprise* to suggest that judicial review of an Article II challenge to an administrative tribunal is not meaningful if conducted after the tribunal's proceeding concludes, because of the inherent remedial limitations of post-proceeding review. *See* Appellants' Br. at 13, 17-18. We disagree. The *Free Enterprise* Court's analysis turned on the accessibility of post-proceeding review by a federal court of appeals — not on whether such review, if accessible, could adequately remedy the PCAOB's alleged violation of Article II. *Free Enterprise* therefore lends no support to the appellants' characterization of their prospective constitutional injury as irremediable after the conclusion of their administrative proceeding.

ii. Touche Ross

The appellants' reliance on *Touche Ross* is similarly unavailing. There, the SEC took steps to institute an administrative proceeding against an accounting firm and several of its partners (collectively, "Touche Ross") under Rule 2(e) of the Commission's Rules of Practice, which related to the suspension and disbarment of persons practicing before the Commissioner. Touche Ross immediately filed a lawsuit in federal court seeking to enjoin the proceeding on the ground that Rule 2(e) was not authorized by statute.

The district court declined to exercise jurisdiction. It reasoned, in part, that the planned administrative proceeding would not irreparably harm Touche Ross, which meant that Touche Ross was required to exhaust the administrative review process before raising its claims in federal court. *See Touche, Ross & Co. v. SEC*, No. 76-CV-4489, 1978 WL 1084, at *4-5, 7-9, 1978 U.S. Dist. LEXIS 17974, *9-12, 18-19, 23 (S.D.N.Y. Apr. 24, 1978), *aff'd sub nom. Touche Ross & Co. v. SEC*, 609 F.2d 570 (2d Cir. 1979).

On appeal, this Court recognized district court jurisdiction over Touche Ross's lawsuit. The panel acknowledged that federal challenges to administrative proceedings at "intermediate stages" are generally disfavored, particularly where — as in the case before it — the agency had not acted "plainly beyond its jurisdiction." *Touche Ross*, 609 F.2d at 576. Nonetheless, the Court permitted Touche Ross's lawsuit to proceed on the ground that its constitutional claim would not benefit from the SEC's "expertise," "discretion" or factfinding, and was thus already ripe for federal adjudication. *Id.* at 577.

The Court's decision did not suggest that a federal court would be unable to vindicate Touche Ross's challenge to Rule 2(e) after the SEC's proceeding concluded.[4] It held only that there was no compelling reason for Touche Ross to wait for post-proceeding review because the administrative tribunal would not

[4] Indeed, in a concurring opinion, two members of the panel expressed their confidence in the capacity of post-proceeding judicial review to "correct the occasional excesses and errors that are an inevitable part of the administrative process." *Touche Ross*, 609 F.2d at 583 (Kaufman, C.J., concurring).

bring its expertise to bear in a way that would aid a federal court's eventual adjudication. That proposition does not support the appellants' contention here that post-proceeding judicial review of their Appointments Clause challenge will not be meaningful. Rather, *Touche Ross* resonates with a different *Thunder Basin* factor: whether a claim falls outside an agency's expertise. And its reasoning on that issue is no longer considered sound, as we explain below.

iii. Conflict with Established Practice Regarding Analogous Challenges to a Tribunal's Constitutional Legitimacy

The appellants' argument that post-proceeding judicial review of their Appointments Clause claim will be meaningless is not merely unsupported by *Free Enterprise* and *Touche Ross*; it is also at odds with established practice in federal court regarding analogous challenges to a tribunal's constitutional legitimacy. As the district court explained, litigants who unsuccessfully challenge the authority of a presiding judge or jury to decide a case often must wait to appeal the issue until after the court renders a final judgment. *See, e.g.*, *Germain v. Connecticut Nat'l Bank*, 930 F.2d 1038, 1040 (2d Cir. 1991) (concluding that a defendant who unsuccessfully challenged the plaintiff's right to jury trial must await the jury's verdict before appealing); *D'Ippolito v. Am. Oil Co.*, 401 F.2d 764, 764-65 (2d Cir. 1968) (per curiam) (deciding that a defendant who unsuccessfully challenged the transfer of his case to another district must await the other district court's "final judgment" before appealing); *see also In re al-Nashiri*, 791 F.3d 71, 75, 80 (D.C. Cir. 2015) (concluding, in denying a petition for writ of mandamus, that a defendant who unsuccessfully raised an Appointments Clause challenge to two of the United States Court of Military Commission Review's presiding judges must await the judges' ruling before appealing in federal court). Like the appellants here, a litigant in this kind of case must expend financial and emotional resources to complete a proceeding that may ultimately prove constitutionally infirm.[5] Subsequent judicial review cannot restore those resources, but it can vacate the resulting judgment and remand for a new proceeding. That post-proceeding relief, although imperfect, suffices to vindicate the litigant's constitutional claim. *See Germain*, 930 F.2d at 1040 (explaining that if a jury trial were in fact improper, an appellate court could "remand for a nonjury trial, thus vindicating the [objecting defendant's] right"); *see also In re al-Nashiri*, 791 F.3d at 80 ("Vacatur [premised on the defendant's Appointment Clause claim], even at the appeal-from-final-judgment stage,

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[5] *Cf.* Learned Hand, *The Deficiencies of Trials To Reach the Heart of the Matter*, 3 Association of the Bar of the City of New York, Lectures on Legal Topics 89, 105 (1926) (musing that becoming a party to a lawsuit should be "dread[ed] . . . beyond almost anything else short of sickness and death").

would fully vindicate [the defendant's] rights and the President's and the Senate's constitutional powers." (internal quotation marks and alterations omitted)). The litigant's financial and emotional costs in litigating the initial proceeding are simply the price of participating in the American legal system, and not an irreparable injury that necessitates interlocutory review of the initial court's jurisdiction.

The Supreme Court applied this principle to facts similar to those presented to us here in *FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980). There, an oil company brought suit in federal district court to enjoin an ongoing administrative proceeding conducted by the Federal Trade Commission ("FTC"), contending that the proceeding as a whole was unlawful because the FTC had initiated it without the requisite evidentiary basis. *Id.* at 235. As a general matter, a respondent in this type of proceeding must exhaust its administrative remedies before filing a related action in federal court, unless the respondent would suffer irreparable injury from the delay. *See Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). The oil company argued that it had exhausted all relevant remedies before filing its federal lawsuit. *Standard Oil*, 449 U.S. at 243. In the alternative, however, the company contended that any failure to exhaust should be excused because the company would suffer irreparable injury in the form of "expense and disruption" if it were compelled to complete the administrative proceeding before reaching federal court. *Id.* at 244. That argument closely resembles the appellants' claim here that post-proceeding judicial review will be powerless to remedy the injury they will suffer by enduring the SEC's administrative adjudication.

The Supreme Court concluded that a federal court would be able to meaningfully review the oil company's claim after the administrative proceeding ended, and therefore ordered the company's lawsuit dismissed on jurisdictional grounds. The Court acknowledged that the company would endure "substantial" expense and disruption before the administrative proceeding concluded. *Id.* But it deemed that hardship to be "part of the social burden of living under government," rather than a form of irreparable injury justifying immediate judicial review. *Id.* at 244-45. As the D.C. Circuit subsequently explained, where "the 'injury' inflicted on the party seeking review is the burden of going through an agency proceeding," the Supreme Court's decision in *Standard Oil* "teaches that the party must patiently await the denouement of proceedings within the Article II branch." *USAA Fed. Sav. Bank v. McLaughlin*, 849 F.2d 1505, 1510 (D.C. Cir. 1988).

In other decisions, the Supreme Court has concluded that post-proceeding judicial review would not be meaningful because the proceeding itself posed a risk of some additional and irremediable harm beyond the burdens associated with the dispute resolution process. *See, e.g.*, *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496-97, 499 (1991) (permitting a class of undocumented aliens to raise a due-process challenge to INS proceedings in district court, rather than pursue eventual review in a federal court of appeals through administrative channels, partly because most of the aliens could "ensure themselves review in courts of appeals only if they voluntarily surrender[ed] themselves for deportation," a "price . . . tantamount to a complete denial of judicial review for most undocumented aliens"). But the appellants have identified no such additional, irremediable harm here. The only prospective injury that they describe is "being subjected to an unconstitutional adjudicative procedure," with the attendant "embarrassment, expense, . . . ordeal . . . [and] state of anxiety and insecurity." Appellants' Br. at 19, 21 (alterations in original and internal quotation marks omitted). As *Standard Oil* and other decisions discussed above indicate, the prospect of such harm alone does not render post-proceeding judicial review less than meaningful. *Cf. In re al-Nashiri*, 791 F.3d at 79-80 (explaining that the defendant's "abstract concern" that his presiding judges violated "the separation of powers" because they had been improperly appointed did not establish a prospective irreparable injury that justified immediate federal intervention in ongoing administrative proceedings).

We therefore conclude that the appellants will have access to meaningful judicial review of their Appointments Clause claim through administrative channels. *See Bebo*, 799 F.3d at 774 (concluding that a respondent in an ongoing SEC administrative proceeding could obtain meaningful judicial review "[a]fter the pending enforcement action has run its course" by "rais[ing] her objections," including an Article II challenge to the presiding ALJ, "in a circuit court of appeals established under Article III"); *see also Jarkesy*, 803 F.3d at 27 ("Even assuming [the respondent] is right that Congress has unconstitutionally delegated power to the SEC to decide whether to place him in an administrative proceeding rather than in a court action, [the respondent] has no inherent right to avoid an administrative proceeding at all. Thus, his rights can be vindicated by a reversal of the Commission's final order if the court of appeals grants his petition for review." (internal quotation marks omitted)).

B. Wholly Collateral

We next consider whether the appellants' Appointments Clause claim is "wholly collateral" to the SEC's administrative scheme. The Supreme Court has not explained precisely how to make this determination, although *Elgin* suggests that a claim is not wholly collateral if it serves as the "vehicle by which" a party seeks to prevail in an administrative proceeding. *See* 132 S. Ct. at 2139-40. In the absence of more extensive guidance, lower courts have adopted two competing approaches. Some decisions have suggested that a claim is *not* wholly collateral to an administrative proceeding only if it is substantively intertwined with the merits dispute that the proceeding was commenced to resolve. *See Hill*, 114 F. Supp. 3d at 1309 (concluding that the respondent's Article II challenge was "wholly collateral" to the ongoing administrative proceeding because "[w]hat occurs at the . . . proceeding and the SEC's conduct there is irrelevant to" the constitutional challenge); *Duka*, 103 F. Supp. 3d at 391 (concluding that the respondent's Article II challenge was "wholly collateral" to the ongoing administrative proceeding because the challenge did not "attack any order that may be issued . . . relating to the outcome of the SEC action" (internal quotation marks omitted)). Other decisions have suggested that a claim is not wholly collateral if it has been raised in response to, and so is procedurally intertwined with, an administrative proceeding — regardless of the claim's substantive connection to the initial merits dispute in the proceeding. *See Jarkesy*, 803 F.3d at 23 (concluding that claims arising "from actions the Commission took in the course of [its administrative] scheme" were not "wholly collateral"); *Bebo*, 2015 WL 905349, at *2-4, 2015 U.S. Dist. LEXIS 25660, at *4-10 (implicitly concluding that the respondent's Article II challenge did not qualify as wholly collateral to the ongoing administrative proceeding because it was raised there as an affirmative defense). *See generally Bebo*, 799 F.3d at 773-74 (comparing these two lines of decisions).

The district court here adopted the latter approach. It began its analysis by noting that the appellants' Appointments Clause claim is substantively "unrelated to the securities violations underlying the administrative proceeding," such that resolving the challenge "cannot reasonably be characterized as the 'regular' or 'routine' business of SEC administrative proceedings." *Tilton*, 2015 WL 4006165, at *11, 2015 U.S. Dist. LEXIS 85015, at *31-32 (quoting, with minor alterations, *Elgin*, 132 S. Ct. at 2140). Nevertheless, the court decided that the claim did not qualify as "wholly collateral" because it was procedurally intertwined with the SEC's ongoing proceeding, where it functioned as an affirmative defense. *Id.* at 2015 WL 4006165, at *12, 2015 U.S. Dist. LEXIS 85015, at *32-34.

Absent further guidance from the Supreme Court, we are inclined to agree with the district court's assessment. The SEC chose to enforce the Investment Advisers Act against the appellants by initiating an administrative proceeding and appointing an ALJ to act as the hearing officer. The appellants' Appointments Clause claim arose directly from that enforcement action and serves as an affirmative defense within the proceeding. To be sure, the claim could be narrowly categorized as collateral to the statutory merits of the Investment Advisers Act charges against the appellants. But we cannot conclude that the claim is *wholly* collateral to the SEC's administrative scheme more broadly. As the district court recognized, it is "difficult to see how [the Appointments Clause claim] can still be considered 'collateral to any Commission orders or rules from which review might be sought,' since the ALJ and the Commission will, one way or another, rule on those claims and it will be the Commission's order that [the appellants] will appeal." *Tilton,* 2015 WL 4006165, at *12, 2015 U.S. Dist. LEXIS 85015, at *32 (citation and some internal quotation marks omitted) (quoting *Free Enterprise,* 561 U.S. at 490); *see also Jarkesy*, 803 F.3d at 23 (reaching a similar conclusion). Put another way, the Appointments Clause claim, like accompanying defenses to the merits of the Investment Advisers Act charges, is a "vehicle by which" the appellants seek to prevail in the proceeding. *Elgin,* 132 S. Ct. at 2139. The claim identifies a purported error in the way the Commission has sought to enforce the securities laws, albeit one that sounds in administrative procedure rather than statutory construction.

The dissent argues that the appellants' Appointments Clause claim is as collateral to the SEC's administrative scheme as the accounting firm's Appointments Clause claim was in *Free Enterprise*. *See ante* at 16-17. We are not persuaded by the analogy. The Supreme Court's jurisdictional conclusion in *Free Enterprise* was, in our view, shaped principally by the absence of the type of procedural link between constitutional claim and administrative proceeding that exists here. The accounting firm objected to actions that the PCAOB had taken entirely outside the scope of the SEC's scheme of administrative and judicial review — actions that could not be the subject of "any Commission orders . . . from which review might be sought." *Free Enterprise*, 561 U.S. at 490. The firm filed suit in federal district court, and the Supreme Court allowed the suit to proceed, because the Appointments Clause claim was not moored to any proceeding that would provide for an administrative adjudication and subsequent judicial review.[6] Here, by contrast, the appellants' Appointments Clause claim targets an aspect of an ongoing administrative proceeding. We think that distinction significantly alters the "wholly collateral" analysis, such that the second *Thunder Basin* factor does not favor district court jurisdiction in this case. *See Jarkesy*, 803 F.3d at 23 (noting that a constitutional challenge might qualify as collateral if it "were filed in court before the initiation of any administrative proceeding," as in *Free Enterprise*, but concluding that

[6] In explaining why the accounting firm's Appointments Clause claim qualified as wholly collateral, the *Free Enterprise* decision at one point characterized the claim as an "object[ion] to the [PCAOB's] existence." 561 U.S. at 490. Like the D.C. Circuit, we do not read that language "to define a new category of collateral claims that fall outside an otherwise exclusive administrative scheme." *Jarkesy*, 803 F.3d at 24. In our view, the Supreme Court classified the accounting firm's claim as wholly collateral because the PCAOB's disputed actions could not be reviewed by the Commission, which meant that the firm's Appointments Clause challenge to those actions fell entirely outside the scope of the administrative scheme and could not be resolved by a Commission "order[] . . . from which [judicial] review might be sought." *Free Enterprise*, 561 U.S. at 490.

constitutional challenges were not collateral when raised in response to "multiple aspects of [an] ongoing proceeding").

C. Agency Expertise

The final consideration within the *Thunder Basin* framework is whether the appellants' Appointments Clause claim falls outside the SEC's expertise. This is a close question. As an initial matter, the Supreme Court's decision in *Free Enterprise* suggests that the SEC does not possess unique legal expertise in analyzing the constitutional sufficiency of its appointments. There, the Court concluded that the merits of an Appointments Clause challenge to the PCAOB fell "outside the Commission's competence and expertise" because the claim raised only "standard questions of administrative law," which were unrelated to any "statutory" or "fact-bound inquiries" that the SEC might be singularly qualified to perform. 561 U.S. at 491.

Under *Touche Ross*, that conclusion might end our analysis of agency expertise. As noted, the panel there permitted respondents to challenge an ongoing SEC administrative proceeding in federal district court solely because the legal substance of the challenge fell outside the administrative tribunal's expertise and could not be usefully developed through its factfinding. 609 F.2d at 577. But the Supreme Court has since adopted a broader conception of agency expertise in the jurisdictional context. *Elgin*, in particular, emphasizes that an agency may bring its expertise to bear on a constitutional claim indirectly, by resolving accompanying, potentially dispositive issues in the same proceeding. *See Jarkesy*, 803 F.3d at 28-29 (noting that "*Elgin* . . . clarified . . . that an agency's relative[ly low] level of insight into the *merits* of a constitutional question is not determinative" of whether the agency can bring its expertise to bear).

In *Elgin*, federal employees who allegedly had been discharged for violating a statutory command sought reinstatement by challenging the constitutionality of the statute. Congress had previously created an administrative process to adjudicate specified personnel decisions regarding federal employees, which was conducted initially by the Merit Systems Protection Board ("MSPB") and subject to review in the Federal Circuit. Before completing that administrative process, the employees attempted to raise their constitutional challenge to the statute in federal district court. In an effort to establish federal jurisdiction, they contended that the claim fell outside the MSPB's expertise because the MSPB disclaimed authority to determine the constitutionality of a federal statute. *Elgin*, 132 S. Ct. at 2130-31, 2140.

The Supreme Court disagreed. Although the MSPB had indeed disclaimed authority to resolve constitutional challenges to statutes, the Court identified several ways in which the agency might "otherwise" bring its expertise "to bear" in proceedings that raised those challenges. First, the MSPB could resolve "preliminary questions unique to the employment context" that might "obviate the need to address the constitutional challenge." *Id.* at 2140. Second, "the challenged statute [could] be one that the MSPB regularly construes, and its statutory interpretation could alleviate constitutional concerns." *Id.* And third, "an employee's appeal [could] involve other statutory or constitutional claims that the MSPB routinely considers, in addition to a constitutional challenge to a federal statute," whose resolution "in the employee's favor might fully dispose of the case." *Id.* In light of those potential applications of agency expertise to other dimensions of the administrative proceeding, the Court concluded that there was "no reason to conclude that Congress intended to exempt" the employees' constitutional challenge "from exclusive review before the MSPB and the Federal Circuit." *Id.*

Applying *Elgin*'s approach here, we think that the SEC might bring its expertise to bear on the appellants' proceeding by resolving accompanying statutory claims that it "routinely considers," and which "might fully dispose of the case" in the appellants' favor. 132 S. Ct. at 2140. In particular, the Commission could rule that the appellants did not violate the Investment Advisers Act, in which case the constitutional question would become moot.

It may be argued that the application of agency expertise to the statutory issues in the appellants' proceeding would improperly skip over their Appointments Clause claim, which raises a "threshold" issue that logically precedes a merits adjudication. Although we are mindful of that concern, the Supreme Court appears to have rejected an analogous argument in *Standard Oil*. There, the respondent oil company, like the appellants here, sought to raise a "threshold" challenge to its administrative proceeding as a whole soon after the proceeding began. The Ninth Circuit permitted the district court to exercise jurisdiction over that challenge, in part because it feared that the oil company's victory on other grounds in the administrative proceeding would evade, and improperly "moot," the threshold issue. *Standard Oil Co. of Cal. v. FTC*, 596 F.2d 1381, 1387 (9th Cir. 1979), *rev'd*, 449 U.S. 232 (1980). The Supreme Court expressly rejected that rationale and reversed, explaining:

> [O]ne of the principal reasons to await the termination of agency proceedings is to obviate all occasion for judicial review. Thus, the

> possibility that [the oil company's] challenge may be mooted in adjudication warrants the requirement that [the company] pursue adjudication, not shortcut it.

Standard Oil, 449 U.S. at 244 n.11 (internal quotation marks and citations omitted). In light of that passage, we are inclined to read *Elgin*'s mention of "other statutory or constitutional claims" that might "fully dispose of the case," 132 S. Ct. at 2140, to include the Investment Advisers Act charges here.

Such a reading of *Elgin* dovetails with our analysis of the availability of meaningful judicial review. We have already concluded, in keeping with established federal practice regarding analogous disputes, that the appellants may adequately vindicate their Appointments Clause claim by first awaiting a final Commission order and then petitioning for judicial review on constitutional grounds only if the order is adverse. By the same logic, a favorable Commission order, including one on statutory grounds, would provide an acceptable resolution of the Appointments Clause claim and obviate any need for judicial review. It follows, we think, that the Commission may bring its expertise to bear in a manner potentially relevant to the constitutional issue by resolving the statutory charges against the appellants. For that reason, the final *Thunder Basin* factor lends minimal support to the appellants' jurisdictional argument. *See*

Jarkesy, 803 F.3d at 29 (concluding that "the Commission's expertise can otherwise be brought to bear on the issues in [the respondent's] proceeding" because "the agency could moot the need to resolve" the respondent's constitutional claims, including several threshold challenges to the proceeding as a whole, "by finding that he did not commit the securities-law violations of which he stands accused" (internal quotation marks omitted)); *Bebo*, 799 F.3d at 773 ("*Elgin* explained that the possibility that [the respondent] might prevail in the administrative proceeding (and thereby avoid the need to raise her constitutional claims in an Article III court) does not render the statutory review scheme inadequate.").

CONCLUSION

After considering each of the *Thunder Basin* factors, we conclude that Congress intended the appellants' Appointments Clause claim "to be reviewed within" the SEC's exclusive "statutory structure." *Free Enterprise*, 561 U.S. at 489 (quoting *Thunder Basin*, 510 U.S. at 207). The "threshold" nature of the claim does not defeat the presumption that it, like other procedural and substantive defenses to an enforcement action, must be resolved in the first instance through agency proceedings. To the contrary: "Many respondents in SEC proceedings join substantive defenses to their securities charges together with challenges to the Commission's actions or authority. It makes good sense to consolidate all of each respondent's issues before one court for review, and only after an adverse Commission order makes that review necessary." *Jarkesy*, 803 F.3d at 29-30. We therefore conclude, in keeping with the decisions of the Seventh and D.C. Circuits in *Bebo* and *Jarkesy*, that the appellants must await a final Commission order before raising their Appointments Clause claim in federal court. The judgment of the district court is AFFIRMED, and our stay on further proceedings by the SEC is VACATED.