IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BARBARA DUKA, *Plaintiff*, v. U.S. SECURITIES AND EXCHANGE COMMISSION, *Defendant*.	No. 15-cv-357

DEFENDANT'S MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

The Securities and Exchange Commission (the "SEC" or "Commission") instituted an administrative proceeding to determine if Plaintiff, Barbara Duka, violated federal securities laws while employed at Standard & Poor's Rating Services. Plaintiff argues that the SEC's use of an administrative law judge ("ALJ") in the initial stages of that proceeding violates Article II of the Constitution because the ALJ was not properly appointed by the Commission and because SEC ALJs' tenure protections deprive the President of adequate control over their decision-making. Instead of litigating her objections in the administrative process, with judicial review available in the court of appeals, Plaintiff improperly seeks to collaterally attack the administrative proceeding in this Court.

Plaintiff's amended complaint should be dismissed for lack of jurisdiction because the exclusive remedial framework Congress established for resolving challenges to SEC administrative proceedings divests this Court of jurisdiction. Under this framework, Plaintiff must raise her challenges before the agency and seek judicial review, if at all, in a federal court of appeals. *See Tilton, et al. v. SEC*, 1:15-cv-02472, ECF No. 24 (S.D.N.Y. June 30, 2015) (Abrams, J.) ("*Tilton* slip op.") (dismissing for lack of jurisdiction suit raising Article II claims identical to Plaintiff's) (Attachment 1); *Spring Hill Capital Partners, LLC, et al. v. SEC*, 1:15-cv-04542, ECF No. 23 (S.D.N.Y June 29, 2015) (Ramos, J.) (dismissing for lack of jurisdiction suit raising Appointments Clause claim identical to Plaintiff's) (order and bench ruling annexed at Attachment 2); *Bebo v. SEC*, No. 2:15-cv-00003, 2015 WL 905349 (E.D. Wis. March 3, 2015) (dismissing for lack of jurisdiction suit raising removal power claim identical to Plaintiff's), *appeal pending* No. 15-1511 (7th Cir.). Indeed, the Second Circuit has held that district courts cannot exercise jurisdiction over challenges like Plaintiff's. *Altman v. SEC*, 687 F.3d 44 (2d Cir. 2012) (per curiam).

Even if this Court had jurisdiction, it should still dismiss Plaintiff's constitutional challenges for failure to state a claim. Plaintiffs' constitutional challenges depend on SEC ALJs being officers of the United States, which they are not. Instead, like the vast majority of

government personnel, SEC ALJs are mere employees. They are subject to the Commission's plenary authority and subordinate to the agency on matters of law and policy. Their functions are limited and do not include issuing final decisions, which only the Commission can do. They plainly lack the powers of judges who are officers of the United States. Moreover, Congress has long treated ALJs as mere employees by establishing a method for appointing them that does not track the requirements for appointing constitutional officers and by placing them within the competitive service, the most basic category of the civil service system. It is unsurprising then that the only court of appeals to address the status of any agency's ALJs decided that they were not officers. *Landry v. FDIC*, 204 F.3d 1125, 1132-34 (D.C. Cir. 2000).

The Court must also dismiss Plaintiff's claim that the Commission violated its organic statute by delegating responsibility for appointing SEC ALJs without publishing its delegation. That claim must be litigated (if at all) pursuant to the exclusive review scheme set forth in the securities laws. Even if review is available in the district court under the Administrative Procedure Act ("APA"), basic principles of administrative law require that Plaintiff wait until she has exhausted her administrative remedies and the Commission has taken "final agency action." 5 U.S.C. § 704. In any event, Plaintiff fails to state a claim because the SEC's hiring of its ALJs is fully consistent with all applicable statutory requirements.

For these reasons, and those stated below, this Court should dismiss the amended complaint under Federal Rule of Civil Procedure 12(b)(1) or, alternatively, 12(b)(6).

BACKGROUND

I. THE PENDING SEC ADMINISTRATIVE PROCEEDING

As part of its mission to protect investors and maintain fair, orderly, and efficient markets, the SEC oversees credit rating agencies registered with the Commission as nationally recognized statistical rating organizations ("NRSROs"), investigates possible violations of the federal securities laws, and enforces those laws in civil actions and administrative proceedings. Plaintiff served as a managing director in the U.S. commercial mortgage backed securities group of Standard & Poor's Rating Services ("S&P"), an NRSRO regulated by the SEC. *See* Am.

Compl. ¶¶ 10, 12-14. On January 21, 2015, the SEC issued an Order Instituting Administrative and Cease-and Desist Proceedings ("OIP") against Plaintiff alleging that she violated the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.*, the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, and the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 *et seq.*, by, among other things, fraudulently misrepresenting the manner in which S&P calculated certain commercial mortgage backed securities ratings in 2011. *See* Am. Compl. ¶¶ 16, 18, 20.[1] The Commission directed that an ALJ be the hearing officer, and the Chief ALJ has assigned ALJ Cameron Elliot to preside. Am. Compl. ¶ 21; *see* 17 C.F.R. §§ 201.101(a)(5), 201.110.

ALJ Elliot will issue an initial decision after a hearing, *id*. § 201.360(a)(1), which is currently scheduled to commence on September 16, 2015. ECF No. 44 (Ex. 1). Plaintiff or the SEC's Division of Enforcement may appeal the initial decision to the Commission, 17 C.F.R. § 201.410, or the Commission may review the initial decision on its own initiative, *id.* § 201.411(c). If no petition for review is filed and the Commission does not undertake review on its own, "the Commission will issue an order" making the ALJ's initial "decision . . . final." *Id.* § 201.360(d)(2). The finality order will specify the date on which sanctions, if any, take effect. *Id*. There are no circumstances under which an ALJ's initial decision becomes final without further Commission action.

Commission review of ALJ initial decisions is *de novo*. *Id.* §§ 201.411(a), 201.452. The Commission "may affirm, reverse, modify, [or] set aside" an initial decision, "in whole or in part," and it "may make any findings or conclusions that in its judgment are proper and on the basis of the record." *Id.* § 201.411(a). The Commission may also "remand for further proceedings," *id.*, "remand . . . for the taking of additional evidence," or "hear additional evidence" itself, *id.* § 201.452. If a majority of participating Commissioners does not agree to a disposition, the ALJ's "initial decision shall be of no effect, and an order will be issued [by the Commission] in accordance with this result." *Id*. § 201.411(f).

[1] *See also* OIP, File No. 3-16349, Securities Act of 1933 Release No. 9706 (SEC Jan. 21, 2015), *available at* http://www.sec.gov/litigation/apdocuments/ap-3-16349.xml ("Duka AP Docket").

The federal securities laws, in similarly worded provisions, provide for review of final orders of the Commission in the courts of appeals. *E.g.*, 15 U.S.C. §§ 77i(a), 78y(a)(1), 80a-42(a). The court of appeals has "exclusive" jurisdiction to affirm, modify, or set aside the Commission's order in whole or in part. *E.g.*, *id.* § 78y(a)(3). The comprehensive review scheme in the securities laws also establishes what constitutes the agency record, *id.* § 78y(a)(2); the standard of review of the Commission's factual findings, *id.* § 78y(a)(4); the process for seeking a stay of the Commission order either before the Commission or in the court of appeals, *id.* § 78y(c)(2); and the process for seeking leave from the court of appeals to adduce additional evidence or requesting that the court of appeals remand the matter to the Commission, *id.* § 78y(a)(5).

II. THE SEC'S ADMINISTRATIVE LAW JUDGES

The SEC has used ALJs since the Commission's early days. *See Charles Hughes & Co. v. SEC*, 139 F.2d 434 (2d Cir. 1943). The SEC may appoint as many ALJs as needed, *see* 5 U.S.C. § 3105, and delegate any of its functions to an ALJ, provided that the agency "retain[s] a discretionary right to review" any action taken pursuant to such delegation. 15 U.S.C. § 78d-1(a), (b). At the SEC, as throughout the federal government, ALJs are civil service employees in the "competitive service," 5 C.F.R. § 930.201(b), which is the most basic category within the civil service system and includes positions such as corrections officers, human resources specialists, and paralegals, among others. *See* 5 U.S.C. § 2102; 5 C.F.R. § 212.101.

The Civil Service Reform Act of 1978 (the "CSRA"), 5 U.S.C. *id.* §§ 1101 *et seq.*, governs federal civil-service employment, including SEC ALJs' employment. *See, e.g.*, *Mahoney v. Donovan*, 721 F.3d 633, 635 (D.C. Cir. 2013). The CSRA regulates SEC ALJs' employment as it does that of other federal employees by, *inter alia*: setting merit systems principles to guide agency personnel management, 5 U.S.C. § 2301; describing the bases on which personnel actions against employees, including ALJs, are prohibited, *id.* § 2302; and specifying the administrative and judicial remedies available in response to such prohibited personnel practices, *id.* §§ 1204, 1212, 1214, 1215, 1221.

The Office of Personnel Management ("OPM"), which oversees federal employment for ALJs and other civil servants, administers a detailed civil service system for selecting ALJs. OPM conducts examinations of ALJ candidates, *see id*. §§ 1104, 1302; 5 C.F.R. §§ 930.201(d)-(e), 930.203; ranks ALJ applicants for placement on a register of eligible candidates according to their qualifications and numerical ratings, 5 U.S.C. § 3313; 5 C.F.R. § 332.401; and issues "certificate[s] of eligibles" from which federal agencies—including the SEC—may select individuals to fill ALJ vacancies, 5 U.S.C. §§ 3317, 3318; 5 C.F.R. §§ 332.402, 332.404. OPM also oversees each agency's "decisions concerning the appointment, pay, and tenure" of ALJs, 5 C.F.R. § 930.201(e)(2), and establishes classification and qualification standards for the ALJ positions, *id.* § 930.201(e)(3).

Like other employees, an ALJ who believes that his employing agency has engaged in a prohibited personnel practice can seek redress either through the Office of Special Counsel or the Merit Systems Protection Board ("MSPB"). *See* 5 U.S.C. §§ 1204, 1212, 1214, 1215, 1221. The employing agency, on the other hand, may propose certain specified personnel actions (*i.e.*, removal, suspension, etc.) against an ALJ. *Id.* § 7521; 5 C.F.R. §§ 930.211, 1201.137. The MSPB then decides, after an opportunity for a hearing, whether "good cause" exists to take the proposed personnel action. 5 U.S.C. § 7521(a). Finally, SEC ALJs are subject to agency reductions-in-force, again like other employees. *Id.* § 7521(b); 5 C.F.R. § 930.210.

III. PROCEDURAL HISTORY

On January 16, 2015, Plaintiff brought this suit seeking to enjoin the SEC's administrative proceeding against her, claiming that ALJ Elliot's tenure protections violate the constitutional separation of powers. She sought an order to show cause why emergency relief should not be granted, ECF No. 8 (Jan. 26, 2015), and this Court issued a show cause order on the same day, ECF No. 9. The Court heard arguments on February 11, 2015 and denied Plaintiff's request for emergency relief on April 15, 2015, finding that Plaintiff was unlikely to succeed on the merits. ECF No. 33, slip op. The Court held that it need not resolve the issue of whether SEC ALJs are "inferior officers" of the United States, *id.* at 16, because there was "no

basis," in any event, to find that SEC ALJs' removal protections are "so structured as to infringe the President's constitutional authority," *id.* at 20 (internal quotation marks omitted).

On June 10, 2015, Plaintiff amended her complaint to add an APA claim and a claim that ALJ Elliot's appointment violated the Appointments Clause because he was not appointed by the head of a Department—here the Commissioners. Am. Compl., ¶¶ 74-77. At a hearing on June 17, 2015, the Court denied Plaintiff's application for temporary restraining order and the request to file a second motion for a preliminary injunction. Instead, the Court ordered expedited briefing on the SEC's motion to dismiss and directed the SEC to anticipate and respond to arguments that Plaintiff may otherwise have made in her preliminary injunction motion. Tr. at 23.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFF'S CLAIMS

The Court should dismiss this case for lack of jurisdiction because the federal securities laws establish a "statutory scheme of administrative and judicial review," *Elgin v. Dep't of Treasury*,132 S. Ct. 2126, 2132 (2012), that channels claims like Plaintiff's through the agency and then directly to the court of appeals, whose jurisdiction is "exclusive." *See, e.g.*, 15 U.S.C. § 78y(a)(3). This statutory scheme displaces this Court's jurisdiction under 28 U.S.C. § 1331 because it "displays a 'fairly discernible' intent to limit jurisdiction, and [because] the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 489 (2010) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212 (1994)) (alteration in the original). Thus, the Second Circuit and numerous other courts have held that the securities laws "generally preclude *de novo* review in the district courts, requiring litigants to bring challenges in the Court of Appeals or not at all." *Altman*, 687 F.3d at 45-46, *affirming Altman v. SEC*, 768 F. Supp. 2d 554 (S.D.N.Y. 2011) (Holwell, J.) (internal quotation marks and citation omitted).[2]

[2] *Accord Tilton* slip op. at 5-23; *Spring Hill*,1:15-cv-04542, ECF No. 23; *Bebo v. SEC*, 2015 WL 905349, at *4; *Chau v. SEC*, -- F. Supp. 3d --, 2014 WL 6984236, at *6 (S.D.N.Y. 2014) (Kaplan, J.), *appeal pending*, No. 15-461 (2d Cir.); *Jarkesy v. SEC*, 48 F. Supp. 3d 32, 37-38

That conclusion is reinforced by statutory provisions that allow respondents in SEC administrative proceedings to obtain district court review in only one circumstance: review of temporary cease-and-desist orders, a form of preliminary relief not relevant here. *See* 15 U.S.C. §§ 77h-1(d); 78u-3(d); 80a-9(f)(4); *see also* S. Rep. No. 101-337 at 14-15 (1990) (differentiating between district court review of temporary cease-and-desist orders and the review procedure that applies to the Commission's issuance of a "permanent cease-and-desist order" that "may be appealed to a U.S. Court of Appeals *in the same way as any other SEC order entered under the securities laws*") (emphasis added); H.R. Rep. No. 101-616 at 26 (1990). Only in challenges to such orders does the ordinary administrative and judicial review process "not apply." 15 U.S.C. §§ 77h-1(d)(4); 78u-3(d)(4); 80a-9(f)(4)(D); *see Elgin*, 132 S. Ct. at 2134 (explaining that an exception to the ordinary review process that permits district court jurisdiction "[i]n only one situation" "demonstrates that Congress knew how to provide alternative forums for judicial review based on the nature of [a plaintiff's] claim").

Since the parties completed briefing on Plaintiff's first motion for emergency relief, three district court judges—including Judges Abrams and Ramos of this Court—have dismissed for lack of jurisdiction cases raising Article II claims identical to Plaintiff's. *See Tilton* slip op. at 5-23; *Spring Hill*, 1:15-cv-04542, Tr. at 60-77; *Bebo*, 2015 WL 905349, at *2-4.[3] In denying

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(D.D.C. 2014), *appeal pending*, No. 14-5196 (D.C. Cir.); *CleanTech Innovations v. NASDAQ*, No. 11-cv-9358, 2012 WL 345902, at *1 (S.D.N.Y. Jan. 31, 2012) (Forrest, J.).

[3] In a fourth case, *Hill v. SEC*, No. 15-cv-1801 (N.D. Ga. June 8, 2015), ECF No. 28 at 13-14, the court found that it had jurisdiction to enjoin an SEC administrative proceeding. The SEC submits that *Hill* was wrongly decided and has filed a notice of appeal seeking review by the Eleventh Circuit. The *Hill* court reasoned that the statutory scheme is not exclusive because the SEC has the option of proceeding either in federal court or administratively. But the fact that Congress gave the *SEC* a choice of forum by no means signifies that Congress intended to give a *respondent* in an SEC administrative enforcement proceeding a similar choice. *Thunder Basin* illustrates the error. The Mine Act "expressly . . . empower[ed] the *Secretary* . . . to coerce payment of civil penalties" by filing actions in district court but offered regulated entities "no corresponding right." 510 U.S. at 209. The Supreme Court inferred from this statutory structure that pre-enforcement claims by regulated entities are subject to the exclusive jurisdiction of the agency and the court of appeals. *See id.* at 207-16. Thus, courts have cited statutes authorizing district court jurisdiction over actions *filed by an agency* as supporting the conclusion that district courts lack jurisdiction over actions *filed by private parties*. *See, e.g.*, *Nat'l Taxpayers Union v.*

Plaintiff's motion, however, this Court had earlier concluded that it likely has jurisdiction because "(1) the absence of jurisdiction in the district court 'could foreclose all meaningful judicial review [of the plaintiff's claim]'; (2) the plaintiff's claim is 'wholly collateral' to 'any Commission orders or rules from which review might be sought'; **and** (3) the plaintiff's claim is 'outside the agency's expertise.'" ECF No. 33, slip op. at 10 (emphasis in original). Defendant respectfully submits that Plaintiff can satisfy none of these criteria and requests that the Court reconsider its prior jurisdictional analysis and dismiss the case for lack of jurisdiction.

A. Plaintiff Will Have Meaningful Judicial Review of Her Constitutional Claims

As this Court has recognized, if Plaintiff is aggrieved by a final order of the Commission, she can ask the court of appeals to review her constitutional claims and vacate the Commission's order. *See id.* at 11; *Bebo*, 2015 WL 905349, at *4; *cf. Landry*, 204 F.3d at 1128 (appellate court review of Appointments Clause challenge on direct appeal from final agency order); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (court of appeals can vacate agency's final order if hearing officer was improperly appointed under the APA). Such a decision would fully "vindicate [Plaintiff's] claim to a constitutionally sound proceeding." *Tilton* slip op. at 12. Just as "postjudgment appeals generally suffice to protect the rights of litigants," *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108-09 (2009), the availability of court of appeals review at the conclusion of the administrative process is all that is required for meaningful judicial review, *see Elgin*, 132 S. Ct. at 2136-37; *Thunder Basin*, 510 U.S. at 215.

Significantly, Plaintiff cannot claim to be similarly situated to the plaintiffs in *Free Enterprise*. In that case, there was no pending or foreseeable enforcement proceeding against the plaintiffs, who therefore would have needed either to challenge a "random" rule or otherwise induce an enforcement proceeding in order to obtain judicial review of their constitutional claim. 561 U.S. at 490-91. Here, by contrast, Plaintiff is currently the subject of an administrative enforcement proceeding, so she is "not presented with a choice between risking 'severe

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U.S. Soc. Sec. Admin., 376 F.3d 239, 243 (4th Cir. 2004); *Sturm, Ruger & Co., Inc. v. Chao*, 300 F.3d 867, 873 (D.C. Cir. 2002). The *Hill* court erred in drawing the opposite inference.

punishment' in order to obtain judicial review or foregoing judicial review altogether"; "[m]eaningful judicial review is already available" to Plaintiff in the court of appeals. *Tilton* slip op. at 15 (quoting *Free Enterprise*, 561 U.S. at 490); *accord Chau*, 2014 WL 6984236, at *12 (rejecting the argument that "administrative respondents need not wait for actual adjudication of their cases in order to challenge their legality"). "Where, as here, the 'injury' inflicted on the party seeking review is the burden of going through an agency proceeding, . . . 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) (citing *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980)).[4]

Despite the fact that the judicial review in the court of appeals is "meaningful" as a matter of law, this Court previously found that Plaintiff would not have meaningful judicial review if this Court does not exercise jurisdiction. The Court's analysis focused on two considerations: first, Plaintiff's constitutional claims could become moot, *see* slip op. at 12 & n.11, and second, court of appeals review would not remedy the allegedly "'substantial litigation and resource burdens incurred during [the] administrative proceeding,' and the 'reputational harm' associated with [Plaintiff] defending the Administrative Proceeding," *id*. at 11 (quoting Compl. ¶¶ 57–59)); *see also* Am. Compl. ¶¶ 68-70. Neither concern provides a valid basis for this Court to exercise jurisdiction.

First, it is settled that "the possibility that [the] challenge may be mooted in adjudication warrants the requirement that [the plaintiff] pursue adjudication, not shortcut it." *Standard Oil*, 449 U.S. at 244 n.11 (1980) (explaining that "one of the principal reasons to await the

[4] This Court previously noted tension between this argument and *Touche Ross & Co. v. SEC*, 609 F.2d 570 (2d Cir. 1979). *See* ECF No. 33, slip op. at 14 n.12. However, the Second Circuit held in *Altman* that the "exception [to the securities laws' exhaustion requirement] identified in *Touche Ross* did not apply" in a case where, as here, a litigant sought to challenge the SEC's constitutional authority to impose sanctions. *Altman*, 687 F.3d at 46. "Courts have read *Touche Ross* narrowly" and have "found its application especially inappropriate" where, as here, "a litigant invokes it to avoid agency review procedures." *Altman*, 768 F. Supp. 2d at 562; *accord Tilton* slip op. at 11 n.3.

termination of agency proceedings is to obviate all occasion for judicial review" (quotation marks omitted)); *see also Elgin*, 132 S. Ct. at 2140 (noting that an agency disposition in favor of petitioner on non-constitutional grounds would avoid the need to reach his constitutional claims). As Judge Abrams explained in *Tilton*, creating an exception to the enforceability of statutory review schemes for cases in which the plaintiffs claim that they are being subjected to an unconstitutional proceeding "could swallow the schemes themselves." *Tilton* slip op. at 8. Indeed, Judge Abrams reasoned, "any arguably plausible claim in district court that an administrative proceeding should be enjoined as unconstitutional could confer jurisdiction and thus thwart Congress' intent to the contrary." *Id.* Although Plaintiff may be frustrated that she cannot challenge the constitutionality of the administrative proceeding "prior to 'endur[ing]' those very proceedings, this posture is not uncommon in our judicial system, nor a burden peculiar to this case. 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." *Id.* at 8-9; *see also, e.g.*, *Mohawk Indus.*, 558 U.S. at 108-09 ("We routinely require litigants to wait until after final judgment to vindicate valuable rights, including rights central to our adversarial system."); *Germain v. Connecticut Nat. Bank,* 930 F.2d 1038, 1040 (2d Cir. 1991) (denial of motion to strike jury demand not immediately appealable; if the plaintiff has no right to a jury trial, the defendant may raise that issue on appeal from an adverse final judgment, and if the appellate court agrees, it will remand for a nonjury trial, thus vindicating the defendant's right); *Rosen v. Sugarman,* 357 F.2d 794, 796 (2d Cir. 1966) (order denying an application for disqualification of a judge not immediately appealable).[5]

[5] In any event, there is no reason for to depart from the statutory scheme to prevent irreparable harm during the administrative process because a court of appeals with jurisdiction to review the Commission's final orders has means of preventing such harm. *See, e.g.*, Fed. R. App. P. 18 (stay pending review of agency action); *Michael v. INS*, 48 F.3d 657, 663-64 (2d Cir. 1995) (stay prior to final order if the court eventually will have jurisdiction); *cf. Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 78-79 (D.C. Cir. 1984) ("where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to *exclusive* review of the Court of Appeals" (emphasis added)).

Second, Supreme Court precedent also rejects the argument that the "expense and disruption of defending [oneself] in protracted adjudicatory proceedings" warrants immediate judicial review, even when "the burden … will be substantial" and the costs "unrecoupable." *Standard Oil*, 449 U.S. at 244; *see also Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 12-13, 22-23 (2000) (allowing circumvention of statutory channeling requirement "simply because [a] party shows that postponement would mean added inconvenience or cost in an isolated, particular case" would undermine the purpose of such a requirement); *Tilton* slip op. at 12-13. Likewise, the Supreme Court has held that after-the-fact correction of procedural errors by an agency fully remedies any reputational harm resulting from those errors. *See Sampson v. Murray*, 415 U.S. 61, 91 (1974). Indeed, channeling statutes like the securities laws would be eviscerated if respondents in administrative enforcement proceedings could circumvent the exclusive review scheme merely by claiming that the process of going through the administrative process is burdensome and damaging to the respondents' reputation.[6]

B. Plaintiff's Constitutional Claims Are Not Wholly Collateral to the Administrative Proceeding

Plaintiff's suit is not "wholly collateral" to the statutory review scheme because they are the means by which Plaintiff seeks to halt the administrative proceeding against her. *See, e.g.*, *Elgin*, 132 S. Ct. at 2139; *Sturm, Ruger & Co. v. Chao*, 300 F.3d 867, 867 (D.C. Cir. 2002); *Chau*, 2014 WL 6984236, at *12.

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[6] In finding that Plaintiff's litigation expenses and reputational harm from the administrative proceeding constitute irreparable injuries that warrants departure from the statutory scheme, this Court cited decisions addressing Article III standing. ECF No. 33, slip op. at 11 n.9. As Judge Abrams concluded in rejecting this reasoning, "it has never been the case that anyone with standing could circumvent the SEC's exclusive remedial scheme and confer district court jurisdiction where none would otherwise exist." *Tilton* slip op. at 13 n.5 (quotation marks and citation omitted). In addition, injury-in-fact for purposes of standing cannot be equated with irreparable injury for other purposes. *See, e.g.*, *Latino Officers Ass'n v. Safir*, 170 F.3d 167, 170-71 (2d Cir. 1999) (finding standing but no likelihood of irreparable harm). Moreover, even if the SEC were to pursue an enforcement action against Plaintiff in district court, as Plaintiff argues that it should do, the reputational damage would not likely be less pronounced. *See Tilton* slip op. at 13 (noting that plaintiffs' alleged harm from a potential adverse initial decision "is no different than the harm that would follow a similar finding in district court").

It is immaterial that Plaintiff's constitutional challenges to the ALJ's authority to preside over the administrative proceeding do not go to the underlying securities violations. *Tilton* is instructive on this point. There, Judge Abrams reasoned that the plaintiffs' Article II claims could not be considered "wholly collateral" to statutory scheme because they could be raised as affirmative defenses in the ongoing administrative proceeding. *See* Tilton slip op. at 18-21. As a result, "it is difficult to see how they can still be considered 'collateral to any Commission orders or rules from which review might be sought." *Tilton* slip op. at 20 (quoting *Free Enterprise*, 561 U.S. at 490). Indeed, "[t]he opposite holding would seem to defeat Congressional intent, as any litigant subject to an administrative proceeding would be invited to escape agency adjudication by fashioning an incidental constitutional challenge and claiming that it is wholly collateral to the proceeding." *Id.* at 21.

The Second Circuit's decision in *Altman* in on point. In *Altman*, the plaintiff similarly sought to avoid the exclusive review scheme in the federal securities laws by arguing that "the Commission acted without constitutional or statutory authority in sanctioning him." 687 F.3d at 45. The court rejected this attempt, holding that the securities laws "supply the jurisdictional route that Altman must follow to challenge the SEC action." *Id.* at 46. The same is true here.

Nor is it material, as this Court previously indicated, that Plaintiff's claims can be characterized as "facial," rather than "as-applied." *See* ECF No. 33, slip op. at 13. The Supreme Court has explicitly rejected the argument that "facial constitutional challenges" should be "carve[d] out for district court adjudication" when Congress has instead provided for review by an agency and the court of appeals. *Elgin*, 132 S. Ct. at 2135. Whether a statutory review scheme applies, in other words, does not turn on the "facial" or "as-applied" nature of the constitutional claim. *See id.* (a "jurisdictional rule based on the nature of a ... constitutional claim would deprive [litigants], the [agency], and the district court of clear guidance about the proper forum for … claims at the outset of the case"); *see also Tilton* slip op. at 24 ("Plaintiffs' characterization of their challenge as facial rather than as applied does not alter the Court's conclusion.").

Free Enterprise is not to the contrary. There the Supreme Court found district court jurisdiction without addressing whether their claim was "facial" or "as-applied." *See* 561 U.S. at 489-91; *Bebo*, 2015 WL 905349, at *2-3 (distinguishing *Free Enterprise*). Instead, the *Free Enterprise* Court's conclusion that the plaintiffs' challenge to the Public Company Accounting Oversight Board was wholly collateral to the statutory review scheme reflected the fact that "not every Board action is encapsulated in a final Commission order or rule" from which an appeal could be taken to the court of appeals. 561 U.S. at 490. Plaintiff, by contrast, has a direct path to judicial review; if the SEC ALJ issues an initial decision against her, she can appeal to the Commission, and if the Commission rules against her, she can seek judicial review of her constitutional claims in the court of appeals. *See Tilton* slip op. at 18-21. Accordingly, as the D.C. Circuit has held, even plaintiffs seeking to raise "a facial constitutional challenge" under Article II "must exhaust their *nonconstitutional* defenses in the ongoing administrative proceeding before bringing their *constitutional* challenge to the agency's authority in federal court." *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 732 (D.C. Cir. 1987) (emphasis in original).

The district court decisions that this Court cited in its decision denying emergency relief (slip op. at 13) do not support a contrary conclusion. *Chau* discussed the facial/as-applied distinction only in dicta, 2014 WL 6984236, at *6, and explicitly rejected the "assertion . . . that administrative respondents need not wait for actual adjudication of their cases in order to challenge their legality," *id.* at *12. Moreover, *Chau* cannot trump the Supreme Court's rejection in *Elgin* of the argument that the facial/as-applied distinction is relevant to determining whether an exclusive review scheme applies. And *Gupta v. SEC*, 796 F. Supp. 2d 503 (S.D.N.Y. 2011), in which Judge Rakoff asserted jurisdiction over an as-applied equal protection challenge to an administrative proceeding, has been superseded by the Second Circuit's decision in *Altman*. *See Jarkesy*, 48 F. Supp. 3d at 40 n.2; *cf. Tilton* slip op. at 16 n.8 (distinguishing *Gupta*).[7]

[7] This Court also previously found that Plaintiff's claims may be collateral to the statutory scheme because she seeks to enjoin an administrative proceeding rather than "attack any order that may be issued in her Administrative Proceeding." ECF No. 33, slip op. at 13. Again, this reasoning would always permit a plaintiff to circumvent an exclusive statutory scheme as long as

C. The SEC Has Expertise to Bring to Bear on Plaintiff's Constitutional Claims

The Commission can bring its expertise to bear on Plaintiff's claims, as can the court of appeals. Even if, as this Court has noted, "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies," ECF No. 33, slip op. at 14 (quoting *Thunder Basin*, 510 U.S. at 215), the Supreme Court's decisions in "*Thunder Basin* and *Elgin* counsel that this is not sufficient to bypass the statutory remedial scheme where meaningful judicial review is otherwise available," *Tilton* slip op. at 22 (citing *Thunder Basin*, 510 U.S. at 215, and *Elgin*, 132 S. Ct. at 2137). Moreover, as the Supreme Court recognized in *Elgin*, there are "many threshold questions that may accompany a constitutional claim and to which [an agency] can apply its expertise." 132 S. Ct. at 2140. Whether SEC ALJs are inferior officers turns in part on antecedent questions about ALJs' authority under the securities laws and the SEC's Rules of Practice, which the SEC is expert at interpreting. *Cf. Thunder Basin*, 510 U.S. at 214-15; *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975). The SEC's interpretation "could alleviate constitutional concerns" about SEC ALJs' status, or the Commission could resolve the proceeding in Plaintiff's favor, thus avoiding the constitutional issues altogether. *See Elgin*, 132 S. Ct. at 2140.

* * *

In sum, "district court jurisdiction 'is not an escape hatch for litigants to delay or derail an administrative action when statutory channels of review are entirely adequate.'" *Bebo*, 2015 WL 905349, at *4 (quoting *Chau*, 2014 WL 6984236, at *6); *Spring Hill*, 1:15-cv-04542, Tr. at 67. The Court should reject Plaintiff's efforts to derail the administrative proceeding against her.

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she sues early enough. But a plaintiff may not "evade the statutory-review process by enjoining the [agency] from commencing enforcement proceedings." *Thunder Basin*, 510 U.S. at 216; *see also Tilton* slip op. at 21; *Altman*, 768 F. Supp. 2d at 558 (securities laws deprive district courts of jurisdiction over challenges to "on-going or pre-enforcement disciplinary proceedings"). *Merritt v. Shuttle, Inc.*, 245 F.3d 182 (2d Cir. 2011), cited at ECF No. 33, slip op. 13-14, is not on point. *Merritt* addresses whether a statute precludes a tort claim against the government, not whether a district court has jurisdiction to enjoin an administrative proceeding. *See* 245 F.3d at 184-92.

II. PLAINTIFF'S ARTICLE II CHALLENGES FAILS TO STATE A CLAIM BECAUSE SEC ALJS ARE NOT INFERIOR OFFICERS UNDER ARTICLE II

Even if this Court had jurisdiction to proceed, it should still dismiss the amended complaint for failure to state a claim. Plaintiff alleges that SEC ALJs were not properly appointed under the Appointments Clause and that their tenure protections violate the Constitution's separation of powers. Am. Compl., ¶¶ 74-77. The Appointments Clause, U.S. Const., art. II, § 2, cl. 2, governs the appointments of principal and inferior officers, but does not speak to government employees falling below the officer threshold. *See Buckley v. Valeo*, 424 U.S. 1, 126 & n.162 (1976); *Tucker v. Comm'r*, 676 F.3d 1129, 1132 (D.C. Cir. 2012). Similarly, while the Constitution limits Congress's ability to restrict the President's authority to remove constitutional officers, *e.g.*, *Free Enterprise*, 561 U.S. at 492, Congress's ability to provide tenure protections for employees is not so restricted. Thus, Plaintiff can succeed on her Article II claims only if SEC ALJs are officers. Because SEC ALJs are mere employees, Plaintiff's Article II claims should be dismissed for failure to state a claim.

The Supreme Court has said that whether government personnel are officers or employees is determined by "the manner in which Congress has specifically provided for the creation of the . . . positions, their duties and appointment thereto." *Burnap v. United States*, 252 U.S. 512, 516 (1920); *see Freytag v. Comm'r*, 501 U.S. 868, 881 (1991). The Court has also held that government personnel qualify as officers only if they "exercis[e] significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 125-26. Although few cases address the line between officers and employees, the Court has emphasized that the vast majority of government personnel are the latter, or "lesser functionaries subordinate to officers of the United States." *Id.* at 126 & n.162; *see Free Enterprise*, 561 U.S. at 506 n.9; *United States v. Germaine*, 99 U.S. 508, 509 (1878). As discussed below, the SEC's discretion whether and how to use ALJs, the ALJs' role within the SEC's decision-making scheme, and Congress's creation and placement of the ALJ position within the competitive service system all reflect that SEC ALJs are "mere aids" to the SEC, *Samuels, Kramer & Co. v. Comm'r*, 930 F.2d 975, 985-86 (2d

Cir. 1991), and that Congress intended ALJs to be employees—a judgment that is entitled to significant deference. Indeed, the only court of appeals to have addressed the status of any agency's ALJs concluded that they are employees. *Landry*, 204 F.3d at 1132-34.

A. SEC ALJs Do Not Exercise "Significant Authority" of the United States

A review of the SEC's regulatory scheme shows that SEC ALJs are "lesser functionaries subordinate to officers of the United States." *Buckley*, 424 U.S. at 126 n.162. As an initial matter, SEC ALJs' powers are contingent on Commission action. While Congress created the ALJ position and made ALJs available for agencies' use, it did not impose ALJs on the Executive Branch. Rather, agencies such as the SEC decide whether to use ALJs and what functions to delegate to them. *See* 5 U.S.C. § 3105; 15 U.S.C. § 78d-1. Consistent with the APA, which provides that a "presiding employee[]" for a hearing on the record need not be an ALJ, *see* 5 U.S.C. § 556(b), the Commission need not use ALJs to conduct its administrative proceedings. An SEC "[h]earing officer" can be an ALJ, "a panel of Commissioners constituting less than a quorum of the Commission, an individual Commissioner, or any other person duly authorized to preside at a hearing." *See* 17 C.F.R. § 201.101(a)(5). In instituting an administrative proceeding, the Commission thus also decides whether an ALJ is to be the hearing officer. *Id.* § 201.110.

The Commission has plenary power to review matters before its ALJs, *see* 15 U.S.C. § 78d-1, and is not bound by anything an SEC ALJ decides. As the Commission has stated, it "retains plenary authority over the course of its administrative proceedings and the rulings of its law judges—both before and after the issuance of the initial decision and irrespective of whether any party has sought relief." *In the Matter of Michael Lee Mendenhall*, 2015 WL 1247374, at *1 (SEC Mar. 19, 2015). The Commission may grant any party's request for interlocutory review or an ALJ's ruling or "at any time, on its own motion, direct that any matter be submitted to it for review." 17 C.F.R. § 201.400(a). Furthermore, an ALJ prepares only an "initial decision" subject to the Commission's *de novo* review. *Id.* § 201.360(a)(1). The Commission "may affirm, reverse, modify, [or] set aside" the initial decision, "in whole or in part," and it "may make any findings or conclusions that in its judgment are proper and on the basis of the record." 17 C.F.R.

§ 201.411(a). The Commission may also "remand for further proceedings," *id.*, "remand . . . for the taking of additional evidence," or "hear additional evidence" itself. *Id.* § 201.452.

Indeed, in enacting the APA, Congress envisioned that an ALJ's "initial decision" would be "advisory in nature" and would merely "sharpen[] . . . the issues for subsequent proceedings." Attorney General's Manual on the Administrative Procedure Act at 83-84 (1947).[8] Because an "agency is in no way bound by the [initial] decision," *id.* at 83; *see also JCC, Inc. v. CFTC*, 63 F.3d 1557, 1566 (11th Cir. 1995); *Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986), the APA provides that in reviewing an ALJ's initial decision the agency "retains 'all the powers which it would have in making the initial decision.'" *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989) (quoting 5 U.S.C. § 557(b)).[9]

Because all final agency determinations are those of the Commission, not of its ALJs, under *Landry*, SEC ALJs are not inferior officers. 204 F.3d at 1133-34. In *Landry*, the D.C. Circuit found that the ALJs of the Federal Deposit Insurance Corporation are not constitutional officers because they issue only recommended decisions and "can never render the decision of the FDIC"; "final decisions are issued only by the FDIC Board of Directors." *Id.* at 1133; *see id.* at 1132 (FDIC ALJs possess "purely recommendatory power, *i.e.*, one followed . . . by de novo review"); *see also Free Enterprise*, 561 U.S. at 507 n.10 (unlike PCAOB, many ALJs "possess purely recommendatory powers" or "perform adjudicative rather than enforcement or policymaking functions").

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[8] The Manual, as "a contemporaneous interpretation [of the APA]," *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978), is "give[n] 'considerable weight,'" *Brock v. Cathedral Bluffs Shale Oil Co*., 796 F.2d 533, 537 (D.C. Cir. 1986).

[9] Plaintiff's prior argument that SEC ALJs have final decision-making authority when there is no further review by the Commission, *see* ECF No. 14 at 11, is wrong. An ALJ's initial decision has no legal force or effect unless and until the Commission acts. *See* 17 C.F.R. §§ 201.360(d)(2), 201.411(c). This Court recognized this point during the June 17, 2015 hearing, stating that whether an ALJ's initial decision "gets appealed or not," it "has to be signed off by the Commission." Transcript at 18; *see id.* ("I think there must be a Commission action or order. That is the only point I was trying to get at."). And Plaintiff's counsel agreed. *Id.* ("MR. BOXER: And we agree with that point.").

Freytag is not to the contrary. There, the Supreme Court, following the Second Circuit's similar ruling in *Samuels, Kramer*, 930 F.2d at 985-86, held that special trial judges of the Tax Court—who exercise "a portion of the judicial powers of the United States," as the Court made clear elsewhere in the opinion—are inferior officers. *Freytag*, 501 U.S. at 880, 891. As the D.C. Circuit found in *Landry*, special trial judges are distinguishable from FDIC ALJs because they are able to issue final decisions in certain categories of cases—a fact that "was critical to the [*Freytag*] Court's decision" that they were inferior officers. *Landry*, 204 F.3d at 1134; *see Freytag*, 501 U.S. at 882 (noting that IRS Commissioner had conceded that special trial judges "act as inferior officers"). Additionally, special trial judges have significant discretion in cases over which they do not have final decision-making authority, including the authority to make factual and credibility findings to which the Tax Court is required to defer. *Landry*, 204 F.3d at 1133. In contrast, neither the FDIC Board nor the Commission defers to ALJs' factual findings. *Id.*; 17 C.F.R. 201.411(a).[10]

In previously requesting to file a second motion for a preliminary injunction, *see* ECF No. 44 (June 16, 2015), a request which this Court denied, Plaintiff has sought to rely on a decision from the District Court for the Northern District of Georgia in *Hill v. SEC*, No. 15-cv-1801 (N.D. Ga. June 8, 2015), ECF No. 28, slip op. In *Hill*, despite finding that SEC ALJs have no final decision-making authority, the court concluded that their "powers" are "nearly identical" to those of the Tax Court's special trial judges. Slip op. at 40. The court noted that both positions are established by law and both ALJs and special trial judges "take testimony, conduct trial, rule on the admissibility of evidence, and can issue sanctions, up to and including excluding people (including attorneys) from hearings and entering default." *Id.* at 38. The *Hill* court is wrong.

[10] The Commission could make a factual finding partially based on an ALJ's credibility determination, but the Commission does not accept an ALJ's credibility determinations "blindly," *In the Matter of Kenneth R. Ward*, 2003 WL 1447865, at *10 (SEC Mar. 19, 2003), and is not bound by such determinations, *see id.* ("[T]here are circumstances where, in the exercise of our review function, we must disregard explicit determinations of credibility."). The Commission can also choose to hear the witnesses' testimony itself. 17 C.F.R. § 201.452.

First, that both positions are created by law is immaterial. Congress had very different goals in creating the positions. The special trial judge operates within an Article I tribunal where Congress has "knowingly expanded the authority of special trial judges," *Samuels, Kramer & Co*., 930 F.2d at 982. Congress created the ALJ position in the APA, on the other hand, to address complaints about hearing examiners' perceived partiality by "separat[ing] adjudicatory functions and personnel from investigative and prosecution personnel in the agencies." *See Ramspeck v. Fed. Trial Exam'rs Conference*, 345 U.S. 128, 131 (1953). In thus creating the ALJ position, there is no indication that Congress intended to elevate ALJs' status above that of other agency personnel.

Second, the *Hill* court ignored an important, fundamental distinction when comparing the tasks of ALJs and special trial judges: a special trial judge is "exercis[ing] a portion of the judicial power of the United States" when performing those tasks, *Freytag*, 501 U.S. at 891, whereas an ALJ performs these tasks merely in aid of its employing agency's exercise of executive power. In assessing SEC ALJs' authority, therefore, it is inadequate to simply list the tasks SEC ALJs perform. Those duties must be viewed in the context of the Commission's plenary authority over the entire administrative process—namely, that the Commission is not bound by any decision an SEC ALJ makes; that the SEC ALJ's role within the agency's decision-making scheme is to sharpen the issues for subsequent proceedings; and that SEC ALJs are "subordinate" to the agency "in matters of policy and interpretation of law," *Nash*, 869 F.2d at 680, which is consistent with the concept that "civil servants are not thought to be the President's policymakers," *In re Sealed Case,* 838 F.2d 476, 497 (D.C. Cir.), *rev'd sub nom*. *Morrison v. Olson*, 487 U.S. 654 (1988).

SEC ALJs' authority pales in comparison to that of special trial judges because they do not possess the judicial powers associated with judges who are inferior officers. Special trial judges, like federal district court judges, have the powers "to punish contempts by fines or imprisonments," "to grant certain injunctive relief," and "to order the Secretary of the Treasury to refund an overpayment determined by [the special trial judge]." *Freytag*, 501 U.S. at 891. In

contrast, SEC ALJs have no power to grant any injunctive relief. Nor does the entry of default or imposition of sanctions by an SEC ALJ have any independent force or effect absent further action by the Commission. Further, SEC ALJs' power to punish contemptuous conduct is limited and does not include any ability to impose fines or imprisonment. *See* 17 C.F.R. § 201.180 ("Sanctions") (hearing officer may exclude a person from a hearing or suspend that person from representing others in the proceeding). And while SEC ALJs, like special trial judges, may issue subpoenas, the Commission itself needs to seek an order from a federal district court to compel compliance. *See, e.g.*, 15 U.S.C. § 78u(c). In sum, the substantive authority SEC ALJs exercise is significantly less weighty than that exercised by special trial judges.

B. The History of the ALJ System and the Statutory Provisions Regarding ALJs' Appointments and Placement Within the Competitive Service Confirm that Congress Intended ALJs to be Employees

To the extent there is any doubt that SEC ALJs are mere employees, this Court should defer to Congress's long-standing judgment that ALJs are employees. *See Weiss v. United States,* 510 U.S. 163, 194 (1994) (Souter, J., concurring) ("in the presence of doubt" whether military judges are principal or inferior officers, "deference to the political branches' judgment is appropriate"). The Constitution assigns to Congress the authority to determine, in the first instance, whether a position it creates is that of an officer or of an employee, *see* U.S. Const. art. II, § 2, cl. 2, and "[t]hat constitutional assignment to Congress counsels judicial deference," *In re Sealed Case*, 838 F.2d at 532 (R.B. Ginsburg, J., dissenting). Congress's judgment "is owed a large measure of respect—deference of the kind courts accord to myriad constitutional judgments" made by the Legislative Branch. *Id.*[11]

Congress is presumed to know the requirements of the Appointments Clause. *E.g.*, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 697 (1979). In fact, when Congress created the

[11] Of course, as then-Judge Ruth Bader Ginsburg noted in her dissenting opinion in *In re Sealed Case*, Congress's "intention [as reflected in the chosen mode of appointment] alone is not dispositive of the constitutional issue, for it is common ground that Congress does not have the final say." 838 F.2d at 532 (quotation omitted). But "judicial review must fit the occasion," and in a "debatable" case, "the fully rational congressional determination" merits acceptance. *Id*.

modern ALJ in 1946, the method of appointment generally determined the status—employee or officer—of the position. At that time, the Supreme Court had long characterized appointments pursuant to the methods prescribed in the Appointments Clause as a "well established definition of what it is that constitutes [an officer of the United States]." *United States v. Mouat*, 124 U.S. 303, 307 (1888). Lower courts, including the Second Circuit, adhered to this precedent. *See McGrath v. United States*, 275 F. 294, 300-01 (2d Cir. 1921); *Hare v. Hurwitz*, 248 F.2d 458, 461 (2d Cir. 1957). Yet Congress specified in the APA that it is the "agency"—not the President, the department head, or a court of law—that appoints ALJs. Pub. L. No. 79-404, 60 Stat. 237, 244 (1946); *see* 5 U.S.C. § 3105. Except in rare situations unique to an agency, *see, e.g.,* 20 U.S.C. § 1234(b) (requiring ALJs for the Department of Education be appointed by the Secretary), in the seven decades since creating the position of ALJ, Congress has not changed their method of appointment.

Congress's judgment that ALJs are not officers is also reflected in Congress's having placed ALJs—along with tens of thousands of other federal employees—in the competitive service, which is the most basic category within the civil service system. *See Myers v. United States*, 272 U.S. 52, 173 (1926); 5 U.S.C. § 2102. The Supreme Court's examination of the Civil Service Commission's regulations of hearing examiners—the precursor of ALJs—was also consistent with the view that ALJs are not constitutional officers. *See Ramspeck*, 345 U.S. at 130.

Hearing examiners, like other government employees of that period, were originally subject to the Classification Act of 1923 and dependent on their agency's ratings for compensation and promotion. *Id*. In 1946, as a result of complaints about hearing examiners' perceived partiality, Congress enacted the APA and "separat[ed] adjudicatory functions and personnel from investigative and prosecution personnel in the agencies," by placing hearing examiners under the jurisdiction of the Civil Service Commission in a merit-based civil service system for federal employees, and by vesting the Civil Service Commission with control of the ALJs' compensation, promotion, and tenure. *See id*. at 131. Section 11 of the APA specified, for

example, that hearing examiners were removable by the employing agency only for "good cause" established and determined by the Civil Service Commission. 60 Stat. at 244.

In enacting these measures, Congress gave no indication that it meant to elevate ALJs' status above that of the investigative and prosecution personnel of the agency. To the contrary, Congress explicitly "retained the examiners as classified Civil Service employees." *Ramspeck*, 345 U.S. at 133. Thus, on the question of whether hearing examiners' tenure protection precluded an agency from removing them due to a reduction in force, the Supreme Court said that "Congress intended to provide tenure for the examiners in the tradition of the Civil Service Commission," namely that "[t]hey were not to be paid, promoted, or discharged at the whim or caprice of the agency or for political reasons." *Id.* at 142. This meant that hearing examiners could be subject to the agency's reduction in force, like other employees. *Id.* at 140-41; *see also* 5 U.S.C. § 7521(b); 5 C.F.R. § 930.210 (ALJs are subject to reduction in force). The Court also found that the Civil Service Commission could set various salary grades to reflect the competence and experience of the examiners in each grade—again, like others in the civil service. *Ramspeck*, 345 U.S. at 136.

Today, OPM is responsible for promulgating rules relating to ALJs and for administering the process by which ALJs are screened for positions across federal agencies. An agency may appoint an individual as an ALJ only with prior approval of OPM, except when it makes its selection from OPM's list of eligibles. 5 C.F.R. § 930.204. The MSPB has jurisdiction over major personnel actions against ALJs. *See* 5 U.S.C. § 7521; 5 C.F.R. §§ 1201.137 *et seq*. The MSPB process is part of the CSRA's comprehensive remedial scheme for federal personnel disputes. *Gray v. Office of Pers. Mgmt.*, 771 F.2d 1504, 1510 (D.C. Cir. 1985) (refusing "to confer special status on ALJs beyond that expressly provided by Congress"). Congress provided no special remedial routes for ALJs to challenge most personnel disputes, even when the ALJ alleges interference with his decisional independence. *See, e.g.*, *Mahoney*, 721 F.3d at 636-37; *Brennan v. HHS*, 787 F.2d 1559, 1562-63 (Fed. Cir. 1986). Congress required that an ALJ's removal, suspension, reductions in grade or pay, and furlough of certain length be based on

"good cause" established and determined by the MSPB, 5 U.S.C. § 7521, the same adjudicative body that handles employment disputes for other employees. In contrast, employees who occupy confidential, policy-determining, or policy-making positions in the "excepted service" may be removed without cause. 5 U.S.C. § 7511(b)(2); *see also id.* § 2302(a)(2)(B)(i).

In sum, SEC ALJs are not constitutional officers. And, at a minimum, Congress views them as standing on a different constitutional footing than inferior officers, who "determine[] the policy and enforce[] the laws of the United States." *Free Enterprise*, 561 U.S. at 484; *see id.* at 506-07 (noting that "[s]enior or policymaking positions in government may be excepted from the competitive service to ensure Presidential control," and emphasizing that "nothing in [the Court's] opinion, therefore, should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies"). Because SEC ALJs are employees whose appointment and removal are not governed by Article II of the Constitution, Plaintiff's Article II challenges fail to state a claim upon which relief can be granted.

C. Plaintiff Cannot State a Claim for Her Separation of Powers Challenge

To the extent Plaintiff continues to press her claim that the removal framework for SEC ALJs is unconstitutional under *Free Enterprise* because ALJs are inferior officers who are insulated from Presidential removal by more than one layer of tenure protection, she cannot state a claim. *See* Am. Compl. ¶¶ 57-63. The Court has held that *Free Enterprise* "clearly did not establish, as Plaintiff suggests, a categorical rule forbidding two levels of 'good-cause' tenure protection." ECF No. 33, slip op. at 17 (quotation marks and citation omitted); rather, "Supreme Court precedent supports a functional test to determine whether and when statutory limitations on the President's power to remove executive officers violate Article II," *id.*

Applying that functional test, this Court found no separation of powers violation because "SEC ALJs perform solely adjudicatory functions, and are not engaged in policymaking or enforcement," *id.* at 20, and "congressional restrictions upon the President's ability to remove 'quasi judicial' agency adjudicators are unlikely to interfere with the President's ability to perform his executive duties," *id.* at 19. The Court found "no basis for concluding . . . that the

statutory restrictions upon the removal of SEC ALJs are so structured as to infringe the President's constitutional authority." *Id.* at 20 (internal quotation marks omitted). Indeed, because the "good cause" restriction bolsters the decisional independence of ALJs, the Court noted that invalidating it "would undermine the ALJs' clear adjudicatory role and their ability to 'exercise[] . . . independent judgment on the evidence before [them], free from pressures by the parties or other officials within the agency.'" *Id.* at 20-21 (quoting *Butz v. Economou*, 438 U.S. 478, 513-14 (1978)).

Because this Court already correctly concluded that "the statutory restrictions on ALJs' removal from office are both appropriate and constitutional," *id.* at 16, Defendant will not repeat its prior arguments on this point, *see* Def's Opp'n to Mot. for TRO/PI, ECF No. 13 (Jan. 28, 2015), at 20-23, except to reiterate only briefly here that the President retains adequate control over executive authority, *see Morrison v. Olson*, 487 U.S. 654, 689-90 (1988), because (1) ALJs exercise only limited executive power in the form of adjudicatory authority; (2) they play a part in a process over which the Commission retains ultimate control, 17 C.F.R. §§ 201.360, 201.410, 201.411, 201.452, and there is no doubt the President exercises constitutionally adequate control over the Commission, *see Humphrey's Executor v. United States*, 295 U.S. 602 (1935); (3) ALJs enjoy ordinary (good cause) tenure protection, 5 U.S.C. § 7521, not the kind of extraordinary tenure protection that was invalidated by the Court in *Free Enterprise*, 561 U.S. at 503; and, (4) ALJs have a long history of use and acceptance, which establishes a gloss on the Constitution, *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

III. PLAINTIFF'S APA CHALLENGE SHOULD BE DISMISSED

Plaintiff also alleges that the Commission violated 15 U.S.C. § 78d-1(a) by delegating the authority to appoint SEC ALJs without publishing its delegation in an order or rule. *See* Am. Compl. ¶¶ 64-66, 80-82. This claim, asserted under the APA, should be dismissed.

As an initial matter, regardless of whether Plaintiff's constitutional claims are properly before the Court, her statutory claim under the APA must be litigated (if at all) pursuant to the securities' laws exclusive remedial scheme discussed above. But even if judicial review is

available under the APA in the district court, such review is available only after Plaintiff has exhausted her administrative remedies and the Commission has taken "final agency action," 5 U.S.C. § 704 (making subject to judicial review "final agency action for which there is no other adequate remedy in a court").

Plaintiff also fails to state a claim. The statute on which Plaintiff relies, 15 U.S.C. § 78d-1(a), is not pertinent to the SEC's hiring of ALJs, which Congress addressed in other provisions. Congress has "transferred from the . . . Commission . . . to the Chairman of the Commission . . . the executive and administrative functions of the Commission, including functions of the Commission with respect to . . . the appointment and supervision of personnel employed under the Commission." 5 U.S.C. App. 1 Reorg. Plan 10 1950 § 1, 64 Stat. 1265. Congress also provided the Chairman authority to further delegate this hiring authority to appropriate personnel within the Commission. *See id.* § 2. In addition, Plaintiff overlooks 5 U.S.C. § 3105, which authorizes"[e]ach agency [to] appoint as many [ALJs] as are necessary" without limiting such authority to department heads. Thus, that the SEC hired its ALJs without the direct involvement of the Commission or a published delegation of the authority specifically to hire ALJs is fully consistent with all applicable statutory requirements.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court dismiss this case for lack of subject matter jurisdiction or, alternatively, for failure to state a claim.

Dated: July 1, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2015, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ *Jean Lin*
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