

EXHIBIT 7

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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GEORGE R. JARKESY, JR., et	:
al.,	:
Appellants,	:
v.	:
SECURITIES AND EXCHANGE	:
COMMISSION,	:
Appellee.	:
----- X	:

No. 14-5196

Monday, April 13, 2015
Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES KAVANAUGH AND SRINIVASAN,
AND SENIOR CIRCUIT JUDGE RANDOLPH

APPEARANCES:

ON BEHALF OF THE APPELLANTS:

S. MICHAEL MCCOLLOCH, ESQ.

ON BEHALF OF THE APPELLEE:

DOMINICK V. FRED A, ESQ.

C O N T E N T S

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S. Michael McColloch, Esq. On Behalf of the Appellants	3; 40
Dominick V. Freda, Esq. On Behalf of the Appellee	19

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P R O C E E D I N G S

THE CLERK: Case number 14-5196, George R. Jarquesy, Jr., et al., Appellants v. Securities and Exchange Commission. Mr. McColloch for the Appellants; Mr. Freda for the Appellee.

ORAL ARGUMENT OF S. MICHAEL MCCOLLOCH, ESQ.

ON BEHALF OF THE APPELLANTS

MR. MCCOLLOCH: Good morning, Your Honors.

JUDGE KAVANAUGH: Good morning.

MR. MCCOLLOCH: May it please the Court, I'm Mike McColloch representing George Jarquesy, Jr. and Patriot28, I'll just refer to them as we have in our briefs as Jarquesy for shorthand.

Your Honors, this case challenges SEC administrative enforcement authority in a case that prior to Dodd-Frank could only be tried in Federal Court. As a result of the powers transferred by Dodd-Frank, the SEC no longer needs Article 3 courts, and indeed that was the very intent of the legislation, to make the authority in the SEC's administrative enforcement proceedings truly co-extensive with that Federal Courts, for several reasons that transfer was unconstitutional, and the administrative proceeding against Mr. Jarquesy is void.

Now, we raise two facial challenges and a due process pre-judgment challenge, while the District Court

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1 below had subject matter federal question jurisdiction to
2 resolve the issues in this case, pursuant to its holding in
3 *Track* (phonetic sp.) we are asking this Court to invoke its
4 powers under the All Writs Act to protect its current and
5 future jurisdiction to decide Jarquesy's constitutional
6 claims now.

7 The problems with this transfer of authority to
8 the SEC are several, number one, the Seventh Amendment. The
9 SEC enforcement today in the wake of Dodd-Frank is
10 fundamentally different from historical enforcement
11 practices. Dodd-Frank in fact created an unprecedented
12 enforcement scheme allowing massive punishment that can be
13 meted out unilaterally against ordinary citizens by this
14 Agency where previously for many decades this power could
15 only be exercised by Article 3 courts.

16 JUDGE KAVANAUGH: So, that's a Seventh Amendment
17 problem, and you also say that the discretion to choose
18 Federal Court or the Agency is a separation of powers
19 problem.

20 MR. MCCOLLOCH: Correct, Your Honor. And really
21 the --

22 JUDGE KAVANAUGH: And so, just -- I mean, I
23 understand, I just wanted to get that out in terms of your
24 merits claim, but obviously we have to figure out the issue
25 of the preclusion here, and it just strikes me that, and

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1 this is a question for both sides, just navigating the case
2 law here is a challenge because you have cases like *Free*
3 *Enterprise*, and *Mathews v. Eldridge*, and *McNary*, and then
4 you have cases like *Elgin*, and I'm curious how you would
5 propose that we navigate that in a principled way.

6 MR. MCCOLLOCH: Through the subject matter
7 jurisdiction.

8 JUDGE KAVANAUGH: Although I know the way you're
9 going to navigate it has you winning, but what's the
10 principled line we would draw for future cases?

11 MR. MCCOLLOCH: Well, Your Honor, I will concede
12 that the whole are of subject matter jurisdiction is not a
13 model of clarity, it almost becomes metaphysical at times,
14 and I think the easiest way to resolve it here, number one,
15 we have briefed ad nauseum in the briefing the three prongs
16 of the *Free Enterprise, Thunder Basin* formulation, because
17 under this statutory scheme which is review of a final order
18 of the Commission by this Court, which in turn is at the
19 Commission level is review of the administrative proceeding
20 from the issuance of the order instituting proceedings, the
21 OIP, up through the initial opinion by the ALJ. All of
22 these claims, these constitutional problems are underlying
23 structural problems, and/or result or emanate from events
24 occurring outside of the administrative proceeding. And as
25 we've said, more stressed in our reply brief than our

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1 principle brief on this point, we don't believe that the
2 whole *Free Enterprise* formulation makes sense, it fits well
3 within the context of this case with these challenges, where
4 you have an equal protection violation that occurs prior to
5 the initiation of the AP, you have a separation of powers
6 problem that is just an underlying structural issue, all of
7 these issues are irrelevant to the merits and the conduct of
8 the administrative proceeding.

9 JUDGE SRINIVASAN: So, when you mentioned the
10 doctrine, and I think you called it a *Thunder Basin, Free*
11 *Enterprise* Doctrine, and there's also *Elgin*, and which is
12 not as good for you, but can you explain how *Elgin* is
13 distinguished based on what you just told us?

14 MR. MCCOLLOCH: Yes, Your Honor. *Elgin*, in fact,
15 cites *McNary v. Haitian Refugee Center*, and itself in *Elgin*
16 draws the distinction between those two situations. Okay.
17 And *Elgin*, as I recall, that was a Merit Selection Review
18 Board proceeding, it's a Civil Service proceeding, and there
19 were all kinds of discovery devices available in that
20 proceeding. You didn't also have an interested party
21 conducting the proceedings in that case. That process, that
22 review process included depositions, interrogatories, almost
23 everything that you would see in a Federal Court, so one of
24 the issues, of course, is whether you can obtain meaningful
25 review of your issue, and you can therefore develop the

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1 issue below before you get up to a Circuit Court. The Court
2 in *Elgin* cited *McNary* as the other kind of situation where
3 you have a much more Spartan agency adjudicative process.

4 JUDGE SRINIVASAN: So, is that your main
5 distinction with *Elgin* is that so, I know that you and the
6 SEC disagree on what kind of fact development proceedings
7 are available in the context of the administrative
8 proceedings that are going on, so it sounds to me like your
9 argument for a distinction with *Elgin* is that if you're
10 right about how constricted it is then *Elgin* is different,
11 but if you're wrong about how constricted it is then maybe
12 *Elgin* is not so different.

13 MR. MCCOLLOCH: Perhaps not, and I'll get to *Track*
14 in a moment because I think we have -- well, and maybe I
15 should get to it very quickly and then I'll directly address
16 Your Honor's question. Under *Track* this Court can look at
17 a, and there's a provision or an excerpt I can give you from
18 *Track* where the Court says as Judge Leventhal emphasized in
19 *National Advertisers* only in rare instances is a non-final
20 agency action reviewed in the teeth of a general denial of
21 jurisdiction, thus we generally will hear only cases of
22 clear right, such as an outright violation of a clear
23 statutory provision, or violation of basic rights
24 established by a structural flaw and not requiring in any
25 way a consideration of the interrelated aspects of the

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1 merits. That's this case. And so, regardless in *Track*
2 where the Circuit Court had exclusive jurisdiction to review
3 what in that case was, it was all about the final order, or
4 the lack thereof, the delay in the issuance of the final
5 order, this Court found it had exclusive jurisdiction over
6 that, which means to the exclusion of the District Court,
7 but still was able to take up a structural flaw or a clear
8 right under the All Writs Act to protect its jurisdiction.
9 Once the case is here it's here, and if the Court's going to
10 have, this Court is going to have either jurisdiction on re-
11 appeal if it remands to the District Court, for example, on
12 the equal protection challenge, which just can't be
13 litigated by any stretch adequately for a number of reasons
14 in the SEC, in the context of the SEC process.

15 JUDGE RANDOLPH: What is the equal protection
16 argument, is it selective prosecution, is that the idea?

17 MR. MCCOLLOCH: Your Honor, it's a class of one
18 equal protection claim which alleges that this target,
19 Jarquesy, was treated differently from other identically
20 situated SEC targets during the same time period that
21 Jarquesy was charged as the --

22 JUDGE RANDOLPH: Yes, so what's the evidence that
23 you want to gather, is it that you want to question the
24 enforcement division of the SEC?

25 MR. MCCOLLOCH: Yes, Your Honor, and we probably

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1 would want to look at Commission records, as well, because
2 as we alleged in the lawsuit --

3 JUDGE RANDOLPH: So, you want to take the
4 deposition of the General Counsel and other individuals
5 working in the Enforcement Division?

6 MR. MCCOLLOCH: Well, as you can -- we'd probably
7 like to, whether we need to do that, we never got that far
8 in the District Court, we --

9 JUDGE RANDOLPH: I thought you did, I thought you
10 sought a subpoena to do just that.

11 MR. MCCOLLOCH: We issued a subpoena in the
12 context of the administrative proceeding to the Commission
13 for its recordings pertaining to the selection of the
14 administrative proceeding as opposed to taking this to
15 Federal Court. There were, I think we had nine other, eight
16 or nine other identically situated targets of SEC
17 enforcement charged under the exact same statutes, dated the
18 same time period were allowed to defend themselves in
19 Federal Court, while Jarkey got relegated to the SEC's
20 internal courts with the truncated summary procedures, and
21 greatly diminished defensive procedures, and evidentiary
22 protections.

23 JUDGE KAVANAUGH: But for purposes of this, for
24 purposes of the *Free Enterprise, Elgin* point that's a
25 tougher hill for you to climb than the Seventh Amendment

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1 kind of the day after the statute has passed we have this
2 constitutional argument tee up.

3 MR. MCCOLLOCH: Your Honor, I don't think it's
4 more different. If you're asking about the Equal Protection
5 challenge --

6 JUDGE KAVANAUGH: I don't know, I'm not talking
7 about the merits of it, but just it doesn't appear from the
8 face of the statute necessarily, obviously, that there's
9 going to be a class of one situation, whereas under your
10 theory the day the statutes passed we have a constitutional
11 argument, whether it's meritorious or not is a different
12 question, but a constitutional argument about the structure
13 that's set up by this statute as being violative of the
14 Seventh Amendment and separation of powers principles.

15 MR. MCCOLLOCH: Correct, Your Honor, but --

16 JUDGE RANDOLPH: Why can't that be brought, why
17 can't that claim be made in the Court of Appeals after
18 administrative proceedings have been?

19 MR. MCCOLLOCH: That claim, the separation of
20 powers claim?

21 JUDGE RANDOLPH: Right.

22 MR. MCCOLLOCH: It can be brought, as --

23 JUDGE RANDOLPH: So, what cases stand for the
24 proposition that you can bypass the normal review from an
25 administrative agency to direct review to this Court, and go

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1 into District Court because you've got a challenge that
2 doesn't depend on the evidence?

3 MR. MCCOLLOCH: Because this case, this case is
4 distinguishable from all those cases because we're not
5 complaining, none of these claims, including equal
6 protection, complain about what's going to be in the final
7 order, complain about the conduct of the administrative
8 proceedings, or the findings of the administrative
9 proceeding; the final order is completely irrelevant, it's
10 an event that occurred prior to the administrative
11 proceedings.

12 JUDGE RANDOLPH: Yes, but the argument is, I guess
13 your argument is that the SEC had no authority to adjudicate
14 this because it deprived us of our Seventh Amendment rights.

15 MR. MCCOLLOCH: Well, that is correct, Your Honor,
16 these are all alternative claims.

17 JUDGE RANDOLPH: As I understand your submission
18 is the facial challenges can go to, directly to the
19 district, constitutional challenge directly to the District
20 Court because there's no evidence to develop. And the other
21 challenges you have are as applied, and they can go directly
22 to the District Court because there is evidence to be
23 developed.

24 MR. MCCOLLOCH: There's evidence to be developed
25 that can't be --

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1 JUDGE RANDOLPH: So, all constitutional challenges
2 under your theory go to the District Court?

3 MR. MCCOLLOCH: Well, we carefully picked these
4 constitutional challenges that are here, that we're talking
5 about today because they are outside of the administrative
6 proceeding, which under the narrow jurisdiction of the SEC
7 is outside of the Commission's --

8 JUDGE RANDOLPH: Didn't *Elgin* specifically reject
9 any kind of an analysis based on whether it's an as-applied
10 or on its face constitutional challenge? I thought *Elgin*
11 just completely rejected.

12 MR. MCCOLLOCH: Well, and we're not stressing
13 that, we're stressing what the essence of the claim is that
14 doesn't complain about anything occurring with regard to the
15 administrative proceeding. All of these things occurred
16 outside, including the pre-judgment issue, which was in
17 another party's case.

18 JUDGE RANDOLPH: It doesn't apply to anything
19 occurring in the administrative proceeding? I thought your
20 argument was there shouldn't be an administrative proceeding
21 so it not only covers things happening, it covers everything
22 that's happening.

23 MR. MCCOLLOCH: Well, it covers the very existence
24 of it, but the review allotted by statute for Commission
25 review in issuing the final order at Circuit Court review of

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1 the final order is restricted by statute to whether or not
2 the target, the Respondent in an administrative proceeding
3 is culpable or not for securities fraud, and all of the
4 incidents surrounding the conduct of the administrative
5 proceeding, evidentiary issues, et cetera, these are all, we
6 have claims that will go up in the administrative appeal,
7 which is pending, that are --

8 JUDGE SRINIVASAN: So, one thing that's --

9 MR. MCCOLLOCH: -- that relate just to what's
10 happening inside, what happened inside the administrative
11 proceeding, these --

12 JUDGE SRINIVASAN: One thing that seems different
13 about this case than *Free Enterprise*, because I think as
14 Judge Randolph was pointing out a lot of what's in *Elgin*
15 cuts against you, but you have *Free Enterprise*, I guess,
16 would be your main answer under the case law. But one thing
17 that seems different about, and of course, *Elgin* comes after
18 *Free Enterprise*, but if we go back to *Free Enterprise*, one
19 thing that seems different about *Free Enterprise* is just the
20 fact that in that case the administrative proceeding hadn't
21 been kicked off, whereas in this case it has, and so you've
22 got a proceeding in place right now the culmination of which
23 will be a Court of Appeals resolution that at which every
24 claim that you raised can be aired and resolved.

25 MR. MCCOLLOCH: Every claim that we raise now can

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1 be resolved because these --

2 JUDGE KAVANAUGH: If you lose.

3 MR. MCCOLLOCH: If we lose here.

4 JUDGE KAVANAUGH: If you lose in the SEC.

5 JUDGE SRINIVASAN: In the Agency.

6 JUDGE KAVANAUGH: If you win in the SEC the claim
7 won't be resolved in the Court of Appeals but you will have
8 been subject to the expense of the proceeding that you don't
9 think ever should have taken --

10 MR. MCCOLLOCH: There's always the --

11 JUDGE KAVANAUGH: -- place.

12 MR. MCCOLLOCH: -- theoretical chance that we
13 could win in the SEC, yes, Your Honor, but it's --

14 JUDGE KAVANAUGH: But I thought your point was,
15 maybe I'm wrong here, but I thought the idea was if we're
16 forced we can't raise this claim in a court unless we
17 actually lose before the SEC, but the existence of the
18 procedure or the proceeding is something we want to
19 challenge and not have to go through the SEC.

20 MR. MCCOLLOCH: And we believe that avoid
21 proceeding --

22 JUDGE KAVANAUGH: So it's --

23 MR. MCCOLLOCH: -- is something we shouldn't have
24 to go through, and there's some Supreme Court precedent on
25 that, particularly with regard to pre-judgment.

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1 JUDGE KAVANAUGH: I mean, I don't know if that's
2 successful, as Judge Srinivasan and Judge Randolph have both
3 pointed out there's, *Elgin* is a problem for you, *Free*
4 *Enterprise* is a problem for them, so --

5 MR. MCCOLLOCH: And we would really stress *McNary*
6 *v. Haitian Refugee Center*.

7 JUDGE KAVANAUGH: Right. And you have other -- so
8 *Free Enterprise*, plus *McNary*, plus *Mathews v. Eldridge*, but
9 they have *Elgin* plus *Thunder Basin* and a couple of others,
10 as well.

11 MR. MCCOLLOCH: That well summarizes it. It's our
12 structural issues that are our primary issues here in this
13 Court, and if I could just with the Court's indulgence to
14 continue the answer to that question, so that the Court is
15 clear --

16 JUDGE KAVANAUGH: Can I ask one thing, I'm
17 sorry --

18 MR. MCCOLLOCH: Yes, Your Honor.

19 JUDGE KAVANAUGH: You will be able to answer that
20 question. But if you were to prevail in this case the, it
21 wouldn't preclude the SEC from continuing its enforcement
22 proceeding unless you actually prevail or obtain a stay from
23 a Federal Court, correct?

24 MR. MCCOLLOCH: Correct.

25 JUDGE KAVANAUGH: In other words, there's no -- I

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1 just want to make sure that your position is that if you win
2 on this theory and you're allowed to pursue the claim in
3 Federal District Court that shouldn't slow down the SEC at
4 all unless you actually prevail on your constitutional
5 claim.

6 MR. MCCOLLOCH: Well, correct to the extent, you
7 know, we're requesting, and the suit is about injunctive
8 relief.

9 JUDGE KAVANAUGH: I know, but the point is if
10 you -- the SEC can keep going unless and until a Federal
11 Court says no, actually, you succeed or you get a stay by
12 showing a likelihood of success on those constitutional
13 claims.

14 MR. MCCOLLOCH: They can proceed, and we're asking
15 this Court -- yes, and we're asking this Court to issue a
16 stay.

17 JUDGE KAVANAUGH: In other words, the mere
18 existence of your suit doesn't stop the SEC in its tracks.

19 MR. MCCOLLOCH: Correct. Now, if --

20 JUDGE KAVANAUGH: Yes.

21 MR. MCCOLLOCH: -- this Court holds, if this Court
22 in this appeal holds that the Dodd-Frank unprecedented grant
23 of jurisdiction over ordinary citizens for massive penalties
24 violates the Seventh Amendment one would think that the SEC
25 would decline to continue to pursue the case, and we would

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1 ask that this Court --

2 JUDGE KAVANAUGH: No, what I meant by prevail on
3 the suit was meant prevail in having the District Court,
4 your primary argument is just to have the District Court to
5 consider this, I think.

6 MR. MCCOLLOCH: Well --

7 JUDGE KAVANAUGH: You would want us to go consider
8 the merits, too, but assuming that didn't happen.

9 MR. MCCOLLOCH: Correct. That was our original
10 suit was to get --

11 JUDGE KAVANAUGH: Yes.

12 MR. MCCOLLOCH: -- the Court to do that, and we --

13 JUDGE KAVANAUGH: Yes.

14 MR. MCCOLLOCH: -- and we, and the District Court,
15 which we filed the day after the Commission in late January
16 of '14, the day after the Commission denied our
17 interlocutory appeal for pre-judgment, the next day we
18 filed --

19 JUDGE KAVANAUGH: Yes.

20 MR. MCCOLLOCH: -- that suit, and then the next
21 business day the administrative proceeding began as the
22 Court had denied the temporary restraining order. But, so
23 going back to the --

24 JUDGE KAVANAUGH: Yes.

25 MR. MCCOLLOCH: -- question, is the structural

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1 claims are, again, first that the Seventh Amendment under
2 the *Atlas Roofing* limited to a situation that doesn't exist
3 here, and under *Tull*, and under *Granfinanciera*, that sort of
4 trilogy of cases, we see that the Seventh Amendment requires
5 a situation where Congress exclusively, Congress exclusively
6 assigns a certain category or class of cases to
7 administrative adjudication, which has not happened here;
8 and also, in all of these cases they keep stressing it's
9 permissible for Congress to do that only if juries are
10 incompatible with the statutory enforcement scheme that
11 Congress has created, this is usually the case in for like
12 technical OSHA violations, as in *Atlas Roofing*. Here, we've
13 got juries have been doing, have been adjudicating basic
14 common law securities fraud and statutory securities fraud
15 cases for many decades, and all of a sudden the Dodd-Frank
16 amendments, which is, you know, four paragraphs in a very
17 lengthy bill, but then it did something very profound, and
18 very different, and unprecedented in federal administrative
19 law giving this Agency that power; it's if the Court doesn't
20 find that that's a Seventh Amendment violation then there's
21 obviously something wrong with the first ever non-exclusive
22 assignment of this category of claims for massive punitive
23 sanctions to an administrative agency where they get to pick
24 and choose essentially willy-nilly. And first of all, they
25 can't do it, they have to do it exclusively, you can't,

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1 there's never been a case where they've given the Agency on
2 identical claims for identical sanctions where they've given
3 an agency free rein to pick on its own; if they're going to
4 do that, and this would be the first time a court has upheld
5 such a thing in this case, and if this Court's going to do
6 that then we have to look at the discretion that's been
7 conferred the legislative power to make that decision as to
8 which category, classes of cases are going to be relegated
9 to administrative, non-jury adjudication. Whether that has
10 any guidelines, whether it has any intelligible principle
11 behind it the --

12 JUDGE KAVANAUGH: Right.

13 MR. MCCOLLOCH: -- SEC has conceded it doesn't.

14 JUDGE KAVANAUGH: Well, that's the merits, and
15 we're still on reviewability, so why don't we hear from the
16 SEC. We'll give you plenty of time on rebuttal.

17 MR. MCCOLLOCH: Thank you, Your Honor.

18 ORAL ARGUMENT OF DOMINICK V. FREDA, ESQ.

19 ON BEHALF OF THE APPELLEE

20 MR. FREDA: May it please the Court. I think this
21 case demonstrates exactly why the line of cases starting
22 with *Thunder Basin* recognizes that the agency process where
23 it's fairly discernible from the intent of Congress to
24 submit claims through that process comes out with the right
25 result. There's a fairness innate in that, and there's an

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1 efficiency in that process. There are threshold issues here
2 that Counsel has pointed out that need to be determined by
3 the Commission in the first instance.

4 JUDGE KAVANAUGH: Well, suppose the claim were,
5 and let me just think of some claim that's probably settled
6 by current law, but just a multi-member SEC is
7 unconstitutional.

8 MR. FREDA: Okay. And is it raised in this
9 case --

10 JUDGE KAVANAUGH: Right.

11 MR. FREDA: -- Your Honor?

12 JUDGE KAVANAUGH: So, that kind of claim were, or
13 that Dodd-Frank's provision assigning power to the SEC is
14 unconstitutional, the general assignment of investigative
15 power to the SEC over this topic is unconstitutional in some
16 respect. And those kinds of claims that go to the Agency
17 structure or the existence of the Agency, are those kinds of
18 claims different?

19 MR. FREDA: Well, *Elgin* would suggest no.

20 JUDGE KAVANAUGH: But what about *Free Enterprise*?

21 MR. FREDA: *Free Enterprise* was different, I mean,
22 *Free Enterprise* is different --

23 JUDGE KAVANAUGH: Why?

24 MR. FREDA: -- because you had to bet the farm in
25 order to bring your claim, according to the Supreme Court.

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1 JUDGE KAVANAUGH: And don't you have to bet the
2 farm here because you have to lose your administrative
3 enforcement proceeding in order --

4 MR. FREDA: No, that's simply constitutional
5 avoidance working its way through, I mean, this Court has --

6 JUDGE RANDOLPH: There's another case you should
7 have cited, which is *Noel Canning*.

8 MR. FREDA: Okay. I was also thinking *Deaver v.*
9 *Seymour*, I mean, the notion that --

10 JUDGE RANDOLPH: I mean, that never went through a
11 District Court, and yet the Supreme Court decided that the
12 structure of the NLRB was unconstitutional because of the
13 recess appointment. You didn't need a District Court for
14 that.

15 MR. FREDA: Okay. But the difference for our
16 purposes, for our case, and those cases are that here you
17 have a process that's in place that's been invoked, that's
18 been started, there is no additional --

19 JUDGE KAVANAUGH: But I think their argument is,
20 or their response is that you can raise all those arguments
21 there, but you can also, there's an alternative route you
22 can proceed, certainly in *Free Enterprise Fund* you could
23 raise the arguments in the defense in the enforcement
24 proceeding, but you can also, someone also has the
25 opportunity to bring a District Court suit, and there will

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1 be preclusion issues depending on which case gets decided
2 first, et cetera, potentially in some matters, right?

3 MR. FREDA: Well, I mean, that's their argument,
4 but I think --

5 JUDGE KAVANAUGH: Right.

6 MR. FREDA: -- I think, if that were the case I
7 think then --

8 JUDGE KAVANAUGH: In other words it's certainly
9 these kinds of issues will arise through the administrative
10 route and then go to the Court of Appeals, but the same
11 issues could arise in the District Court suit and *Free*
12 *Enterprise Fund* it relayed *McNary*, and *Mathews v. Eldridge*
13 the Court said that's fine because it was collateral, I'm
14 trying to figure out what's collateral.

15 MR. FREDA: Well we've been trying to figure that
16 out, as well.

17 JUDGE KAVANAUGH: Yes.

18 MR. FREDA: I mean, I could point you to what this
19 Court has said is collateral, but ultimately I think it's
20 more helpful to go back to what is meaningful in judicial
21 review. I mean, I think if you look at the three factors
22 for the exception that *McNary*, and then *Thunder Basin*
23 quotes, and then *Free Enterprise* applies it really boils
24 down to whether or not there's meaningful judicial review of
25 the claims, and undoubtedly there will be meaningful

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1 judicial review for Mr. Jarkesy's claims at the end of the
2 day.

3 JUDGE KAVANAUGH: If he loses.

4 MR. FREDA: Yes, if he loses.

5 JUDGE KAVANAUGH: Not if he wins.

6 MR. FREDA: Not if he wins. And so, in that
7 circumstance --

8 JUDGE KAVANAUGH: Even though his argument is that
9 he shouldn't have to go through this proceeding.

10 MR. FREDA: Right, and *Standard Oil* had no problem
11 with that.

12 JUDGE KAVANAUGH: So, how is that different, how
13 is that different from *Free Enterprise Fund*?

14 MR. FREDA: Well, again, *Free Enterprise Fund* was
15 about the farm case, you had no clear path to meaningful
16 judicial review. In that case the Court said we're not
17 going to require someone to violate a random rule, or wait
18 to challenge some random rule based upon their
19 constitutional defense; in that case you could go to
20 District Court, but that's the exception, not the rule. If
21 the exception were the rule we wouldn't have *Thunder Basin*.

22 JUDGE KAVANAUGH: Well, I don't know if there's an
23 exception or a rule given that you can line up a bunch of
24 cases on both sides of this.

25 MR. FREDA: Right, but you could line them up, but

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1 I think if, the wait falls on our side in this case, I mean,
2 it's not just *Thunder Basin*, it's not just *Elgin*, it's
3 *Thurmer*, or it's *Daniels*, or it's *John Doe, Inc.*, it's
4 *Fornaro*, all of these, this Court's cases all fall squarely
5 on our side of the ledger on this, and the reason being is
6 he can bring his claims at the end of the day, there's clear
7 case law recognizing that merely having to go through the
8 process to bring your claims is not itself a constitutional
9 harm that needs to be avoided because he has legal relief at
10 the end of the day. I mean, if *Deaver v. Seymour* could come
11 out the way that it comes out then of course you have to
12 subject yourself to an Agency administrative proceeding.

13 JUDGE KAVANAUGH: Can I ask you a question about
14 suppose this were someone who were not the subject of
15 current enforcement proceedings, who wanted to, but it's a
16 regulated entity under the statutory scheme, same result?

17 MR. FREDA: In this case? If he's not a
18 regulated, if he is a regulated --

19 JUDGE KAVANAUGH: He is a regulated --

20 JUDGE SRINIVASAN: No, he is. He is.

21 JUDGE KAVANAUGH: -- entity --

22 MR. FREDA: Okay.

23 JUDGE KAVANAUGH: -- but there's no enforcement
24 proceeding that's been --

25 MR. FREDA: Well, I mean, all --

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1 JUDGE KAVANAUGH: -- initiated.

2 MR. FREDA: Yes, it's hard to envision that case
3 because all of Jarquesy's claims really arise from the
4 Commission's administrative proceeding itself.

5 JUDGE KAVANAUGH: No. Well, no, a claim that the
6 statutory scheme on its face it unconstitutional because it
7 transfers this discretion, and I'm not saying anything about
8 the merits to the constitutional claim.

9 MR. FREDA: Right. No, I -- right. I understand.

10 JUDGE KAVANAUGH: But that's, the theory is that
11 on its face the day it was passed we see something
12 unconstitutional in this statute in that it grants huge new
13 enforcement authority, again, I'm not characterizing it, but
14 that's their claim.

15 MR. FREDA: Well, but the claim --

16 JUDGE KAVANAUGH: And so, someone who's a
17 regulated party says I don't want to be subject to a
18 regulation under that scheme, and brings the suit, even
19 though nothing's been initiated against them yet, which is
20 what result there?

21 MR. FREDA: Right. Well, I mean, I think what you
22 have to look at for that case is what is the harm that the
23 person is under, it's a different scenario than in the *PCAOB*
24 case. What they're complaining about in Dodd-Frank is
25 extending the Commission's discretion to bring an AP against

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1 unregistered persons, which could essentially be a large
2 segment of the securities industry.

3 JUDGE RANDOLPH: What is the situation for
4 issuers, for regulated person, those -- is there discretion
5 within the SEC to proceed to District Court, or run an
6 administrative proceeding?

7 MR. FREDA: Yes, there is.

8 JUDGE RANDOLPH: And how long has that existed?

9 MR. FREDA: Gosh, you're putting me on the spot
10 here. It's been a very long time because I can't remember
11 when this issue has ever come up before.

12 JUDGE RANDOLPH: Was that with the 34 Act?

13 MR. FREDA: Under the 34 Act we could bring
14 certain cases administratively, I just can't recall which
15 class of cases. I think broker/dealers, probably. But yes,
16 we've had that discretion for a very long time.

17 JUDGE KAVANAUGH: Your point there is that the
18 merits of their constitutional arguments are weak, right?

19 MR. FREDA: Well, no.

20 JUDGE KAVANAUGH: Is that what --

21 MR. FREDA: But my point for --

22 JUDGE KAVANAUGH: Which is, I mean, it's a fair
23 point, but --

24 MR. FREDA: Yes.

25 JUDGE KAVANAUGH: -- it doesn't really --

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1 MR. FREDA: Well, back to your --

2 JUDGE KAVANAUGH: I mean, a fair point for you to
3 make, but it's not really the one before us.

4 MR. FREDA: Right. No, but my point for your
5 question was the constitutional harm under the Dodd, that
6 they're making under Dodd-Frank really is about when you're
7 bringing an AP, so anyone who would be subject to that harm
8 would be before the Commission's administrative process,
9 already.

10 JUDGE SRINIVASAN: Well, but suppose, I mean, I
11 guess I think what we're trying to do is explore if there's
12 a scenario in which *Free Enterprise* -- your argument is that
13 *Elgin* looms large, and the line of cases, and takes control,
14 and I think what we're trying to explore is is there a
15 scenario in which *Free Enterprise* takes control, and one
16 distinction would be a case in which the proceeding hasn't
17 been initiated yet, and suppose that the person, the
18 regulated party has standing under some theory, and so they
19 have a concrete enough stake in the structure of the
20 Commission that they can bring the claim, then that starts
21 to look a lot more like the one in *Free Enterprise*.

22 MR. FREDA: Again, I have a difficulty envisioning
23 such a claim, and I think it has a lot of other --

24 JUDGE SRINIVASAN: What's difficult about --

25 MR. FREDA: -- problems.

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1 JUDGE SRINIVASAN: -- envisioning the claim? Is
2 what you're saying that's what's difficult to see how
3 somebody who brought that claim would have standing to bring
4 it, is that --

5 MR. FREDA: Yes.

6 JUDGE SRINIVASAN: -- what you're saying, or is
7 your --

8 MR. FREDA: Basically, yes.

9 JUDGE SRINIVASAN: Because the claim is not that
10 difficult to envision.

11 MR. FREDA: Yes. Because no, the claim -- you're
12 absolutely right. But I think one of I think a few issues
13 that that hypothetical claim would raise is how are you
14 going to be a person that's harmed by the process if you're
15 not subject to the process?

16 JUDGE RANDOLPH: In *Free Enterprise* that wasn't a
17 problem in part --

18 MR. FREDA: Right.

19 JUDGE RANDOLPH: -- because the rules that the
20 Accounting Board would promulgate, the individuals who
21 brought the suit would be subject to them. But here the
22 rules that you promulgate, or whatever the SEC's rules are,
23 are wholly independent about how you proceed in an
24 enforcement.

25 MR. FREDA: Exactly.

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1 JUDGE RANDOLPH: Yes.

2 MR. FREDA: Yes, I couldn't have said it any
3 better.

4 JUDGE RANDOLPH: Thanks.

5 JUDGE KAVANAUGH: But I find it odd for this issue
6 to draw the line based on whether the enforcement proceeding
7 has begun, as you can probably tell from my questions. I
8 see that making a standing or ripeness argument, but for
9 this line of cases to say oh, well, you have to go through
10 the Court of Appeals route if these agencies started
11 investigating, but you can go to the District Court if the
12 Agency hasn't started investigating, strikes me as a little
13 odd.

14 MR. FREDA: I think if it's, I think if you're
15 boiling it down to just that factor yes, but I think in the
16 context of the hypothetical you were posing I think it
17 works. All of these cases have a bit of a facts and
18 circumstances application, that's why you could have the
19 same case, you know, the same standard, and yet you have
20 *Thunder Basin* and you have *Free Enterprise*, I mean, there's,
21 the devil is in the details.

22 JUDGE RANDOLPH: This issue came up with respect
23 to the NLRB years and years ago, and the Supreme Court did
24 carve out an exception for District Court review even though
25 its direct review after the NLRB issues an order, and the

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1 case was called *Leedom v. Kyne*, are you familiar with that?

2 MR. FREDA: Yes, I am.

3 JUDGE RANDOLPH: Yes.

4 MR. FREDA: But again, that was a different
5 scenario, and *Leedom* was one of the cases that, I can't
6 recall, one of our cases that distinguished it. Maybe it
7 was *Thurmer*, it was this Court in *Thurmer*. And so, you
8 know, it's, again, that's one of those that goes on the
9 other side of the ledger, but I think if you look at the
10 details and you recall the real policy reasons why the
11 Supreme Court recognized in *Thunder Basin* that preclusion --

12 JUDGE SRINIVASAN: Well, I guess one distinction,
13 if you have a, if you draw a distinction between the
14 situation in which the enforcement proceeding has been
15 initiated, and one in which it hasn't, and you assume that
16 the party in the latter situation does have standing, then
17 one distinction is the one that was identified by the
18 Supreme Court in *Free Enterprise* because that, we don't have
19 the strange situation in which somebody has to affirmatively
20 incur a sanction in order to create. Now, I suppose
21 somebody could take the position well, that was one thing
22 that they noticed, but that wasn't the be-all, end-all, and
23 there were other considerations that led to the decision in
24 *Free Enterprise*, too. But as to at least that observation
25 there is a material distinction between the scenario in

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1 which a proceeding has been initiated and one in which it
2 hasn't.

3 MR. FREDA: Again, I couldn't agree more. I think
4 we view, I mean, it's hard not to view *Free Enterprise* as to
5 the, you know, the *Bet the Farm* case, I mean, that's the
6 classic language from it. Interestingly, I think --

7 JUDGE KAVANAUGH: What about *McNary* and *Mathews v.*
8 *Eldridge*?

9 MR. FREDA: Well, I mean, *McNary* and *Mathews* they
10 don't have, what you have there --

11 JUDGE KAVANAUGH: Those -- yes.

12 MR. FREDA: -- is -- I'm sorry.

13 JUDGE KAVANAUGH: Go ahead.

14 MR. FREDA: What you have there, and what this
15 Court has said, particularly regarding *McNary*, is the
16 touchstone is lack of meaningful judicial review, and so, in
17 *McNary* the Court said they weren't going to, I mean, the
18 statute only allowed for review from deportation
19 proceedings, and it was on a very limited record, I think it
20 was like four categories of documents, and so by statute you
21 weren't, the Court found there was really no meaningful
22 avenue to bring the Petitioner's claim in that case. But
23 that's a far cry from what we have here where all Mr.
24 Jarquesy need do is litigate his case to its completion, and
25 if aggrieved bring his claims to this Court.

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1 JUDGE KAVANAUGH: And *Mathews*?

2 MR. FREDA: *Mathews*, I mean, you don't have the
3 dire circumstances, and the real constitutional harm that is
4 being, you're being subjected to by going through the
5 process itself, so, you know, again, I think when you're
6 talking about having to submit yourself to an administrative
7 proceeding I think *Standard Oil* clearly holds that, that's
8 not something that the harm that gets you out of a process,
9 and you have clear legal relief at the end of the day here.

10 JUDGE KAVANAUGH: So, the line that seems to be
11 out there is, no, that's wrong, there is not a clear line
12 out there, but there is --

13 MR. FREDA: I think we can agree on that.

14 JUDGE KAVANAUGH: Yes. So, the question here,
15 though, as I approach it, and maybe this is the wrong way to
16 approach it, is constitutional challenges to the statute
17 that you could bring the day after the statute was passed,
18 or the day that, the hour after the statute has passed, and
19 those kinds of challenges to the statute that don't depend
20 on future application, and it does seem like you have cases
21 like *Free Enterprise Fund*, *Johnson*, *Mathews* that allow those
22 kinds of cases to be brought, and then you do have, though,
23 I think, on your side *Elgin* and *Thunder Basin*, you know,
24 *Elgin* is very tied up with the Civil Service rules, you
25 know, that's one, I'm not saying that's a principled

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1 distinction, but that's certainly one issue that's going on
2 in that case, and again, maybe that's an observation, not a
3 principle, but that was going on in that case. I'm just not
4 sure how to draw the line, really unsure how to draw the
5 line, and I'm really unsure about the broader issue of just
6 a constitutional challenge to a statute, that you have a
7 statute has passed, you're going to be regulated under that
8 statute, and to tell that person well, we'll see you in
9 three years after you go through the administrative process
10 seems in tension with some of these cases, and some of the
11 principles we have about constitutional adjudication.

12 MR. FREDA: Well, but again, I think the line
13 where it can be drawn it falls on our side of the ledger, we
14 are applying what appears to me to be *Elgin*, or *Thunder*
15 *Basin*, or a mix of the two, I mean, you have essentially not
16 a pre-enforcement, but an actual proceeding being initiated
17 and litigated, and these claims all arise out of it.

18 JUDGE KAVANAUGH: They're not trying to stop the
19 proceeding, by the way, that was the point of my questions
20 to them.

21 MR. FREDA: Well, that's good news.

22 JUDGE KAVANAUGH: I mean, one of your concerns
23 would be it's going to really slow us down --

24 MR. FREDA: Right.

25 JUDGE KAVANAUGH: -- but the answer is it won't

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1 slow you down unless they're actually successful, and if
2 they're actually successful you should be slowed down,
3 because that means you're operating in an unconstitutional
4 statute.

5 MR. FREDA: Right. Well, that's true, I mean, if
6 that were going about four steps forward I think that's
7 true.

8 JUDGE KAVANAUGH: Just two. Yes.

9 MR. FREDA: Two?

10 JUDGE KAVANAUGH: Yes.

11 MR. FREDA: All right. So, if -- but as you can
12 recognize, I mean, that's exactly what this Court said in
13 *Track* that you want to avoid, the circumstance in which you
14 have duplicative proceedings, and you have arguments about
15 what, you know, when threshold issues need to be decided and
16 really can be disposed of in the proceeding itself.

17 JUDGE RANDOLPH: So, your point is that if there's
18 a proceeding ongoing then the District Court doesn't have
19 jurisdiction to consider whether that proceeding should be
20 enjoined?

21 MR. FREDA: I don't know if I would say it so
22 distinctly, I think there are a lot of factors that are
23 involved, but so long as the issue is involved the claims
24 can be determined in that proceeding.

25 JUDGE RANDOLPH: So, if the SEC started an

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1 enforcement proceeding on the basis that a particular
2 company was violating EPA regulations, could you go into
3 District Court and enjoin that proceeding?

4 MR. FREDA: I mean, I would have to have more
5 information regarding the proceeding. Is it assuming that
6 we have the same sort of exclusive review scheme --

7 JUDGE RANDOLPH: Over which the --

8 MR. FREDA: -- that we have here?

9 JUDGE RANDOLPH: -- the SEC has no authority
10 whatsoever.

11 MR. FREDA: Oh.

12 JUDGE RANDOLPH: I don't think you have authority
13 over EPA.

14 MR. FREDA: No. No, no, no. Right. I missed
15 that step. Okay.

16 JUDGE RANDOLPH: That's the crucial step.

17 MR. FREDA: Right. Yes. No, that, well, in that
18 case there is really no, I think it's fair to concede that
19 if we were bringing a case that was arguing, that was
20 alleging EPA violations --

21 JUDGE RANDOLPH: Yes.

22 MR. FREDA: -- that it probably would not be
23 something that can achieve meaningful review through our
24 process.

25 JUDGE RANDOLPH: Even though after the proceeding

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1 ended and you tried to impose fines the Court of Appeals
2 could take care of the case.

3 MR. FREDA: I think so, yes. I think I feel
4 pretty comfortable saying okay with that one.

5 JUDGE SRINIVASAN: Why? I'm not sure what the
6 distinction is, because you have --

7 MR. FREDA: Well, because I think -- I don't think
8 there -- because it's a two step process in this, the
9 *Thunder Basin* analysis, I mean, the first one is fairly
10 discernible whether or not Congress has enacted a scheme,
11 right? Well, under even Judge Randolph's example we still
12 have a statutory review scheme in place, but the thing is
13 that claim falls outside of it because --

14 JUDGE SRINIVASAN: But presumably the SEC would
15 have asserted that it falls within, I mean, they bring a
16 proceeding that says we're trying to enforce the following
17 statute, and it turns out when you look at the SEC's, the
18 document --

19 MR. FREDA: Right.

20 JUDGE SRINIVASAN: -- is it AP, or whatever you
21 call the document, it turns out that everything that's being
22 sought to be enforced is an EPA regulation. So, in theory
23 you would have judicial review at the end of the day that
24 would say that's interesting that you thought that, but --

25 MR. FREDA: Yes.

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1 JUDGE SRINIVASAN: -- you look at this and you
2 just, it's not within your purview, and this whole
3 proceeding should never have been brought.

4 MR. FREDA: Right. Yes, I guess within, I guess I
5 got a little tripped up by this typo because it's a little
6 far afield. But I think you're right, you could have
7 judicial review at the end of the day of that, I just
8 can't --

9 JUDGE SRINIVASAN: Right.

10 MR. FREDA: -- envision us bringing such a case.

11 JUDGE KAVANAUGH: Can I ask, this may be
12 repetitive, but I want to try this --

13 MR. FREDA: Sure.

14 JUDGE KAVANAUGH: -- which is if the
15 constitutional harm is the proceeding itself, being
16 subjected to the proceeding itself, there's no way to get
17 that review if you actually prevail in the proceeding, and
18 you might respond well, if you prevail in the proceeding you
19 haven't really been harmed, but that ignores, you know,
20 hundreds of thousands of dollars in legal fees, et cetera,
21 that would come from defending yourself in the proceeding.
22 What --

23 MR. FREDA: Okay.

24 JUDGE KAVANAUGH: -- are we supposed to do with
25 that scenario?

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1 MR. FREDA: Well, the Court said in *Standard Oil*
2 that that is not constitutional harm, and so therefore you
3 have to subject yourself to the proceeding. And again, I
4 think --

5 JUDGE KAVANAUGH: The Court said in a lot of other
6 cases, though, and I mean, this is getting really far
7 afield, but cases like *Sackett* (phonetic sp.) and the like
8 that you, that's a troubling scenario.

9 MR. FREDA: Yes, I think it was *Deaver v. Seymour*
10 said, you know, it's the cost of living in a democracy, a --

11 JUDGE KAVANAUGH: Well, that's a criminal --

12 MR. FREDA: -- constitutional democracy.

13 JUDGE KAVANAUGH: -- that's -- yes.

14 MR. FREDA: Yes, I mean --

15 JUDGE KAVANAUGH: Criminal context.

16 MR. FREDA: -- what there -- well, but think about
17 it --

18 JUDGE KAVANAUGH: I know, that's worse --

19 MR. FREDA: -- it's worse in some ways.

20 JUDGE KAVANAUGH: -- in some -- yes.

21 MR. FREDA: Right. I mean --

22 JUDGE KAVANAUGH: Yes.

23 MR. FREDA: -- you were not able to bring your
24 claim to challenge the appointment of the prosecutor in that
25 case --

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1 JUDGE KAVANAUGH: Right.

2 MR. FREDA: -- and the Court said, you know, there
3 is -- and interestingly it has, it goes through some of the
4 same policy rationales that the Court adopted in *Thunder*
5 *Basin*, the notion that when Congress passed the Rules of
6 Criminal Procedure giving Defendants only a limited right to
7 bring interlocutory review favoring final orders, final
8 judgments, that that's very similar to what you have when
9 you look at the, you know, fairly discernible from the
10 statutory scheme whether the intent of Congress is to have
11 an exclusive statutory review scheme.

12 JUDGE RANDOLPH: Could you get, you could -- I
13 mean, if the SEC goes off the deep end could you get
14 attorney's fees under *Egypt*?

15 MR. FREDA: It's a possibility, yes.

16 JUDGE RANDOLPH: Yes.

17 MR. FREDA: Yes.

18 JUDGE RANDOLPH: So, if it's really egregious then
19 the likelihood of recovering for the expense, at least part
20 of it anyway, is increased.

21 MR. FREDA: That's true. That's absolutely right.
22 If the panel has nothing further.

23 JUDGE KAVANAUGH: Thank you.

24 MR. FREDA: All right. Thank you.

25 ORAL ARGUMENT OF S. MICHAEL MCCOLLOCH, ESQ.

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1 ON BEHALF OF THE APPELLANTS

2 MR. MCCOLLOCH: Your Honors, I think I want to
3 come back, if I could, briefly, to addressing, or sort of
4 responding to the whole colloquy about all of these subject
5 matter jurisdiction cases. There are several reasons for
6 this Court, I mean, back to *Track*, and All Writs Act, we are
7 where we are, this is here now before this Court properly,
8 the, Jarquesy's rights are being denied every day as he's
9 being subjected to this, it's not just the money, there's a
10 whole lot of other reasons applied, there's significant
11 constitutional harm, and there's D.C. Circuit case law that
12 discusses the continuing harm of a constitutional
13 deprivation. If Jarquesy wins at the Commission, or loses,
14 either way this Court will then lose the ability, or may
15 lose the ability to entertain its claims for injunctive
16 relief, he's trying to stop the proceeding from proceeding
17 to a final order.

18 JUDGE RANDOLPH: May I ask you, the, is it a
19 bifurcated proceeding with respect to first of all the
20 violation of the SEC's rules, that's number one; and number
21 two, what the remedy should be? Or is it a combined
22 proceeding together?

23 MR. MCCOLLOCH: It's all a combined proceeding.

24 JUDGE RANDOLPH: And the, what was the ALJ's
25 recommendation here?

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1 MR. MCCOLLOCH: The ALJ's recommendation here, she
2 entered a 30-some page initial decision --

3 JUDGE RANDOLPH: And that was in October?

4 MR. MCCOLLOCH: It was in about, it was in
5 October, I think so. Yes, Your Honor. And she imposed a
6 disgorgement of over a million dollars, and then penalties
7 of \$450,000, which is a tiny, tiny fraction of what the
8 Division of Enforcement had sought. The Division of
9 Enforcement is seeking at this point about \$80 million in
10 punishment.

11 JUDGE RANDOLPH: Did the ALJ impose a lifetime, or
12 recommend a lifetime bar?

13 MR. MCCOLLOCH: Yes. Yes.

14 JUDGE RANDOLPH: Yes. Okay.

15 MR. MCCOLLOCH: Yes. And so, he's barred for
16 life, if that's upheld by the Commission, and virtually all
17 of these are, and for purposes of even the Seventh Amendment
18 argument it's useful to understand that the losses to the
19 investors in the wake of the financial meltdown, '07/'08,
20 was about \$15 million, and they're requesting \$80 million,
21 so it's clearly all about punishment. The interesting
22 exchange about criminals worse, and going through a criminal
23 proceeding is worse, you could actually argue here with an
24 \$80 million hit, which Mr. Jarkey of course doesn't have,
25 he's an ordinary guy, you know, you could debate what's

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1 worse, but this is clearly at least quasi-criminal in nature
2 because it's all about punishment, and that's what the
3 Seventh Amendment cases go to, it's all about the nature of
4 the relief, and all the way back to 1830 in the *Parsons*
5 case, the U.S. Supreme Court said the focus for Seventh
6 Amendment rights hinges on the nature of the relief sought,
7 and then in *Tull* the Supreme Court ruled that when they were
8 looking for, the Government's looking for \$22 million in
9 penalties for Clean Water Act violations because they had
10 these multipliers, just like we have here, then there's an
11 absolute right to a jury trial. And in *Granfinanciera* the
12 Court --

13 JUDGE RANDOLPH: I'm thinking back, and I may be
14 wrong about this, but I thought there were, there's a spade
15 of cases in which there's dual investigations, one by the
16 SEC, and the other by the Department of Justice, and the
17 subjects or targets of the investigation go into Federal
18 Court and try to enjoin the SEC from proceeding until the
19 Justice Department has finished its job, but how do those
20 cases fit in? I haven't looked at those cases.

21 MR. MCCOLLOCH: Well, I don't know that those
22 cases really fit into this situation because we don't have
23 that here, there was no criminal prosecution of Mr. Jarkesy,
24 so we didn't have a parallel proceeding going on.

25 JUDGE RANDOLPH: But do the District Courts in

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1 those situations, you know, I'm assuming there are cases,
2 you know, do the District Courts say well, we can't do that,
3 we don't have jurisdiction?

4 MR. MCCOLLOCH: District Courts can, District
5 Courts stay civil litigation, of course, all the time if
6 it's interfering with an ongoing criminal investigation.

7 JUDGE RANDOLPH: Well, where do -- how does that
8 fit into the exclusive review proceeding in the Court of
9 Appeals?

10 MR. MCCOLLOCH: It wouldn't fit in very well at
11 all. You know, that's about all I can say about it, it
12 would fit very badly. And, you know, the Commission, the
13 SEC's position is basically with some very good answers a
14 moment ago notwithstanding, I'd respectfully submit that
15 their position essentially is that under *Thunder Basin*, *Free*
16 *Enterprise*, et cetera, that just about any attack on, any
17 lawsuit against the SEC for almost anything is precluded,
18 even things that don't relate to the actual, or occur within
19 the context, in the purview of the administrative
20 proceeding, that is the sole subject of the statutory
21 review. Statutory, as we say in, especially in our reply
22 brief, all of these cases that this Court deals with I
23 suppose all the time, from *Elgin*, *McNary*, *Thunder Basin*,
24 *Free Enterprise*, and on and on, the one thing they do teach
25 that is clear is that every claim has to be looked at

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1 individually on an ad hoc basis, and compared to the context
2 of the particular statutory review process applicable in
3 that case.

4 JUDGE RANDOLPH: You know, one of the common
5 claims, as I recall, and I am very fuzzy about this, is that
6 the target of the investigation claims that the, if the SEC
7 is allowed to proceed the only way I can defend is to waive
8 my Fifth Amendment rights. Suppose in this situation there
9 was no, though you may not be aware of a grand jury
10 investigation necessarily, but suppose there was none, no,
11 and that was your client's claim that by forcing me through
12 this administrative proceeding I can't defend myself against
13 a potential criminal investigation.

14 MR. MCCOLLOCH: And because if I, if I take the
15 Fifth it'll be used against me.

16 JUDGE RANDOLPH: Used against you. Yes.

17 MR. MCCOLLOCH: And which is another interesting
18 constitutional question is whether you're paying a price for
19 invoking a constitutional right, but that is --

20 JUDGE RANDOLPH: But your claim would --

21 MR. MCCOLLOCH: -- the settle --

22 JUDGE RANDOLPH: -- you could bring that in the
23 District Court.

24 MR. MCCOLLOCH: I believe you could bring that in
25 the District Court. There are so many things that, all of

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1 these cases on subject matter jurisdiction are pretty
2 closely restricted to their facts, and you have to look
3 really carefully what is the nature of the claim, what does
4 it arise out of, and what is the scope and nature of these
5 specific statutory review procedure that's available there.
6 And we don't think that the statutory review just because
7 you can obviously on, you could bring up just about
8 everything that has to do with the Agency and what the
9 Agency's done during or before or outside of the
10 administrative proceeding in the statutory review, but to
11 have to wait as in *Free Enterprise* to have to wait and go
12 through that process we don't believe that that's what the
13 case law stands for. As I said before, these are pure
14 questions of constitutional law, we don't need the
15 Commission's opinion, this Court doesn't need the
16 Commission's opinion or their view of the Seventh Amendment
17 and separation of powers in order to rule, like with regard
18 to the pre-judgment claim, that's just a blatant and
19 egregious pre-judgment, there's not an argument around it.
20 It's far worse than the *Cinderella Finishing School*, and
21 *Texaco* cases out of this Circuit where stray comments made
22 by a Commissioner just implicitly referring to a current
23 target of an enforcement proceeding, here they, in another
24 party's case not part of our record in this administrative
25 proceeding, ruled that Jarquesy was guilty two months before

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1 his trial, before his administrative trial. That's already
2 been up to the Commission, they've already issued their
3 opinion on that, it was thorough, it was thoroughly briefed,
4 they thoroughly rejected the claim. This Court's case law
5 makes clear that that renders the proceedings void, once the
6 proceedings are void they're void, and we think this Court
7 should stop the proceedings now. And under *Track*
8 particularly this Court has jurisdiction to do that.

9 JUDGE KAVANAUGH: Okay. Thank you very much.

10 MR. MCCOLLOCH: Thank you.

11 JUDGE KAVANAUGH: Thank both sides for their
12 arguments.

13 MR. MCCOLLOCH: Thank you, Your Honor.

14 JUDGE KAVANAUGH: The case is submitted.

15 (Whereupon, at 10:59 a.m., the proceedings were
16 concluded.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Paula Underwood

July 2, 2015

DEPOSITION SERVICES, INC.