

The SEC's Fight to Stop District Courts from Declaring Its Hearings Unconstitutional

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Can the Securities and Exchange Commission (SEC) unilaterally deny a United States citizen the right to challenge the constitutionality of the agency's administrative hearings in district court? The SEC thinks so, but it makes no sense for these constitutional challenges to be brought in the very proceeding that allegedly, and likely, violates the U.S. Constitution. The appellate courts mostly agreed with the SEC, until recently when the Fifth Circuit held that the district courts should hear these claims. Given this circuit split, this issue will soon reach the Supreme Court, making this Article extremely timely.

The Securities Exchange Act of 1934 authorized the SEC to regulate securities. More recently, Congress amended that act to give the SEC the ability to bring enforcement cases either in federal court before an Article III judge or in its in-house forum before an SEC Administrative Law Judge (ALJ). After numerous losses in federal court, the SEC moved in-house and did so aggressively. As the SEC used adjudication more frequently, entities on the receiving end of an enforcement action challenged the constitutionality of the in-house process. They sued in federal district courts around the nation, raising a variety of constitutional claims, including unlawful delegation, violation of equal protection and due process, interference with the right to a jury trial, and unconstitutional appointment and removal of SEC ALJs.

In response, the SEC argued that federal courts lacked subject matter jurisdiction to hear the claims, citing the doctrine of implied preclusion. The SEC argued that its decision to bring an in-house adjudication against an entity forecloses the federal district courts from hearing any challenges to the SEC's process, including constitutional challenges. The claims can be heard only on appeal of the agency's decision. In short, plaintiffs must endure the very harm they claim is unconstitutional before the issue can be heard in an Article III court. Not surprisingly, plaintiffs counter that they should not have to endure an unconstitutional proceeding before being able to raise their claim that the

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process is unconstitutional, especially given that no adequate remedy can be provided. You can't unscramble an egg!

Resolution of this issue is important because it addresses a fundamental question: who should resolve challenges regarding an agency's constitutionality, the federal courts or the adjudicating agency? Importantly, the SEC is not the only agency mounting this fight. Other agencies are also using the implied preclusion doctrine to prevent district courts from adjudicating their constitutionality. This Article explains the implied preclusion doctrine and why the agencies are wrong. Federal courts should determine whether the agencies' adjudicatory processes violate the Constitution, not the agencies themselves.

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I. Introduction

Imagine that you are an investment advisor trying to comply with the vast and confusing morass of federal and state securities laws. Despite your best efforts to follow the law, the Securities and Exchange Commission's (SEC or Commission) enforcement division investigates your actions after receiving a complaint from a disgruntled investor. After the investigation, the

enforcement division presents its findings to the Commission, which institutes an administrative hearing against you. An administrative law judge (ALJ), an agency employee who works for the SEC, will preside over your hearing, and the Commission will hear any appeal. The SEC will prosecute you, judge the case, and decide any appeal. You do not like the odds.

You file suit in federal court to challenge the constitutionality of the adjudicative process. The SEC moves to dismiss, arguing that the federal court has no jurisdiction to hear the claim. The SEC argues it has the exclusive power to resolve these constitutional issues and federal courts can only consider the constitutionality of the agency's structure after the SEC's adjudicative process is complete. This means that you must go through the unconstitutional process, lose on the merits, and appeal twice. Only during the second appeal can you raise the constitutional challenges in a forum that not only has the power to consider the challenges but is a far better forum for resolving them. Yet, even if you win, you win nothing; the unconstitutional hearing has already taken place. The egg cannot be unscrambled.¹

In this Article, I explain why Congress did not intend to preclude the district courts from reviewing constitutional challenges to SEC adjudications. This analysis is not limited to SEC adjudications; other agencies also adjudicate, and identical constitutional challenges have been raised regarding these adjudications as well.² This Article answers a fundamental question: Who should resolve challenges regarding the constitutionality of administrative adjudication, the federal courts or the adjudicating agency?

I proceed as follows. After this introduction, Part II provides background explaining how the SEC obtained the power to forum shop and then used that power to dramatically improve its win rate. When regulated entities, subject to in-house adjudications, challenged the constitutional legitimacy of that process in federal court, the SEC challenged the courts' power to hear these cases pursuant to the doctrine of implied preclusion. The federal district courts split on whether they had jurisdiction over these cases.³

1. *Duka v. SEC*, 103 F. Supp. 3d 382, 390, n.10 (S.D.N.Y. 2015), *abrogated by* *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016).

2. Indeed, one such case is before the Supreme Court. *Axon Enter., Inc. v. FTC*, 986 F.3d 1173, 1189 (9th Cir. 2021) (holding that the FTC Act precluded review of a corporation's constitutional claims of the FTC's structure), *cert. granted*, 142 S. Ct. 895 (2022); *see also*, *Sackett v. EPA*, 622 F.3d 1139, 1147 (9th Cir. 2010) (holding that the Clean Water Act did not allow for pre-enforcement review of compliance orders and that this bar did not violate due process), *rev'd*, 566 U.S. 120, 131 (2012) (holding that the Clean Water Act impliedly precluded review of plaintiffs' due process challenge); *Bank of La. v. FDIC*, 919 F.3d 916, 924 (5th Cir. 2019) (holding that 12 U.S.C. § 1818 precluded review of a Bank's equal protection claims); *cf.* *Carr v. Saul*, 141 S. Ct. 1352, 1362 (2021) (holding that appellants timely raised their challenge to the appointment of Social Security ALJs).

3. *See infra* note 52.

However, the appellate courts overwhelmingly sided with the SEC.⁴ The Supreme Court has yet to address this issue.

Part III explores the most significant Supreme Court cases addressing the implied preclusion doctrine to develop a framework. Spoiler alert: the Court has not provided clear direction.⁵ First, in *Abbott Laboratories v. Gardner*,⁶ the Court required “clear and convincing evidence” of legislative intent to preclude judicial review.⁷ However, because the clear and convincing standard proved difficult to meet, the Court rejected it fifteen years later. In *Block v. Community Nutrition Institute*,⁸ the Court required instead that congressional intent to preclude review be “fairly discernible in the statutory scheme.”⁹

In the ensuing four decades, *Block*’s “fairly discernible” test has endured; however, it has morphed. In *Thunder Basin Coal Co. v. Reich*,¹⁰ the Court added a second step to the test: not only must congressional intent to preclude review be fairly discernible in the statutory scheme, but meaningful judicial review must also be available.¹¹ While this two-step test persists, the relationship between the two steps is unclear. Sometimes the Court examines both steps,¹² sometimes just *Block*’s fairly discernible step,¹³ and sometimes just *Thunder Basin*’s meaningful review step.¹⁴ While the cases are not models of clarity, I end this Part with a framework for analyzing implied preclusion cases.

4. See *infra* note 54.

5. As Chief Judge Edward Carnes said during the Eleventh Circuit argument in one of these preclusion cases, “I just want the Supreme Court to tell me what they want me to do.” Ed Beeson, *11th Circ. Struggles with Challenges to SEC In-House Court*, LAW 360 (Feb. 26, 2016, 11:23 PM), <http://www.law360.com/articles/764544/11th-circ-struggles-with-challenges-to-sec-in-house-court> [https://perma.cc/2LQA-4CDC].

6. 387 U.S. 136 (1967).

7. *Id.* at 141 (drawing this standard from *Rusk v. Cort*, 369 U.S. 367, 379–80 (1962)).

8. 467 U.S. 340 (1984).

9. *Id.* at 351 (quoting *Data Processing Serv. v. Camp*, 397 U.S. 150, 157 (1970)).

10. 510 U.S. 200 (1994).

11. *Id.* at 207.

12. *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 11–12, 15–18 (2012) (analyzing both *Block*’s fairly discernible factors and the three questions, thus suggesting that a yes answer to any one of the questions would be sufficient to defeat a finding of implied preclusion).

13. *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2136 (2016) (analyzing only *Block*’s fairly discernible step and finding review impliedly precluded under that step alone); *Sackett v. EPA*, 566 U.S. 120, 128, 131 (2012) (never reaching the three questions once it concluded that review was not precluded at step one: *Block*’s fairly discernible step).

14. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 489 (2010) (“Congress does not intend to [preclude review] if ‘a finding of preclusion could foreclose all meaningful judicial review’; if the suit is ‘wholly collateral to a statute’s review provisions’; and if the claims are ‘outside the agency’s expertise.’” (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212–13 (1994))).

After providing the framework, in Part IV I explain how most of the circuit courts misapplied the doctrine. In sum, the courts largely ignored *Block's* fairly discernible step and misanalysed *Thunder Basin's* meaningful review step. They overemphasized the timing of the lawsuits (did the plaintiffs sue after the administrative proceeding was underway?) and redefined meaningful review to mean any review, meaningful or not. In short, they turned implied preclusion from an exception into the default.

In Part V, I show how these cases should have been analyzed, applying the implied preclusion framework to the above hypothetical. This Part explains why it makes no sense for claims about the constitutionality of an agency's adjudicative proceeding to be brought first in the very proceeding that allegedly, and likely, violates the Constitution.¹⁵

In Part VI, I conclude that preclusion should be an exception, not the default rule. As Justice Kagan noted, "Congress rarely intends to prevent courts from enforcing its directives to federal agencies. For that reason, this Court applies a 'strong presumption' favoring judicial review of administrative action."¹⁶ The circuit courts have largely ignored this direction, and the SEC challengers are paying the price.

Finally, I also note that these claims are likely to evade review if federal courts continue to dismiss them for lack of jurisdiction. The plaintiffs challenging the legitimacy of the SEC's adjudication have limited resources, time, and enthusiasm for mounting a challenge that will not be resolved for decades. Perhaps that is what the SEC is banking on; after all, its approach has worked so far.

II. The SEC and Forum Shopping

The Securities Exchange Act of 1934¹⁷ (Exchange Act) authorized the SEC to regulate securities. In the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (Remedies Act), Congress amended the Exchange Act by giving the SEC the ability to bring cases against those

15. See Linda D. Jellum, "You're Fired!" *Why the ALJ Multi-Track Dual Removal Provisions Violate the Constitution and Possible Fixes*, 26 GEO. MASON L. REV. 705, 708 (2019) (arguing that dual for-cause removal provisions violate the U.S. Constitution); Linda D. Jellum & Moses M. Tincher, *The Shadow of Free Enterprise: The Unconstitutionality of the Securities & Exchange Commission's Administrative Law Judges*, 70 SMU L. REV. 3, 34 (2017) (explaining why the appointment and removal of SEC ALJs violates the Appointments Clause); cf. Richard J. Pierce, Jr., *The Court Should Change the Scope of the Removal Power by Adopting a Purely Functional Approach*, 26 GEO. MASON L. REV. 657, 669 (2019) (arguing that the Court should formulate a removal test based on the officer's functions).

16. *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (quoting *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986)); see also *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896, 1902 (2022) (noting the Court's "strong presumption" in favor of judicial review of agency action (quoting *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018))).

17. The Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified at 15 U.S.C. § 78d).

licensed to practice before it in either federal court or an in-house administrative proceeding.¹⁸ In an administrative proceeding, an ALJ can order disgorgement, issue a cease and desist order, and impose a civil fine.¹⁹ Congress expanded the SEC's administrative jurisdiction in 2010 to include those entities not licensed to practice before the SEC in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).²⁰ The Dodd-Frank Act significantly expanded the SEC's power to choose its forum: an adjudication before an SEC ALJ or a civil suit in federal court before an Article III judge.²¹ After numerous losses in federal court, the SEC moved in-house and did so aggressively.²²

In 2014, the SEC had a sixty percent win rate in court and a one hundred percent win rate in-house.²³ Newspaper headlines alleged that the SEC had gained a significant home-court advantage with its new power.²⁴ Something

18. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, §§ 102, 203, 104 Stat. 931, 933, 939 (codified at 15 U.S.C. § 77h-1).

19. Securities Exchange Act of 1934, Pub. L. 73-291, § 21(d)(3), 48 Stat. 881 (codified at 15 U.S.C. § 78u); Securities Exchange Act of 1933, §§ 8A(e), 20(d)(1), 48 Stat. 74 (codified at 15 U.S.C. §§ 77h-1, 77t).

20. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929p(a), 124 Stat. 1376, 1862-63 (2010) (codified at 15 U.S.C. §§ 77h-1, 77v(a), 78t(a), 78u-2(a), 78aa, 80a-9(d)(1), 80b-3(i)(1), 80b-14) (authorizing the Commission to impose a civil penalty against any person who has violated the federal securities laws).

21. *Id.* The SEC explained its approach to making the forum choice in the following document. SEC, DIVISION OF ENFORCEMENT APPROACH TO FORUM SELECTION IN CONTESTED ACTIONS (2015), <https://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf> [<https://perma.cc/SKA8-9JRW>].

22. See David Zaring, *Enforcement Discretion at the SEC*, 94 TEXAS L. REV. 1155, 1157 (2016) (noting that after the SEC lost a number of cases against twenty-seven co-conspirators brought in federal court, it brought one of the final co-conspirator's case to an in-house ALJ); P.J. D'Annunzio, *No Violation 'Too Small' as SEC Sets Enforcement Record*, LAW.COM (Oct. 11, 2016), <https://www.law.com/2016/10/11/no-violation-too-small-as-sec-sets-enforcement-record/> [<https://perma.cc/MV3J-ASZU>] (noting that "[t]here were 868 enforcement actions this fiscal year compared with 807 in 2015 and 755 in 2014").

23. See John F. Libby & Jacqueline C. Wolff, Manatt Phelps & Phillips LLP, *Wherefore Art Thou Due Process? SEC Administrative Hearings Under Attack*, LEXOLOGY (Apr. 21, 2015), <http://www.lexology.com/library/detail.aspx?g=08473403-f528-4bbe-aafd-26631f0da66d> [<https://perma.cc/2B86-KCHP>] (observing "[t]he SEC brought a majority of its cases, or 57%, in federal court and 43% as administrative proceedings" and "[t]he SEC was successful in 11 out of the 18 federal court cases (13 of which were jury trials), and it had a success rate of nearly 100% in its administrative proceedings").

24. A Wall Street Journal article argued that from October 2010 to September 2015, the SEC's enforcement division prevailed in 86% of the proceedings it brought in-house, while it prevailed in 70% of the cases it brought in federal court. Jean Eaglesham, *Fairness of SEC Judges Is in Spotlight*, WALL ST. J. (Nov. 22, 2015, 9:25 PM), <http://www.wsj.com/articles/fairness-of-sec-judges-is-in-spotlight-1448236970> [<https://perma.cc/JV84-DE3L>]. From October 2013 to January 2015, the SEC won 219 in-house adjudications in a row. Ryan Jones, *The Fight over Home Court: An Analysis of the SEC's Increased Use of Administrative Proceedings*, 68 SMU L. REV. 507, 509 (2015). In fiscal year 2013, the SEC's enforcement division prevailed in 100% of its administrative

fishy was going on.²⁵ In 2015, Congress held hearings examining the fairness of the SEC's administrative hearings.²⁶ Undaunted by this oversight, the SEC brought a record number of enforcement actions in 2016.²⁷

As the SEC used adjudication more aggressively, entities on the receiving end of an SEC enforcement action challenged its constitutionality. They sued in federal district courts around the nation, raising a variety of constitutional claims, including unlawful delegation,²⁸ violation of equal protection and due process,²⁹ interference with the right to a jury trial,³⁰ and unconstitutional appointment and removal of ALJs.³¹

For example, in July 2014, the SEC indicated its intent to start an enforcement action against hedge fund manager Joseph Stilwell for allegedly

proceedings, while it prevailed in only 61% of the cases it brought in federal court. Nate Raymond, *U.S. Judge Criticizes SEC Use of In-House Court for Fraud Cases*, REUTERS (Nov. 5, 2014, 12:40 PM), <https://www.reuters.com/article/sec-fraud-rakoff/u-s-judge-criticizes-sec-use-of-in-house-court-for-fraud-cases-idUSL1N0SV2LN20141105> [<https://perma.cc/X3UF-ZVYU>].

25. At least one SEC Commissioner, a former SEC ALJ, and a U.S. District Court judge are reported to have raised fairness concerns about the proliferation of SEC administrative enforcement actions. *See, e.g.*, Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015, 10:30 PM), <http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803?tesla=y> [<https://perma.cc WR9L-NJ2D>] (interviewing a former SEC ALJ who believed “the system was slanted against defendants at times”). *But see generally* Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform through Removal Legislation*, 85 FORDHAM L. REV. 1143 (2016) (arguing that outside of insider trading cases, the Commission has a high and statistically indistinguishable record of success in administrative and federal court proceedings).

26. Libby & Wolff, *supra* note 23.

27. D'Annunzio, *supra* note 22 (“There were 868 enforcement actions this fiscal year compared with 807 in 2015 and 755 in 2014.”). Professor Urska Velikonja challenged the headlines, arguing that the news agencies used the SEC statistics inaccurately. *See generally* Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901 (2016) (noting that the SEC's metrics are deeply flawed and suggesting that the performance indicators would be more reliable if they were outsourced and not developed by the SEC). She concluded that the SEC was no more likely to prevail in an administrative forum than in court. *Id.* at 976. But Professor David Zaring disagreed. Using an empirical approach, he concluded that “[i]n fiscal year 2014, the SEC won every administrative case that went to a judgment, including all fourteen cases that went to trial. The SEC has not been uniformly successful, however, comprehensively losing cases in the administrative forum in 2011, three times in 2013, and once in 2015.” Zaring, *supra* note 22, at 1176.

28. *E.g.*, Hill v. SEC, 114 F. Supp. 3d 1297 (N.D. Ga. 2015), *vacated*, 825 F.3d 1236 (11th Cir. 2016).

29. *E.g.*, Bebo v. SEC, No. 15-C-3, 2015 WL 905349, at *2 (E.D. Wis. Mar. 3, 2015), *aff'd*, 799 F.3d 765, 768 (7th Cir. 2015); *see also* Chau v. SEC, 72 F. Supp. 3d 417, 420 (S.D.N.Y. 2014); Gupta v. SEC, 796 F. Supp. 2d 503, 514 (S.D.N.Y. 2011).

30. *E.g.*, Hill v. SEC, 114 F. Supp. 3d 1297 (N.D. Ga. 2015), *vacated*, 825 F.3d 1236 (11th Cir. 2016).

31. *See, e.g.*, Gray Fin. Grp., Inc. v. SEC, 166 F. Supp. 3d 1335 (N.D. Ga. 2015), *vacated*, Hill v. SEC, 825 F.3d 1236 (11th Cir. 2016); Complaint for Declaratory and Injunctive Relief and Demand for Jury Trial at 13–14, Stilwell v. SEC, No. 14-cv-7931 (S.D.N.Y. Oct. 1, 2014); Bebo v. SEC, No. 15-C-3, 2015 WL 905349, at *1 (E.D. Wis. Mar. 3, 2015), *aff'd*, 799 F.3d 765, 768 (7th Cir. 2015); Jarkesy v. SEC, 48 F. Supp. 3d (D.D.C. 2014), *aff'd*, 803 F.3d 9 (D.C. Cir. 2015). *See* Zaring, *supra* note 22, at 1190 (alleging that the constitutional claims lack merit).

failing to disclose loans in violation of antifraud provisions in the Advisers Act.³² In response to the Wells notice,³³ Stilwell's attorneys filed a complaint in federal district court seeking a declaration that the SEC's ALJs were unconstitutional because they were subject to dual for-cause removal protections.³⁴ The Supreme Court has yet to resolve this constitutional challenge, although I have argued elsewhere that the claim will be successful.³⁵ The SEC ultimately settled with Stilwell before the court could resolve the constitutional challenge. Others quickly picked up and expanded upon Stilwell's constitutional challenges.³⁶

One such person was Lynn Tilton. On March 30, 2015, the SEC issued an order instituting administrative proceedings against her and her

32. Jonathan Stempel, *Activist Investor Stilwell Sues SEC to Stop Enforcement Case*, REUTERS (Oct. 1, 2014, 1:52 PM), <https://www.reuters.com/article/sec-stilwell/activist-investor-stilwell-sues-sec-to-stop-enforcement-case-idUKL2N0RW1O020141001> [<https://perma.cc/425Z-5T8B>]; Joe Palazzolo, *SEC Looking into Loans Made Between Stilwell Funds*, WALL ST. J. (Aug. 15, 2014, 6:41 PM), <http://www.wsj.com/articles/sec-looking-into-loans-made-between-stilwell-funds-1408141969> [<https://perma.cc/459V-4D39>].

33. If the SEC makes a preliminary decision to bring an enforcement action, it may elect to provide the person or firm with a Wells notice. The person or firm can make a voluntary submission in response, explaining why the enforcement action should not be brought. *Investor Bulletin: SEC Investigations*, U.S. SEC. & EXCH. COMM'N (Oct. 22, 2014), https://www.sec.gov/oiea/investor-alerts-bulletins/ib_investigations.html [<https://perma.cc/NE9W-U74H>].

34. Complaint for Declaratory and Injunctive Relief and Demand for Jury Trial at 13, *Stilwell v. SEC*, No. 14-CV-7931 (S.D.N.Y. Oct. 1, 2014). Dual for-cause removal provisions protect both the ALJ and employing agency head or heads from removal other than for-cause.

35. See Jellum, *supra* note 15, at 708.

36. See Complaint for Declaratory and Injunctive Relief and Demand for Jury Trial at 1, *Stilwell v. SEC*, No. 14-CV-7931 (S.D.N.Y. Oct. 1, 2014) (alleging that the SEC administrative proceedings violate Article II of the U.S. Constitution); Complaint for Declaratory and Injunctive Relief and Demand for Jury Trial at 1, *Peixoto v. SEC*, No. 14-CV-8364 (S.D.N.Y. Oct. 20, 2014) (arguing that the SEC administrative proceeding violates due process and equal protection rights); *Bebo v. SEC*, 15-C-3, 2015 WL 905349, at *1 (E.D. Wis. Mar. 3, 2015), *aff'd*, 799 F.3d 765 (7th Cir. 2015) (noting plaintiff's allegation that SEC's authority in administrative proceedings violates equal protection and due process rights); Amended Complaint for Declaratory and Injunctive Relief at 1, *Duka v. SEC*, 103 F. Supp. 3d 382 (S.D.N.Y. 2015), *abrogated by Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016) (alleging that SEC administrative proceedings violate Article II of the Constitution); Second Amended Complaint for Declaratory and Injunctive Relief and Demand for Jury Trial at 1, *Gray Fin. Grp., Inc. v. SEC*, 166 F. Supp. 3d (N.D. Ga. 2015) (same); *Tilton v. SEC*, No. 15-CV-2472, 2015 WL 4006165 (S.D.N.Y. June 30, 2015), *aff'd*, 824 F.3d 276 (2d Cir. 2016) (noting plaintiffs' argument that enforcement action before an ALJ is unconstitutional and unfair); Complaint for Declaratory and Injunctive Relief at 4, *Hill v. SEC*, 114 F. Supp. 3d 1397 (N.D. Ga. 2015), *vacated*, 825 F.3d 1236 (2016) (arguing that administrative proceeding brought by SEC was unconstitutional); Complaint for Declaratory and Injunctive Relief with Jury Demand at 1, *Spring Hill Cap. Partners, LLC v. SEC*, No. 15-CV-4542 (S.D.N.Y. June 11, 2015) (alleging that "[t]he SEC's program for administrative enforcement proceedings violates Article II of the U.S. Constitution"); Complaint for Declaratory and Injunctive Relief at 1, *Timbervest, LLC v. SEC*, No. 15-CV-02106 (N.D. Ga. June 12, 2015) (arguing that SEC administrative proceedings violate Article II of the Constitution); Complaint for Declaratory and Injunctive Relief at 3, *Ironridge Glob. IV, Ltd. v. SEC*, No. 1:15-cv-02512 (N.D. Ga. July 14, 2015) (arguing that SEC's administrative proceedings are unconstitutional).

investment firms, alleging that they breached fiduciary duties and defrauded clients.³⁷ Tilton's attorneys immediately filed a civil complaint in the Southern District of New York, seeking declaratory and injunctive relief.³⁸ The complaint alleged that the appointment of the SEC ALJs violated the Appointments Clause in the U.S. Constitution because the SEC ALJs are inferior officers who were not appointed as constitutionally required.³⁹ The complaint also argued that the dual for-cause removal protections afforded SEC ALJs were unconstitutional.⁴⁰ The trial court dismissed the complaint for lack of subject matter jurisdiction.⁴¹ The Second Circuit affirmed, and the Supreme Court denied certiorari.⁴² Consequently, Tilton had to raise her challenges regarding the constitutionality of the SEC ALJs before an SEC ALJ.⁴³ When the ALJ held that Tilton had done nothing wrong, others had to pick up the fight.⁴⁴ In a subsequent case, the Supreme Court agreed with one of Tilton's constitutional challenges and held that SEC ALJs were unconstitutionally appointed.⁴⁵

While their lawsuits raise varied constitutional challenges, these plaintiffs all share one common goal: to avoid the SEC's adjudicative process.⁴⁶ Were they to lose before the SEC, their careers would effectively

37. *In re Lynn Tilton*, Order Instituting Administrative and Cease-and-Desist Proceedings, Administrative Proceeding No. 3-16462 (Mar. 30, 2015), <http://www.sec.gov/litigation/admin/2015/ia-4053.pdf> [<https://perma.cc/2SDR-T62A>].

38. *Tilton v. SEC*, No. 15-CV-2472, 2015 WL 4006165, at *1 (S.D.N.Y. June 30, 2015), *aff'd*, 824 F.3d 276 (2d Cir. 2016).

39. *Id.* at *2.

40. *Id.*

41. *Id.* at *1.

42. *Tilton v. SEC*, 824 F.3d 276, 291 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2187 (2017).

43. *See In re Lynn Tilton*, Release No. 1182, 2017 WL 4297256, at *49 (ALJ Sept. 27, 2017) (dismissing the claims against Tilton).

44. *Id.*; *see* Alison Frankel, *Radio Host Ray Lucia Settles with SEC but War Over ALJ Removals Wears On*, REUTERS (June 17, 2020, 3:44 PM), <https://www.reuters.com/article/us-otc-alj/radio-host-ray-lucia-settles-with-sec-but-war-over-alj-removals-wears-on-idUSKBN23O3EO> [<https://perma.cc/B3W2-QBRQ>] ("At least three other defendants in administrative proceedings brought by executive branch agencies—two in SEC cases and one by the Federal Trade Commission—are still litigating [the removal issue]."). *See, e.g.*, *Gibson v. SEC*, 2019 WL 5698679, at *1 (May 8, 2019) (raising removal claim regarding SEC ALJs), *aff'd*, 795 Fed. App'x. 753 (2019), *cert. denied*, 141 S. Ct. 1125 (2021); *Fleming v. U.S. Dep't. of Agric.*, 987 F.3d 1093, 1097–98 (D.C. Cir. 2021) (refusing to reach the argument that the dual layers of for-cause removal protections for ALJs were unconstitutional because the issue was not raised in the administrative proceeding); *Axon Enter., Inc. v. FTC*, 986 F.3d 1173, 1189 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 895 (2022) (finding that the plaintiff's claim that FTC ALJs are unconstitutionally protected from removal was impliedly precluded from review); *cf. Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2020) (holding that for-cause removal restriction for a single director of the Federal Housing Finance Agency violated the Constitution); *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020) (holding that for-cause removal restriction for a single director of the CFPB violated the Constitution).

45. *See Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (holding that SEC ALJ's are "[o]fficers of the United States" and thereby subject to the Appointments Clause of the U.S. Constitution).

46. *See supra* notes 23, 28–31 and accompanying text.

be over; stays of the agency's action are not automatic during an appeal to federal court.⁴⁷ Further, when these plaintiffs request stays, the SEC often denies them.⁴⁸ Hence, these plaintiffs filed various actions in federal court to avoid the adjudicative process. In response, the SEC alleged that federal courts lacked subject matter jurisdiction to hear the claims, citing the doctrine of implied preclusion.⁴⁹ The SEC's preclusion argument was simple: the administrative proceeding, with its potential appellate review, was the exclusive forum for all challenges to the SEC's adjudication process, constitutional or otherwise.⁵⁰ In short, the SEC contended that its decision to bring an adjudication against an entity foreclosed the federal district courts from hearing any challenges to the SEC's assertion of authority until the administrative appeal, including constitutional challenges to the adjudication's legality.⁵¹

The federal district courts split on whether they had jurisdiction.⁵² In contrast, the circuits courts, with one exception,⁵³ overwhelmingly agreed with the SEC and held that Congress impliedly precluded federal court

47. 15 U.S.C. § 78y(c)(2) (“The filing of a petition under this section does not operate as a stay of the Commission’s order or rule. Until the court’s jurisdiction becomes exclusive, the Commission may stay its order or rule pending judicial review if it finds that justice so requires.”).

48. See Raymond J. Lucia Cos., Inc., Exchange Act Release No. 76241, Investment Advisors Act Release No. 4239, Investment Company Act Release No. 31880, 2015 WL 6352089, at *1 (Oct. 22, 2015) (refusing the stay request); *Jarkesy v. SEC*, 803 F.3d 9, 14 (D.C. Cir. 2015) (noting the Commission had denied a stay). Sometimes, the Court will grant the stay, even when the SEC does not. *Tilton v. SEC*, 824 F.3d 276, 281 (2d Cir. 2016) (staying SEC proceedings).

49. See, e.g., *Hill v. SEC*, 114 F. Supp. 3d 1397, 1306 (N.D. Ga. 2015) (noting that the SEC argued that Congress impliedly precluded judicial review “by allowing the SEC to make the administrative proceeding its forum choice”), *vacated*, 825 F.3d 1236 (11th Cir. 2016).

50. *Hill*, 114 F. Supp. 3d at 1305.

51. *Id.*

52. The district courts that agreed with the SEC include the following: *Tilton v. SEC*, No. 15–CV–2472, 2015 WL 4006165, at *1 (S.D.N.Y. June 30, 2015), *aff’d*, 824 F.3d 276, 279 (2d Cir. 2016); *Bebo v. SEC*, No. 15–C–3, 2015 WL 905349, at *2 (E.D. Wis. Mar. 3, 2015), *aff’d*, 799 F.3d 765, 767 (7th Cir. 2015); *Jarkesy v. SEC*, 48 F. Supp. 3d 32, 34 (D.D.C. 2014) (mem.), *aff’d*, 803 F.3d 9, 12 (D.C. Cir. 2015). The district courts that agreed with the plaintiffs include the following: *Hill v. SEC*, 114 F. Supp. 3d 1297, 1320 (N.D. Ga. 2015), *vacated*, 825 F.3d 1236, 1237–38 (11th Cir. 2016); *Gray Fin. Grp., Inc. v. SEC*, 166 F. Supp. 3d 1335, 1338, 1355 (N.D. Ga. 2015), *vacated*, *Hill v. SEC*, 825 F.3d 1236, 1237–38 (11th Cir. 2016); *Duka v. SEC*, No. 15 Civ. 357, 2015 WL 5547463, at *1, *22 (S.D.N.Y. Sept. 17, 2015), *abrogated by Tilton v. SEC*, 824 F.3d 276, 279, 283 (2d Cir. 2016); *Gupta v. SEC*, 796 F. Supp. 2d 503, 507 (S.D.N.Y. 2011).

53. *Cochran v. SEC*, 20 F.4th 194, 198 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 2707 (2022).

jurisdiction over these claims.⁵⁴ One case is now pending before the Supreme Court.⁵⁵

Unless the Supreme Court intervenes, the plaintiffs are out of luck. To challenge the constitutionality of the SEC's adjudicative process, the plaintiffs must first go through an allegedly unconstitutional hearing. There, they must ask the SEC ALJ and, if they lose, the SEC Commissioners to rule on the constitutionality of the SEC's adjudication process (guess which way both are likely to rule),⁵⁶ even though the ALJ and the SEC have no authority to rule on the constitutionality of the process.⁵⁷ Moreover, if the plaintiffs lose their hearing, they lose their ability to continue their profession unless the SEC or appellate court issues a stay.⁵⁸ Although the plaintiffs can appeal the SEC's final decision to a federal appellate court, the process may take years. Their careers may be over before the case is heard.

III. The Supreme Court's Implied Preclusion Doctrine

Pursuant to the Administrative Procedure Act (APA), courts may review final agency action "except to the extent that [the] statute[] preclude[s] judicial review . . ."⁵⁹ Congress can preclude judicial review either expressly or implicitly. Congress rarely precludes review expressly.⁶⁰

54. *Cochran v. SEC*, 969 F.3d 507, 510 (5th Cir. 2020), *rev'd en banc*, 20 F.4th 194, 198 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 2707 (2022); *Bennett v. SEC*, 844 F.3d 174, 176 (4th Cir. 2016); *Hill v. SEC*, 825 F.3d 1236, 1252 (11th Cir. 2016); *Tilton v. SEC*, 824 F.3d 276, 291 (2d Cir. 2016); *Jarkesy v. SEC*, 803 F.3d 9, 30 (D.C. Cir. 2015); *Bebo v. SEC*, 799 F.3d 765, 767 (7th Cir. 2015).

55. *Cochran v. SEC*, 969 F.3d 507, 510 (5th Cir. 2020), *rev'd en banc*, 20 F.4th 194, 198 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 2707 (2022).

56. See *Raymond J. Lucia Cos., Inc.*, Exchange Act Release No. 75837, Investment Advisers Act Release No. 4190, Investment Company Act Release No. 31806, 112 SEC. Docket 1754, at *33 (Sept. 3, 2015) (rejecting the Appointments Clause claim). More recently, the SEC rejected the argument that the dual for-cause removal provisions violate the Constitution. See *John Thomas Cap. Mgmt. Grp. LLC*, Securities Act Release No. 10834, Exchange Act Release No. 89775, Investment Advisers Act Release No. 5572, Investment Company Act Release No. 34003, 2020 WL 5291417, at *27 (Sept. 4, 2020) (rejecting removal argument).

57. "[A]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (internal citation omitted); *Malone v. Dep't of Just.*, 13 M.S.P.B. 81, 83 (1983) ("[I]t is well settled that administrative agencies are without authority to determine the constitutionality of statutes.").

58. See 15 U.S.C. § 77h-1(a) (providing the SEC with the power to impose cease and desist orders when a party is found to have violated any SEC rule or regulation); *Shelley A. Finger, Jones v. SEC: Upholding the SEC's Ability to Impose Sanctions in Addition to Those of the NASD*, 51 ADMIN. L. REV. 989, 996 (1999) ("The issuance of a cease-and-desist order is not contingent on a finding of a likelihood of future violations and is often viewed as being an attractive 'settlement vehicle' because it does not have the collateral consequences associated with injunction.").

59. 5 U.S.C. § 701(a).

60. *But see, e.g., United States v. Erika, Inc.*, 456 U.S. 201, 206-07 (1982) (holding that the Medicare statute precluded review of awards under Part B because it expressly provided for judicial review of awards under Part A).

Similarly, Congress had seldom precluded review implicitly, at least until recently.⁶¹ The Supreme Court has incrementally developed its two-step implied preclusion doctrine. This Part describes the Supreme Court cases developing the implied preclusion doctrine and ends with a framework for analyzing these cases.

A. *Abbott Labs' Clear & Convincing Test*

The first Supreme Court case to address this issue was *Abbott Laboratories v. Gardner (Abbott Labs)*.⁶² In that case, the Court developed an implied preclusion test the Court would later abandon: the “clear and convincing” test.⁶³

This case came to court because Congress had amended the Federal Food, Drug, and Cosmetic Act in 1962 to require prescription drugs manufacturers to include the generic names on drug labels.⁶⁴ The Food and Drug Administration (FDA) had proposed regulations designed to implement this act.⁶⁵ The proposed regulations would have required that the generic name of a drug be included any time the established drug name was used in marketing materials.⁶⁶ Before the proposed regulation could take effect, drug manufacturing companies and an association sued the FDA, challenging the any-time rule as beyond the FDA’s statutory authority.⁶⁷ The district court granted declaratory and injunctive relief; however, the Court of Appeals for the Third Circuit reversed, holding that pre-enforcement review was unauthorized, and therefore the suit was not within the jurisdiction of the district court.⁶⁸

The Supreme Court granted certiorari and reversed.⁶⁹ In reviewing the legality of the FDA’s regulation, the Court turned first to the question of whether judicial review was “prohibited” or precluded.⁷⁰ The Court noted that “[t]he question [should be] phrased in terms of ‘prohibition’ rather than ‘authorization’ because a survey of [the Court’s] cases show[ed] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of

61. *See infra* Part III.

62. 387 U.S. 136 (1967).

63. *Id.* at 141.

64. *Id.* at 137–38.

65. *Id.* at 138.

66. *Id.*

67. *See id.* at 138–39 (explaining how drug manufacturers “challenged the regulations on the ground that the [FDA] Commissioner exceeded his authority”).

68. *Id.* at 139.

69. *Id.* at 139, 156.

70. *Id.* at 139–40.

Congress.”⁷¹ The Court then stated that “only upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review.”⁷² To determine whether there is clear and convincing evidence, a court must ask “whether in the context of the entire legislative scheme the existence of that circumscribed remedy evinces a congressional purpose to bar agency action not within its purview from judicial review.”⁷³ As the Court noted later, “A clear command of the statute will preclude review; and such a command of the statute may be inferred from its purpose.”⁷⁴

The FDA argued that review of pre-enforcement claims was impliedly precluded because while the act expressly allowed other types of claims to be reviewed, it did not expressly allow pre-enforcement claims to be reviewed.⁷⁵ The Court rejected this *expressio unius* argument. Instead, the Court extensively reviewed the structure of the act and its legislative history, concluding “that the specific review provisions [that were included] were designed to give an additional remedy and not to cut down more traditional channels of review.”⁷⁶

Concluding, the Court held there was no preclusion and stressed that final agency action is presumptively reviewable.⁷⁷ As we will see, *Abbott Labs*’ clear and convincing test did not survive; however, its admonition—that final agency action is presumptively reviewable—has endured.⁷⁸

B. Block’s Fairly Discernible Step

Although not insurmountable,⁷⁹ *Abbott Labs*’ clear and convincing test proved too narrow. Approximately fifteen years after the Supreme Court created that test, the Court discarded it. In *Block v. Community Nutrition Institute*,⁸⁰ the Court replaced *Abbott Labs*’ clear and convincing test with a

71. *Id.* at 140 (citing *Bd. of Governors of the Fed. Rsrv. Sys. v. Agnew*, 329 U.S. 441, 444 (1947)).

72. *Id.* at 141 (quoting *Rusk v. Cort*, 369 U.S. 367, 379–80 (1962)).

73. *Id.*

74. *Barlow v. Collins*, 397 U.S. 159, 167 (1970).

75. *Abbott Labs*, 387 U.S. at 141.

76. *Id.* at 142, 144–45.

77. *See id.* at 146 (explaining that “the policy favoring judicial review [is] expressed in the Administrative Procedure Act and this Court’s decisions”).

78. *See infra* subpart III(B); *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (“Congress rarely intends to prevent courts from enforcing its directives to federal agencies. For that reason, this Court applies a ‘strong presumption’ favoring judicial review of administrative action.” (quoting *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986))).

79. *See, e.g., Johnson v. Robison*, 415 U.S. 361, 373–74 (1974) (applying *Abbott Labs*’ clear and convincing test to find that the district court had jurisdiction to hear a conscientious objector’s claims about the constitutionality of the Veterans’ Readjustment Benefits Act of 1966).

80. 467 U.S. 340 (1984).

new one: whether congressional intent to preclude review was “fairly discernible in the statutory scheme.”⁸¹

Prior to the lawsuit in *Block*, Congress had enacted the Agricultural Marketing Agreement Act of 1937 (Marketing Act) to stabilize and increase milk prices.⁸² The Marketing Act authorized the Secretary of the Department of Agriculture (Secretary) to issue milk market orders, which set the minimum prices that handlers (those who process dairy products) had to pay to dairy farmers for milk products.⁸³ Pursuant to its authority, the Secretary issued market orders under which the handlers would pay an additional payment for “reconstituted milk” (“milk manufactured by mixing milk powder with water”), which was used to make fluid milk products (rather than surplus milk products like butter, cheese, and dry milk powder).⁸⁴

Individual consumers of fluid dairy products sued the Secretary. They argued that the compensatory payment requirement made reconstituted milk more expensive.⁸⁵ The district court held that it had no jurisdiction to hear the case because Congress had impliedly precluded judicial review of the Marketing Act.⁸⁶ The court of appeals disagreed. It applied *Abbott Labs*’ clear and convincing test and concluded that the Marketing Act’s structure and purposes did not reveal the “clear and convincing evidence of congressional intent needed to overcome the presumption in favor of judicial review.”⁸⁷

The Supreme Court granted certiorari and reversed.⁸⁸ The Court indicated that the lower courts should not have looked for clear and convincing evidence; rather, the courts should have asked whether evidence of congressional intent to preclude review was “fairly discernible in the statutory scheme.”⁸⁹ The Court restated *Abbott Labs*’ presumption favoring judicial review of final agency action; however, the Court then stressed that this presumption could be overcome with “specific language or specific legislative history” showing congressional intent to preclude review.⁹⁰ The Court then suggested that it had “never applied the ‘clear and convincing

81. *Id.* at 350–51 (quoting *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970)).

82. *Id.* at 341–42.

83. *Id.*

84. *Id.* at 343.

85. *Id.* at 344.

86. *Id.*

87. *Id.* at 345 (quoting *Cnty. Nutrition Inst. v. Block*, 698 F.2d 1239, 1252 (D.C. Cir. 1983)).

88. *Id.*

89. *Id.* at 351 (quoting *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970)).

90. *Id.* at 349.

evidence' standard in the strict evidentiary sense."⁹¹ Rather, the Court explained, it "ha[d] found the [implied preclusion] standard met, and the presumption favoring judicial review overcome, whenever the congressional intent to preclude judicial review [was] 'fairly discernible in the statutory scheme.'"⁹² It is unclear where the phrase "fairly discernible in the statutory scheme" came from, but it would become iconic.⁹³

Describing its new fairly discernible test in *Block*, the Court noted that whether a particular statute precludes judicial review must be determined not only from the statute's language "but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved."⁹⁴ Applying its new test, the Court examined the statutory scheme in the Marketing Act in some detail to conclude that Congress intended to preclude review of the agency's milk market orders for consumer litigants because they were not expressly included within the Marketing Act, while producers and handlers were.⁹⁵

Just two years later, in *Bowen v. Michigan Academy of Family Physicians*,⁹⁶ the Court reaffirmed the strong presumption in favor of judicial

91. *Id.* at 350. The Court criticized the court of appeal's application of the "clear and convincing evidence" standard, suggesting that the lower court looked for "unambiguous proof, in the traditional evidentiary sense, of a congressional intent to preclude judicial review" of the specific challenges at issue. *Id.* When direct statutory language and legislative history on this issue could not be found, "the Court of Appeals found the presumption favoring judicial review to be controlling." *Id.*

92. *Id.* at 351 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970)).

93. The Court quoted an earlier case for this language. *Block*, 467 U.S. at 351 (quoting *Data Processing Serv. Orgs.*, 397 U.S. at 157). In *Data Processing*, the Court had said that "[t]here is no presumption against judicial review and in favor of administrative absolutism, unless that purpose is fairly discernible in the statutory scheme." *Data Processing Serv.*, 397 U.S. at 157 (emphasis added) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967)). Citing another case, the *Data Processing* Court had said that the presumption of reviewability could be overcome if "that purpose [was] fairly discernible in the statutory scheme." *Id.* (citing *Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297 (1943)). But that other case never used the phrase "fairly discernible in the statutory scheme." See *Switchmen's Union*, 320 U.S. at 300 (discussing the district court's power to review the National Mediation Board's action without using the phrase "fairly discernible in the statutory scheme"). In sum, the iconic phrase has unknown origins.

94. *Block*, 467 U.S. at 345. Although the Court suggested that courts should consider legislative history in making this determination, in subsequent cases, the Court refers to "text, structure, and purpose." See, e.g., *Elgin v. Dep't of Treasury*, 567 U.S. 1, 10 (2012) ("To determine whether it is 'fairly discernible' that Congress precluded district court jurisdiction over petitioners' claims, we examine the CSRA's text, structure, and purpose.").

95. *Id.* at 346–47. Although the suit also involved a nonprofit association, the Court did not make clear why its holding also applied to the association's claims. In contrast, the statute explicitly required the milk handler to proceed in the administrative forum. *Id.* at 347 (stating that "Congress unequivocally directed handlers first to complain to the Secretary that the prices set by milk market orders [were] too high").

96. 476 U.S. 667 (1986), *superseded by statute*, 42 U.S.C. § 405.

review and attempted to harmonize *Abbott Labs*' clear and convincing test with *Block*'s fairly discernible test.⁹⁷

In *Bowen*, an association of family physicians and several individual doctors sued to challenge the validity of a regulation that the Secretary of Health and Human Services (Secretary) promulgated under Part B of Medicare.⁹⁸ The regulation authorized different payment amounts for similar services.⁹⁹ Both lower courts rejected the Secretary's contention that Congress precluded judicial review of challenges to Part B of the Medicare program.¹⁰⁰

The Supreme Court granted certiorari and affirmed.¹⁰¹ The Court began by reiterating "the strong presumption that Congress intends judicial review of administrative action."¹⁰² The Court quoted from a senate committee report, written during the APA's passage, to underscore its point about the availability of judicial review:

Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.¹⁰³

The Court then recited *Abbott Labs*' clear and convincing test, noting that "[t]his standard has been invoked time and again when considering whether [an agency] has discharged 'the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [the agency's] decision.'"¹⁰⁴ Turning to *Block*, the Court acknowledged that the presumption in favor of judicial review could be overcome by evidence of congressional intent to preclude review as shown by (1) specific statutory language, (2) specific legislative history, or (3) a specific legislative

97. See *Bowen*, 476 U.S. at 670 (reaffirming the strong presumption of the availability of judicial review of administrative action while citing *Abbott Labs* and noting the presumption can be overcome).

98. *Id.* at 668 (citing 42 C.F.R. § 405.504(b) (1985)).

99. *Id.*

100. *Id.* at 669.

101. *Id.*

102. *Id.* at 670 (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967)). The Court emphasized that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Id.* (quoting *Abbott Labs*, 387 U.S. at 140).

103. *Id.* at 671 (quoting S. REP. NO. 79-752, at 26 (1945)).

104. *Id.* at 671-72 (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)).

scheme.¹⁰⁵ Applying its test, the Court rejected the government's implied preclusion argument.¹⁰⁶

After *Bowen* then, the test for implied preclusion was whether congressional intent to preclude judicial review was fairly discernible in the statutory scheme based on three factors: (1) the statutory language, (2) the legislative history, and (3) the legislative scheme. However, the test was about to get a whole lot more complicated.¹⁰⁷ In *Abbott Labs*, *Block*, and *Bowen*, the plaintiffs' only avenue to obtain judicial review was by bringing a case in district court; there was no administrative alternative. In its next case on this topic, the Court would address implied preclusion when the

105. *Id.* at 673 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984)).

106. The government had argued that specific statutory language in Part B of Medicare precluded review. *Bowen*, 476 U.S. at 673. In particular, the government had argued that because the relevant act expressly allowed certain types of claims, it implicitly precluded all other claims. *Id.* Although the Court had largely accepted a similar argument in *Block*, the Court summarily rejected it in *Bowen*, much like it had in *Abbott Labs*. The Court noted that “[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.” *Id.* at 674 (quoting *Abbott Labs*, 387 U.S. at 141). Further, the Court reasoned that neither the text nor legislative history supported the government's assertion that review was precluded. *Id.* at 676–77. In sum, the Court found it “implausible to think [that Congress] intended that there be *no* forum to adjudicate statutory and constitutional challenges to regulations promulgated by the Secretary.” *Id.* at 678 (emphasis in original).

107. Five years after *Bowen*, the Supreme Court decided *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991). In *McNary*, the Court again emphasized the presumption in favor of judicial review. *Id.* Because the case involved the contours of an express preclusion provision, none of the Justices addressed implied preclusion, but the tone of the case underscores the Court's preference for allowing judicial review rather than curtailing it.

In this case, petitioners challenged the Immigration Reform and Control Act of 1986 (Reform Act), which established an amnesty program for refugees designated as special agricultural workers (SAW). *McNary*, 498 U.S. at 483. The Reform Act expressly prohibited district court review of individual SAW determinations. *Id.* at 486.

The Haitian Refugee Center and others filed suit in the District Court for the Southern District of Florida, seeking relief on behalf of a class of refugees who would be or had been harmed by the practices the Immigration and Naturalization Service (INS) had adopted pursuant to the Reform Act to implement the SAW amnesty program. *Id.* at 487. The district court ruled that it had jurisdiction and held a number of the practices to be unconstitutional. *Id.* at 488–89. On appeal, the Eleventh Circuit affirmed. *Id.* at 489.

The Supreme Court granted certiorari on the only question raised, the jurisdictional question, and affirmed. *Id.* at 499. Writing for the majority, Justice Stevens rejected the government's argument that the express preclusion provision applied to the claim before it. *Id.* at 491–94. “Given Congress' choice of statutory language, [the Court] conclude[d] that challenges to the procedures used by INS [did] not fall within the scope of [express preclusion provision].” *Id.* at 494. Justice Stevens did not consider implied preclusion nor *Block*'s fairly discernible test. While he did mention *Bowen*, he did so primarily to underscore the Court's “well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action.” *Id.* at 496 (citing *Bowen*, 476 U.S. at 670). Justice Rehnquist, in dissent, noted that this presumption has no force where, as here, the statute was unambiguous. *McNary*, 498 U.S. at 503 (Rehnquist, C.J., dissenting). He similarly did not apply *Block*'s fairly discernible test.

plaintiffs had the ability to raise their claims before the agency first and then appeal any adverse decision to a federal appellate court.

C. *Thunder Basin's Meaningful Review Step*

Eight years after *Bowen*, the Supreme Court decided *Thunder Basin Coal Co. v. Reich*.¹⁰⁸ As it had in *Block*, the Court significantly modified its implied preclusion test. The Court added a second step, which I will call “*Thunder Basin's* meaningful review step.”

In *Thunder Basin*, a Wyoming mine operator sued the Department of Labor’s Mine Safety and Health Administration for pre-enforcement injunctive relief.¹⁰⁹ The Federal Mine Safety and Health Act (Mine Act) required the Secretary of Labor or designee to conduct periodic, unannounced health and safety inspections of mines.¹¹⁰ A regulation promulgated under this act required mine operators to post onsite information regarding the miners’ representatives for these walk-around inspections.¹¹¹ The mine operator refused to post the notice, claiming that the process violated its rights under the National Labor Relations Act (NLRA).¹¹² By letter, the agency instructed the mine operator to post the notice.¹¹³

Instead, the mine operator sued for pre-enforcement injunctive relief.¹¹⁴ The only constitutional issue raised involved timing: the mine operator “alleged that requiring it to challenge the MSHA’s interpretation of [the relevant law] through [an administrative hearing] would violate the Due Process Clause of the Fifth Amendment, since the company would be forced to choose between violating the Act and incurring possible escalating daily penalties”¹¹⁵

The district court issued an injunction, but the Court of Appeals for the Tenth Circuit reversed, holding that the Mine Act precluded district court jurisdiction of pre-enforcement challenges.¹¹⁶ The Tenth Circuit said:

‘[T]he gravamen of *Thunder Basin's* case is a dispute over an anticipated citation and penalty. . . . Operators may not avoid the Mine Act’s administrative review process simply by filing in a district court before actually receiving an anticipated citation, order, or

108. 510 U.S. 200 (1994).

109. *Id.* at 204–05.

110. *Id.* at 202–03.

111. *Id.* at 203–04.

112. *Id.* at 204–05 (arguing that the designation of a nonemployee representative “violated the principles of collective-bargaining representation under the NLRA as well as the company’s NLRA rights to exclude union organizers from its property”).

113. *Id.* at 204.

114. *Id.* at 205.

115. *Id.*

116. *Id.* at 206.

assessment of penalty.’ To hold otherwise, . . . ‘would permit preemptive strikes that could seriously hamper effective enforcement of the Act, disrupting the review scheme Congress intended.’¹¹⁷

The Supreme Court granted certiorari and affirmed, finding judicial review impliedly precluded.¹¹⁸ While doing so, the Court amended its implied preclusion test: “Whether a statute is intended to preclude initial judicial review is determined from the statute’s language, structure, and purpose, its legislative history *and whether the claims can be afforded meaningful review.*”¹¹⁹ The italicized language was new and reflected the ability of the mine operator to raise the issue in the administrative hearing and seek federal court review of the agency’s decision.¹²⁰ That option did not exist in *Abbott Labs*, *Block*, or *Bowen*.

Applying its new test, the Court turned first to *Block*’s fairly discernible step, examining the Mine Act’s text, structure, purpose, and legislative history¹²¹ to see if there was congressional intent to preclude judicial review of claims under the act.¹²² The Court reasoned that the Mine Act precluded judicial review because of the act’s “detailed structure for reviewing violations” of health or safety rules and orders and its legislative history.¹²³

117. *Id.* (quoting *Thunder Basin Coal Co. v. Martin*, 969 F.2d 970, 975 (10th Cir. 1992)).

118. *Id.* at 206, 218.

119. *Id.* at 207 (emphasis added) (first citing *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984); then citing *Bd. of Governors of the Fed. Rsrv. Sys. v. MCorp Fin., Inc.*, 502 U.S. 32 (1991); and then citing *Whitney Nat’l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965)).

120. For this step, the Court cited *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32 (1991), and *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965). *MCorp Financial* involved express, not implied, preclusion. *MCorp Financial*, 502 U.S. at 38–39 (providing that “except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order” (quoting 12 U.S.C. § 1818(i)(1))).

Whitney National focused on agency review. The Court found the claims impliedly precluded by reasoning that “where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive.” *Whitney Nat’l*, 379 U.S. at 420.

121. Justice Scalia concurred but refused to join the Court’s analysis of the legislative history. “I find that discussion unnecessary to the decision. It serves to maintain the illusion that legislative history is an important factor in this Court’s deciding of cases, as opposed to an omnipresent makeweight for decisions arrived at on other grounds.” *Thunder Basin*, 510 U.S. at 219 (Scalia, J., concurring in part). After this decision, legislative history disappeared from the analysis. *See, e.g.*, *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 10 (2012) (noting that under the fairly discernible standard, the Court will consider only the “text, structure, and purpose” of a statute to determine if Congress intended to preclude district court jurisdiction over a petitioner’s claim).

122. *Thunder Basin*, 510 U.S. at 207.

123. *Id.* The Court said:

Although . . . the Act is facially silent with respect to pre-enforcement claims . . . [t]he structure of the Mine Act . . . demonstrates that Congress intended to preclude challenges such as the present one. . . . We consider the legislative history and these

In other words, there were several provisions in the Mine Act expressly providing for judicial review of certain types of claims. However, the mine operator's claims were not expressly included. Hence, the Court reasoned that Congress intended to preclude judicial review of these claims.¹²⁴ Had it applied only *Block's* fairly discernible step, the Court would have stopped here. It continued.

After applying *Block's* fairly discernible step, the Court turned to determining whether the claims could receive "meaningful review" if district court review were precluded. "We turn to the question whether petitioner's claims are of the type Congress intended to be reviewed within this statutory structure."¹²⁵ The Court noted that it had upheld jurisdiction in the past over claims considered "wholly 'collateral' to the statute's review provisions and outside the agency's expertise, particularly where a finding of preclusion could foreclose all meaningful judicial review."¹²⁶ The Court explained that when (1) the claims were largely unrelated to the issues before the agency, (2) those issues were unconnected to the agency's area of expertise, or (3) the plaintiff would be unable to ever receive meaningful judicial review, then the appellate review provided in the administrative scheme was inadequate; in such instances, the district court should exercise jurisdiction and hear the case.¹²⁷ Consequently, the Court used two steps to determine whether a case was impliedly precluded when judicial appellate review was allowed: (1) *Block's* fairly discernible step, and (2) *Thunder Basin's* meaningful review step with its three anti-preclusion questions.

Applying its second step, the Court conflated the three questions into one: Did the agency have the expertise to review the claims?¹²⁸ The Court reasoned that the mine operator's claims "at root" required interpretation of the parties' rights and duties under a section of the Mine Act, rather than the NLRA, and so fell squarely within the agency's expertise.¹²⁹ The Court acknowledged that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies," but that rule was not categorical.¹³⁰ Importantly, the reviewing agency was not the agency that had promulgated the

amendments to be persuasive evidence that Congress intended to direct ordinary challenges under the Mine Act to a single review process.

Thunder Basin, 510 U.S. at 208, 211.

124. For the first time, the *expressio unius* argument—that the inclusion of some review provisions precluded judicial review for others—convinced the Court.

125. *Thunder Basin*, 510 U.S. at 212.

126. *Id.* at 212–13 (citations omitted) (quoting *Heckler v. Ringer*, 466 U.S. 602, 618 (1984)).

127. *Id.*

128. *Id.* at 212–16.

129. *Id.* at 214.

130. *Id.* at 215 (quoting *Johnson v. Robison*, 415 U.S. 361, 368 (1974)).

regulation.¹³¹ Further, the reviewing agency had resolved constitutional issues before, and the claims could also be reviewed during any administrative appeal.¹³² Hence, the meaningful review step was satisfied.¹³³

In summary, in *Thunder Basin* the Court added a new step to its implied preclusion test. Not only must the congressional intent to preclude review be fairly discernable in the statutory scheme, but meaningful review must also be available. Meaningful judicial review is available when (1) the administrative scheme offers meaningful judicial review, (2) the claim is not wholly collateral to the issues raised in the administrative hearing, and (3) the claim is within the agency's expertise to resolve. Whether these three items were factors or elements was uncertain.

D. *One Giant Step Forward*

Sixteen years later, the Supreme Court decided *Free Enterprise Fund v. Public Co. Accounting Oversight Board*.¹³⁴ In that case, the Court held that the Sarbanes-Oxley Act¹³⁵ did not preclude federal courts from reviewing constitutional challenges to the composition of the Public Company Accounting Oversight Board (Board).¹³⁶ The Court did not discuss *Block's* fairly discernible step, focusing only on *Thunder Basin's* meaningful review step and its three anti-preclusion questions. The Court's analysis was threadbare.

The case came to the Court after Congress created the Board in the Sarbanes-Oxley Act of 2002¹³⁷ as part of series of accounting reforms.¹³⁸ The Board was comprised of five members whom the Commissioners appointed.¹³⁹ Congress gave the Board extensive power over accounting firms.¹⁴⁰

The Board had inspected the plaintiff accounting firm, had released a report critical of the plaintiff's auditing procedures, and had initiated a formal

131. *Id.* at 212, 215.

132. *Id.* at 215.

133. *Id.* at 216; *see also* *Armstrong Coal Co., Inc. v. U.S. Dep't of Labor*, 927 F. Supp. 2d 457, 461 (W.D. Ky. 2013) ("Under the Mine Act, Congress adopted a 'split-enforcement' regime where issues of policy and enforcement are delegated to the Secretary of Labor and issues of adjudication are addressed by an independent review body known as the Federal Mine Safety and Health Review Commission . . .").

134. 561 U.S. 477 (2010).

135. Specifically, 15 U.S.C. § 78y.

136. *Free Enter. Fund*, 561 U.S. at 491.

137. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.A.).

138. *Free Enter. Fund*, 561 U.S. at 484, 489.

139. *Id.* at 484.

140. *Id.* at 485.

investigation.¹⁴¹ Anticipating it would be subject to an enforcement action, the plaintiff (together with a nonprofit organization) anticipatorily sued in federal court seeking a declaratory judgment that the Board was unconstitutional.¹⁴² The plaintiff argued that the Sarbanes-Oxley Act violated the separation of powers by conferring executive power on the Board members without subjecting them to presidential control.¹⁴³ Control was absent because the Board members were insulated from removal by two layers of tenure protection: the Commission could only remove the Board members “for good cause shown,” and the president could only remove the Commissioners for good cause.¹⁴⁴

The United States intervened to defend the Act, arguing that federal court jurisdiction was impliedly precluded.¹⁴⁵ The district court disagreed, finding it had jurisdiction, but granted the Board’s motion for summary judgment on the merits.¹⁴⁶ The court of appeals affirmed.¹⁴⁷

The Supreme Court granted certiorari. It affirmed the jurisdictional holding but reversed on the merits.¹⁴⁸ Writing for the majority, Chief Justice Roberts described the Court’s implied preclusion test accurately, noting both steps.¹⁴⁹ But when applying the test, he entirely ignored *Block*’s fairly

141. *Id.* at 487.

142. *Id.* at 487–88. While the government challenged standing initially, it did not pursue this challenge. *See* *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, No. 06-0217, 2007 WL 891675 at *3 (D.D.C. Mar. 21, 2007) (noting that defendants conceded standing for some plaintiffs and rejecting remaining standing arguments).

143. *Free Enter. Fund*, 561 U.S. at 487–88.

144. *Id.* at 486–87 (citing 15 U.S.C. § 7211(e)(6)). Oddly, the Court simply accepted the parties’ stipulation as to the SEC Commissioners’ protection from at-will removal. *Id.* at 487. The statute is silent on this issue. *Cf.* 15 U.S.C. § 78d (establishing the SEC and setting limitations on Commissioners but not specifying tenure prosecutions for Commissioners).

145. *Free Enter. Fund*, 561 U.S. at 488–90.

146. *Id.* at 488.

147. *Id.*

148. *Id.* at 488, 491–92.

149. He described the test as follows:

Provisions for agency review do not restrict judicial review unless the “statutory scheme” displays a “fairly discernible” intent to limit jurisdiction, and the claims at issue “are of the type Congress intended to be reviewed within th[e] statutory structure.” *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212 (1994) (internal quotation marks omitted). Generally, when Congress creates procedures “designed to permit agency expertise to be brought to bear on particular problems,” those procedures “are to be exclusive.” *Whitney Nat. Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965). But we presume that Congress does not intend to limit jurisdiction if “a finding of preclusion could foreclose all meaningful judicial review”; if the suit is “wholly collateral to a statute’s review provisions”; and if the claims are “outside the agency’s expertise.” *Thunder Basin*, [510 U.S.] at 212–213, (internal quotation marks omitted). These considerations point against any limitation on review here.

Free Enter. Fund, 561 U.S. at 489–90.

discernable step and analyzed only *Thunder Basin*'s meaningful review step.¹⁵⁰ In *Thunder Basin*, the Court had analyzed the meaningful review step separately from *Block*'s fairly discernible step, implying the two steps were serial.¹⁵¹ But Chief Justice Roberts conflated the analysis into one step, merely mentioning *Block*'s fairly discernible step. It is not clear why the Chief Justice did not apply *Block*'s fairly discernible step; perhaps he believed review would be precluded under it.

Applying *Thunder Basin*'s meaningful review step, Chief Justice Roberts serially examined each of the three anti-preclusion questions.¹⁵² First, for the meaningful review question, he reasoned that the plaintiff could not receive meaningful review because the Sarbanes-Oxley Act limited judicial review to review of *Commission* actions.¹⁵³ Here, the plaintiff challenged the Board's existence, not any action either the Board or the Commission had taken.¹⁵⁴ Because the plaintiff had not yet been notified that it would be subject to an enforcement action, it had no *Commission action* to challenge.¹⁵⁵ While the SEC had argued that the plaintiff could have violated a rule to invite a Commission sanction and thereby trigger a Commission action, Chief Justice Roberts stated very definitively that plaintiff need not "bet the farm" to seek judicial review of its claim.¹⁵⁶ Further, he noted that requiring the plaintiffs to select a Board rule to challenge at random would be an odd procedure for Congress to choose for meaningful review.¹⁵⁷ Hence, because the plaintiff was unable to seek any judicial review in the administrative forum, review was not meaningful.

Second, for the wholly collateral question, the Chief Justice reasoned that "petitioner[] object[s] to the Board's existence, not to any of its auditing standards. Petitioner[']s general challenge to the Board is 'collateral' to any Commission orders or rules from which review might be sought."¹⁵⁸ Thus, the claim was wholly collateral because the plaintiff did not challenge an order or rule; it challenged the constitutionality of the agency.

150. *See id.* at 490–91 (analyzing substantively only the meaningful review step and concluding that jurisdiction was not precluded).

151. *See Thunder Basin*, 510 U.S. at 207–09, 212–15 (analyzing fairly discernible step and meaningful review step separately).

152. *Free Enter. Fund*, 561 U.S. at 489–91.

153. *Id.* at 490.

154. *Id.*

155. *Id.*

156. *Id.* at 490–91 (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007)) ("We normally do not require plaintiffs to 'bet the farm . . . by taking the violative action' before 'testing the validity of the law,' and we do not consider this a 'meaningful' avenue of relief." (citations omitted) (first quoting *MedImmune*, 549 U.S. at 129; and then *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212 (1994))).

157. *Id.* at 490.

158. *Id.*

Third, for the agency expertise question, Justice Roberts said, “Petitioner[’s] constitutional claims are also outside the Commission’s competence and expertise. . . . [T]he statutory questions involved do not require ‘technical considerations of [agency] policy.’ They are instead standard questions of administrative law, which the courts are at no disadvantage in answering.”¹⁵⁹ Justice Roberts quickly distinguished *Thunder Basin*, noting that the claims at issue in that case were statutory and arose under the specific act being challenged, the Mine Act; thus, the claims fell squarely within the reviewing agency’s expertise.¹⁶⁰

In sum, in *Free Enterprise*, the Chief Justice skipped *Block*’s fairly discernible step, implying either that judicial review was precluded under that step or that both steps must show congressional intent to preclude review. He applied *Thunder Basin*’s meaningful review step, analyzing each of the three anti-preclusion questions separately but in summary fashion. Pursuant to this approach, a finding at either step (and also on any anti-preclusion question) that review should not be precluded would mean that the district court has jurisdiction to hear the claim.

In its next case to address this issue, the Supreme Court applied this same approach, viewing each step as sufficient to end the inquiry. In *Sackett v. EPA*,¹⁶¹ the Court similarly focused on only one step. While in *Free Enterprise* the Court had focused only on *Thunder Basin*’s meaningful review step, in *Sackett*, the Court focused only on *Block*’s fairly discernible step. The *Sackett* Court ignored *Thunder Basin*’s meaningful review step and held, as it had in *Free Enterprise*, that review was not precluded.¹⁶²

In *Sackett*, landowners had received a compliance order from the Environmental Protection Agency (EPA).¹⁶³ In the order, the EPA had claimed the landowners illegally filled about half an acre of their property with dirt and rock to build house.¹⁶⁴ The EPA had argued that the Clean Water Act (CWA) protected the land from being filled and the Sacketts’ action violated that act. The compliance order was not appealable; either the Sacketts voluntarily complied with it, or the EPA had to bring a subsequent enforcement action in federal court.¹⁶⁵

159. *Id.* at 491 (quoting *Johnson v. Robison*, 415 U.S. 361, 373 (1974)).

160. *Id.* His comparison is not entirely correct. The plaintiff in *Thunder Basin* had argued a constitutional due process claim related to the delay of having its claim heard, but the remaining claims did arise under the Mine Act. *Thunder Basin*, 510 U.S. at 205.

161. 566 U.S. 120 (2012).

162. *Id.* at 128–31.

163. *Id.* at 124.

164. *Id.*

165. *Id.* at 123.

The Sacketts, who did not wish to voluntarily comply with the order, sued in the United States District Court for the District of Idaho seeking injunctive and declaratory relief.¹⁶⁶ They contended that the order was arbitrary and capricious, and deprived them of due process in violation of the Fifth Amendment because no hearing was provided before the order issued.¹⁶⁷ The district court dismissed the case, holding that judicial review was impliedly precluded.¹⁶⁸ The landowners appealed, and the United States Court of Appeals for the Ninth Circuit affirmed.¹⁶⁹

The Supreme Court granted certiorari to determine whether the dispute could be brought in federal court and reversed.¹⁷⁰ Writing for the majority, Justice Scalia first reiterated that the APA “creates a ‘presumption favoring judicial review of administrative action,’ but as with most presumptions, this one ‘may be overcome by inferences of intent drawn from the statutory scheme as a whole.’”¹⁷¹ He then described half of the implied preclusion test, quoting *Block* but failing to mention *Thunder Basin*.¹⁷²

Applying *Block*'s fairly discernible test, Justice Scalia rejected the government's arguments that review was precluded based on the CWA's

166. *Id.* at 125.

167. *Sackett v. EPA*, 622 F.3d 1139, 1141 (9th Cir. 2010), *rev'd*, 566 U.S. 120 (2012).

168. *Sackett*, 566 U.S. at 125.

169. *Id.*

170. *Id.* at 125, 131.

171. *Id.* at 128 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984)).

172. *Id.*

text,¹⁷³ structure,¹⁷⁴ and purpose.¹⁷⁵ He never analyzed *Thunder Basin*'s meaningful review step nor its three anti-preclusion questions. It is unclear why he ignored *Thunder Basin*'s meaningful review step. This analysis was unnecessary because analysis of *Block*'s fairly discernible step yielded a "no" to the implied preclusion question. Hence, the Court's approaches in both *Free Enterprise* and *Sackett* suggest that review should be precluded only when Congress intended to preclude review *and* when meaningful review is available.

The implied preclusion test was becoming clear: a court could examine either *Block*'s fairly discernible step or *Thunder Basin*'s meaningful review step to determine whether review should be precluded. Given the strong

173. The government argued that because the text of the CWA expressly granted the EPA the choice of whether to proceed by informal adjudication or by civil action, allowing the landowners to proceed judicially would "undermine" the CWA's choice of forum. *Id.* at 128. Note this same issue arises with Sarbanes-Oxley: the SEC, not the regulated entity, has the choice of which forum to use, although the SEC's adjudication is subsequently reviewable, unlike the EPA's order. Justice Scalia disagreed with the government's undermining argument, although his reasoning is unclear. He noted that compliance orders allow for voluntary compliance, while civil actions are useful when the regulated entity does not voluntarily comply. *Id.* He further said that the CWA does not guarantee the EPA that issuing a compliance order will be its most effective choice. *Id.* at 128–29. Thus, no undermining.

174. The government made two arguments based on the act's structure. The government argued that because compliance orders were not self-executing, they were merely a step in the "deliberative process," and thus, were not final. *Id.* at 129. Congress, the government continued, did not intend the steps in the deliberative process to be reviewable. *Id.* Justice Scalia rejected this argument, noting that the order was not appealable, and thus, the EPA's deliberation was at an end. "[T]he APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction." *Id.*

The government also pointed out that in another section of the CWA, Congress expressly provided for prompt judicial review when the EPA assessed administrative penalties. *Id.* Because Congress had not similarly expressly provided for judicial review of compliance orders, Congress intended to preclude judicial review of such orders. *Id.* Again, the Court disagreed. "[I]f the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA's presumption of reviewability for all final agency action, it would not be much of a presumption at all." *Id.*

Recall that the Court in *Block* had accepted similar reasoning to find review precluded. *Id.* at 129–30. Distinguishing *Block*, Justice Scalia noted that when "a statute provides that an agency action is reviewable at the instance of one party," who must first exhaust administrative remedies, the implication is strong that the same agency action is not reviewable at the instance of other parties, who are not subject to the administrative process. *Id.* That was not the case here. The government also relied on *United States v. Erika, Inc.*, 456 U.S. 201 (1982), which had held that Medicare, which expressly provides for judicial review of awards under Part A, precluded judicial review of awards under Part B. 456 U.S. at 206–08. Justice Scalia distinguished *Erika* by noting that there was a "strong parallel" provision in the two statutes at issue there. *Sackett*, 566 U.S. at 130.

175. Addressing purpose, the government noted that Congress had passed the CWA to remedy the inefficient process then in place for addressing water pollution. *Sackett*, 566 U.S. at 130. The EPA would be less likely to use compliance orders if they were subject to judicial review. *Id.* "That may be true," Justice Scalia countered, "but it will be true for all agency actions subjected to judicial review. The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Id.*

presumption of reviewability, this approach makes sense. However, neither *Free Enterprise* nor *Sackett* clarified the relationship among the three anti-preclusion questions in *Thunder Basin*'s meaningful review step. The anti-preclusion questions are whether: (1) a finding of preclusion would foreclose all meaningful judicial review of the claim, (2) the claim is wholly collateral to the issues raised in the administrative action, and (3) the claim is beyond the agency's expertise.¹⁷⁶ But it was unclear whether a court had to answer all the questions in the affirmative, to balance the answers to the questions, or to answer any one question in the affirmative to find implied preclusion. This lack of clarity would be addressed in the Court's next case, as the Court retreated from its resistance to finding implied preclusion.¹⁷⁷

E. *Two Steps Backwards*

Three months after *Sackett*, the Supreme Court decided *Elgin v. Department of the Treasury*.¹⁷⁸ In *Elgin*, the Court confirmed that both steps were pertinent to the analysis.¹⁷⁹ More importantly, the Court strongly implied that if any of the three anti-preclusion questions were answered positively, preclusion should be denied.¹⁸⁰ However, the Court held that the case was impliedly precluded.¹⁸¹ *Elgin* shows a Supreme Court overly willing to find implied preclusion and, likely, was wrongly decided.

The Military Selective Service Act (Selective Service Act) requires male citizens between certain ages to register for the draft.¹⁸² Another federal act, 5 U.S.C. § 3328 (Section 3328), bars an agency from employing anyone who knowingly and willfully fails to register.¹⁸³ The Treasury Department fired *Elgin* and several other employees who had failed to register.¹⁸⁴ *Elgin* challenged his termination, alleging that the registration for the draft violated the Equal Protection and Bill of Attainder Clauses of the United States Constitution.¹⁸⁵ The Civil Service Reform Act (CSRA) provides that certain federal employees can seek administrative and judicial review of adverse employment actions by requesting a hearing before the Merit Systems Protection Board (MSPB), which assigns the hearing to an ALJ.¹⁸⁶ The issue

176. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212–13 (1994).

177. *See generally* *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012) (discussing each of these questions as they related to the CSRA review scheme).

178. 567 U.S. 1 (2012).

179. *Id.* at 10, 15.

180. *See generally* *Elgin*, 567 U.S. 1 (discussing each of the three steps as they related to the CSRA review scheme).

181. *Id.* at 23.

182. 50 U.S.C. § 3802(a).

183. 5 U.S.C. § 3328.

184. *Elgin*, 567 U.S. at 7.

185. *Id.*

186. 5 U.S.C. § 7701.

before the Court was whether the CSRA impliedly precluded judicial review of the plaintiffs' claim that Section 3328 was unconstitutional.¹⁸⁷

The ALJ dismissed the administrative challenge for lack of jurisdiction, concluding that Elgin was not entitled to any review because the relevant acts placed an absolute bar on his employment.¹⁸⁸ The ALJ also held that the constitutional claims did not confer jurisdiction on the MSPB, because it lacked authority to determine the constitutionality of an act.¹⁸⁹

Elgin neither petitioned the MSPB for review of the ALJ's decision nor appealed to the United States Court of Appeals for the Federal Circuit, as the CSRA required.¹⁹⁰ Instead, he, and others similarly situated, sued in the United States District Court for the District of Massachusetts, seeking a declaratory judgment and an injunction.¹⁹¹ The government argued that the district court lacked jurisdiction to hear the claims because the CSRA provided the exclusive avenue for judicial review: an administrative challenge followed by an appeal to the Federal Circuit.¹⁹² The district court rejected the government's preclusion argument.¹⁹³ The court reasoned that the CSRA did not prevent the court from hearing the plaintiffs' claims "because the MSPB had no authority to determine the constitutionality of a federal statute."¹⁹⁴ However, the district court denied petitioners' constitutional claims on the merits.¹⁹⁵

On appeal, the First Circuit vacated and remanded with instructions to the district court to dismiss for lack of jurisdiction.¹⁹⁶ The First Circuit reasoned that the petitioners should have appealed their administrative loss to the MSPB and, if necessary, to the Federal Circuit because the appellate court had the power to adjudicate the constitutionality of a federal act even if the agency did not.¹⁹⁷

The Supreme Court granted certiorari to determine whether the CSRA provided the exclusive means for judicial review of the plaintiffs' constitutional claims or whether the plaintiffs could advance their claims

187. *Elgin*, 567 U.S. at 8.

188. *Id.* at 7.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Elgin v. United States*, 697 F. Supp. 2d 187, 190–91 (D. Mass. 2010), *aff'd sub nom. Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012).

193. *Elgin*, 567 U.S. at 8.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

concurrently under the federal question statute.¹⁹⁸ Writing for the majority, Justice Thomas held that the CSRA impliedly precluded judicial review.¹⁹⁹

Justice Thomas applied the Court's two-step test.²⁰⁰ First, he analyzed *Block's* fairly discernable step, reviewing the CSRA's text, structure, and purpose.²⁰¹ Given that a prior Supreme Court decision had essentially resolved this step against the plaintiffs,²⁰² they did not argue that Congress had impliedly precluded district court jurisdiction under this act.²⁰³ However, the plaintiffs invited the Court to carve out an exception for employees who alleged facial rather than as-applied constitutional challenges to federal acts.²⁰⁴ Justice Thomas rejected the invitation.²⁰⁵

Next, after concluding that review was impliedly precluded under *Block's* fairly discernable step, Justice Thomas turned to *Thunder Basin's* meaningful review step.²⁰⁶ He thoroughly and independently examined each of the three anti-preclusion questions.²⁰⁷ Turning to the meaningful review question first, Justice Thomas concluded that the plaintiffs had access to meaningful judicial review even though the ALJ had refused to examine the constitutionality of the federal act and would have had difficulty compiling a record.²⁰⁸ It was enough, Justice Thomas reasoned, that the appellate court

198. *Id.* at 8–9.

199. *Id.* at 10.

200. *Id.* at 10, 15. Justice Thomas first rejected petitioners' argument that a heightened standard applied. In *Webster v. Doe*, 486 U.S. 592 (1988), the Court had said that “‘where Congress intends to preclude judicial review of constitutional claims[,] its intent to do so must be clear.’” *Elgin*, 567 U.S. at 9 (quoting *Webster*, 486 U.S. at 603). Thus, where Congress intends to preclude *all* judicial review, Congress must provide so expressly. *Id.* (citing *Webster*, 486 U.S. at 603). In *Webster*, the litigant could not have had his constitutional claim reviewed in any judicial forum. But the Court concluded *Elgin* was not such a case because a judicial forum was available through the CSRA process: if the employee lost the adjudication before the MSPB, the employee could appeal that decision to the Federal Circuit. *Id.* at 9–10. These plaintiffs had chosen not to follow this route. The heightened standard requirement seems identical to the first anti-preclusion question: whether a finding of preclusion would foreclose all meaningful judicial review of a plaintiff's claims. However, Justice Thomas did not equate them in that way. Here, appellate review would have been available.

201. *Elgin*, 567 U.S. at 10. After Justice Scalia's partial dissent in *Thunder Basin* chastising the majority for relying on legislative history in this step, that factor seems largely to have left the analysis.

202. *See United States v. Fausto*, 484 U.S. 439, 448–52 (1988) (performing the fairly discernable step and concluding that Congress's intention was fairly discernible).

203. *Elgin*, 567 U.S. at 12.

204. *Id.*

205. *Id.* at 12–13.

206. *Id.* at 15.

207. *Id.* at 16, 21–22. *See id.* at 15 (“[P]etitioners invoke [the] presum[ption] that Congress does not intend to limit [district court] jurisdiction if a finding of preclusion could foreclose all meaningful judicial review; if the suit is wholly collateral to a statute's review provisions; and if the claims are ‘outside the agency's expertise.’” (internal quotation marks omitted) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 489 (2010))).

208. *Id.* at 16–17, 19.

could consider the constitutional claim during an appeal.²⁰⁹ He failed to explain how an appellate court could review a claim when there was no record to review.

Turning to the next two questions, he acknowledged that the wholly collateral and agency expertise questions were related, but he analyzed them separately, finding that each was met.²¹⁰ Concerning the wholly collateral question, Justice Thomas rejected the petitioners' argument that their constitutional claims had nothing to do with the day-to-day personnel actions that the MSPB and Federal Circuit adjudicated.²¹¹ He noted that employees regularly challenge their dismissal in both forums under the CSRA's administrative scheme.²¹² He reasoned that the claims were not wholly collateral to the statutory scheme because the claims were "the vehicle by which [plaintiffs] seek to reverse" the agency actions taken against them.²¹³ Thus, a claim is not wholly collateral when it is "the vehicle by which" the party seeks to prevail before the agency. This "vehicle test" is overly broad: a claim will rarely be wholly collateral because it will be one reason the plaintiff seeks to prevail before the agency. Yet, we will see shortly that the lower courts adopted the vehicle test when analyzing this anti-preclusion question.

Turning finally to the agency expertise question, Justice Thomas rejected the plaintiffs' argument that their constitutional claims were outside of the MSPB's expertise.²¹⁴ He reasoned that because the challenged act might be one the agency regularly construed and because the claims might be mooted, he saw "no reason to conclude that Congress intended to exempt such claims from exclusive review before the MSPB and the Federal Circuit."²¹⁵

In a better reasoned dissent, Justice Alito disagreed that either implied preclusion step had been met. Reversing the analysis of the two steps, he focused first on *Thunder Basin's* meaningful review step. Regarding the three questions, he concluded that the constitutional claims were wholly

209. *Id.* at 17 (citing *Thunder Basin*, 510 U.S. at 215). The petitioners had argued that the Federal Circuit's jurisdiction was derived from the MSPB's jurisdiction and, thus, that court could not review the constitutional claims either. *Id.* at 17–18. The Supreme Court rejected this argument. *Id.* at 18.

210. *Id.* at 21–23.

211. *Id.* at 21–22.

212. *Id.*

213. *Id.*

214. *Id.* at 22.

215. *Id.* at 23.

collateral²¹⁶ and outside the MSPB's expertise.²¹⁷ He concluded, "Administrative agencies typically do not adjudicate facial constitutional challenges to the laws that they administer. Such challenges not only lie outside the realm of special agency expertise, but they are also wholly collateral to other types of claims that the agency is empowered to consider."²¹⁸ Here, the plaintiffs challenged the facial validity of a law the Board was bound to apply; it made little sense to require them to seek review from that board.²¹⁹

However, he conceded that meaningful review was likely available.²²⁰ Under his approach, an affirmative finding on one (or in this case two) of the anti-preclusion questions means the federal courts have power to hear the claim.

Next, Justice Alito questioned the majority's reliance on *Thunder Basin*. He noted that in that case, the only constitutional issue raised related to timing. The mine operator had argued that it had a constitutional right to immediate judicial review of its claims; it did not have to proceed through the administrative process first.²²¹ The *Thunder Basin* Court had disagreed and held that the plaintiff could not use a pre-enforcement challenge to obtain judicial review because Congress had clearly intended challenges of the agency's enforcement actions to go through the administrative process.²²² Thus, the Court in *Thunder Basin* had resolved the constitutional claim "not on preclusion grounds but on the merits."²²³

After first applying *Thunder Basin*'s meaningful review step, Justice Alito turned to *Block*'s fairly discernible step. He concluded that Congress did not intend to preclude judicial review because the administrative record would be insufficient for the appellate court to resolve the issue on appeal,

216. For the wholly collateral question, he conceded that claims should be channeled through the administrative process to prevent claim splitting and reducing redundant analysis of overlapping issues of law and fact when the claim "is legally or factually related to the dispute the agency is authorized to hear." *Id.* at 26 (Alito, J., dissenting). But that was not the case here. The facts relevant to the plaintiffs' constitutional claims had nothing to do with the specific circumstances in which employee grievances arose. *Id.* at 29.

217. For the expertise question, he pointed out that when a claim falls within the agency's administrative area of expertise, the agency would have an advantage over the courts in resolving that claim. *Id.* at 26. Here, however, plaintiffs' claims—that the military draft violated the Equal Protection and Bill of Attainder Clauses of the U.S. Constitution—were outside of the Board's administrative area of expertise because they had nothing to do with federal employment laws. *Id.* at 28–29. Indeed, the Board had admitted it was powerless even to consider the merits of the plaintiffs' claims. *Id.* at 28.

218. *Id.* at 29–30.

219. *Id.* at 30.

220. *Id.* at 33.

221. *Id.* at 32 (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 205 (1994)).

222. *Id.*

223. *Id.* (quoting *Thunder Basin*, 510 U.S. at 219 (Scalia, J., concurring in part and in the judgment)).

and thus, remand to the agency would likely be needed.²²⁴ He thought it unlikely that “Congress intended to impose these pinball procedural requirements instead of permitting petitioners’ claims to be decided in a regular lawsuit in federal district court.”²²⁵

In sum, both the majority and dissent analyzed the two steps separately, showing that review should not be precluded if either *Block*’s fairly discernible step or *Thunder Basin*’s meaningful review step are not satisfied. In addition, the majority and dissent examined each anti-preclusion question independently, as elements. Finally, Justice Alito reiterated the truism that findings of implied preclusion should be the exception and not the rule.²²⁶

In the Supreme Court’s next preclusion case, *Cuozzo Speed Technologies, LLC v. Lee*,²²⁷ the Court acknowledged this point.²²⁸ Writing for the majority, Justice Breyer addressed implied preclusion, applied only *Block*’s fairly discernible step, and held that the relevant act precluded review of the litigant’s suit against the patent office.²²⁹ Like Justice Scalia in *Sackett*, Justice Breyer never analyzed *Thunder Basin*’s meaningful review step. Importantly, the discussion of implied preclusion in this case was dicta; the relevant act included an express preclusion provision.²³⁰

This case involves inter partes review.²³¹ The Leahy–Smith America Invents Act of 2011 (Invents Act) allows a third party to seek reexamination and cancellation of existing patents.²³² The Trial and Appeal Board (Board), which is within the U.S. Patent and Trademark Office (Patent Office), hears these reviews.²³³ Under the Invents Act, the Board can cancel patents when it determines that the patents should not have been granted initially.²³⁴ After

224. *Id.* at 33.

225. *Id.* at 33–34.

226. *See id.* at 25 (noting that the federal court had original jurisdiction and that the question is “not whether Congress has specifically conferred jurisdiction, but whether it has taken it away”).

227. 136 S. Ct. 2131 (2016).

228. *See id.* at 2140 (“We recognize the ‘strong presumption’ in favor of judicial review that we apply when we interpret statutes, including statutes that may limit or preclude review.” (quoting *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015))).

229. *See id.* at 2140–41 (“doubt[ing]” that Congress intended the Patent Office’s decisions to be “unwound under some minor statutory technicality,” “recogniz[ing]” the *Block* exception, and concluding that it applied to the Patent Office’s decision).

230. *See id.* at 2136 (“No Appeal.—The determination by the Director [of the Patent Office] whether to institute an inter partes review under this section shall be final and non-appealable.” (alteration in original) (quoting 35 U.S.C. § 314(d))).

231. *See generally Cuozzo Speed Techs.*, 136 S. Ct. 2131 (considering the inter partes review process created by 35 U.S.C. § 100 *et seq.*).

232. *Id.* at 2136.

233. *Id.* at 2137.

234. *Id.*

a competitor filed an inter partes review, the Board canceled some of Cuozzo Speed Technologies, LLC's (Cuozzo) patents based on obviousness.²³⁵

Cuozzo appealed the Board's decision to the United States Court of Appeals for the Federal Circuit.²³⁶ The Federal Circuit held that the Invents Act made inter partes review decisions nonreviewable.²³⁷ The Invents Act provides, "No Appeal.—The determination by the Director [of the Patent Office] whether to institute an inter partes review under this section shall be final and non-appealable."²³⁸ This express preclusion provision should have resolved Cuozzo's appeal. Indeed, Justice Breyer noted that the express preclusion clause prohibits appeals attacking any "determination . . . whether to institute" an inter parties review.²³⁹ However, Cuozzo argued that the Invents Act did not bar judicial review of the Patent Office's decision to institute a review *on grounds other than those specifically mentioned in the third-party's review request*.²⁴⁰

Given the breadth of the express preclusion provision, the case could have ended there; however, in dicta Justice Breyer turned to implied preclusion.²⁴¹ Mentioning the strong presumption in favor of judicial review and harking back to *Abbott Labs*, he cautioned that the presumption can be overcome only with "clear and convincing" evidence that Congress intended to preclude review.²⁴² Applying *Block's* fairly discernable step, he examined the Invent Act's text, structure,²⁴³ and purpose.²⁴⁴ He concluded that the

235. *Id.* at 2138–39.

236. *Id.* at 2139.

237. *Id.* (citing *In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268, 1273 (Fed. Cir. 2015)).

238. 35 U.S.C. § 314(d).

239. *Cuozzo Speed Techs.*, 136 S. Ct. at 2139 (quoting 35 U.S.C. § 314(d)).

240. *See id.* at 2136, 2139 (outlining petitioner's position regarding the question presented). A competitor had challenged twenty of Cuozzo's patents on various grounds. *Id.* at 2138. Relevant here were claims 10, 14, and 17. *See id.* (identifying the claims reexamined by the Board). The competitor alleged that patent claim 17 was obvious given existing patents. *Id.* The competitor challenged claims 10 and 14 also, but on different grounds (not obviousness). *Id.* The Board examined all three claims for obviousness even though the competitor had not alleged obviousness for all three claims. *Id.* The Board reasoned that the competitor had implicitly challenged the obviousness of claims 10 and 14 because claim 17 depended on claim 14, which depended on claim 10. *Id.* The Board then concluded that each claim should be canceled based on obviousness. *Id.* at 2138–39.

241. *See id.* at 2140 (addressing the interpretation of statutes that "may limit or preclude review").

242. *Id.* at 2139 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349–50 (1984)). Oddly, he cited *Block* rather than *Abbott Labs* for his clear and convincing standard.

243. He found significant the existence of similar preclusion provisions in this act and other related acts that similarly limited judicial review. *See id.* at 2141 ("[T]he existence of similar provisions in this, and related, patent statutes reinforces our conclusion.").

244. He reasoned that clear and convincing evidence existed here because the purpose of the Invents Act was to give the Patent Office significant power to revisit and revise earlier patents. *Id.* ("The text . . . along with its place in the overall statutory scheme, its role alongside the

presumption in favor of judicial review had been overcome, and thus, Cuozzo's appeal was precluded.²⁴⁵

As an aside, Justice Breyer pointed out that had Cuozzo raised a constitutional question, the result might be different.²⁴⁶ He characterized Cuozzo's claim as "little more than a challenge to the Patent Office's conclusion . . . that the 'information presented in the petition' warranted review."²⁴⁷ In other words, Cuozzo simply argued that the competitor's request was not well-pleaded. A claim that challenges the interpretation of one small section of an act does not rise to the level of a facial constitutional claim.²⁴⁸ Thus, this aside suggests that facial challenges should not be precluded.

Justice Breyer's approach to implied preclusion in this case conflicted with the Court's approach in prior cases. He only applied *Block's* fairly discernable step, never asking whether meaningful review was available. Yet had he applied *Thunder Basin's* meaningful review step, he likely would have reached a different result.²⁴⁹ With judicial review precluded, Cuozzo can never have its claim heard—unlike those cases in which the entity could appeal the agency's adverse administrative decision to an appellate court. Hence, Justice Breyer's approach wrongly suggests that implied preclusion can be found whenever congressional intent to preclude review can be found after applying just *Block's* fairly discernable step.

Justice Alito dissented.²⁵⁰ Treating this case solely as one challenging the boundaries of an express preclusion provision, he neither mentioned nor

Administrative Procedure Act, the prior interpretation of similar patent statutes, and Congress's purpose in crafting inter partes review, all point in favor of precluding review of the Patent Office's institution decisions.").

245. *Id.* at 2140–41.

246. *Id.* at 2136.

247. *Id.* at 2142 (quoting 35 U.S.C. § 314(a)).

248. *See id.* at 2141 (distinguishing between claims "that are closely tied to the application and interpretation of statutes related to the Patent Office's decision" and those that "implicate constitutional questions").

249. Indeed, the Court did not even cite *Thunder Basin*, *Free Enterprise*, or *Elgin*. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 211–15 (1994) (explaining and applying the meaningful review step); *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 489–91 (2010) (applying the meaningful review step); *Elgin v. Dep't of Treasury*, 567 U.S. 1, 16–21 (2012) (same).

250. Applying the presumption, Justice Alito reasoned that because the Invents Act said the Director's decision "to *institute* an inter partes review" was "final and nonappealable," the act did not prohibit "review" of the Board's decision once the inter partes review process had concluded. *Cuozzo*, 136 S. Ct. at 2151 (Alito, J., concurring in part and dissenting in part) (emphasis added) (quoting 35 U.S.C. § 314(d)). Justice Alito reasoned that the Board's decision to institute inter partes review was "final and nonappealable" because the court could not stop the proceeding from going forward. *Id.* But the reviewing court could consider whether the Board's decision to institute inter partes review was lawful. In other words, the Board could hold its hearing without court interference, but once the process was concluded, the Board would be held accountable for whether

applied the two-step implied preclusion test. He did not cite *Abbott Labs*, *Block*, *Thunder Basin*, *Free Enterprise*, *Sackett*, or *Elgin*. Instead, Justice Alito stressed the Court's "strong presumption" in favor of judicial review and quoted *Bowen*.²⁵¹ He acknowledged that this presumption was rebuttable, but he cautioned that the agency bears a heavy burden to show that Congress "prohibited[ed] all judicial review" regarding whether an agency complied with its legislative mandate.²⁵² In other words, the burden to show Congress intended preclusion is on the agency. The plaintiffs do not bear the burden of proving a negative—that Congress did not intend preclusion. Further, Justice Alito pointed out that if an act could be read to permit judicial review, then it should be read that way.²⁵³ He chastised the majority for giving "short shrift to the presumption in favor of judicial review."²⁵⁴

Importantly, this case differed from the other implied preclusion cases in three ways. First, the relevant act contained an express preclusion provision, so the issue for the Court was the boundaries of that express provision; thus, Justice Breyer's implied preclusion discussion was dicta.²⁵⁵ Second, *Cuozzo* appealed its loss before the agency; the Supreme Court granted certiorari to determine whether the appellate court could review the *agency's* decision, not whether *Cuozzo* could bypass the administrative process and head directly to district court.²⁵⁶ Third, *Cuozzo* did not raise constitutional claims; *Cuozzo* simply disagreed with the agency's decision.²⁵⁷ And Justice Breyer even said that if *Cuozzo* had raised constitutional claims, the result might be different.²⁵⁸ In sum, *Cuozzo* offers little that is useful regarding the implied preclusion doctrine.

F. A Framework for Implied Preclusion

While the Supreme Court has not definitively set forth a test for implied preclusion, these cases point to a two-step approach. Whether a claim is

it complied with the Invents Act. *Id.* Thus, Justice Alito examined the express preclusion provision using the traditional tools of statutory interpretation. He did not mention either step of the implied preclusion test, likely because this issue involved the boundaries of an express preclusion provision rather than whether review was impliedly precluded. *Id.* at 2151–52. Instead, the dissent disagreed with the majority's interpretation of the language in the express preclusion provision. "Nonappealable" bars only "matters that are not *immediately* or *independently* appealable, but which are subject to review at a later point." *Id.* at 2151.

251. *Id.* at 2150 (quoting *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (quoting *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986))).

252. *Id.* (quoting *Mach Mining*, 575 U.S. at 486).

253. *Id.*

254. *Id.* at 2151.

255. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 492–94 (1991), similarly explored the boundaries of an express preclusion provision. *See supra* note 106.

256. *Cuozzo Speed Techs.*, 136 S. Ct. at 2136.

257. *Id.*

258. *Id.* at 2141.

impliedly precluded from judicial review depends on whether Congress intended to preclude review. That intent can be found in either of two ways. First, congressional intent can be found in the act's text, structure, and purpose (*Block's* fairly discernible step). Second, it can be found in determining whether the claim is one that can be meaningfully reviewed within the administrative process with its appeal to the appellate court (*Thunder Basin's* meaningful review step).²⁵⁹ Only when both steps are satisfied, should a court find the claim to be precluded.²⁶⁰

Under *Block's* fairly discernible step, a court examines the act's text, structure, purpose, and perhaps its legislative history, to determine whether Congress intended to preclude judicial review. Under *Thunder Basin's* meaningful review step, a court examines the three anti-preclusion questions to determine whether Congress intended agencies to serve as the initial forum for these claims. Congress would want federal courts, not agencies, to serve as the initial forum for these claims when (1) meaningful judicial review would be unavailable, (2) the claim is wholly collateral to the issues raised in the administrative action, *or* (3) the claims are outside the agency's expertise.

While the Supreme Court has not definitively explained the relationship among these three questions—are they elements or factors—in those cases analyzing *Thunder Basin's* meaningful review step (with the exception of *Thunder Basin*), the Supreme Court analyzed each question separately and found all either met²⁶¹ or not met.²⁶² Treating them as elements better accords with the Court's strong presumption in favor of judicial review and with the Court's preference to interpret acts that expressly preclude such review narrowly. Hence, if the answer to any one of the questions is yes, then initial review of the claim should proceed in federal court, not in the administrative forum.

Further, an elements approach makes sense. Agencies cannot evaluate the constitutionality of either legislative acts or their own structure. They have no expertise to address these questions, which are largely unrelated to

259. *Elgin v. Dep't of Treasury*, 567 U.S. 1, 33–34 (2012) (Alito, J., dissenting) (stating that meaningful review is not the only consideration; the court must also determine whether it is fairly discernible that Congress intended to preclude review).

260. For example, in *American Hospital Ass'n v. Becerra*, the Supreme Court never examined *Thunder Basin's* meaningful review step because it found *Block's* discernible step unmet. 142 S. Ct. 1896, 1902–03 (2022) (underscoring that unless the statute's language or structure precludes judicial review of agency action, it is traditionally available); *accord Axon Enter., Inc. v. FTC*, 986 F.3d 1173, 1178 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 895 (2022) (applying the two-step approach to considering implied preclusion).

261. *E.g.*, *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 489–91 (2010); *Bowen v. Mich. Acad. Fam. Physicians*, 476 U.S. 667, 671–72 (1986).

262. *E.g.*, *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212–16 (1994) (analyzing only one question); *Elgin v. Dep't of Treasury*, 567 U.S. 1, 17–23 (2012).

the legal issues and factual questions in the administrative proceeding before them. Forcing these plaintiffs to go through a burdensome administrative process that may be unconstitutional before they can receive judicial review of their claims seems an inadequate and time-consuming approach at best. Further, as noted in Justice Alito's dissent in *Elgin*, the record the agency compiles for an administrative review will likely be insufficient for appellate review of these constitutional challenges, forcing the case to be remanded to the agency for further factfinding.²⁶³ Such a process is inefficient and cumbersome.

IV. Implied Preclusion in the Circuits

Assuming the framework above delineates the correct approach, the circuit courts have overwhelmingly applied this doctrine incorrectly. This Part analyzes the circuit courts' analysis of the implied preclusion doctrine. The Second, Fourth, Seventh, D.C., Eleventh, and a panel of the Fifth Circuit all agreed with the SEC and held that the plaintiffs' claims were impliedly precluded. However, after an en banc hearing, a divided Fifth Circuit agreed with the plaintiffs and held that these claims were not impliedly precluded. The Seventh Circuit was the first circuit to analyze this doctrine. Its errors permeated the decisions of the circuits that followed.

A. *The Seventh Circuit*

First up was *Bebo v. SEC*,²⁶⁴ which the Seventh Circuit decided in August 2015. The SEC had filed a cease-and-desist proceeding against Laurie Bebo, claiming she violated various securities laws.²⁶⁵ After the hearing concluded, but before the ALJ rendered an initial decision, Bebo sued the SEC in federal district court, challenging the constitutionality of the adjudicatory process.²⁶⁶ The district court dismissed the action, holding that Congress had impliedly precluded judicial review.²⁶⁷ The Seventh Circuit affirmed.²⁶⁸

Likely because it was the first court to address this issue, the Seventh Circuit made four critical errors, which its sister circuits would repeat. First,

263. *Elgin*, 567 U.S. at 33 (Alito, J., dissenting).

264. 799 F.3d 765 (7th Cir. 2015).

265. *Id.* at 767.

266. *Id.* at 768 (including that the adjudicative process violated equal protection and due process and that the SEC ALJs were unconstitutional because they are protected from removal by more than one layer of for-cause protection).

267. *Id.* at 767.

268. *Id.*

the court never analyzed *Block*'s fairly discernible step.²⁶⁹ Instead, the court noted that in *Free Enterprise*, the Supreme Court had already held that 15 U.S.C. § 78y did not preclude review of all claims.²⁷⁰ The Seventh Circuit then erroneously stated that the Supreme Court in *Elgin* had narrowed *Free Enterprise*'s broad holding, so the Seventh Circuit was free to decide whether this claim was precluded.²⁷¹

Second, the Seventh Circuit analyzed only one of *Thunder Basin*'s anti-preclusion questions: the meaningful review question. The court reasoned that because Bebo could appeal any adverse administrative decision to a federal appellate court she could receive meaningful judicial review as part of that appeal.²⁷²

The court's reasoning is flawed. Most statutes providing for administrative adjudications allow for appellate review of the agency's final decision. Those statutes that preclude judicial review do so explicitly.²⁷³ If the Seventh Circuit's reasoning were correct, then a statute that does not explicitly preclude review would now do so implicitly. In other words, preclusion becomes the rule rather than the exception, and few, if any, claims will be heard in federal district court.

Third, in analyzing the meaningful review anti-preclusion question, the Seventh Circuit concluded that timing was the critical distinction between *Bebo* and *Free Enterprise*.²⁷⁴ In *Free Enterprise*, no hearing was scheduled, although an investigation was ongoing.²⁷⁵ In *Bebo*, the hearing was underway.²⁷⁶ The Seventh Circuit reasoned that because Bebo waited for the SEC to bring an enforcement action before suing in district court, her claims were impliedly precluded.²⁷⁷ Instead, had she filed the claim while the

269. *Id.* at 775 ("We see no evidence from the statute's text, structure, and purpose that Congress intended for plaintiffs like Bebo who are already subject to ongoing administrative enforcement proceedings to be able to stop those proceedings by challenging the constitutionality of the enabling legislation or the structural authority of the SEC.")

270. *Id.* at 769. Rather than comparing the claim in its case to the claim in *Free Enterprise* to see if the new claim was precluded, the court pivoted and said that because *Elgin* had narrowed *Free Enterprise*, the court was free to decide whether this claim was precluded under 15 U.S.C. § 78y. *Id.* at 771.

271. *Id.* at 767, 771–72. The Court in *Elgin* never said it was limiting the jurisdictional holding in *Free Enterprise*. *Elgin v. Dep't of Treasury*, 567 U.S. 1, 15–17 (2012). The *Elgin* Court merely quoted *Free Enterprise* for the anti-preclusion questions. *Id.* at 16.

272. *Bebo v. SEC*, 799 F.3d 765, 775 (2015).

273. See, e.g., *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2136–37 (2016) (discussing the Leahy–Smith America Invents Act of 2011); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 481, 483–84 (1991) (discussing the Immigration Reform and Control Act of 1986); *Webster v. Doe*, 486 U.S. 592, 594, 597, 603–04 (1988) (discussing the National Security Act, 50 U.S.C. § 403(c)).

274. *Bebo*, 799 F.3d at 774–75.

275. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 487 (2010).

276. *Bebo*, 799 F.3d at 767.

277. *Id.* at 774–75.

investigation was ongoing, like the plaintiff in *Free Enterprise* had done, she could have had her claim heard. In other words, a plaintiff must sue in federal court before the SEC initiates an enforcement proceeding.

The court's reasoning is again flawed. This distinction makes little sense. If a court is looking for congressional intent to preclude judicial review, then the inquiry should be on the nature of the claim, the applicable statute, and the plaintiff's ability to have each claim meaningfully heard through the administrative process. The inquiry should not be on how omniscient a plaintiff is in predicting whether the SEC will initiate an enforcement action. Pursuant to this reasoning, entities subject to an SEC investigation should immediately sue in district court, rather than wait to see if the investigation results in an enforcement or other adjudication. Yet the SEC will not bring an enforcement action each time it investigates, making this approach wasteful. Further, plaintiffs are unlikely to file any cases under this approach. What plaintiff would be willing to file a case in district court without the threat of an impending enforcement action? Finally, once the SEC initiates an investigation, jurisdiction becomes a race to the "courthouse." If the SEC initiates an enforcement action first, the plaintiff's claim will be precluded, but if the plaintiff files first, then the federal court has jurisdiction. Hence, the Seventh Circuit's reliance on timing makes no sense.

Fourth, the Seventh Circuit decided, with no legal support or reasoning, that the meaningful review anti-preclusion question was the only *Thunder Basin* question that mattered.²⁷⁸ The court said "the Supreme Court has never said that any of [the anti-preclusion questions] are sufficient conditions to bring suit in federal district court under § 1331."²⁷⁹ True. But the Supreme Court has never said that satisfying just one of the three anti-preclusion questions was sufficient either. Further, every Supreme Court case that has addressed *Thunder Basin*'s meaningful review step—*Thunder Basin*, *Bowen*, *Free Enterprise*, and *Elgin*—has examined all three questions, finding all either met or not met.²⁸⁰

Thus, with a sweep of its pen, the Seventh Circuit rewrote the Supreme Court's implied preclusion doctrine, changing it from a two-step, three-question test into a one-step, one-question test. Under that test, courts need only ask whether a plaintiff has the potential to have its claims reviewed by a federal court at some point in the appeal process, which will almost always be the case. In summary, the Seventh Circuit's analysis was abysmal.

278. *See id.* at 774 (explaining that whether the plaintiff can receive meaningful judicial review without access to the district courts is the most critical thread in the case law).

279. *Id.*

280. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212–15 (1994) (focusing primarily on the agency expertise factor); *Free Enter. Fund*, 561 U.S. at 489–91; *Elgin v. Dep't of Treasury*, 567 U.S. 1, 16–17, 21–23 (2012).

B. *The D.C. Circuit*

Not surprisingly, when the D.C. Circuit addressed this issue, it rejected much of the Seventh Circuit's analysis.²⁸¹ The D.C. Circuit decided *Jarkesy v. SEC*²⁸² in September 2015, finding that the plaintiffs' claims were precluded.²⁸³ While its analysis is significantly better than its sister court's, the court misanalysed the meaningful review question and reversed the burden.

In *Jarkesy*, the SEC brought a cease-and-desist proceeding against the plaintiffs, charging them with violating various securities laws.²⁸⁴ Unlike the adjudication in *Bebo*, the adjudication in *Jarkesy* had not yet commenced but was just days from starting.²⁸⁵ Racing to the courthouse, Jarkesy sued in federal district court, alleging constitutional and statutory violations regarding the adjudicatory process.²⁸⁶

Despite the pending lawsuit, the SEC refused to stay its hearing, so the adjudication moved forward. The ALJ rejected Jarkesy's constitutional and statutory claims.²⁸⁷ Jarkesy petitioned the Commission for review of the ALJ's initial decision and a stay of that decision.²⁸⁸ The Commission denied the stay but granted review.²⁸⁹ Before the Commission issued its decision, the district court held that it was precluded from hearing Jarkesy's claims.²⁹⁰ Jarkesy appealed. The Commission's review was still pending when the D.C. Circuit affirmed the district court's decision that jurisdiction was impliedly precluded.²⁹¹

281. *Jarkesy v. SEC*, 803 F.3d 9, 22 (D.C. Cir. 2015) (“examin[ing] the remaining considerations without assessing whether the capacity for meaningful review would alone suffice to negate jurisdiction”).

282. 803 F.3d 9 (D.C. Cir. 2015).

283. *Id.* at 29.

284. *Id.* at 13.

285. *Id.*

286. Jarkesy argued that the agency's prejudgment of the charges against it violated the Fifth Amendment Due Process Clause, that the proceeding violated the Equal Protection Clause and the Seventh Amendment because there was no jury trial, and that the agency violated its *Brady* obligations. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that the prosecution must disclose material exculpatory evidence to the defendant). Jarkesy also argued that the agency violated the APA by engaging in improper ex parte communications. *Jarkesy*, 803 F.3d at 14.

287. *Jarkesy*, 803 F.3d at 14.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 30. Subsequently, the Commission affirmed the ALJ's initial decision. *See John Thomas Cap. Mgmt. Grp. LLC*, Securities Act Release No. 10834, Exchange Act Release No. 89775, Investment Advisers Act Release No. 5572, Investment Company Act Release No. 34003, 2020 WL 5291417, at *1–2 (Sept. 4, 2020) (agreeing with the ALJ that Jarkesy violated several federal securities laws). Jarkesy subsequently appealed to the Fifth Circuit, seeking a stay of monetary penalties, which the Commission granted. Petition for Review at 1–2, *Jarkesy v. SEC*,

Unlike the Seventh Circuit, the D.C. Circuit understood that its analysis should include both *Block's* “fairly discernible” step and *Thunder Basin's* “meaningful review” step.²⁹² According to the D.C. Circuit, “[t]he ultimate question is whether Congress intended exclusivity when it established the statutory scheme.”²⁹³ The court explained that the two-step test helps courts determine whether Congress intended litigants to proceed exclusively through the administrative and judicial review processes provided in the statutory scheme or whether litigants could sue directly in federal court.²⁹⁴ The D.C. Circuit properly described *Block's* fairly discernible step and *Thunder Basin's* meaningful review step.²⁹⁵ So far, so good.

Applying *Block's* fairly discernible step, the court examined the text and structure of 15 U.S.C. § 78y and reasoned that its review process—agency adjudication followed by judicial review—was similar to the review process in the Mine Act, which the Supreme Court had found to preclude review in *Thunder Basin*.²⁹⁶ Although there were two differences between the two review processes, the court did not find either difference dispositive.²⁹⁷

However, there was an important difference the D.C. Court did not address but should have. In *Thunder Basin*, the reviewing body was not the agency that had promulgated the regulation, but an independent commission established exclusively to adjudicate Mine Act disputes.²⁹⁸ Congress might be more likely to preclude review of disputes challenging the legitimacy of

No. 20-61007 (5th Cir. Nov. 2, 2020); John Thomas Cap. Mgmt. Grp. LLC, Securities Act Release No. 10921, Exchange Act Release No. 5672, Investment Advisers Act Release No. 10921, Investment Company Act Release No. 34179, 2021 WL 221882, at *1 (Jan. 21, 2021) (partial stay order).

292. See *Jarkesy*, 803 F.3d at 15, 17 (adopting the “fairly discernible” and “meaningful review” steps from *Thunder Basin*). *Jarkesy* takes both of these tests from *Thunder Basin*, which itself adopts the fairly discernible test from *Block*. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994).

293. *Jarkesy*, 803 F.3d at 12.

294. *Id.* at 15.

295. *Id.* at 15–16 (quoting *Thunder Basin*, 510 U.S. at 207, 212 (describing *Block's* fairly discernible step as whether congressional intent is “fairly discernible in the statutory scheme” and *Thunder Basin's* meaningful review step as whether “the litigant’s claims are ‘of the type Congress intended to be reviewed within [the] statutory structure’”).

296. *Id.* at 16.

297. See *id.* at 16–17 (observing the differences between the Mine Act and the Exchange Act but focusing on Congress’s grant of forum choice to the SEC as dispositive). The first difference was that under the Exchange Act as modified, the Commission has the exclusive ability to initiate the administrative process, while under the Mine Act, the sanctioned operator initiates the administrative process. *Id.* at 16. The second difference was that under the Exchange Act as modified, the Commission could choose either the administrative process or the judicial process, while under the Mine Act, the sanctioned operator could choose only the administrative process. See *id.* at 16–17 (noting that while under the Mine Act a sanctioned operator can only bring a challenge before the ALJ, under the Exchange Act, the Commission itself can choose to pursue violations in a district court).

298. *Thunder Basin*, 510 U.S. at 215.

one agency's actions when a different agency would hear those claims. In any event and failing to address this difference, the D.C. Circuit concluded that Congress had intended to preclude review of the plaintiffs' claims under *Block's* fairly discernible step.²⁹⁹

The court then turned to *Thunder Basin's* meaningful review step. Before analyzing the three anti-preclusion questions, the D.C. Circuit first reversed the burden of proof on the issue. The court said that to overcome its conclusion under *Block's* fairly discernible step that review was precluded, Jarkesy must demonstrate "a strong countervailing rationale."³⁰⁰ The court did not explain why it was Jarkesy's burden. The burden to prove Congress intended preclusion should be on the agency, not the plaintiff.³⁰¹ Under this approach, plaintiffs now must prove a negative: that Congress did not intend to preclude review.

Next, the D.C. Circuit was unclear about whether *Thunder Basin's* meaningful review step was an elements or a factors test.³⁰² Despite its confusion, the court examined all three anti-preclusion questions, finding that each supported a finding of implied preclusion.³⁰³ However, its analysis of each question was flawed.

First, regarding the meaningful review question, the court concluded that so long as an Article III court fully competent to adjudicate constitutional challenges could assess the claims at some point, the meaningful review question was satisfied.³⁰⁴ Thus, because Jarkesy could seek appellate review of any adverse Commission decision, this question was satisfied.³⁰⁵ The D.C. Circuit's reasoning mirrored the Seventh Circuit's: when judicial review of the administrative decision is available through appeal, then meaningful

299. See *Jarkesy*, 803 F.3d at 16 (using *Thunder Basin's* fairly discernible analysis to determine Congress intended to preclude review of SEC claims). *Thunder Basin* itself adopted *Block's* fairly discernible test. See *supra* note 292.

300. *Jarkesy*, 803 F.3d at 17 (quoting *E. Bridge, LLC v. Chao*, 320 F.3d 84, 89 (1st Cir. 2003)).

301. See *supra* text accompanying note 252.

302. The Court suggested that such a countervailing rationale should be found only "if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Jarkesy*, 803 F.3d at 17 (emphasis added) (quoting *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 489–90 (2010)). This is an elements test: all three questions must be answered affirmatively for review to be precluded. But the court continued. Not all the elements were of the same weight: they are not "three distinct inputs in[] a strict mathematical formula. Rather, the considerations are general guideposts useful for channeling the inquiry into whether the particular claims at issue fall outside an overarching congressional design." *Jarkesy*, 803 F.3d at 17. This description suggests a balancing, or factors, test.

303. *Jarkesy*, 803 F.3d at 17–29.

304. *Id.* at 19.

305. *Id.*

review will always be available. Thus, the D.C. Circuit's reasoning is flawed for the same reason.³⁰⁶

Also like the Seventh Circuit, the D.C. Circuit wrongly weighted the timing of the administrative proceeding.³⁰⁷ The SEC had already initiated a proceeding against Jarkesy, it just had not started yet.³⁰⁸ The D.C. Circuit noted, "The result might be different if a constitutional challenge were filed in court before the initiation of any administrative proceeding."³⁰⁹ However, as explained earlier,³¹⁰ it is unclear why timing should make a difference if the court is searching for congressional intent as to which forum should hear these constitutional challenges.

After adopting the Seventh Circuit's faulty reasoning on these two points, the D.C. Circuit responded to an argument not addressed in *Bebo*. Specifically, the D.C. Circuit rejected Jarkesy's argument that the appellate court's subsequent judicial review would not be meaningful because Jarkesy would have to undergo the unconstitutional proceeding first.³¹¹ The D.C. Circuit disagreed, noting that "the expense and annoyance of litigation is part of the social burden of living under government."³¹² The court also rejected Jarkesy's argument that because Jarkesy might prevail in the administrative proceeding, some or all of the constitutional claims could become moot, making the claims wholly collateral (or at least capable of repetition but evading review).³¹³ The court reiterated that Jarkesy would not suffer any harm other than undergoing an unconstitutional proceeding, which the judicial system tolerates.³¹⁴

Second, moving to the "wholly collateral" question, the D.C. Circuit concluded that Jarkesy's claims were "inextricably intertwined with the conduct of the very enforcement proceeding the statute grants the SEC the power to institute and resolve as an initial matter."³¹⁵ The court likely got this one right; most of Jarkesy's claims addressed the SEC's actions regarding Jarkesy's specific proceeding, meaning the claims were as-applied rather

306. *See supra* text accompanying notes 272–73.

307. *See Jarkesy*, 803 F.3d at 20 ("Jarkesy would not have to erect a Trojan-horse challenge to an SEC rule or 'bet the farm' by subjecting himself to unnecessary sanction under the securities laws. Jarkesy is already properly before the Commission by virtue of [his] alleged violations of those laws.").

308. *Id.* at 13. Yet, unlike *Bebo*, Jarkesy had filed its lawsuit *before* the adjudication had started, albeit only days. *See supra* text accompanying note 276.

309. *Jarkesy*, 803 F.3d at 23.

310. *See supra* text following note 276.

311. *Jarkesy*, 803 F.3d at 25.

312. *Id.* at 26 (quoting *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980)).

313. *Id.* at 27.

314. *Id.* at 28.

315. *Id.* at 23 (quoting *Jarkesy v. SEC*, 48 F. Supp. 3d 32, 38 (D.D.C. 2014)).

than facial, like the claims in *Elgin*.³¹⁶ Thus, Jarkey's specific claims were related to the claims in the adjudication.

Third, moving to the expertise question, the court concluded that most of Jarkey's claims lay firmly within the Commission's expertise.³¹⁷ For the few that arguably did not fall within the Commission's expertise, that expertise could aid the appellate court in its subsequent review.³¹⁸ It seems that for those claims for which the Commission did not have expertise, the district court would be the better forum. However, the D.C. Circuit did not consider splitting those claims from the claims lying firmly within the Commission's expertise.

Finishing its analysis of *Thunder Basin*'s anti-preclusion questions, the D.C. Circuit not only concluded that its analysis did not alter the finding of preclusion the court had reached after the analysis of *Block*'s fairly discernible step, but that analysis actually strengthened that finding.³¹⁹ Hence, the court affirmed the judgment of the district court, which had dismissed the case for lack of subject matter jurisdiction.³²⁰

The D.C. Circuit's analysis was vastly better than the Seventh Circuit's analysis in *Bebo*. The D.C. Circuit carefully analyzed both steps and all three anti-preclusion questions.³²¹ However, the D.C. Circuit's analysis was not error free. The court was uncertain about how the three questions related, describing a balancing approach while applying an elements approach.³²² Additionally, and like the Seventh Circuit, the D.C. Circuit wrongly reasoned that when judicial review of the administrative decision is available through an appeal of the administrative decision, meaningful review of the administrative decision will always be available. Further, the D.C. Circuit, like the Seventh Circuit, gave too much weight to the timing of the lawsuit,

316. *Id.* at 22–23. The D.C. Circuit cautioned that a plaintiff cannot simply add a facial challenge to a lawsuit to make the case reviewable in federal court. *Id.* at 24.

317. *Id.* at 29.

318. *Id.*

319. *Id.* Many respondents in SEC proceedings join substantive defenses to their securities charges together with challenges to the Commission's actions or authority. It makes good sense to consolidate all of each respondent's issues before one court for review, and only after an adverse Commission order makes that review necessary. By contrast, a system like the one Jarkey envisions—where respondents “‘jump the gun’ by going directly to the district court to develop their case instead of seeing agency proceedings through to conclusion . . . would create substantial uncertainty about what sort of claims could properly be adjudicated outside the administrative scheme. *Id.* at 29–30 (internal quotation marks omitted) (quoting *John Doe, Inc. v. DEA*, 484 F.3d 561, 570 (D.C. Cir. 2007)).

320. *Id.* at 30.

321. *Id.* at 17–29.

322. *Id.* at 17, 29; accord *Axon Enter., Inc. v. FTC*, 986 F.3d 1173, 1187 (9th Cir. 2021) (balancing the anti-preclusion elements to find that the district court was impliedly precluded from exercising jurisdiction over claims that the FTC's removal structure was unconstitutional), *cert. granted*, 142 S. Ct. 895 (2022).

which should have been irrelevant. And, perhaps most concerning, the D.C. Circuit reversed the burden, requiring the plaintiff to demonstrate a negative: that Congress did not intend to preclude review.³²³

C. *The Second Circuit*

Next up, the Second Circuit's decision in *Tilton v. SEC*,³²⁴ decided in June 2016.³²⁵ In *Tilton*, the Second Circuit followed its sister circuits, holding that the district court lacked subject matter jurisdiction.³²⁶ The court's erroneous analysis rivals the Seventh Circuit's. The Second Circuit only briefly discussed *Block*'s fairly discernable step, used a factors approach to resolve *Thunder Basin*'s meaningful review step (weighing the meaningful review question most heavily), concluded that judicial review need only be *available* to be meaningful, adopted Justice Thomas's vehicle test for the wholly collateral question, distinguished the case based on the timing of the lawsuit in relation to the administrative proceeding, and decided that the SEC had expertise to analyze the constitutionality of an agency structure.³²⁷

In this case, the SEC initiated an administrative proceeding against Tilton and several of her investment firms (collectively, Tilton), alleging that they had violated the Investment Advisers Act.³²⁸ Two days later, Tilton sued in the United States District Court for the Southern District of New York, seeking to enjoin the SEC's administrative proceeding.³²⁹ Tilton argued, *inter alia*, that the SEC ALJs were unconstitutionally appointed, an argument that eventually prevailed in the Supreme Court in another case.³³⁰ The district

323. While the D.C. Circuit appeal was pending, the ALJ held an evidentiary hearing and determined that Jarkey committed securities fraud. *Jarkey v. SEC*, 34 F.4th 446, 450 (5th Cir. 2022). Jarkey appealed that decision to the Commission. *Id.* While that appeal was pending, the Supreme Court held that SEC ALJs were unconstitutionally appointed. *Id.* (citing *Lucia v. SEC*, 138 S. Ct. 2044, 2054–55 (2018)). So, the SEC reassigned Jarkey's case to a properly appointed ALJ; however, Jarkey waived their right to a new hearing and continued with their appeal to the Commission. *Id.* The Commission affirmed, rejecting Jarkey's constitutional claims. *Id.*

Jarkey sought judicial review of the Commission's decision to the Fifth Circuit, raising a number of constitutional challenges, including that removal restrictions on SEC ALJs violated Article II and separation-of-powers principles, and that the proceedings violated their Seventh Amendment right to a jury trial. *Id.* The Fifth Circuit agreed with Jarkey. *Id.* at 451. The implied preclusion issue was not revisited. *See id.* at 449 (addressing only the Seventh Amendment, Vesting Clause, and Take Care Clause issues).

324. 824 F.3d 276 (2d Cir. 2016).

325. The Second Circuit decided *Chau v. SEC*, 665 F. App'x. 67 (2d Cir. 2016), six months later and affirmed the lower court's dismissal for lack of subject matter jurisdiction. 665 F. App'x. at 69.

326. *Tilton*, 824 F.3d at 291.

327. *Id.* at 283–91.

328. *Id.* at 280.

329. *Id.*

330. *Lucia v. SEC*, 138 S. Ct. 2044, 2049–51 (2018).

court dismissed Tilton's claim.³³¹ The Second Circuit stayed the administrative proceeding pending its decision, then affirmed the district court's holding.³³²

Applying *Block*'s fairly discernible step first, the Second Circuit quickly determined that the claims were impliedly precluded.³³³ Tilton did not contest that conclusion, arguing instead that as “a threshold constitutional challenge to agency practice” . . . [the] claim satisfie[d] all three of the *Thunder Basin* factors and so f[ell] outside the exclusive purview of the SEC's administrative review scheme.”³³⁴ The Second Circuit disagreed.³³⁵

Turning to *Thunder Basin*'s meaningful review step, the Second Circuit applied a factors, rather than an elements, approach. The court thoroughly examined each anti-preclusion question but gave the most weight to the meaningful review question.³³⁶ Tilton had argued that review would not be meaningful because the appellate court could not fashion an adequate remedy: going through the unconstitutional administrative process was the harm.³³⁷ The Second Circuit rejected this argument by redefining “meaningful.”³³⁸ The court concluded that judicial review was *meaningful* when it was *available*, not when it remedied the harm.³³⁹

The court's reasoning is illogical. Review that cannot remedy the harm is not meaningful. Further, for an appellate court to meaningfully resolve a claim raised in an adjudication, the adjudicating tribunal must be able to both develop an adequate record and resolve the claim in the first instance.³⁴⁰ The

331. *Tilton*, 824 F.3d at 279.

332. *Id.* at 281, 291.

333. *Id.* at 281–82 (citing *Elgin v. Dep't of Treasury*, 567 U.S. 1, 9–10 (2012)).

334. *Id.* at 282 (quoting Brief for Plaintiffs-Appellants at 12, *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016) (No. 15-2103)).

335. *Id.*

336. *Id.* at 282–87.

337. *Id.* at 283.

338. The Second Circuit noted that in other cases where litigants unsuccessfully challenged the authority of a presiding judge or jury, the litigants often had to wait to appeal the issue until after the court rendered a final judgment. *Id.* at 285. The Second Circuit distinguished *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991), which the Supreme Court had allowed to proceed despite a due process challenge regarding the administrative proceedings. *Tilton*, 824 F.3d at 286. The Second Circuit reasoned that in that case the post-proceeding judicial review was not meaningful because the process itself posed additional irreparable harm beyond the burden of simply enduring an unconstitutional process. *Id.* at 286 (citing *McNary*, 498 U.S. at 496–97). The plaintiffs in *McNary* would have to voluntarily surrender themselves for deportation. *McNary*, 498 U.S. at 496. Here, the only harm alleged was experiencing the potentially unconstitutional hearing.

339. The court reasoned that the Supreme Court's analysis of this element in *Free Enterprise* depended upon the *availability* of post-proceeding judicial review, not whether such review would *remedy* the constitutional violation. *Tilton*, 824 F.3d at 284. No review was available to the plaintiffs in *Free Enterprise*; in contrast, review would be available for Tilton.

340. See Admin. Conf. of the U.S., Recommendation 2013–4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41358, 41360 (July 10, 2013) (recommending that agencies develop an administrative record for judicial review).

SEC can do neither.³⁴¹ Regardless, the Second Circuit decided meaningful review was present because Tilton's claims could be reviewed, even if that review could not remedy the harm.³⁴²

Turning next to the wholly collateral anti-preclusion question, the Second Circuit identified two approaches the lower courts had developed to resolve this question.³⁴³ The Second Circuit was the first circuit to identify these two approaches. Under one approach, courts look to see whether the claim is “substantially intertwined with the merits dispute that the proceeding was commenced to resolve.”³⁴⁴ Pursuant to this approach, a claim is wholly collateral when it is unrelated to legal and factual issues in the adjudication.³⁴⁵ This approach makes sense and limits the number of claims that can be filed in federal court.

Under the second, so-called vehicle approach,³⁴⁶ courts look to see whether the claim is “raised in response to, and so is procedurally intertwined with, an administrative proceeding—regardless of the claim’s substantive connection to the initial merits dispute in the proceeding.”³⁴⁷ This approach makes no sense. A claim raised in the adjudication will never be wholly collateral because the adjudication serves as the vehicle in which the plaintiff brought the claim to light. Further, plaintiffs must raise their claims as affirmative defenses in the adjudication or risk waiving them.³⁴⁸ Thus, the vehicle test gives plaintiffs a Hobson’s choice: raise the claim as an affirmative defense and have the claim precluded from judicial review in district court or do not raise the claim in the administrative proceeding thereby risking waiving it entirely.

Despite the approach’s shortcomings, the Second Circuit adopted the vehicle approach and concluded that because Tilton’s claim was raised in the

341. *See supra* note 57.

342. *Tilton*, 824 F.3d at 286–87.

343. *Id.* at 287. The court noted that the Supreme Court has not guided the lower courts on how to analyze this factor. *Id.*

344. *Id.* (first citing *Hill v. SEC*, 114 F. Supp. 3d 1297, 1308–09 (N.D. Ga. 2015), *vacated*, 825 F.3d 1236 (11th Cir. 2016); and then *Duka v. SEC*, 103 F. Supp. 3d 382, 391 (2015), *abrogated by Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016)).

345. For example, in *Thunder Basin* and *Elgin*, the constitutional claims were directly tied to the sufficiency of the adjudication in each case. *See supra* subparts III(C) & (E) for a discussion of these cases. In contrast, in *Free Enterprise*, the constitutional claims were unrelated to the specific situation (even had the SEC initiated an adjudication); they applied more broadly to any SEC adjudication. *See supra* subpart III(D) (discussing how the plaintiff anticipatorily sued the Public Company Accounting Oversight Board seeking a declaratory judgment that the Board was unconstitutional).

346. *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 21–22 (2012).

347. *Tilton*, 824 F.3d at 287. The latter approach harkens back to *Elgin*’s “vehicle” language. 567 U.S. at 21–22.

348. “No objection . . . may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.” 15 U.S.C. § 78y(1), (c)(1).

adjudication, it was not wholly collateral.³⁴⁹ In its reasoning, the court emphasized the word “wholly” and said that Tilton’s claim was not “*wholly* collateral to the SEC’s administrative scheme more broadly” because it arose from the enforcement action.³⁵⁰ The court distinguished the contrary holding in *Free Enterprise*, noting that the claim in that case was not “moored to any proceeding that would provide for an administrative adjudication and subsequent judicial review.”³⁵¹ Because an adjudication was pending, Tilton’s claim was moored to that adjudication; thus, timing once again proved fatal. Agreeing with the Seventh and D.C. Circuits, the Second Circuit concluded that the timing of the lawsuit was dispositive; Tilton had waited too long to sue in federal court.³⁵²

Turning finally to the agency expertise question, the Second Circuit noted that it was “a close question.”³⁵³ The court rejected both *Free Enterprise*’s finding that the SEC lacked expertise to analyze the “constitutional sufficiency of its appointment[.]” process and another case in which the Second Circuit itself had held that the SEC lacked expertise to resolve a similar claim and could not fully develop a record through its factfinding.³⁵⁴ Quoting *Elgin*, the court concluded that “the SEC might bring its expertise to bear on [Tilton’s] proceeding by resolving accompanying statutory claims that it ‘routinely considers,’ and which ‘might fully dispose of the case’ in [Tilton’s] favor.”³⁵⁵ Underscoring the point that Tilton could challenge the appointment process during an appeal of any adverse administrative proceeding, the Second Circuit held that Congress intended to preclude judicial review of Tilton’s claim.³⁵⁶ In other words, because the SEC has some related expertise that might prove relevant, expertise was present. Yet, is “some possibly related expertise” the type of expertise that adjudicators should have when resolving constitutional issues? I doubt it.

Not surprisingly, the dissent disagreed with the majority’s analysis and persuasively argued that review should not be precluded. The dissent noted that Tilton’s case was “nearly indistinguishable from [*Free Enterprise*].”³⁵⁷ The case differed in only one significant way: administrative proceedings had begun, a distinction without a difference (as noted repeatedly above).³⁵⁸

349. *Tilton*, 824 F.3d at 288.

350. *Id.*

351. *Id.*

352. *See id.* 281–82 (concluding that “persons responding to SEC enforcement actions are precluded from initiating lawsuits in federal courts as a means to defend against them”).

353. *Id.* at 289.

354. *Id.* (first citing *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 (2010); and then *Touche Ross & Co. v. SEC*, 609 F.2d 570, 577 (2d Cir. 1979)).

355. *Id.* at 290 (quoting *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 23 (2012) (Alito, J., dissenting)).

356. *Id.* at 290–91.

357. *Id.* at 292 (Droney, J., dissenting).

358. *Id.*

Further, the dissent criticized the majority for stripping away any significance from the wholly collateral and agency expertise questions.³⁵⁹ Lastly, the dissent blamed the majority's weak analysis on a faulty reading of *Elgin*.³⁶⁰

In sum, the Second Circuit spent little time on *Block*'s fairly discernible step, overemphasizing *Thunder Basin*'s meaningful review step. Like the Seventh Circuit, the Second Circuit approached the meaningful review questions as factors rather than as elements and agreed with the Seventh Circuit that the meaningful review question was the most, if not the only, relevant question.³⁶¹ Even though the answers to the other two anti-preclusion questions were closer calls, the Second Circuit reasoned that the closer calls did not persuasively demonstrate that Tilton's constitutional claims should be heard in district court.³⁶² In sum, the Second Circuit's analysis fared little better than the analysis of the Seventh Circuit, likely because it relied so heavily on that court's decision in *Bebo*.

D. The Eleventh Circuit

The Eleventh Circuit decided the next implied preclusion case less than three weeks after *Tilton*.³⁶³ The Eleventh Circuit similarly applied a factors, rather than an elements, test, and held that the plaintiffs' claims were precluded.³⁶⁴ The Eleventh Circuit's reasoning was as weak as the Seventh and Second Circuits'.

*Hill v. SEC*³⁶⁵ involved a consolidated appeal that differed from the preceding cases in two ways. First, some of the plaintiffs had sued the SEC before it initiated its enforcement action against them.³⁶⁶ Second, contrary to the lower courts in the other circuit cases, the Northern District of Georgia determined not only that it had subject matter jurisdiction to hear the claims

359. *Id.*

360. *Id.* The dissent noted that *Elgin* had examined claims:

involving the substance of the very act entrusted to the agency for implementation and requesting the types of relief that the agency regularly gives—a far cry from the present case, where the constitutional claim has no relation to the securities laws entrusted to the SEC and the requested remedy of disallowing the proceedings before the ALJ is obviously not a routine outcome—cannot be considered ‘wholly collateral’ to the administrative scheme.

Id. at 295.

361. *Id.* at 282 (majority opinion).

362. *Id.* The district court had found that Tilton's cases failed to satisfy two of the anti-preclusion questions (the meaningful review and wholly collateral questions) and may have failed to satisfy the third (the expertise question). *Id.*

363. *Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016).

364. *Id.* at 1252.

365. 825 F.3d 1236 (11th Cir. 2016).

366. *Id.* at 1240.

but also that the SEC ALJs were unconstitutionally appointed.³⁶⁷ However, the plaintiffs' win was short-lived. The SEC appealed, and the Eleventh Circuit reversed.³⁶⁸

Applying *Block's* fairly discernible step, the Eleventh Circuit looked only to the text of 15 U.S.C. § 78y, ignoring its structure and purpose, and reasoned that § 78y was “materially indistinguishable” from the relevant statutory provisions at issue in *Thunder Basin* and *Elgin*.³⁶⁹ Thus, the court concluded that *Block's* fairly discernible step was satisfied; Congress intended to preclude review.³⁷⁰

Turning to *Thunder Basin's* meaningful review step, the Eleventh Circuit addressed the meaningful review question first.³⁷¹ It joined its sister courts and reasoned that the administrative appeal process was sufficient.³⁷² The plaintiffs had argued that their case was different from *Bebo*, *Jarkesy*, and *Tilton*, because they sued before the SEC brought an enforcement action.³⁷³ The Eleventh Circuit was “unmoved” by the timing argument.³⁷⁴ The court reasoned that it was sufficient that the enforcement action was imminent.³⁷⁵ If correct, potential plaintiffs must now file their claims at the first sign of an investigation, rather than wait for it to conclude. Yet, that process would be extremely inefficient.

Next, the court addressed plaintiffs' concerns that discovery would be “paltry” and that the administrative record would be insufficient for meaningful appellate review.³⁷⁶ These concerns failed to move the court.³⁷⁷ The Eleventh Circuit concluded that the “pinball” proceeding Justice Alito

367. *Id.*

368. *Id.* at 1252.

369. *Id.* at 1242–43.

370. *Id.* at 1242 (“We discern from the text of the statute that Congress sought to foreclose district court review of [the constitutionality of] administrative proceedings.”).

371. *Id.* at 1245.

372. *Id.*

373. *Id.* at 1249 n.6.

374. *Id.* at 1248. The court distinguished *Free Enterprise, Inc.* In that case, the SEC had not yet acted in a way the plaintiff could challenge. *Id.* Here, in contrast, the plaintiffs challenged an SEC action, which if allowed to proceed would result in an order. *Id.* at 1243. The court characterized Hill's challenges as simple objections to the forthcoming orders. *Id.*

375. *Id.* at 1249 (“Similarly, here, it makes no difference that the Gray respondents filed their complaint in the face of an impending, rather than extant, enforcement action. The critical fact is that the Gray respondents can seek full [post-deprivation] relief under § 78y.”).

376. *Id.* (quoting Brief of Appellees Gray Fin. Grp, Inc., Laurence O. Gray and Robert C. Hubbard, IV at 26, *Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016) (No. 15-13738)).

377. *Id.*

had rejected in *Elgin* would be sufficient to satisfy the meaningful review question.³⁷⁸

Combining its analysis of the remaining two anti-preclusion questions, the Eleventh Circuit briefly noted they “[did] not cut strongly either way and thus [did] not persuade us that the [Hill’s] claims fall outside the scope of § 78y’s review scheme.”³⁷⁹ Addressing the expertise question first, the court found the question satisfied because the claim might be rendered moot and agency expertise would be irrelevant.³⁸⁰ Yet, this reasoning is nonsensical and does not address the question of whether the SEC has expertise on resolving constitutional claims. Further, what if the claims are not rendered moot?

Addressing the wholly collateral factor, the Eleventh Circuit mentioned the two tests the Second Circuit had identified in *Tilton*.³⁸¹ Unsure which test to apply, the Eleventh Circuit simply punted. It acknowledged that resolution of this question leaned in the plaintiffs’ favor.³⁸² But a win on that one question was not enough to grant the plaintiffs “license to bypass § 78y.”³⁸³ Explicitly agreeing with the Seventh Circuit in *Bebo* that the meaningful review question was the only question that mattered, the Eleventh Circuit held that review was impliedly precluded.³⁸⁴

The Eleventh Circuit’s reasoning is as flawed as its sisters’. The Eleventh Circuit concluded that an analysis of all three *Block* factors was unnecessary (only text mattered); *Thunder Basin*’s anti-preclusion questions were merely factors and meaningful review was the only relevant anti-preclusion question; and timing was determinative. In addition, the Eleventh Circuit eliminated the expertise question entirely because there was a possibility that the administrative action might moot the claim.³⁸⁵

E. *The Fourth Circuit*

In December 2016, in *Bennett v. SEC*,³⁸⁶ the Fourth Circuit similarly held that the plaintiff’s claims were precluded.³⁸⁷ The lower court had

378. *See id.* at 1250 (concluding that a reviewing court remanding to the Commission to develop the record helps satisfy the meaningful review question); *see Elgin v. Dep’t of Treasury*, 567 U.S. 1, 34–35 (2012) (Alito, J., dissenting) (describing the procedure of a reviewing court remanding to the relevant agency for record development as “pinball procedur[e]”).

379. *Hill*, 825 F.3d at 1250.

380. *Id.*

381. *Id.* at 1251.

382. *Id.*

383. *Id.* at 1252.

384. *Id.*

385. *Id.* at 1250–51.

386. 844 F.3d 174 (4th Cir. 2016).

387. *Id.* at 176.

dismissed for lack of jurisdiction.³⁸⁸ The Fourth Circuit affirmed.³⁸⁹ In so doing, the court altered the meaningful review question, asking whether there was *meaningful access* to judicial review, not whether the review would be meaningful.³⁹⁰ Further, the court adopted the vehicle approach to the wholly collateral question, ignored the timing difference in the case, and decided that the SEC had expertise because the administrative proceeding might be dismissed.³⁹¹

While the facts were nearly identical to the others, in this case, there was one critical difference: the plaintiff had filed her lawsuit *three months* before the enforcement action was to begin.³⁹² Given the weight the other circuits gave this factor, would timing make a difference? Sadly, no.

Applying *Block's* fairly discernible step, the Fourth Circuit reasoned that the act's text and structure were identical to the text and structure of the review provisions in the Mine Act, which was at issue in *Thunder Basin*.³⁹³ Agreeing with *Jarkesy* and *Hill*, which had similarly found the act's provisions to be “‘nearly identical’ and ‘materially indistinguishable’” from the Mine Act's provisions, the Fourth Circuit concluded that congressional intent to preclude review was fairly discernible.³⁹⁴

Next, moving to *Thunder Basin's* meaningful review step, the court addressed each anti-preclusion question in turn. Addressing the meaningful review question, the court found that the administrative process could provide meaningful review.³⁹⁵ Much as its sister circuits had done, the court cited *FTC v. Standard Oil Co. of California*³⁹⁶ as proof that defending oneself in an unlawful forum was not irreparable harm.³⁹⁷ Litigation expense and annoyance are simply part of the social burden of living under any government.³⁹⁸ Although the plaintiff had argued that *Standard Oil* was inapposite because the plaintiffs in that case had not raised a constitutional challenge to an administrative proceeding, just a statutory challenge, the Fourth Circuit concluded that that difference was immaterial because the plaintiffs in both *Elgin* and *Thunder Basin* had raised constitutional challenges and their claims had been precluded.³⁹⁹ However, the

388. *Id.* at 178.

389. *Id.* at 176.

390. *Id.* at 186.

391. *Id.* at 186–88.

392. *Id.* at 177.

393. *Id.* at 181–82.

394. *Id.* at 182–83 (first quoting *Jarkesy v. SEC*, 803 F.3d 9, 16–17 (D.C. Cir. 2015); and then *Hill v. SEC*, 825 F.3d 1236, 1242 (11th Cir. 2016)).

395. *Bennett*, 844 F.3d at 184–86.

396. 449 U.S. 232 (1980).

397. *Bennett*, 844 F.3d at 184–85 (citing *Standard Oil*, 449 U.S. at 244).

398. *Id.* at 185.

399. *Id.*

constitutional claims in *Elgin* and *Thunder Basin* were focused on the particular proceedings at issue in each case and not on the constitutionality of the proceedings generally.⁴⁰⁰

Next, the court addressed timing, which had been so critical in the other cases. Much like the Eleventh Circuit, the Fourth Circuit distinguished *Free Enterprise* by noting that here, the SEC had instituted an administrative disciplinary proceeding against the plaintiff.⁴⁰¹ That administrative proceeding would culminate with a reviewable order.⁴⁰² In *Free Enterprise*, the plaintiffs had to choose between challenging a rule at random or incurring penalties for noncompliance. That choice made “judicial review not meaningfully *accessible*.”⁴⁰³ Thus, like the Second Circuit, the Fourth Circuit changed the first anti-preclusion question from asking whether *meaningful review* was available to asking whether there was *meaningful access* to judicial review.⁴⁰⁴ These are different questions.

Addressing the wholly collateral question, the court adopted the vehicle approach because several of its sister circuits had done so.⁴⁰⁵ Applying that approach, the court reasoned that because the plaintiff had waited to sue until after the SEC initiated proceedings, her claims were the vehicle by which she sought to “vacate the ALJ’s initial findings.”⁴⁰⁶ This finding seems at odds with the facts: the administrative proceeding had not begun when the plaintiff had filed the suit. The vehicle was still at the manufacturing plant.⁴⁰⁷

Addressing the agency expertise question, the court adopted the mootness reasoning of the D.C. and Eleventh Circuits. The Fourth Circuit noted that the SEC could bring its expertise to bear on the issue because the Commission might find its Division of Enforcement’s claims to be meritless.⁴⁰⁸ If so, the case would be dismissed before the constitutional question need be reached.⁴⁰⁹ The court ignored the fact that such a result was

400. *See supra* subparts III(C) & (E) for a discussion of these cases.

401. *Bennett*, 844 F.3d at 182.

402. *Id.*

403. *Id.* at 186 (emphasis added) (citing *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490 (2010)).

404. *Id.*

405. *Id.* at 187 (citing *Jarkesy v. SEC*, 803 F.3d 9, 22–23 (D.C. Cir. 2015); then *Tilton v. SEC*, 824 F.3d 276, 287–88 (2d Cir. 2016); then *Bebo v. SEC*, 799 F.3d 765, 773–74 (7th Cir. 2015); and then *Hill v. SEC*, 825 F.3d 1236, 1251–52 (11th Cir. 2016)). However, support for that approach was less than overwhelming. The D.C. and Second Circuits had adopted that approach; however, the Seventh and Eleventh Circuits had refused to decide which approach to use. *See Jarkesy*, 803 F.3d at 22–23 (adopting the vehicle approach); *Tilton*, 824 F.3d at 288 (same); *Bebo*, 799 F.3d at 774 (declining to choose either approach); *Hill*, 825 F.3d at 1252 (same).

406. *Bennett*, 844 F.3d at 187.

407. *See id.* at 177 (noting that the plaintiff filed suit against the SEC on October 30, 2015, almost three months before her administrative proceeding was scheduled to begin).

408. *Id.* at 187–88.

409. *Id.*

“unlikely to occur” (an understatement!) in this case given that the plaintiff had defaulted at the initial hearing.⁴¹⁰ Because the plaintiff defaulted and could no longer appeal, the case against the plaintiff could not be dismissed. Moreover, even if the plaintiff had not defaulted, this reasoning is weak at best. Expertise is not acquired because a claim might become moot.

In sum, the Fourth Circuit incorrectly changed the meaningful review question to one asking about meaningful access to judicial review. Further, the court, as had all the circuits before it, distinguished *Free Enterprise* based on timing yet rejected an argument that filing three months prior to an adjudication mattered. Finally, the court floundered on the agency expertise question.

F. *The Fifth Circuit*

1. *The Panel Decision.*—The Fifth Circuit came to the party late. In August 2020, a panel of the court decided *Cochran v. SEC*⁴¹¹ and joined its sister courts in holding that the administrative review process was the exclusive path to challenge the legitimacy of the administrative adjudication.⁴¹² The year before, the Fifth Circuit had held that the judicial review provision in the Federal Deposit Insurance Corporation’s (FDIC) enabling act provided the exclusive means for judicial review.⁴¹³ Given the holding in this earlier case and the unanimous holdings of the other five appellate courts to address this issue, the Fifth Circuit majority felt “bound” to agree.⁴¹⁴ But then a surprising thing happened: the court granted en banc review and reversed.⁴¹⁵ Judge Haynes, who had dissented from the panel decision, wrote the majority opinion reversing it.⁴¹⁶

Here is the background. While the SEC’s proceeding had been pending in this case, the Supreme Court decided *Lucia v. SEC*,⁴¹⁷ which held that the SEC ALJs were unconstitutionally appointed.⁴¹⁸ This constitutional argument was one that many of the plaintiffs in these cases had been making, yet they could not get the claim heard because the lower courts kept dismissing the cases. After *Lucia*, the SEC reassigned all pending

410. *Id.* at 188 & n.15.

411. 969 F.3d 507 (5th Cir. 2020), *rev’d en banc*, 20 F.4th 194, 198 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 2707 (2022).

412. *Id.* at 510.

413. *Bank of La. v. FDIC*, 919 F.3d 916 (5th Cir. 2019).

414. *Cochran*, 969 F.3d at 510. The dissent disagreed that *Bank of Louisiana* was controlling, arguing that the case addressed a different statute and failed to address the constitutional claim. *Id.* at 518 (Haynes, J., dissenting).

415. *Cochran v. SEC*, 20 F.4th 194, 198, 213 (2021), *cert. granted*, 142 S. Ct. 2707 (2022).

416. *Id.* at 197.

417. 138 S. Ct. 2044 (2018).

418. *Id.* at 2055.

adjudications to properly appointed ALJs, including the ALJ in *Cochran*.⁴¹⁹ After a new ALJ took over her case, the plaintiff sued, challenging the constitutionality of the SEC ALJ's removal provisions. The district court dismissed for lack of jurisdiction.⁴²⁰

A panel of the Fifth Circuit affirmed, using much of the faulty reasoning the other circuits had used.⁴²¹ Applying *Block*'s fairly discernible step, the Fifth Circuit concluded that congressional intent to preclude review was clear in the text and structure of the Exchange Act.⁴²² The court reasoned that the text supported such a finding because the Exchange Act granted jurisdiction to the circuit courts only after the Commission issued a final order and declared such review to be "exclusive."⁴²³ The court further reasoned that the structure of the enforcement scheme also supported its conclusion because the Exchange Act gives the SEC the power to select the forum.⁴²⁴ The ability to choose a forum would be illusory if plaintiffs could file an action in district court to bypass the administrative tribunal.⁴²⁵

The court's reasoning is unsound. The court failed to recognize that the issues in the administrative proceeding were different from the constitutional challenges filed in district court. Moreover, the Supreme Court had already rejected this "undermining" argument in *Sackett*.⁴²⁶

Turning to *Thunder Basin*'s meaningful review step, the Fifth Circuit treated the anti-preclusion questions as "factors" and said, "each provides evidence of whether Congress intended district courts or the SEC to get first crack at a claim."⁴²⁷ The majority then addressed each question.⁴²⁸

Addressing the meaningful review question first, the majority noted that *Lucia v. SEC* proved that post-adjudication judicial review could meaningfully address constitutional challenges to the Commission's structure.⁴²⁹ *Lucia*—in which the Supreme Court had held that the SEC ALJs were unconstitutionally appointed—had been issued as part of the administrative appeal.⁴³⁰ However, the Fifth Circuit failed to acknowledge that the adjudication took more than a decade to reach the Supreme Court.

419. *Cochran v. SEC*, 969 F.3d 507, 510 (2020), *rev'd en banc*, 20 F.4th 194, 198 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 2707 (2022).

420. *Id.*

421. *Id.* at 518.

422. *Id.* at 511.

423. *Id.* (first citing 15 U.S.C. § 78y(a)(3); and then *Jarkesy v. SEC*, 803 F.3d 9, 16 (D.C. Cir. 2015)).

424. *Id.* at 512.

425. *Id.*

426. *Sackett v. EPA*, 566 U.S. 120, 128 (2012).

427. *Cochran*, 969 F.3d at 512.

428. *Id.* at 514.

429. *Id.*

430. *Id.* at 510.

Litigants with less money and persistence would likely be unable to pursue a claim to that venue.

Next, and like its sister circuits, the Fifth Circuit majority pointed to timing to reject the plaintiff's argument that *Free Enterprise* controlled.⁴³¹ The Fifth Circuit noted that in *Free Enterprise* the plaintiffs had no standing to challenge the findings of an investigation; here, the adjudication was ongoing and would end with the opportunity to appeal any adverse decision.⁴³²

Moving to the wholly collateral question, the court described both approaches for determining whether a claim was wholly collateral.⁴³³ If the court were to apply the vehicle approach, then the claims were related, not wholly collateral.⁴³⁴ But the court acknowledged that if it were to apply the first approach—which asks whether the substance of the plaintiff's claims are intertwined with the statutory scheme—then the plaintiff would have “a stronger case.”⁴³⁵ The majority seemed reluctant to “become the first circuit to conclude that this aspect of the wholly collateral question helped [the plaintiff] on this factor.”⁴³⁶ And even were the court to do so, “that [finding] would not overcome the other two *Thunder Basin* factors.”⁴³⁷ In other words, the majority refused to adopt an approach to the wholly collateral question that it seemed to prefer and that made more sense because the other circuits had rejected it. Lemmings anyone?

Moving finally to the third question, agency expertise, the majority labeled it a “close call.”⁴³⁸ Citing *Elgin*, the majority noted that it was not supposed to determine whether the particular agency had expertise regarding the specific claim before the district court.⁴³⁹ Instead, the court was to look at whether the agency's resolution of other issues could obviate the need to address the constitutional challenge.⁴⁴⁰ Applying that approach, the majority concluded that because of the remote possibility that the ALJ or the Commission would rule in the plaintiff's favor, her case could be resolved in the administrative forum on non-constitutional grounds.⁴⁴¹

431. *Id.* at 515 (explaining that the timing “distinction between an investigation that may never reach an ALJ and a pending adjudication that already has is the same one every court of appeals has made”).

432. *Id.* at 514–15.

433. *Id.* at 515.

434. *Id.*

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.* at 516.

439. *Id.*

440. *Id.*

441. *Id.*

Again, the majority's reasoning was flawed. The majority determined that whether the agency had expertise to resolve the constitutional claim was irrelevant to answering the question of whether the agency had expertise to resolve the constitutional claim. All that mattered was that the claim might be mooted. This odd approach is consistent with the approach the D.C., Eleventh, and Fourth Circuits took. In short, much like its sister circuits, the Fifth Circuit panel crashed and burned.

Judge Haynes dissented. Without explanation, she skipped *Block's* fairly discernible step and addressed only *Thunder Basin's* meaningful review step. She disagreed with the majority's analysis and resolution of the three anti-preclusion questions.⁴⁴² Cochran petitioned for en banc review, which the court granted. Judge Haynes wrote the majority's opinion.

2. *The En Banc Decision.*—Writing for the majority, Judge Haynes correctly noted that there were two steps to the implied preclusion test, *Block's* fairly discernible step and *Thunder Basin's* meaningful review step.⁴⁴³ For *Block's* fairly discernible step, Judge Haynes began, and would

442. Regarding the meaningful review question, Judge Haynes distinguished *Thunder Basin* and *Elgin*. In those cases, the plaintiffs had challenged the constitutionality of the substantive statute giving rise to their administrative action. *Id.* at 519 (Haynes, J., dissenting) (first citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 203–04 (1994); and then *Elgin v. Dep't of Treasury*, 567 U.S. 1, 6–7 (2012)). In contrast, here, the plaintiff challenged the constitutionality of the ALJ who would oversee her proceeding. *Id.* If the plaintiff were to win before the ALJ or the Commission, she would lose the ability to have a court consider the now-moot constitutional claim. *Id.* Judge Haynes reasoned that cases raising fundamental structural concerns, like a case concerning the President's removal powers, are fundamentally different from those cases in which a plaintiff challenges the constitutionality of the applicable statute. *Id.* at 519–20. In the latter, if a plaintiff wins on the substantive claim, the need to address the constitutional issue would disappear. *Id.* In the former, if the plaintiff wins on the substantive claim, the constitutional issue remains but now is unable to be reviewed. *Id.*

Regarding the wholly collateral question, Judge Haynes first found it unnecessary to decide which test was appropriate: the procedural or the substantive relationship test. *Id.* at 520. Applying the procedural relationship test, she noted that the plaintiff did not allege that any agency misdeeds took place during or as part of the enforcement proceedings. *Id.* Applying the substantive relationship test, she noted that the plaintiff's claims were virtually identical to the claims raised in *Free Enterprise*, which the Supreme Court had found to be wholly collateral. *Id.* Like the plaintiff in that case, the plaintiff here similarly did not challenge the securities laws underlying her administrative proceeding; she challenged the ALJ's very existence. *Id.* Thus, under either wholly collateral test, the plaintiff's claim was wholly collateral.

Regarding the agency expertise question, the dissent correctly noted that the claim was outside the SEC's competence and expertise because the plaintiff did not ask the court to delve into a fact-bound inquiry or into issues regarding securities laws. *Id.* at 520–21. She said that courts are well-positioned to address questions regarding the constitutionality of the removal provisions protecting SEC ALJs. *Id.*

Finally, Judge Haynes concluded that the plaintiff's structural removal claim is not the type of claim that Congress would want the SEC, rather than the courts, to address. *Id.* at 521.

443. *Cochran v. SEC*, 20 F.4th 194, 205 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 2707 (2022).

have ended, with *Free Enterprise*.⁴⁴⁴ She reminded the parties of the strong presumption favoring judicial review of administrative action and noted that the government had a heavy burden overcoming this presumption.⁴⁴⁵ Reviewing the text of § 78y, she rejected the SEC's argument that by giving the courts of appeals the power to review the Commission's final orders, "Congress implicitly stripped *all* jurisdiction from every other court—including district courts' jurisdiction over removal power claims under § 1331."⁴⁴⁶ She reasoned that the text does not speak to litigants like Cochran who are not subject to a final agency order.⁴⁴⁷ Further, the statute is written in permissive rather than mandatory terms, providing that a person aggrieved by a final order "may" petition for review.⁴⁴⁸ Finally, she noted that were there any remaining doubt, the Supreme Court in *Free Enterprise* had already rejected the SEC's argument that § 78y stripped district courts of jurisdiction over removal power challenges.⁴⁴⁹

Indicating that "*Free Enterprise Fund* is enough to decide this case," she nevertheless independently examined what she called the "*Thunder Basin* factors," after assuming for the sake of argument that Congress had intended § 78y to preclude judicial review.⁴⁵⁰ Judge Haynes reversed the order of *Thunder Basin*'s meaningful review questions and started by asking whether the claim was wholly collateral.⁴⁵¹ According to Judge Haynes, whether a claim is wholly collateral depends upon whether the administrative process can provide the relief the plaintiff seeks.⁴⁵² Like the plaintiff in *Free Enterprise*, Cochran challenged the existence of SEC ALJs.⁴⁵³ She did not challenge the Exchange Act or an SEC rule or order.⁴⁵⁴ Further, the outcome of the district court case would have no effect on Cochran's liability for violating the securities laws.⁴⁵⁵ Consequently, because Cochran was not seeking relief that the Exchange Act can provide, Judge Haynes concluded that Cochran's removal claim was wholly collateral.⁴⁵⁶

444. Judge Haynes noted that the facts and arguments in this case were identical to those in *Free Enterprise. Id.* at 203. She rejected the SEC's timing argument, which was that the initiation of an adjudication in *Cochran* distinguished it from *Free Enterprise. Id.* Cochran had no guarantee that she could obtain judicial review of her claim unless the district court could hear it then. *Id.*

445. *Id.* at 200 (quoting *Salinas v. U.S. R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021)).

446. *Id.*

447. *Id.*

448. *Id.* at 200–01.

449. *Id.* at 201–02.

450. *Id.* at 204.

451. *Id.* at 206–07.

452. *Id.* at 207 (citing *Elgin v. Dep't of Treasury*, 567 U.S. 1, 22 (2012)).

453. *Id.*

454. *Id.*

455. *Id.*

456. *Id.*

Regarding agency expertise, Judge Haynes cited *Free Enterprise* and quickly said, “there is no doubt” that the claims were “standard questions of administrative law, which the courts are at no disadvantage in answering.”⁴⁵⁷ A removal claim does not require specialized understanding of the securities laws, unlike the mine operator’s claims in *Thunder Basin*. Resolving those claims required the Mine Act be interpreted.⁴⁵⁸ Hence, the SEC had no expertise to help the court in resolving Cochran’s removal claim.

Regarding meaningful review, Judge Haynes’s argument is hard to follow. She noted that *Free Enterprise* had come out differently from *Thunder Basin* and *Elgin* despite similar facts.⁴⁵⁹ Understanding why the cases came out differently was critical to understanding whether meaningful review would be available. She suggested that the difference in the outcome of cases was related to the nature of the claim.⁴⁶⁰ The claim in *Free Enterprise* was structural, while the claims in *Thunder Basin* and *Elgin* were substantive.⁴⁶¹ At bottom, the difference, she believed, was that the administrative process could remedy the potential harms in *Thunder Basin* and *Elgin* but could not do so in *Free Enterprise*.⁴⁶² Because Cochran’s removal claim might never be judicially reviewed, the opportunity for meaningful review was threatened.⁴⁶³

Judge Costa wrote a lengthy dissent, criticizing the majority’s decision to “discount[] the wisdom of our brethren” and create a circuit split.⁴⁶⁴ In describing the implied preclusion test, he described how *Block*’s fairly discernible step focuses on the act’s “text, structure, and purpose” but not the type of claim.⁴⁶⁵ The type of claim a party is seeking to bring in district court is relevant only during *Thunder Basin*’s meaningful review step.⁴⁶⁶ His description is accurate but irrelevant. Judge Haynes did not discuss the claim during her analysis of the first step.⁴⁶⁷

Next, Judge Costa accused the majority of analyzing *Block*’s fairly discernible step as though “it were writing on a blank canvas.”⁴⁶⁸ Citing no authority himself, he said that the Supreme Court had already “painted the

457. *Id.* at 207–08 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 (2010)).

458. *Id.* at 208.

459. *Id.*

460. *Id.* at 209.

461. *Id.* at 208.

462. *Id.* at 209.

463. *Id.* at 212.

464. *Id.* at 236 (Costa, J., dissenting).

465. *Id.* at 240 (quoting *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 10 (2012)).

466. *Id.* at 240.

467. *Id.* at 207 (majority opinion).

468. *Id.* at 241 (Costa, J., dissenting).

picture.”⁴⁶⁹ “Statutes, with language and structure almost identical to section 28y, that provide for agency adjudication followed by appellate review generally prevent district courts from interfering with enforcement proceedings.”⁴⁷⁰ Likely, he was referring to *Thunder Basin* and *Elgin*, which analyzed the Mine Act and the CSRA, not the Exchange Act. But he did not cite either case. Moreover, Judge Haynes did anything but paint on a blank canvas. She cited, quoted, and shouted *Free Enterprise* from the rooftops, a case that specifically analyzed the Exchange Act.⁴⁷¹

Moving to *Thunder Basin*’s meaningful review prong, Judge Costa started with the meaningful review question. He identified three cases in which the Supreme Court ultimately heard structural challenges like Cochran’s removal claim.⁴⁷² Hence, meaningful review was clearly available. It is true that each of these claims finally reached the Supreme Court; however, each of the litigants had to endure the unconstitutional harm of which they complained. And that harm was never remedied for them, only for others. Further, each of these claims took years to reach the Supreme Court.⁴⁷³ Just because review of a claim is available does not mean that review is *meaningful*.

Turning to the wholly collateral question, he adopted the vehicle approach without identifying it as such.⁴⁷⁴ He concluded that because “Cochran would not be able to assert this claim but for the SEC’s charging her in an enforcement proceeding,” the claim was not wholly collateral.⁴⁷⁵ He criticized the majority for adopting an approach to this question that no other circuit had adopted.⁴⁷⁶ Yet, the approach Judge Haynes adopted actually makes more sense than the vehicle approach, as explained earlier.⁴⁷⁷

469. *Id.*

470. *Id.*

471. *Id.* at 201–04 (majority opinion).

472. *Id.* at 242 (Costa, J., dissenting) (first citing *Lucia v. SEC*, 138 S. Ct. 2044 (2018); then *NLRB v. Noel Canning*, 573 U.S. 513 (2014); and then *Carr v. Saul*, 141 S. Ct. 1352 (2021)).

473. *See, e.g.*, *Raymond J. Lucia Cos., Inc.*, 106 SEC Docket 3613, 2013 WL 3379719, at *12 (ALJ July 8, 2013), *supplemented by* 107 SEC Docket 4365, 2013 WL 6384274, at *38–54 (ALJ Dec. 6, 2013), *rev’d in part*, Exchange Act Release No. 75837, Investment Advisors Act Release No. 4190, Investment Company Act Release No. 31806, 2015 WL 5172953 (Sept. 3, 2015), *pet. denied*, *Lucia v. SEC*, 868 F.3d 1021 (D.C. Cir. June 26, 2017) (mem.), *cert. granted*, 138 S. Ct. 2044 (2018) (showing that the case took over eight years to reach the Supreme Court); *Noel Canning*, 358 N.L.R.B. No. 4, 2012 WL 402322 (Feb. 8, 2012), *vacated*, *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 573 U.S. 513 (2014) (showing that the case took over two years to reach the Supreme Court).

474. *Cochran*, 20 F.4th at 246–47 (Costa, J., dissenting).

475. *Id.* at 247.

476. *Id.* The dissent said that the majority asked whether the plaintiff’s claim is “intertwined with the enforcement scheme.” *Id.*

477. *See supra* text accompanying notes 346–48.

Finally, regarding the agency expertise question, he admitted that, “at first blush,” it appears to help Cochran because purely legal questions do not benefit from agency expertise.⁴⁷⁸ However, he reasoned that the Supreme Court in *Elgin* had directed courts not to actually consider whether agencies have expertise on the topic, but to determine instead whether “the agency’s resolution of other issues ‘may obviate the need to address the constitutional challenge.’”⁴⁷⁹ In other words, he accepted the “mootness equalizes expertise” argument the D.C. and Eleventh Circuits put forth. However, the Supreme Court in *Free Enterprise* said exactly the opposite: “standard questions of administrative law, which the courts are at no disadvantage in answering.”⁴⁸⁰

At bottom, the majority and dissent disagreed about whether *Free Enterprise* or *Elgin* controlled this case and whether circuit court judges should be lemmings. Given the inconsistent direction in the two cases, this disagreement is not surprising. And the lemming approach may offer comfort that the court is not alone. Moreover, *Elgin* was the Court’s latest case on implied preclusion; perhaps it should control. However, *Free Enterprise* directly addressed the Exchange Act and an almost identical claim, and *Elgin* was poorly reasoned.⁴⁸¹ Hence, Judge Haynes’s reliance on *Free Enterprise* and her decision not to follow the other circuits off the proverbial cliff is reasonable. We will likely find out: the Supreme Court granted certiorari on this case in May 2022.⁴⁸²

V. Applying the Implied Preclusion Framework

By now you realize the hypothetical in the introduction was based on the series of cases above. Let’s return to it. You are an investment advisor trying to comply with the vast and confusing morass of federal and state securities laws. After investigating a complaint, the SEC Enforcement Division brings an enforcement action against you that will be heard by an SEC ALJ. You believe that the SEC ALJs are unconstitutionally subject to dual layers of for-cause removal protection.⁴⁸³ You file your claim in district court rather than waste your time arguing these points before an SEC ALJ (who cannot hold that the removal provision violates the Constitution) and

478. *Cochran*, 20 F.4th at 247 (Costa, J., dissenting).

479. *Id.* at 248 (quoting *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 22–23 (2012)).

480. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 (2010).

481. *Id.* at 485 (explaining that willful violations of Board rules are treated as willful violations of the Exchange Act); *Cochran v. SEC*, 969 F.3d 507, 510 (5th Cir. 2020) (citing the holding of *Free Enterprise* to demonstrate that Cochran’s constitutional argument addresses the same issue as in *Free Enterprise*), *rev’d en banc*, 20 F.4th 194, 198 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 2707 (2022).

482. *SEC v. Cochran*, 142 S. Ct. 2707 (2022).

483. *See* Jellum, *supra* note 15, at 708 (arguing that dual for-cause removal provisions violate the U.S. Constitution).

appealing to the Commission (which also will not rule in your favor). Should the district court dismiss your case, making you endure a potentially unconstitutional proceeding? In short, no.

A. *Applying Block's Fairly Discernible Step*

First, the court should apply *Block's* fairly discernible step and examine the text, structure, and purpose of the Exchange Act as modified by the Remedies and Dodd-Frank Acts. In *Free Enterprise*, the Supreme Court ignored this step without explanation, finding instead that review was not precluded after applying only *Thunder Basin's* meaningful review step.⁴⁸⁴ Assuming both steps are essential to the analysis, the Court's failure to analyze this step suggests the Court found either that congressional intent to preclude review was fairly discernible in the text, structure, and purpose of that act, or that a finding on this step was unnecessary because application of *Thunder Basin's* meaningful review step decided the issue.

For *Block's* fairly discernible step, the circuit courts have either reviewed the Exchange Act broadly or just 15 U.S.C. § 78y. The broader approach comports better with *Block's* directive to review the act's text, structure, and purpose. The Exchange Act gave the SEC the power to file an action for an injunction in federal court.⁴⁸⁵ Specifically, 15 U.S.C. § 78u(d)(1), as amended by the Remedies Act and the Dodd-Frank Act, authorizes the SEC to proceed in court to seek monetary, as well as other, remedies. That provision provides:

Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter [or] the rules or regulations thereunder . . . it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices . . .⁴⁸⁶

Subsequently, the Remedies Act and the Dodd-Frank Act empowered the SEC to proceed in an administrative proceeding.⁴⁸⁷ Specifically, 15 U.S.C. § 77h-1(a) and (g) authorize the SEC to initiate an administrative proceeding and impose monetary, as well as other, penalties. Section 77h-1 provides:

484. *Free Enter. Fund*, 561 U.S. at 489–91.

485. 15 U.S.C. § 78u(d)(1).

486. *Id.*

487. *Id.* § 77h-1(a) (authorizing administrative proceedings); *id.* § 78u(d) (authorizing district court actions).

If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this subchapter, or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person . . . to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation. Such order may, in addition to requiring a person to cease and desist from committing or causing a violation, require such person to comply, or to take steps to effect compliance, with such provision, rule, or regulation, upon such terms and conditions and within such time as the Commission may specify in such order. Any such order may, as the Commission deems appropriate, require future compliance or steps to effect future compliance, either permanently or for such period of time as the Commission may specify, with such provision, rule, or regulation with respect to any security, any issuer, or any other person.⁴⁸⁸

Neither section expressly precludes judicial review. Nor does either appear to impliedly preclude review of constitutional claims from text alone.

Further, under 15 U.S.C. § 78d–1, the Commission has the power to delegate authority to an ALJ to hear these administrative proceedings and to review the ALJ's initial decision.⁴⁸⁹ Then, under 15 U.S.C. § 78y, aggrieved parties may appeal the Commission's final order.⁴⁹⁰ Once appealed, the appellate court has exclusive jurisdiction to affirm, modify, or set aside the Commission's order.⁴⁹¹ The court may, however, remand to the Commission for further proceedings if the administrative record is insufficient.⁴⁹² Section 78y impliedly cabins appellate judicial review to Commission *actions*. These provisions do not expressly limit the district court's jurisdiction under other statutes, such as 28 U.S.C. § 1331, nor does it preclude every claim against the SEC. As the Supreme Court said in *Free Enterprise*, not everything the SEC does “is encapsulated in a final Commission order or rule.”⁴⁹³

The text of § 78y suggests that Congress intended challenges to the SEC's enforcement actions that culminate in an order to be brought through the administrative process. Thus, if the defendant in an administrative proceeding believes the ALJ considered evidence that the judge should not have considered or issued a ruling not supported by substantial evidence, the defendant should raise that challenge through the administrative process,

488. *Id.* § 77h–1(a).

489. *Id.* § 78d–1(a), (b).

490. *Id.* § 78y(a)(1).

491. *Id.* § 78y(a)(3).

492. *Id.* § 78y(a)(5).

493. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 489 (2010).

including appellate appeal. However, the text of § 78y says nothing about congressional intent regarding challenges to the constitutionality of the administrative process or the ALJ structure. Indeed, it appears to take review of those claims out of the appellate court's jurisdiction. Hence, if the plaintiff challenges something unrelated to the order (or a rule), such as whether the ALJ removal provisions violate the Appointments Clause in the U.S. Constitution, that challenge can be brought, in fact should be brought, before the district court under the court's general federal question jurisdiction in 28 U.S.C. § 1331.

As for the structure, the SEC was given the choice to bring an enforcement action in-house or in federal court in the Remedies and Dodd-Frank Acts. And that choice should be honored so long as the challenge relates to and can be remedied in the enforcement action. When the issues are unrelated from any enforcement proceeding, the choice should not be the agency's alone. Some judges have reasoned that “[t]he agency’s statutory power to select the forum would be illusory if [parties sued by the SEC] could file an action in district court.”⁴⁹⁴ And that is true when the entity’s claim relates to the enforcement proceeding and is relatively unique to that entity; however, it is not true when the entity, now a plaintiff, challenges something outside of the issues involved in the specific enforcement hearing. SEC choice is irrelevant: the SEC has no power to file suit seeking to have the court declare that its ALJs are constitutionally appointed. Thus, this argument is a red herring.

As for statutory purpose, Congress added the administrative process as an “alternative” to the district court process, to allow the SEC flexibility to choose its forum.⁴⁹⁵ Congress wanted to “provide the agency with a broader range of remedies to protect investors and maintain the integrity of the nation’s securities markets.”⁴⁹⁶ The Senate Committee Report shows that Congress wanted to give the SEC a method to:

[R]esolve cases without protracted negotiation or litigation on that part of defendants seeking to avoid the collateral consequences of an injunction. Cease-and-desist authority also will provide the SEC with an alternative remedy against persons who commit isolated infractions and present a lesser threat to investors. Moreover, given the extremely congested nature of federal court dockets, which often results in considerable delays in cases being heard, the authority to

494. *Cochran v. SEC*, 969 F.3d 507, 512 (5th Cir. 2020), *rev'd en banc*, 20 F.4th 194, 198 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 2707 (2022).

495. *See, e.g.*, S. REP. No. 101-337, at 17–18 (1990) (describing the SEC’s flexibility to choose between the two).

496. *Id.* at 1.

issue an administrative cease-and-desist order will enable the SEC to respond in a more timely fashion to violate conduct or practices.⁴⁹⁷

Thus, Congress wanted to give the agency an alternative forum to make settlement easier; to help defendants avoid collateral consequences; to speed up the resolution of smaller, less serious violations; and to avoid a congested court system. Congress wanted the SEC to have a choice for these lower stake cases. Instead, the SEC has turned to its in-house process to improve its odds of success in small- and big-scale cases.⁴⁹⁸ In any event, none of these purposes suggest that Congress intended to preclude judicial review of constitutional challenges to the agency's structure.

Thus, applying *Block's* fairly discernible test, a district court should find that it has jurisdiction under 28 U.S.C. § 1331. Yes, Congress intended to preclude judicial review for those claims related to the specific administrative proceeding, but Congress did not intend to preclude judicial review for every claim. Assuming this reasoning is correct, the next step is to determine whether these claims are of the type that Congress intended be precluded. To resolve that question, the court should apply *Thunder Basin's* meaningful review step.

B. *Applying Thunder Basin's Meaningful Review Step*

Assuming congressional intent to preclude review of some claims is apparent from the text, structure, and purpose of the act, a district court must next apply *Thunder Basin's* meaningful review step and analyze the three anti-preclusion questions to confirm that Congress intended to preclude jurisdiction of these particular claims. The sections below analyze each question as it relates to our hypothetical claims.

1. Meaningful Review.—The first question a court must ask is whether a finding of preclusion would foreclose all meaningful judicial review. The answer to that question is yes.

First, claims like the removal claim are threshold jurisdictional challenges whose resolution should precede a decision on the merits of the enforcement action. However, it would be largely ineffective for our hypothetical plaintiff to raise her claim in the enforcement action as an

497. *Id.* at 18.

498. *See supra* Part II.

affirmative defense, and she cannot raise it as a counterclaim.⁴⁹⁹ Yet, if she fails to raise the claim, she waives it.⁵⁰⁰

Second, even if she could effectively raise the claim in the administrative proceeding, it would be largely futile. She would ask the SEC ALJ, and then the Commission, to rule on the constitutionality of the SEC ALJs generally and the ALJ hearing her case specifically. ALJs and agencies have no power to rule on the constitutionality of these structural claims.⁵⁰¹

Moreover, it seems highly unlikely that the SEC ALJ or the Commission could assess the plaintiff's claim impartially.⁵⁰² What ALJ would be willing to declare himself or herself unconstitutional, especially when doing so would mean finding invalid a removal protection that protects ALJ independence?⁵⁰³ As for the Commission, that body presumes its process is constitutional; otherwise, why would the SEC be litigating this issue so aggressively? Thus, the ALJ and the Commission are "inherently conflicted in assessing" the merits of this constitutional challenge.⁵⁰⁴ The plaintiff would have to pay the expense of raising the claim in the administrative proceeding and wait years for judicial resolution. Hence, raising the claim in the administrative hearing would be futile, time-consuming, and costly.

Third, even if the plaintiff could effectively raise her claim and have it heard before neutral decisionmakers, another problem remains. To have her claim heard in the appellate court, the plaintiff must lose the administrative hearing and any appeal. However, the plaintiff may settle her claim. Or the plaintiff may win on the substantive issues. In either case, a federal court would never hear the constitutional claim.⁵⁰⁵ She would be unable to appeal given that she had won before the agency, and the SEC enforcement division

499. The SEC's "Rules of Practice do not provide for a counterclaim" through which respondents can raise such challenges. *Feldman*, Release No. 403, 55 SEC Docket 2477, 1994 WL 23256, at *2 (ALJ Jan. 14, 1994) ("Unlike the Federal Rules of Civil Procedure, which require the pleading of affirmative defenses, the [SEC's] Rules make no provision for such pleading, either as a requirement or permissively.").

500. 15 U.S.C. § 78y(c)(1).

501. *Elgin v. Dep't of Treasury*, 567 U.S. 1, 17 (2012); *Jarkesy v. SEC*, 803 F.3d 9, 18 (D.C. Cir. 2015).

502. At least one SEC ALJ expressed "doubt" regarding whether he had authority to resolve constitutional claims like the one made in this case. See Hill, Admin. Proceedings Rulings Release No. 2675, 2015 SEC LEXIS 1899, at *14 (ALJ May 14, 2015) (resolving the claim anyway in favor of the SEC).

503. For background on this issue, see generally Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39 (2020), and Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797 (2013).

504. *Gupta v. SEC*, 796 F. Supp. 2d 503, 513–14 (S.D.N.Y. 2011).

505. Oral Argument at 5:00–16:20, *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015) (No. 15–1511), [http://media.ca7.uscourts.gov/oralArguments/oar.jsp?caseyear=15&casenumber=1511&listCase=List+case%28s%29&amonth=\[https://perma.cc/35KV-9E88\]](http://media.ca7.uscourts.gov/oralArguments/oar.jsp?caseyear=15&casenumber=1511&listCase=List+case%28s%29&amonth=[https://perma.cc/35KV-9E88]).

similarly could not appeal. Thus, the issue would remain unresolved, never to be heard by any federal court. The unconstitutional infirmity would be unremedied. The plaintiff would have succeeded only in winning after an allegedly unconstitutional enforcement action. But the allegedly unconstitutional process would continue, whether the SEC brought a new action against the plaintiff or another regulated entity.

Fourth, even if the plaintiff could effectively raise her claim, have it heard before neutral decisionmakers, and be able to appeal to a federal court, another problem remains. The SEC's administrative forum could hinder the plaintiff's ability to develop a strong administrative record because discovery and pretrial motions are limited or unavailable.⁵⁰⁶ The Commission acknowledged in an earlier case addressing the appointments claim that discovery would be needed because the ALJs' status could not be gleaned from existing statutes and regulations.⁵⁰⁷ Judicial review is unlikely to be meaningful when discovery is limited or nonexistent and the record incomplete.⁵⁰⁸ In *Elgin*, the Court did not find this argument convincing, suggesting that the administrative process was generally sufficient to allow plaintiffs to find the necessary facts to support these constitutional challenges.⁵⁰⁹ For those few times that the record was incomplete, the appellate court could simply remand the issue to the agency to develop a better record.⁵¹⁰ Justice Alito scathingly noted that this inefficient pinball

506. See, e.g., *Timbervest, LLC*, Investment Advisers Act Release No. 4096, Investment Company Act Release No. 31652, 2015 WL 3398239, at *1 (May 27, 2015) (the SEC ordered the Division of Enforcement to submit "additional material," in the form of an affidavit and any supporting exhibits, detailing the method of hiring, selection, and appointment of SEC ALJs). Respondents have no right to request interrogatories or documents, to conduct depositions, to make requests for admission, to issue subpoenas, or to make discovery-related motions, from the SEC or third parties. See 17 C.F.R. § 201.154(a) (2021) (expressly allowing only motions for relief, not discovery); *id.* § 201.232(b) (2018) (stating that subpoena issuers have discretion to refuse to issue subpoenas or impose conditions); *id.* § 201.233(a) (2019) (describing standards for permissive depositions); *Griseuk*, Release No. 440, 57 SEC Docket 1386, 1994 WL 485047, at *1 (ALJ Aug. 31, 1994) ("[I]nterrogatories and requests for documents . . . are not available in administrative proceedings before this Commission.").

507. See *Timbervest, LLC*, Investment Advisers Act Release No. 4096, Investment Company Act Release No. 31652, 2015 WL 3398239, at *1 (May 27, 2015) (requesting additional discovery to aid the Commission's consideration of the Appointments Clause challenge).

508. See *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 497 (1991) (stating that when a plaintiff cannot develop an adequate record in a proceeding, that proceeding is "the practical equivalent of a total denial of judicial review"); see also *Burdue v. FAA*, 774 F.3d 1076, 1085 (6th Cir. 2014) (stating that district courts should hear constitutional claims that require factual development). Cf. *Elgin v. Dep't of Treasury*, 567 U.S. 1, 19, 21 (2012) (finding meaningful review where agency could "administer oaths, examine witnesses, take depositions, . . . and receive evidence" (citing 5 U.S.C. § 1204(b)(1)-(2))).

509. *Elgin*, 567 U.S. at 21 (holding that meaningful constitutional review was possible because the MSPB has the tools to develop the factual record).

510. 15 U.S.C. § 78y(a)(5).

approach could hardly be the meaningful review Congress would have expected.⁵¹¹ It is time-consuming and inefficient.

Fifth, even if the plaintiff could effectively raise her claim, have it heard before neutral decisionmakers, be able to appeal to a federal court, and put together a sufficient record, another problem remains. The plaintiff's harm could never be effectively remedied.⁵¹² Assume the Commission ruled against the claim; however, after appeal, the appellate court were to hold that SEC ALJs are unconstitutional because they are subject to dual for-cause removal provisions. What then? The plaintiff would have already brought her constitutional challenge as part of the SEC's enforcement action and endured the harm she sought to avoid: a hearing before an unconstitutional ALJ. In *Free Enterprise*, the Supreme Court reasoned that the plaintiffs in that case could not meaningfully pursue their constitutional claims in the administrative forum because they objected to the Board's existence, not to any specific Commission rule or action.⁵¹³ Similarly, this plaintiff objects to the SEC ALJ's existence, not to any specific Commission rule or action. Thus, winning the constitutional claim after the administrative review has taken place would not remedy the harm because the harm would have already occurred; the hearing would already have been held. "[Y]ou can't unscramble an egg."⁵¹⁴

511. *Elgin*, 567 U.S. at 33–34 (Alito, J., dissenting).

512. *Accord Axon Enter., Inc. v. FTC*, 986 F.3d 1173, 1192 (9th Cir. 2021) (Bumatay, J., concurring in the judgment in part and dissenting in part) (noting the argument that subjecting a company to an administrative agency's jurisdiction is itself the harm), *cert. granted*, 142 S. Ct. 895 (2022); *cf. Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2196 (2020) (stating that a person subject to an unconstitutional agency's power suffers from a "here-and-now" injury).

513. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490 (2010).

514. *Duka v. SEC*, 103 F. Supp. 3d 382, 391 n.10 (S.D.N.Y. 2015), *abrogated by Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016).

While some district courts found this argument convincing,⁵¹⁵ the appellate courts found it unpersuasive.⁵¹⁶ It is true that a win for the plaintiff on this claim might help those in the throes of pending unconstitutional hearings; however, the win would do little to help the plaintiff who paid the enormous costs—both of time and money—to successfully challenge the unconstitutional structure. The plaintiff would simply have to endure a second hearing after the constitutional infirmity was remedied.

Moreover, this process is inefficient. For example, if a claim like the plaintiff's, which was precluded, ultimately prevails during the appeal of the adjudication, all cases pending before all ALJs subject to dual for-cause removal and some decided cases would need to begin again once a constitutional structure is put into place.⁵¹⁷ This is what happened after *Lucia*.⁵¹⁸ Indeed, the Fifth Circuit panel acknowledged that this process was inefficient and “could impose unnecessary costs on [the plaintiff].”⁵¹⁹ But the panel also concluded that concerns about piecemeal review (or claim splitting) and opening the floodgates to litigation trumped efficiency concerns.⁵²⁰ But plaintiffs are already required to bring all claims arising out of a common set of facts in one lawsuit, so claim splitting should not be an issue.⁵²¹ In any event, whether these concerns do trump efficiency concerns

515. *Duka*, 103 F. Supp. 3d at 390–91. In *Hill v. SEC*, the district court reasoned:

Plaintiff's claims go to the constitutionality of Congress's entire statutory scheme, and Plaintiff specifically seeks an order enjoining the SEC from pursuing him in its “unconstitutional” tribunals. If Plaintiff is required to raise his constitutional law claims following the administrative proceeding, he will be forced to endure what he contends is an unconstitutional process. Plaintiff could raise his constitutional arguments only after going through the process he contends is unconstitutional—and thus, being inflicted with the ultimate harm Plaintiff alleges (that is, being forced to litigate in an unconstitutional forum). By that time, Plaintiff's claims would be moot and his remedies foreclosed because the court of appeals cannot enjoin a proceeding which has already occurred.

Hill v. SEC, 114 F. Supp. 3d 1297, 1307 (N.D. Ga. 2015), *vacated*, 825 F.3d 1236 (11th Cir. 2016); *accord* *Gray Fin. Grp., Inc. v. SEC*, 166 F. Supp. 3d 1335, 1344 (N.D. Ga. 2015), *vacated*, *Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016). And in *Gupta v. SEC*, the district court reasoned that without judicial review, the plaintiff “would be forced to endure the very proceeding he alleges is the device by which unequal treatment is being visited upon him.” 796 F. Supp. 2d 503, 514 (S.D.N.Y. 2011).

516. *See, e.g., Hill*, 825 F.3d at 1246; *Bennett v. SEC*, 844 F.3d 174, 184 n.10 (4th Cir. 2016); *Tilton v. SEC*, 824 F.3d 276, 285 (2d Cir. 2016).

517. *See, e.g., Cochran v. SEC*, 969 F.3d 507, 510 (5th Cir. 2020) (noting that after *Lucia v. SEC*, “the SEC reassigned all adjudications to judges whose appointments had, by then, been ratified by the Commission” and thus that *Cochran*'s case was assigned to a new ALJ), *rev'd en banc*, 20 F.4th 194, 198 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 2707 (2022).

518. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (remanding for a new hearing before a new ALJ).

519. *Cochran*, 969 F.3d at 516.

520. *See id.* (raising “larger systematic concerns about piecemeal review,” and noting that the “general prohibition on interlocutory appeals requires a party to litigate its whole case” before appealing).

521. *Elgin v. Dep't of Treasury*, 567 U.S. 1, 34 (2012) (Alito, J., dissenting).

is not the question. The question is whether Congress intended such an inefficient process. It is unlikely that had Congress considered the issue, this is the process Congress would have selected.

Assume instead the plaintiff brought her claim in federal court and lost, either at the district court or appellate court level. If the federal court enjoined the administrative proceeding, the SEC would lose time waiting for the process to culminate but would lose little else. If the SEC believed that the plaintiff's actions were so egregious that the public was at risk, then the SEC could initiate its enforcement action in federal court rather than an in-house proceeding to ensure the case would be heard as promptly as possible.

Thus, the plaintiff cannot obtain meaningful review of her constitutional claim through the administrative process, and judicial review should not be precluded. Because a positive finding on one anti-preclusion question could end the inquiry, the court could stop here, especially if the court believed, as the Seventh Circuit did, that the meaningful review question is the most important question. However, if the court instead assumes the anti-preclusion questions are factors that should be balanced, then the court should analyze the wholly collateral question next.

2. *Wholly Collateral*.—The second question a court must ask is whether the plaintiff's claim is wholly collateral to the administrative proceeding. It is currently unclear which test a district court should use to determine whether the claim is wholly collateral because the Supreme Court has not told us. Lower courts applied two tests: the *procedural* relationship test (whether the claim is inextricably intertwined with the administrative proceeding) and the *substantive* relationship test (whether the claim is substantively related to the administrative proceeding).⁵²² The Fifth Circuit's en banc decision applied a third test: whether the administrative scheme can provide the relief the plaintiff seeks.⁵²³

The procedural relationship test makes no sense, at least as some circuit courts have applied it. These courts have looked to see whether the plaintiffs would have brought a federal claim but for having an administrative proceeding against them.⁵²⁴ Using this approach, the federal claim will never be wholly collateral; plaintiffs only file these lawsuits because the agency institutes or plans to institute an enforcement action against them.⁵²⁵

522. See, e.g., *Cochran*, 969 F.3d at 515 (describing the relevance of this distinction).

523. *Cochran v. SEC*, 20 F.4th 194, 210 (5th Cir. 2021), cert. granted, 142 S. Ct. 2707 (2022).

524. E.g., *Bennett v. SEC*, 844 F.3d 174, 187 (4th Cir. 2016).

525. Indeed, were a plaintiff who was not subject to some agency action to bring such a claim, that plaintiff might not have standing to raise a constitutional challenge. Plaintiffs "must have suffered an 'injury in fact'—an invasion of a legally protect interest which is . . . concrete and particularized," and an abstract outrage at the constitutionality of an ALJ's removal protections

A better way to apply the procedural relationship test is to ask whether the plaintiff's claims *arose* from misdeeds that occurred during or as part of the agency's proceeding.⁵²⁶ The focus is not on *whether* the SEC brought an administrative proceeding, but on *how* and *why* the plaintiff sued. For example, in *Bank of Louisiana v. FDIC*,⁵²⁷ the plaintiff claimed that the FDIC denied it equal protection by targeting the company's president.⁵²⁸ The plaintiff also claimed that the FDIC "violated due process by preventing the company from proffering certain evidence and by preventing [the company's president] from talking with his counsel" at certain points during enforcement proceedings.⁵²⁹ These claims related to events in that specific agency proceeding. In contrast, here, the plaintiff's claim that the dual for-cause removal structure violates Article II is wholly unrelated to the action pending before the SEC, which concerns whether the plaintiff violated certain securities laws; hence, it is wholly collateral procedurally.

If instead the court applies the substantive relationship test—looking to see whether the claim is substantively related to the proceeding—then the court should find these claims to be wholly collateral. The plaintiff's claim that the ALJs are unconstitutionally subject to dual for-cause removal provisions is unrelated to the securities laws the plaintiff is alleged to have violated. Applying the substantive relationship test makes more sense than applying the procedural relationship test, especially given that the next anti-preclusion question asks about agency expertise. These two questions work together. Courts, not agencies, should hear claims that are completely unrelated to the issues before the agency (wholly collateral), in part because the agency has no substantive expertise to resolve the claim (agency expertise). Having a lower tribunal resolve a legal issue for which the agency has no expertise or power does not aid appellate court review. Further, challenges to the agency's legitimacy should be rarer than challenges to the agency's orders and regulations, thus negating the floodgates concern.⁵³⁰

would not count. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). It is unclear how imminent the invasion must be: is an investigation with a possible enforcement action enough?

526. *E.g.*, *Cochran*, 969 F.3d at 520 (Haynes, J., dissenting).

527. *Bank of La. v. FDIC*, 919 F.3d 916 (5th Cir. 2019).

528. *Id.* at 921.

529. *Id.*

530. Some courts have distinguished between broad, facial, constitutional challenges versus narrow, as-applied, constitutional challenges. *See Mace v. Skinner*, 34 F.3d 854, 858 (9th Cir. 1994) (discussing how a particular claim constitutes a "broad" constitutional challenge); *Chau v. SEC*, 72 F. Supp. 3d 417, 426 (S.D.N.Y. 2014) (noting that courts are more likely to sustain jurisdiction for "broad facial and systematic challenges"). The Supreme Court rejected this distinction in *Elgin v. Dep't of Treasury*, 567 U.S. 1, 15 (2012) ("[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." (quoting *Citizens United v. FEC*, 558 U.S. 310, 331 (2010))).

Applying the substantive relationship test to our hypothetical plaintiff, a court should determine that the claim is wholly collateral. The plaintiff does not challenge the charges against her or the agency's action, the legitimacy of an agency rule, or even the legality of the securities laws the plaintiff is alleged to have violated.⁵³¹ The plaintiff challenges the ALJ's removal protection, like the plaintiff in *Free Enterprise*, who challenged the Board's dual for-cause removal protection provisions.⁵³² The cases are virtually identical, save one thing: the administrative proceeding in the hypothetical plaintiff's case had begun, while the administrative proceeding in *Free Enterprise* was a threat on the horizon.

Finally, were the court to apply Judge Haynes's test—whether the administrative scheme can provide the relief the plaintiff seeks—the court would reach the same result the Fifth Circuit reached in its latest *Cochran* case. The administrative scheme simply cannot remedy the potential constitutional infirmity before the plaintiff would have to submit to the potentially unconstitutional hearing.

Thus, under any approach to the wholly collateral question, a district court should find that the plaintiff's claim that the dual for-cause removal structure violates Article II is wholly collateral from the SEC's enforcement proceeding, which will determine whether the plaintiff violated securities laws. Because a positive finding of one anti-preclusion question should end the inquiry, the court could stop here. However, if the court instead assumes the anti-preclusion questions are factors that should be balanced, the court should analyze the agency expertise question next.

3. *Agency Expertise.*—The third question a court must ask is whether the SEC has administrative expertise to resolve the plaintiff's claim. Of the three, this question is the easiest to answer. Our hypothetical plaintiff's claim that dual for-cause removal provisions violate Article II are “outside the [SEC's] competence and expertise.”⁵³³ In *Free Enterprise*, the Supreme Court explained that whether a claim falls within an agency's expertise

531. *Contra*, Gupta v. SEC, 796 F. Supp. 2d 503, 513 (S.D.N.Y. 2011) (noting that in a prior case in which “appellants were facing disciplinary proceedings brought by the SEC” the Second Circuit only allowed a challenge of the Commission's authority to promulgate a new rule to proceed); Live365 Inc. v. Copyright Royalty Bd., 698 F. Supp. 2d 25, 34 (D.D.C. 2010) (stating that plaintiff's constitutional challenge to the appointment of the agency judges was “wholly independent of any action actually taken or expected to be taken in the future by [those] judges”).

532. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 486–87 (2010).

533. *Id.* at 491; *accord* *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (“Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.” (quoting *Johnson v. Robison*, 415 U.S. 361, 368 (1974))).

depends on whether the claim involves subject-matter knowledge or “technical considerations of [agency] policy.”⁵³⁴ Neither is present here.

The plaintiff does not ask the court to resolve facts related to the SEC's charges against her, nor any legal issues involving securities laws. Instead, the plaintiff challenges the constitutionality of the SEC ALJs' for-cause removal protection. That protection is in 5 U.S.C. § 7521.⁵³⁵ This is not a federal securities statute; thus, it is not within the SEC's administrative expertise. Neither the ALJ nor the Commission can offer technical or industry insight to help the appellate court resolve this claim. Rather, constitutional issues “are particularly suited to the expertise of the judiciary”⁵³⁶ because courts are better at determining the constitutionality of agency structures.⁵³⁷

The Supreme Court concluded that the plaintiffs' claims related to the agency's expertise in *Thunder Basin* and *Elgin*. In *Thunder Basin*, the plaintiff's constitutional claims required the court to interpret the Mine Act and its implementing regulations; hence, the claims fell within the Federal Mine Safety and Health Review Commission's expertise.⁵³⁸ Similarly, in *Elgin*, the plaintiffs challenged the constitutionality of the employment statute that the MSPB regularly administers.⁵³⁹ In finding the claims to be within the MSPB's expertise, the Court reasoned that there might be “threshold questions” to the constitutional claim that the agency would have expertise to resolve or at least weigh in on.⁵⁴⁰ One such threshold question was whether one of the plaintiffs in that case was constructively fired, an issue squarely within the MSPB's expertise.⁵⁴¹

In contrast, here, there are no threshold issues that need resolving and the removal claim does not turn on knowledge of the security laws, so there is simply no expertise that the SEC can bring to the table. The plaintiff's claim is a “standard question[] of administrative law” best left to judicial resolution.⁵⁴²

534. *Free Enter. Fund*, 561 U.S. at 491 (alteration in original) (quoting *Johnson*, 415 U.S. at 373).

535. There is no statute protecting the SEC Commissioners from for-cause removal; however, the Supreme Court in *Free Enterprise* assumed the Commissioners had this protection. *Free Enterprise*, 561 U.S. at 486–87. To the extent the MSPB's for-cause removal protection is considered, that protection can be found in 5 U.S.C. § 1202.

536. *Gupta*, 796 F. Supp. at 512; *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (noting that the “benefit of [an agency's] experience and expertise” is not applicable when “the only issue is the constitutionality of a statutory requirement”).

537. *See Thunder Basin*, 510 U.S. at 215 (noting that constitutionality determinations are typically beyond the reach of administrative agencies).

538. *Id.* at 214.

539. *Elgin v. Dep't of Treasury*, 567 U.S. 1, 7, 22 (2012).

540. *Id.* at 22–23.

541. *Id.* at 23.

542. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 (2010).

The D.C., Second, and Eleventh circuit courts misanalysed this element.⁵⁴³ They reasoned that because the ALJ or the Commission could rule in favor of the plaintiff during the administrative proceeding, the SEC indirectly had “expertise” to resolve the constitutional claim.⁵⁴⁴ Under this approach, the ability to moot or dismiss a claim provided the SEC with the needed expertise. However, the ability to moot is not expertise and certainly is not what either *Thunder Basin* or *Free Enterprise* envisioned. Further, were mootness the test for expertise, then this element would be present in every administrative proceeding, making it superfluous.

Thus, the district court should find that the SEC lacks expertise to resolve the plaintiff’s claim that the dual for-cause removal structure violates Article II. The plaintiff’s claim is based on separation of powers questions involving constitutional and administrative law that “courts are at no disadvantage in answering.”⁵⁴⁵

Because a positive finding of one anti-preclusion question should end the inquiry, this finding alone should be sufficient to conclude that the plaintiff’s structural removal claim is not the type of claim for which Congress intended to limit jurisdiction. Even if these questions should be balanced as factors, none supports implied preclusion. Hence, the district courts have jurisdiction to hear these claims.

VI. Conclusion

The SEC should not be the decider of its own constitutionality. Yet that is exactly what is happening. The SEC is using the implied preclusion doctrine as a shield, to prevent plaintiffs from raising claims challenging its structural legitimacy.

Whether a claim is impliedly precluded from judicial review depends on a two-step process. First, courts should look for congressional intent to preclude review in the relevant act’s text, structure, and purpose (*Block*’s fairly discernible step).⁵⁴⁶ Second, assuming such intent can be found (and

543. The dissent from the Fifth Circuit also misanalysed this element. *Cochran v. SEC*, 20 F.4th 194, 247–49 (2021) (Costa, J., dissenting), *cert. granted*, 142 S. Ct. 2707 (2022).

544. *See, e.g., Jarkey v. SEC*, 803 F.3d 9, 29 (D.C. Cir. 2015) (concluding that “the Commission’s expertise ‘can otherwise be brought to bear on’ issues in [the respondent’s] proceeding” because “the agency could moot the need to resolve” the respondent’s constitutional claims, including several threshold challenges to the proceeding as a whole, “by finding that he did not commit the securities-law violations of which he stands accused”); *Hill v. SEC*, 825 F.3d 1236, 1250–51 (11th Cir. 2016) (reasoning that because “the Commission could rule that the appellants did not violate the Investment Advisers Act, in which case the constitutional question would become moot,” even if the Commission “could offer no added benefit to the resolution of the constitutional claims themselves,” it would have expertise (quoting *Tilton v. SEC*, 824 F.3d 276, 290 (2nd Cir. 2016))).

545. *Free Enter. Fund*, 561 U.S. at 491.

546. *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984).

only if so), courts should then determine whether the specific claims are ones that can be meaningfully reviewed in the administrative forum (*Thunder Basin's* meaningful review step).⁵⁴⁷ Review is precluded only when (1) *meaningful* judicial review would be available, (2) the claim is not wholly collateral to the issues raised in the administrative action, and (3) the claims are within the agency's administrative expertise. While the Supreme Court has not made clear the relationship among these three questions—whether they are elements or factors—they should be treated as elements. Only when all are present is judicial review precluded.

All circuit courts other than the Fifth Circuit applied the doctrine incorrectly. They failed to understand the relationship between the two steps—both are needed—and the relationship among the three anti-preclusion questions—none can be present. Consequently, they have reversed the presumption that implied preclusion is the exception and not the rule. Indeed, in one case, the D.C. Circuit required the plaintiff to disprove that Congress implied preclusion, rather than make the SEC prove Congress intended preclusion.⁵⁴⁸

These circuit courts are wrong. Challenges to the very legitimacy of the SEC's adjudication process should be heard at the outset by federal courts and not be dragged through years of litigation at the SEC before finally being heard by an appellate court. Such an approach almost guarantees that these claims will never be heard.

I do not exaggerate. In 2018, in *Lucia v. SEC*, the Supreme Court held that the SEC ALJs were unconstitutionally appointed.⁵⁴⁹ It took Raymond Lucia fifteen years to reach this outcome from the beginning of the SEC's first investigation into his business practices in 2003.⁵⁵⁰ In 2013, an unconstitutionally appointed ALJ ruled against Lucia and his business, finding both guilty of violating various sections of the Advisers Act.⁵⁵¹ The ALJ imposed “a severe sanction,” permanently revoking his registration to serve as an investment advisor; permanently barring him from associating with investment advisers, brokers, and dealers; and imposing a combined penalty of \$300,000.⁵⁵² The Commission affirmed and rejected Lucia's

547. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994).

548. *Jarkesy*, 803 F.3d at 17.

549. 138 S. Ct. 2044, 2055 (2018).

550. *Raymond J. Lucia Cos., Inc.*, Investment Advisers Act Release No. 495, 106 SEC Docket 3613, 2013 WL 3379719, at *12 (ALJ July 8, 2013), *supplemented by* 107 SEC Docket 4365, 2013 WL 6384274, at *38–54 (ALJ Dec. 6, 2013).

551. *Raymond J. Lucia Cos., Inc.*, Investment Advisers Act Release No. 495, 106 SEC Docket 3613, 2013 WL 3379719 at *23 (ALJ July 8, 2013), *supplemented by* 107 SEC Docket 4365, 2013 WL 6384274, at *38–54 (ALJ Dec. 6, 2013) (reconsidering the same violations on remand).

552. *Raymond J. Lucia Cos., Inc.*, Investment Advisers Act Release No. 495, 106 SEC Docket 3613, 2013 WL 3379719, at *38–41 (ALJ July 8, 2013), *supplemented by* 107 SEC Docket 4365, 2013 WL 6384274, at *38–54 (ALJ Dec. 6, 2013) (leaving sanctions unchanged on remand).

Appointments Clause claim, wrongly concluding that its ALJs were not inferior officers.⁵⁵³ When Lucia appealed, the Commission stayed only the financial penalty; he was barred from practicing his profession.⁵⁵⁴

In 2016, the D.C. Circuit affirmed, wrongly concluding that SEC ALJs were not inferior officers and, thus, that their appointment was constitutional.⁵⁵⁵ Two years later, the Supreme Court reversed, holding that SEC ALJs are indeed inferior officers.⁵⁵⁶ The Court refused to consider whether the dual for-cause removal provisions violate the Constitution because the issue had not been raised below.⁵⁵⁷ So, the case was remanded back to the SEC for a new hearing before a new and constitutionally appointed ALJ, but one subject to potentially unconstitutional dual for-cause removal protection.⁵⁵⁸

But Lucia had had enough. Rather than fight the SEC again regarding the constitutionality of its ALJs, Lucia settled.⁵⁵⁹ Consequently, the burden to raise the removal claim now falls on others.⁵⁶⁰ Let's hope that they are not similarly worn out by the SEC's tenacious fight to be able to decide that its administrative process is constitutional.

553. Raymond J. Lucia Cos., Inc., Exchange Act Release No. 75837, Investment Advisers Act Release No. 4190, Investment Company Act Release No. 31806, 112 SEC Docket 1754, 2015 WL 5172953, at *26 (Sept. 3, 2015).

554. Raymond J. Lucia Cos., Inc., SEC Release No. 5523, 2020 WL 3264213, at *3 (June 16, 2020).

555. Raymond J. Lucia Cos., Inc. v. SEC, 832 F.3d 277, 284–85, 289, 296 (D.C. Cir. 2016), *rev'd sub nom.* Lucia v. SEC, 138 S. Ct. 2044 (2018), *vacated*, 736 F. App'x 2 (D.C. Cir. 2018).

556. *Lucia*, 138 S. Ct. at 2054–55; see Jellum & Tincher, *supra* note 15, at 19–28 (explaining why SEC ALJs are inferior officers).

557. The parties did not raise this issue; rather, the Solicitor General urged the Court to consider this issue. *Lucia*, 138 S. Ct. at 2057 (Breyer, J., concurring in the judgment in part and dissenting in part).

558. *Id.* at 2055; 736 F. App'x at 3.

559. He agreed to pay a \$25,000 penalty and be barred from working as an investment advisor for three years following the date of the original Commission Opinion and Order. He may apply for reinstatement immediately as that time has now passed. Raymond J. Lucia Cos., Inc., Release No. 5523, 2020 WL 3264213, at *5 (June 16, 2020).

560. For background on Lucia's case, see generally, Frankel, *supra* note 44.