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Response

Short Circuiting the Administrative Judiciary: A response to Linda Jellum

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Introduction

Linda Jellum provides a powerful analysis of the status of the exhaustion process for the SEC administrative judiciary and more broadly of the entire administrative judiciary.[1] Many of her arguments are telling and on point. I disagree with a number of her technical and statutory arguments, and even more so the consequences of her analysis for the administrative state as we know it.

Jellum's argument is that Congress did not intend to preclude district courts from hearing constitutional challenges to SEC adjudications because agency ALJs are not the right adjudicators to hear challenges to the constitutionality of their own operations.[2]

Jellum traces the history of administrative exhaustion in the Supreme Court from *Abbott Laboratories v. Gardner*[3] through *Block v. Community Nutrition Institute* [4] to *Thunder Basin Coal Co. v. Reich*[5] through *Elgin v. Department of Treasury*[6] and *Free Enterprise Fund v. Public Co. Accounting*

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1. Linda D. Jellum, *The SEC's Fight to Stop District Courts from Declaring Its Hearings Unconstitutional*, 101 TEXAS L. REV. 339 (2022).

2. *Id.* at 341.

3. 387 U.S. 136, 141 (1967) (articulating that there must be "clear and convincing evidence" that the legislative intent was to prelude judicial review).

4. 467 U.S. 340, 350–51 (1984) (requiring that the legislative intent to preclude review be "fairly discernable" in the statutory scheme).

5. 510 U.S. 200, 207 (1994).

6. 567 U.S. 1, 5 (2012).

Oversight Board.[7] She presents both a summary and a suggested interpretation for Supreme Court jurisprudence on administrative exhaustion:

> 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.[8]

This summary captures the state of play. However, in her discussion of the circuit court treatment of the factors test, she argues that the circuits mostly miss the point, "changing it from a two-step, three question test into a one-step, one question test."[9] She offers the Seventh Circuit's treatment of *Bebo v. SEC*[10] as an example: the fact that meaningful judicial review was available after the SEC proceeding meant that there was no harm created by mandating that Bebo first raise her claims in the SEC administrative proceeding.[11] She looks at the similar treatments in the Second, Fourth, Eleventh, and D.C. Circuits,[12] and notes the circuit split created by the Fifth Circuit's decision *en banc* in *Cochran v. SEC* ("*Cochran en banc*").[13]

Her conclusion is that all but the Fifth Circuit *en banc* treat the application of the *Thunder Basin* factors incorrectly.[14] Functionally, she argues that, in contrast to the circuit courts, *Thunder Basin* is an elements test—and that all the elements of the *Thunder Basin* test must be answered affirmatively before a party is able to skip the administrative judicial process.[15] However, the import of her argument is not the reinforcement of an elements test, but rather where the elements test would lead—that the majority of adjudications now undertaken by the SEC's in-house ALJs would be driven to the federal district courts.

I. The *Thunder Basin* Factors

We must remember that in our judicial system the common law rules of exhaustion would ordinarily control unless Congress crafted statutory rules

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7. 561 U.S. 477 (2010).

8. Jellum, *supra* note 1*,* at374 (emphasis removed).

9. *Id.* at 377.

10. 799 F.3d 765 (7th Cir. 2015); Jellum, *supra* note 1, at 376–77.

11. *Id.* at 775.

12. Tilton v. SEC, 824 F.3d 276, 282 (2d Cir. 2016); Bennett v. SEC, 844 F.3d 174, 176 (4th Cir. 2016); Hill v. SEC, 825 F.3d 1236, 1245 (11th Cir. 2016); Jarkesy v. SEC, 803 F.3d 9, 12 (D.C. Cir. 2015).

13. Cochran v. SEC, 20 F.4th 94 (5th Cir. 2020) (en banc).

14. Jellum, *supra* note 1, at 411–12. Since Jellum's article, the Court heard oral arguments in *Cochran*. *See* Transcript of Oral Argument, SEC v. Cochran, (No. 21-1239) (argued Nov. 7, 2022) [*hereinafter SEC v. Cochran Oral Argument*].

15. Jellum, *supra* note 1, at 413.

requiring[16] or excluding[17] exhaustion. The question we face is whether the SEC organic statute specifies an exclusive path for securing judicial review of agency adjudication—one that requires a regulated entity to traverse the administrative process before going to court.[18]

In that context, *Thunder Basin* sets out three factors (or in Jellum's view, "elements") to consider when judging an effort to skip administrative adjudication. Administrative adjudication is not the appropriate vehicle for "[1] claims considered 'wholly collateral' to a statute's review provisions and [2] outside the agency's expertise . . . [3] particularly where a finding of preclusion could foreclose all meaningful judicial review."[19]

A. Meaningful Review

Thunder Basin states that exhaustion of the administrative adjudication of a question is required unless "adjudication of petitioner's claims through the statutory-review provisions will violate due process by depriving petitioner of meaningful review."[20] The Court further notes that the channeling of adjudication as set forth in the Mine Act does not deprive meaningful review because "petitioner's statutory and constitutional claims here can be meaningfully addressed in the Court of Appeals."[21]

The question is why the right to appeal to an Article III judge is not sufficient meaningful review. It is clearly review. So, the question then becomes is it meaningful? The Seventh Circuit tries to answer that question in *Bebo*. It argues that Bebo "is already the respondent in a pending enforcement proceeding, so she does not need to risk incurring a sanction . . . just to bring her constitutional challenges before a court of competent jurisdiction. After the . . . enforcement action has run its course, she can raise her objections in a circuit court of appeals . . . ."[22]

16. As an example, in the Prison Litigation Reform Act (PLRA) Pub. L. No. 104-134, 110 Stat. 1321 (1996), now 42 U.S.C. § 1997e (a), the absolute exhaustion requirement mandates, "No action shall be brought with respect to prison conditions . . . by a prisoner. . . until such administrative remedies available are exhausted." *See Ross v Blake*, 578 U.S. 632, 643–45 (2016) (recognizing exceptions to a mandatory rule of exhaustion in cases of futility, opacity of the administrative process, or when administrators frustrate prisoners' attempts to use the grievance system.).

17. At least one provision—42 U.S.C. § 9613(h)—of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) expressly forbids immediate court challenges.

18. Presumably this would be a form of non-statutory review such as 28 U.S.C. § 1331.

19. Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212–13 (1994). (internal citations omitted).

20. *Id.* at 214.

21. *Id*. at 216.

22. Bebo v. SEC, 799 F.3d 765, 774 (7th Cir. 2015). *See also* Hill v. SEC, 825 F.3d 1236, 1248 (11th Cir. 2016); Jarkesy v. SEC, 803 F.3d 9, 20 (D.C. Cir. 2015); Bennett v. SEC, 844 F.3d 174, 176 (4th Cir. 2016); Tilton v. SEC, 824 F.3d 276, 291 (2d Cir. 2016).

Jellum criticizes *Bebo*'s reasoning that the right to appeal an adverse administrative decision provides meaningful judicial review.[23] She argues that most statutes providing for administrative adjudications allow for appellate review of the agency's final decision and that "those statutes that preclude judicial review do so explicitly."[24] Further, she argues that "[i]f 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."[25]

Jellum is not arguing that there is an impediment to securing Article III review. Rather, she is arguing that if one can implicitly preclude review then preclusion would become the rule.

This is not a claim that the opportunity for court of appeals review is not "meaningful." It is an argument that there is something wrong if, by following precedent, too many statutory schemes implicitly require that recourse to an Article III court must come after the administrative process is concluded.

Surely this argument is wrong headed. First, it is incorrect to argue that if explicit review is not required, then all statutes would implicitly preclude review. After all, if "x" is not always true, that does not mean that "not x" is always true. We have numerous cases where parties have argued for an implicit requirement for administrative exhaustion and been turned down.[26] Rather, it is more correct to say that one must look at each statutory scheme separately to determine if the statute calls for implicit preclusion.

Certainly, review in the court of appeals would be meaningful in the sense that it had the power to overturn any agency decision. Perhaps Jellum is arguing that the court of appeals would not have all the evidence it needed for a meaningful review. Driving this point home, Jellum notes Justice Alito's dissent in *Elgin* considering the Merit Systems Protection Board's evaluation of constitutional claims:

> [T]he Board is powerless to adjudicate facial constitutional claims and so these claims cannot be addressed on the merits until they reach the Federal Circuit on appeal. As a result, the Federal Circuit will be

23. Jellum, *supra* note 1, at 376; *see* Bebo, 799 F.3d at 775.

24. Jellum, *supra* note 1, at 376.

25. *Id.*

26. *See e.g.*, McCarthy v. Madigan, 503 U.S. 140, 149 (1992) (holding that a federal prisoner seeking monetary damages in a Bivens action "need not have exhausted his constitutional claim for money damages. . . [;] given the type of claim [the prisoner] raises and the particular characteristics of the Bureau's general grievance procedure, [the prisoner]'s interests outweigh countervailing institutional interests favoring exhaustion."); *see also* Bowen v. City of New York, 476 U.S. 467, 482 (1986).

> forced to address the claims in the first instance, without the benefit of any relevant factfinding at the administrative level. [27]

Perhaps her argument is that if the ALJ refuses to entertain the constitutional issue in the administrative process then there is no point in requiring a facial constitutional claim to await that process. Certainly, there will be no record developed as to the constitutional claim. Jellum asks how can "an appellate court review a claim where there is no record to review."[28] Normally, one would at least raise the constitutional question to preserve it for the record.[29] However, even if the respondent in an administrative proceeding does not raise the constitutional claim before the ALJ, it is likely that the issue can still be introduced on appeal (at least in a Social Security case).[30]

B. Meaningful Access to Review

1. Access as a Legal Question

We begin our treatment of the issue of meaningful access to review by parsing the phrase "meaningful access." Access to judicial review is a legal question; we will discuss some barriers to judicial review—these are uncommon and generally quite obvious. When modified with the word "meaningful," the question of access becomes empirical. Many courts and scholars have come to different conclusions regarding whether factors which affect the "meaningfulness" are so burdensome as to effectively impair one's access to judicial review.

Access to judicial review could be barred by a statute that strips petitioners of standing. Petitioners have no standing when seeking judicial review of discretionary agency decisions. For example, the tax code notes, "in the case of any assessment of interest . . . the Secretary may abate the assessment of all or any part of such interest for any period."[31] The Supreme Court has found that "the federal courts uniformly held that the Secretary's decision not to grant an abatement was not subject to judicial review . . . Any

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27. Jellum, *supra* note 1, at 375 (citing Elgin v. Dep't of Treasury, 576 U.S. 1, 33 (2012) (Alito J., dissenting)).

28. Jellum, *supra* note 1, at 368; *see also, e.g.,* McNary v. Haitian Refugee Center, 498 U.S. 479, 498 (1991).

29. *See*, *e.g.*, Respondent's Renewed Motion to Disqualify the Administrative Law Judge at 1, Axon Enter., Inc., FTC Docket No. D939 (July 8, 2020).

30. *See* Carr v. Saul, 141 S. Ct. 1352, 1360–62 (2021) (extending the holding of Sims v. Apfel, 530 U.S. 103 (2000), to allow constitutional claims not raised before the ALJ to still be raised on appeal despite the fact that ALJ proceedings are more adversarial than the Social Security Agency Appeals Council proceedings in *Sims*). We should underscore this limitation of the "issue exhaustion" principle, however, did not mean the claimant could skip the administrative adjudication stage.

31. 26 U.S.C. § 6404(e)(1).

decision by the Secretary was accordingly 'committed to agency discretion by law' under the Administrative Procedure Act . . . and thereby insulated from judicial review."[32]

The requirement to pay a bond before judicial review has had mixed results in considering whether it was an absolute bar to access. In *Boddie v. Connecticut*,[33] the Supreme Court invalidated the state's requirement that indigent petitioners for divorce post a bond. The Court noted that given "state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages."[34] Interestingly, courts have not ruled that requiring bonds to appeal cases or administrative agency actions are bars to access to the courts of appeal. For example, the Ninth Circuit noted that a petitioner seeking to appeal a decision of the Commodities Futures Trading Commission claimed the court's bond requirement violated his due process rights.[35]The court distinguished *Boddie*, finding that the petitioner "has had an opportunity to present his case. He participated in an adversary proceeding before an administrative law judge, and he appealed to the Commission."[36]

2. Meaningful Access as an Empirical Question

Thus, it is no surprise, Jellum and other critics of the channeling function of §78y and other similar schema focus on the concept of meaningful access. Consider the case law: in *Elgin*, Justice Thomas argued that there is meaningful review if the appellate court considers the constitutional case on appeal.[37] This logic has followed through to numerous SEC ALJ cases.[38] From an analytical perspective it is hard to understand why one would think otherwise. After all, if you have recourse to an Article III court, it is hard to argue that you do not have recourse to meaningful review.[39]

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32. Hinck v. United States, 550 U.S. 501, 503–04 (2007).

33. 401 U.S. 371 (1971).

34. *Id.* at 374; *see also* Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982) (holding that a petitioner seeking relief under the Illinois Fair Employment Practices Act was deprived of due process when the Fair Employment Practices Commission scheduled his hearing five days after the statutory period of 120 days elapsed and subsequently rejected his claim as untimely).

35. Saharoff v. Stone, 638 F.2d 90, 92 (9th Cir. 1980).

36. *Id.*

37. Elgin v. Dep't of Treasury, 567 U.S. 1, 17 (2012).

38. Bennett v. SEC, 844 F.3d 174, 186 (4th Cir. 2016); Tilton v. SEC, 824 F.3d 276, 282 (2d Cir. 2016); Hill v. SEC, 825 F.3d 1236, 1250 (11th Cir. 2016).

39. We note that in *Crowell v. Benson*, 285 U.S. 22 (1932), constitutional or jurisdictional facts were open to review by an Article III court while "regular" facts were settled by the commission as long as the decision was reasonable. The statutes discussed in this essay offer greater review. At the bottom of the issue, we ask, unless there is some legal impediment to such recourse how can the opportunity to appeal to a circuit court of appeals not be meaningful review?

According to Jellum and other critics, the nature of the claims advanced by petitioners impacts the meaningfulness of their access to review.[40] In *Bennett*, for example, Ms. Bennett distinguished her quest for interlocutory relief from *Thunder Basin* and *Elgin,* arguing her claims were "'structural, prophylactic' challenge[s] to the constitutionality of the forum itself" and therefore "the only appropriate relief is an injunction to halt the allegedly unconstitutional administrative proceeding before it occurs."[41] The Fourth Circuit rejected this interpretation of meaningful review, noting "the Supreme Court has similarly rejected the drawing of jurisdictional lines between agencies and federal courts based on the nature of constitutional claims."[42] Nonetheless, the Fifth Circuit in *Cochran en banc* found the argument that structural challenges merited interlocutory relief persuasive. The *en banc* court noted the "'meaningful judicial review' factor thus requires an alternative path to court for targets of SEC enforcement proceedings. A person subject to an unconstitutional adjudication should at least be able to sue for declaratory relief requiring a constitutionally structured proceeding."[43] Professor Jellum elaborates on the distinction the *en banc* opinion makes between *Thunder Basin* and *Elgin*, and *Free Enterprise* stating:

> The claim in *Free Enterprise* was structural, while the claims in *Thunder Basin* and *Elgin* were substantive. 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*. Because Cochran's removal claim might never be judicially reviewed, the opportunity for meaningful review was threatened.[44]

Perhaps the timeliness of the review impacts the meaningfulness. Professor Jellum and others suggest that delayed review is denied review.[45]

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40. *See* Jellum, *supra* note 1, at 403–08.

41. Bennett, 844 F.3d at 184.

42. *Id*.

43. Cochran v. SEC, 20 F.4th 194, 233 (5th Cir. 2021) (en banc).

44. Jellum, *supra* note 1, at 397. Jellum is tracking Judge Haynes here, but it is important to state that it is hard to understand why if "Cochran's removal claim might never be judicially reviewed, the opportunity for meaningful review was threatened." *Id.* It is up to Cochran whether she wished to seek review, and if she chooses not to seek review, that in no way means she lacked a meaningful opportunity for review.

45. *See e.g.,* Jellum*, supra* note 1*,* at 404. Jellum discusses the inability of a hypothetical plaintiff to get relief for facial, constitutional questions that address the underlying nature of the SEC's adjudicatory process. *Id.* at 404–06. She notes for the plaintiff "[t]o have her claim heard in the appellate court, the plaintiff must lose the administrative hearing and any appeal." *Id.* at 404. *See also* Adam M. Katz, *Eventual Judicial Review*, 118 COLUM. L. REV. 1139, 1180 (2018) (discussing the district court's rationale in Duka v. SEC, 103 F.Supp.3d. 382 (S.D.N.Y. 2015), which held in part that "'eventual' judicial review of a constitutional challenge to an administrative

It is useful to delve deeper into what constitutes an absence of meaningful review. We will look at three possible considerations: money, delay in time, or an individual forced to undergo an unconstitutional proceeding.

C. Delay

The claim that delay is a reason to skip the administrative process leads us down a number of rabbit holes. The argument must be that the delay creates a "cognizable Article III injury" in the "'concrete cost of a[] . . . proceeding.'"[46] What would such a cognizable injury be?

1. Money

It has become axiomatic that the cost of litigation is not an Article III injury, at least for the purposes of standing.[47] As early as 1938, the Supreme Court pronounced, "the expense and annoyance of litigation is 'part of the social burden of living under government.'"[48] Elaborating on this sentiment, the Fourth Circuit noted in *Bennett*, "The burden of defending oneself in an unlawful administrative proceeding, however, does not amount to irreparable injury."[49] And the Second Circuit in *Tilton* noted that the "litigant's financial and emotional costs in litigating the initial proceeding are simply the price of participating in the American legal system."[50] Indeed, in the standing context, litigation expenses are not injuries cognizable to organizational standing.[51] In any event, it is unclear the extent to which money was a bar for Cochran and other litigants who have attacked the SEC administrative process. Many

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proceeding cannot in any real sense be meaningful if the challenge is relegated to the aftermath of the administrative action").

46. Cochran*,* 20 F.4th at 213 (quoting Sea-Land Serv., Inc. v. Dep't of Transp., 137 F.3d 640, 648 (D.C. Cir. 1998)).

47. FTC v. Standard Oil Co., 449 U.S. 232, 244 (1980); Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974).

48. Petroleum Expl., Inc. v. Pub. Serv. Comm'n of Ky., 304 U.S. 209, 222 (1938) (quoting Bradley Lumber Co. of Ark. v. NLRB, 84 F.2d. 97, 100 (5th Cir. 1936)). This memorable phrase was quoted by Justice Powell in *Standard Oil*, 449 U.S. at 244, and requoted in the SEC ALJ context in *Jarkesy I*, Jarkesy v. SEC, 803 F.3d 9, 26 (D.C. Cir. 2015).

49. Bennett v. SEC, 844 F.3d 174, 184–85 (4th Cir. 2016).

50. Tilton v. SEC, 824 F.3d 276, 285 (2d Cir. 2016).

51. *See e.g.* Food & Water Watch Inc. v. Vilsack, 808 F.3d 905, 919 (D.C. Cir. 2015) ("[A]n organization's use of resources for litigation, investigation in anticipation of litigation, or advocacy is not sufficient to give rise to an Article III injury."). *See also* Nat'l Taxpayers Union, Inc. v United States, 68 F.3d 1428, 1434 (D.C. Cir. 1995) ("'The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization.'") (quoting Ass'n for Retarded Citizens v. Dallas Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trs,, 19 F.3d 241, 244 (5th Cir. 1994))).

of these lawsuits seem to have been funded, at least at some point in the process, by conservative public interest law firms.[52]

2. Time

There can be no doubt that delay is a significant social problem in litigation. And indeed there is extensive literature on the problem of delay in civil justice and proposals to reduce that delay.[53] The question, of course, is at what point the irreducible reality of delay becomes a legal rather than a policy issue. Charles Dickens famously illustrated that there is some point in a legal dispute where delay can reach levels that distort the legal system.[54]

Jellum is incensed that "[i]t took Raymond Lucia fifteen years to reach [a favorable outcome in the Supreme Court] from the beginning of the SEC's first investigation into his business practices."[55] The Supreme Court did not end Lucia's saga; his case was remanded and ultimately settled.[56] An issue worth noting is that a portion of that time was consumed by Lucia's progress to the Supreme Court. The SEC issued its initial Order Instituting Administrative Cease-and-Desist Proceedings in September 2012.[57] The SEC ALJ issued his initial decision against Lucia in July 2013.[58] Lucia appealed the ALJ's decision to the Commission, which remanded the decision once, before issuing its final Opinion of the Commission and Order

52. For example, New Civil Liberties Alliance, a "nonpartisan, non-profit civil rights group founded by prominent legal scholar Philip Hamburger" that "views the Administrative State as an especially serious threat to constitutional freedoms," has been instrumental in several SEC ALJ lawsuits from *Lucia* through *Cochran*. *Mission*, NEW C.L. ALL., https://nclalegal.org/about/ [https://perma.cc/VZ2M-U8NQ]. *See also Lucia v. SEC | NCLA Files Suit Over Unconstitutional SEC Appointees*, NEW C.L. ALL., NCLA Files Suit Over Unconstitutional SEC Appointees (Nov. 29, 2018), https://nclalegal.org/2018/11/ncla-files-suit-over-unconstitutional-sec-appointees/ [https://perma.cc/7HFV-BKJC]; *NCLA Asks High Court To Uphold Federal Court Jurisdiction Over Unconstitutional Agency Proceedings* NEW C.L. ALL., (Nov. 7, 2022) https://nclalegal.org/2022/11/ncla-asks-high-court-to-uphold-federal-court-jurisdiction-over-unconstitutional-agency-proceedings/ [https://perma.cc/E5EP-CBPM].

53. When Chief Justice Burger announced the 1978 Pound Conference on *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, he argued that the focus was to make litigation faster (and cheaper). Warren E. Burger, *Preface*, *in* THE POUND CONFERENCE: Perspectives on Justice in the Future 5, 6 (A Leo Levin & Russell R. Wheeler eds.,1979); *see generally* Melvin M. Belli, *The Law's Delays: Reforming Unnecessary Delay in Civil Litigation*, 8 J. LEGIS. 16 (1981); Richard Abel, *Forecasting Civil Litigation*, 58 DEPAUL. L. REV. 425 (2009); Saul Levmore, *Strategic Delays and Fiduciary Duties*, 74 VA. L REV 863 (1988).

54. *See generally,* CHARLES DICKENS, BLEAK HOUSE (Folio Society 1985)) (1853). As Dickens writes "Jarndyce and Jarndyce drones on." *Id*. at 4.

55. Jellum, *supra* note 1, at 413.

56. *Id.* at 414.

57. Joint Appendix at 1–2, Raymond J. Lucia Cos., Inc. v. SEC, 832 F.3d 277 (D.C. Cir. 2016), *reh'g en banc granted, vacated* (Feb. 16, 2017), *on reh'g en banc*, 868 F.3d 1021 (D.C. Cir. 2017), *rev'd and remanded sub nom*. Lucia v. SEC., 138 S. Ct. 2044 (2018) *and vacated*, 736 Fed. Appx. 2 (D.C. Cir. 2018) (No. 15-1345).

58. *Id.* at 34.

Imposing Remedial Sanctions in September 2015.[59] After the SEC's final order, Lucia appealed to the D.C. Circuit in October 2015,[60] which handed down its decision in August 2016.[61] Thus half of the fifteen years at issue were consumed by appeals of the SEC's initial decision.

In other agency contexts, delay itself has not been a reason to short-circuit the administrative process. While interlocutory appeals under 28 U.S.C. § 1292 are difficult and rare, they have been allowed when the delay is particularly egregious.[62] This six-factor test, originating in *Telecommunications. Research & Action Center v. FCC (T.R.A.C.)*, held that "[i]n the context of a claim of unreasonable delay, the first stage of judicial inquiry is to consider whether the agency's delay is so egregious as to warrant mandamus."[63] Next, the court must (1) assess the time an agency takes to make a decision and assess if the decision was governed by a "rule of reason"; (2) look to see if Congress has provided a speed at which it expects an agency to proceed or if a relevant statute governs the process; (3) assess whether the prolonged decision-making will affect human health and welfare; (4) assess the effect of expediting this decision and the competing priorities of the agency; and (5) assess the nature of the incidents at stake and the consequences of delay. [64] Sixth, the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"[65]

What then is the hue and cry raised by Professor Jellum regarding delay in civil litigation? In criminal trials, constitutional claims often wait until the end of the trial to be adjudicated. As one Court stated, "the requirements for collateral appeal are particularly 'stringent' in the criminal context because "'the delays and disruptions attendant upon immediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair

59. *Id.* at 6, 8.

60. Docket, *Lucia Cos.*, 832 F.3d 277 (No. 15-1345).

61. *Lucia Cos.*, 832 F.3d at 277.

62. *See* Telecomms. Rsch. & Action Ctr. v. FCC, 750 F.2d 70, 79 (D.C. Cir. 1984). In a later case, the court spoke to "unreasonable delay." *In re Cmty. Voice*, 878 F.3d 779, 783-84 (9th Cir. 2017). In giving a heuristic to quantify unreasonable delay, the Ninth Circuit cites opinions by the D.C. Circuit, "'a reasonable time for agency action is typically counted in weeks or months, not years' and thus a 'six-year-plus delay is nothing less than egregious.'" *Id.* at 787(quoting In re Am. Rivers & Idaho Rivers United, 372 F.3d 413,419 (DC Cir. 2004)).

63. Telecomms. Rsch., 750 F.2d at 79.

64. *Id*. at 80. In cases where there is no congressional statute governing delays, the court has made case by case determinations. For example, in some cases, the D.C. Circuit found that the six-factor test established in *Telecomms. Research & Action Ctr. v. FCC* did not even need to be considered "because the D.C. Circuit has *never* held that a delay of . . . more than 20 years . . . can be reasonable." *Air Alliance of Houston, et al. v. U.S. Chemical and Safety Hazard Investigation Board*, 365 F. Supp. 3d 118, 131 (D.D.C. 2019).

65. Telecomms. Rsch., 750 F.2d at 80 (quoting Pub. Citizen Health Rsch. Grp. v. Comm'r, FDA, 740 F.2d 21, 34 (D.C. Cir. 1984)).

administration of the criminal law.'"'"[66] As the Ninth Circuit suggested in *United States v. McIntosh*, an "order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily[67] is not considered an injunction and therefore is not appealable under §1292(a)(1)."[68]

3. "Here & Now Injury"

One of the more convincing arguments regarding the harm caused by delay is that awaiting court decisions until the end of the administrative process harms petitioners by forcing them to endure an unconstitutional process. In short, petitioners are irreparably injured even if they win before the ALJ.[69] Jellum uses *Tilton* as her heuristic tool. The SEC brought action against Tilton in-house for "breach[ing] fiduciary duties and defrauding clients."[70] Tilton tried to bring a constitutional claim regarding ALJ appointments, foreshadowing *Lucia*, but she was rebuffed at the district and circuit court.[71] Her case was then heard by the SEC ALJ. As Jellum tells us, "[w]hen the ALJ held that Tilton had done nothing wrong, others had to pick up the fight."[72] The suggestion is, of course, that winning the case is not enough; it is winning the legal issue that counts.

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66. *In re* Search of Elec. Commc'ns in the Acct. of chakafattah@gmail.com at Internet Serv. Provider Google, Inc. (*In re Fattah*), 802 F.3d 516, 525 (3d Cir. 2015) (quoting Abney v. United States, 431 U.S. 651, 657 (1977) (quoting DiBella v. United States, 369 U.S. 121, 126 (1962))); *see also* United States v. McIntosh, 833 F.3d 1163, 1172 (9th Cir. 2016) ("[I]n almost all circumstances, federal criminal defendants cannot obtain injunctions of their ongoing prosecutions, and orders by districts courts relating solely to request to stay ongoing federal prosecutions will not constitute appealable orders under §1292(a)(1).").

67. However, interlocutory appeals during criminal trials are allowed in three specific situations: 1) an order denying motion to reduce bail which is immediately appealable (*Stack v. Boyle*, 342 U.S. 1, 6 (1951)); 2) interlocutory review of double jeopardy claims (*Abney,* 431 U.S. 651, 662); 3) review of denial of Congressman's motion to dismiss indictment based on violations of the Speech or Debate Clause (*Helstoski v Meanor,* 442 U.S. 500, 506 (1979); *see also id.* at 509 (Brennan, J., dissenting)). *See also* United States v. Larouche Campaign*,* 829 F. 2d 250, 254 (1st Cir. 1987).

68. *McIntosh*, 833 F.3d at 1172 (quoting Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 279 (1988)).

69. Cochran v. SEC, 20 F.4th 194, 203 (5th Cir. 2021) (en banc) (noting that Ms. Cochran's constitutional claim would be denied "a meaningful opportunity for judicial review," if "the SEC. . . resolve[s] her case in her favor."). Jellum's treatment of *Bebo* sheds light on this curious approach to "winning," noting Ms. Bebo's attorneys' oral argument before the Seventh Circuit, discussing that, "had [she] won before the agency . . . the SEC enforcement division similarly cannot 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." *Jellum*, *supra* note 1, at 404–05. Advancing this argument suggests that the SEC's opponents are more concerned with making law than winning the case for their clients.

70. Jellum, *supra* note 1, at 346–47.

71. *Id.* at 347.

72. *Id.*

In an amicus brief in *Cochran*, the CATO institute and the Institute for Competitive Enterprise make this argument forcefully. "[The Exchange Act] provides no remedy for the constitutional injury they have already endured from having been forced for many months (and perhaps years) to obey the *ultra vires* commands of a federal officer . . . . [B]y that point the constitutional injury cannot be undone or meaningfully remedied by any court."[73]

Cochran argued that she was suffering a "here-and-now injury by simply having to proceed before an ALJ that is unconstitutional in its very existence."[74] Indeed, her lawyer suggested that she "is suffering this injury wholly apart from whether we win or lose at the end of the day."[75]

Other than the Fifth Circuit in *Cochran en banc*, courts considering SEC actions have not been receptive to this claim of harm. In *Tilton*, for example the court responded to the claim of harm of suffering an unconstitutional administrative process thus: "The only prospective injury that [Tilton's attorneys] describe is 'being subjected to an unconstitutional adjudicative procedure,' with the attendant 'embarrassment, expense, . . . ordeal . . . [and] state of anxiety and insecurity.'"[76] The Second Circuit determined that this claim was subsumed by the opportunity for meaningful review at the appellate level, holding "the prospect of such harm alone does not render post-proceeding judicial review less than meaningful."[77]

The Court has viewed this claim of harm on a continuum. In *McNary v. Haitian Refugee Center,*[78] petitioners sought to prevent visa applicants' being forced to endure immigration hearings, alleging those hearings were deficient in due process.[79] The Court held the nature of the administrative record and hearings precluded their consideration of constitutional issues and that Congress did not intend to deny petitioners the opportunity to raise such questions until they were in deportation proceedings.[80] This concern was particularly germane considering the limited information available to build a record from the immigration hearings themselves.[81] On the requirement to raise constitutional questions before the conclusion of the immigration

73. Brief of Amici Curiae CATO Institute & Competitive Enterprise Institute in Support of Plaintiff-Appellant on Petition for Rehearing *En Banc* at 14, *Cochran v. SEC*, 20 F.4th 194 (2021) (No. 19-10396).

74. *SEC v. Cochran Oral Argument* at 12.; *see also* Transcript of Oral Argument, Axon Enter. v. FTC, at 12, 22, No. 21-86 (argued Nov. 7, 2022) [hereinafter *Axon Enter. v. FTC Oral Argument*].

75. *SEC v. Cochran Oral Argument* at 13.

76. Tilton v. SEC, 824 F3d. 276, 286 (2d Cir. 2016) (quoting Brief for Plaintiffs-Appellants at 19, 21, *Tilton*, 824 F.3d 276 (No. 15-2103) (alterations in original)).

77. *Tilton*, 824 F.3d at 286.

78. 498 U.S. 479 (1991).

79. *Id.* at 487.

80. *Id.* at 492–93.

81. *Id.* at 493.

hearing proceedings, the Court held, "Because the administrative appeals process does not address the kind of procedural and constitutional claims respondents bring in this action, limiting judicial review of these claims to the procedures set forth in [the Immigration and Naturalization Act] is not contemplated by the language of that provision."[82] Thus at one extreme of the continuum, allegation of an unconstitutional process requires immediate review in an Article III court.

On the other side of the continuum are cases where the court has determined that there is no harm in litigating the administrative process until exhaustion. In *Renegotiation Board v. Bannercraft Clothing Co.*,[83] petitioners sought to enjoin the Renegotiation Board from continuing the administrative process that commanded renegotiation of contracts with the federal government when private industry suppliers realized excess profits at government expense.[84] The Court determined that neither requiring the businesses to renegotiate with the government—as mandated in the Renegotiation Act of 1951—nor the Renegotiation Board's use of FOIA exemptions to refuse to provide methodology used to determine excessive profits were harms that permitted immediate access to the courts, stating, "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."[85]

Jellum advocates that such "here-and-now" injuries should be limited to constitutional claims[86]; presumably further limiting them to structural claims.[87]I do not know how that is analytically the case; constitutional claims can range far and wide beyond the structural. A claim that a hearing lacks subject matter or personal jurisdiction would implicate the case or controversy requirement of Article III. As would a claim that the hearing lacked due process as applied. Further, if a claim is defective statutorily, forcing one to go through an illegally improper adjudication whatever injury or dignity the petitioner suffers is the same. Only law professors (and perhaps Justices) would privilege a constitutional injury over equivalent injuries for undergoing a statutory violation.

D. "[T]he suit is 'wholly collateral to a statute's review provisions';"

82. *Id.* at 491.
83. 415 U.S. 1 (1974).
84. *Id.* at 6, 8–9, 14.
85. *Id.* at 20–24.
86. Jellum, *supra* note 1, at 408.
87. *Id.* at 397 (discussing *Cochran en banc*).

and . . . the claim[] [is] 'outside the agency's expertise.'"[88]

The concept "wholly collateral" is an "open-textured"[89] term which, according to case law, can have different meanings along a continuum. Analytically, the adjective "collateral" can mean "not connected to the charge at hand."[90] In her article, Jellum investigates three approaches courts and scholars have used to measure whether a claim is wholly collateral.[91] The first she calls the "procedural relationship test," which asks, "whether the claim is inextricably intertwined with the administrative proceeding."[92] Courts of appeals have favored this approach, noting claims that are intertwined cannot be collateral.[93]

A second possible interpretation for wholly collateral Jellum calls "the substantive relationship test (whether the claim is substantively related to the administrative proceeding)."[94] This test was employed in the Fifth Circuit's panel opinion in *Cochran,* when it noted that because "[r]esolution of the separation-of-powers claim [would] not depend on the record from the adjudication," the claim was collateral.[95] Jellum notes that the Fifth Circuit's *en banc* opinion sketched out a third test: "whether the administrative scheme can provide the relief the plaintiff seeks"[96] This expands the substantive review question because it is unlikely that any administrative adjudication

88. Cochran v. SEC, 20 F.4th 194, 202 (5th Cir. 2021) (en banc), (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 461 U.S. 477, 489 (2010)).

89. By 'open-textured,' I mean situations in which words are used without agreeing on a single meaning. *See* Friedrich Waismann, *Verifiability*, 19 PROC. ARISTOTELIAN Soc'y 119, 123 (Supp. 1945) (developing the classic explanation of the term "open texture" and distinguishing it from "vagueness"). Please note, open-textured is not vagueness.

90. Meriam Webster defines "collateral" as an adjective meaning "accompanying as secondary or subordinate." *Collateral*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/collateral [https://perma.cc/6TRR-F33P] (last visited Mar. 26, 2023). Additionally, Black's Law Dictionary defines collateral as, "By the side; at the side; attached upon the side. Not lineal, but upon a parallel or diverging line. Additional or auxiliary; supplementary; cooperating." *Collateral*, BLACK'S LAW DICTIONARY (2nd ed. 1910), https://thelawdictionary.org /collateral/ [https://perma.cc/R9QP-7E4U] (last visited Mar. 26, 2023).

91. Jellum, *supra* note 1, at 408 (emphasis omitted).

92. *Id*. Some courts have interpreted the procedural test to mean "whether the plaintiffs would have brought a factual claim but for having an administrative proceeding against them." Jellum believes this test "makes no sense." *Id.* (criticizing Bennett v. SEC, 844 F.3d 174, 187 (4th Cir. 2016)).

93. *E.g.*, Bennett, 844 F.3d at 187 ; Jarkesy v. SEC, 803 F.3d 9, 23 (D.C. Cir. 2015), ; Hill v. SEC, 825 F.3d 1236, 1251–52 (11th Cir. 2016); Tilton v. SEC, 824 F.3d 276, 288 (2d Cir. 2016); Bebo v. SEC, 799 F.3d 765, 773–74 (7th Cir. 2015).

94. Jellum, *supra* note 1, at 408 (emphasis omitted).

95. Cochran v. SEC, 969 F.3d 507, 515 (5th Cir. 2020). The court went on to note its interpretation of wholly collateral alone "would not overcome the other two *Thunder Basin* factors to give the district court jurisdiction in spite of the SEC-specific review provisions." *Id.*

96. Jellum, *supra* note 1, at 408 (quoting Cochran v. SEC, 20 F.4th 194, 210 (5th Cir. 2021) (en banc)).

can provide relief for a claim that seeks to invalidate it on constitutional grounds.[97]

Here, Jellum's advocacy to apply the *Thunder Basin* factors as an elements test does the most work. Applying the tests as factors that require weighing, courts of appeals have allowed meaningful review to occlude the wholly collateral factor, particularly when applying her "procedural test."[98] In oral arguments at the Supreme Court, Cochran's attorney noted that when applying the elements test, "[T]he government [is] not really . . . fighting too hard on wholly collateral or agency expertise . . . I think that they largely focused . . . on the opportunity for a meaningful judicial review."[99] Conversely, applying the substantive test or the relief-sought definitions of collateral particularly when viewing the *Thunder Basin* factors as elements opens wide the floodgates of constitutional challenges to administrative schemes.

Jellum's point is a subtle one that has been advanced by petitioners in *Cochran* and *Jarkesy I*, namely that should the administrative process moot their constitutional challenges, the relief they seek would not be complete; therefore, the facial challenge is necessarily collateral.[100] The Supreme Court has been less willing to separate broad facial challenges from narrower challenges that invalidate statutes, stating that "[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."[101] The D.C. District elaborates on the Court's point in this context: "Because Jarkesy's constitutional claims, including his non-delegation challenge to Dodd-Frank, can eventually reach 'an Article III court fully competent to adjudicate' them, it is of no dispositive significance whether the Commission has the authority to rule on them in the first instance during the agency proceedings."[102]

In *Jarkesy I,* the D.C. Circuit, relying on *Elgin* and *Heckler v. Ringer*,[103] found that neither APA nor statutory claims were wholly collateral because

97. The question of the availability of relief is essential to common law treatment of exhaustion. *See, e.g.,* McCarthy v. Madigan, 503 U.S. 140, 148 (1992) (discussing whether a prisoner's *Bivens* suit for monetary damages for defective medical treatment did not require him first to exhaust administrative remedies because "[the] agency may be competent to adjudicate the issue presented, but still lack authority to grant the type of relief requested.").

98. *See* Tilton, 824 F.3d at 288.

99. *SEC v. Cochran Oral Argument* at 24–25.

100. Cochran v. SEC, 20 F.4th 194, 210 (5th Cir. 2021) (en banc); Jarkesy v. SEC, 803 F.3d 9, 17-18 (D.C. Cir. 2015).

101. Citizens United v. FEC, 558 U.S. 310, 331 (2010).

102. Jarkesy, 803 F.3d at 19 (quoting Elgin v. Dept. of Treasury 567 U.S. 1,17 (2012)).

103. 466 U.S. 602, 615(1984) (holding that petitioners "supposed 'procedural' objections is the invalidation of the Secretary [of HHS]'s current policy and a 'substantive' declaration from her that

"they arise from actions the Commission took in the course of that scheme. And they are the 'vehicle by which' [petitioner] Jarkesy seeks to prevail in his administrative proceeding."[104] For the D.C. Circuit, claims were only wholly collateral when, as in *Free Enterprise Fund,* "a constitutional challenge [is] filed in court before the initiation of any administrative proceeding (and the plaintiff could establish standing to bring the judicial action)."[105]

E. Agency Expertise

Of the *Thunder Basin* factors, courts and commentators give the shortest shrift to the question of agency expertise. To dismiss the notion that constitutional questions cannot be addressed in the SEC's administrative scheme, for example, Jellum calls on *Thunder Basin*'s formulation that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies."[106] Moreover, she notes *Free Enterprise*'s formulation for considering agency expertise, "whether a claim falls within an agency's expertise depends on whether the claim involves subject-matter knowledge or 'technical considerations of [agency] policy.'"[107]

We can concede that it is outside the power of SEC ALJs to decide on the constitutionality of their own removal protections; however, that does not end the analysis of agency expertise. While it is often said that the lack of this power leads to the conclusion that they have no expertise, this claim is not exactly accurate. Those that do hear constitutional claims are building a record for the courts of appeals to review. In weighing the overall fairness (including meaningful review) of proceedings, ALJs and Commissioners "do have expertise in the way adjudications are conducted;"[108] that is to say the ALJs are experts in what they do. Moreover, the agencies themselves are the government's experts in the issues underlying the adjudication. Additionally, when considering if exhaustion of administrative remedies is appropriate, "the agency may still apply its expertise to other subjects that will produce a

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the expenses of [the subject] surgery are reimbursable under the Medicare Act" and thus intertwined with the claim and not collateral to it.).

104. Jarkesy, 803 F.3d at 23 (paraphrasing Elgin, 567 U.S. at 22).

105. *Id.* (discussing Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 461 U.S. 477, 490 (2010)).

106. Jellum, *supra* note 1 at 410 (citing Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215 (1994)). *See also* Elgin, 567 U.S. at 16 (quoting 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.").

107. *Id.* at 410–11(citing Free Enter. Fund, 561 U.S. at 491).

108. *Axon Enter. v. FTC Oral Argument* at 65.

ruling that will obviate the need for the court to decide the issue at the end of the day."[109]

Courts should consider the agency's expertise on all of these points in weighing whether to allow plaintiffs to depart the administrative scheme for the courts. The opportunity to moot the constitutional issue by resolving an agency decision in the plaintiff's favor would likely advance a plaintiff's cause more completely and cost effectively than a trial. However, should a plaintiff aggrieved by the agency's judgement need to avail herself of the courts of appeals as allowed in §78(y), the procedural aspects of the agency's hearing would likely be at issue.[110]

F. The Thunder Basin Factors are Factors, not Elements

As discussed above, Jellum advocates for analyzing the *Thunder Basin* components as an elements test, where failure to satisfy any one of the three overcomes the exhaustion requirement and avails plaintiffs of the federal courts. We believe their treatment as factors—as employed by courts since *Thunder Basin*—is the correct approach. Using a factors approach, one would have to satisfy some measure of all three of the *Thunder Basin* factors before one can skip the ALJ process.[111] In the SEC ALJ cases, circuit courts have explicitly approached the *Thunder Basin* factors as "weighing" or "balancing" tests. For example in *Bebo*, the Seventh Circuit described the reasoning behind *Free Enterprise Fund*: "The Court concluded that all three factors weighed in favor of finding jurisdiction . . . ."[112] In *Tilton*, the Second Circuit described the availability of meaningful judicial review as "a fact that weighs strongly against district court jurisdiction."[113] The Fourth Circuit expressed its balancing approach to the *Thunder Basin* factors in *Hill*, noting "the final factor—whether the respondents' claims are wholly collateral to the statute's review provisions—tip the scales in favor of judicial review

109. *SEC v. Cochran Oral Argument* at 42.

110. *See* Elgin, 567 U.S. at 19 (noting that even without the ability to rule on constitutional issues, "the CSRA review scheme fully accommodates an employee's potential need to establish facts relevant to his constitutional challenge to a federal statute."). In building out this point the Court in *Elgin* further notes that "Congress has authorized magistrate judges, for example, to conduct evidentiary hearings and make findings of fact relevant to dispositive pretrial motions, although they are powerless to issue a final ruling on such motions." *Id.* (citing United States v Raddatz, 447 U.S. 667, 673 (1980)).

111. For a description of the balancing required in support of a factors test approach see, for example, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) ("identification of the specific dictates of due process generally requires consideration of three distinct factors"). *See also, id.* at 331 n.11 (emphasizing that while the nature of the claim and the consequences of deferment of judicial review are important factors, "the core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable.").

112. Bebo v. SEC, 799 F.3d 765, 769 (7th Cir. 2015).

113. Tilton v. SEC, 824 F3d. 276, 282 (2d Cir. 2016).

outside of the procedures set forth in § 78y."[114] In *Jarkesy I*, the DC Circuit discussed its approach to *Thunder Basin* factors as not "three distinct inputs into 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."[115]

At the heart of the factors analysis is a question of the availability of relief when administrative exhaustion is required.

> Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review. [116]

The factors approach in *Thunder Basin* takes that functioning into account and allows courts to weigh the considerations of review, expertise, and the collaterality of questions. In *Elgin,* the Court employed the factors analysis to determine whether "claims could be 'meaningfully addressed in the Court of Appeals' and that the case therefore did 'not present the serious constitutional question that would arise if an agency statute were construed to preclude all judicial review of a constitutional claim.'"[117] The issue of meaningful access to review can outweigh the other factors in this analysis because it gets at the fundamental fairness of the administrative proceedings. In this analysis, cases where exhaustion is not required are those "particularly where a finding of preclusion could foreclose all meaningful judicial review"[118] and "where the petitioner had made a colorable showing that full postdeprivation relief could not be obtained."[119] The factors analysis better comports with the preliminary question asked when considering exhaustion, i.e., whether Congress intended to require exhaustion in the statutory scheme.

Additionally, applying a factors approach to the *Thunder Basin* analysis comports with the canon of constitutional avoidance. Justice Jackson noted in her question to Ms. Cochran's attorney during oral argument, that the channeling scheme set forth in the amendments to the SEC Organic Act "may avoid having to have judicial review at all. And traditionally, our thought has been you don't jump into constitutional questions. If there's a way to

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114. Hill v. SEC, 825 F.3d 1236, 1251 (11th Cir. 2016).

115. Jarkesy v. SEC, 803 F.3d 9, 17 (D.C. Cir. 2015).

116. Weinberger v. Salfi, 422 U.S. 749, 765 (1974).

117. Elgin v. Dep't of Treasury, 567 U.S. 1, 9 (2012) (quoting Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215 n.20 (1994)).

118. Thunder Basin, 510 U.S. at 212–13(citing Traynor v. Turnage, 485 U.S. 535, 544-45 (1988)).

119. *Id.* at 213 (citing Matthews v. Eldridge, 424 U.S. 319, 331 (1976)).

avoid it, you do."[120] The Court has noted "the canon of constitutional avoidance has no application in the absence of statutory ambiguity."[121] Here we must investigate where Jellum alleges the ambiguity lies, thus enabling constitutional changes in the interlocutory phase. Section 78(y) does not appear to yield any ambiguity when it states "A person aggrieved by a final order of the Commission . . . may obtain review of the order in the United States Court of Appeals . . . ."[122] Neither does there appear to be ambiguity in the Administrative Procedure Act's authority to conduct adjudications.[123] In the absence of ambiguity, and the absence of irremediable harm when weighing the *Thunder Basin* factors, there appears to be no need to cut through the SEC's channeling scheme with interlocutory appeals.

Furthermore, for the general run of exhaustion cases, a factors approach is common sense. At least if one believes that the administrative adjudication scheme set forth by congress is basically fair. The general rule has been to promote orderly development of litigation. Piecemeal review is disfavored. Once you get beyond the animus to ALJ proceedings shown by several recent opinions,[124] the caselaw is replete with the value of orderly proceedings that refrain from hearing interlocutory appeals—even constitutional claims—out of order.

In his journal article Professor Harold Krent notes that Professor Jellum fails to consider "[t]he wider context and deeply embedded norm of delaying review of nonfinal orders."[125] Krent's criticism is largely on point. For example, he points out that in "[c]ompar[ing] judicial review of challenges

120. *SEC v. Cochran Oral Argument* at 11.

121. United States v. Oakland Cannabis Buyers Coop, 532 U.S. 483, 494 (2001). There is some dispute as to how the constitutional avoidance doctrine relates to ambiguity. Jellum herself writes, "The modern constitutional avoidance doctrine directs that, when there are two reasonable interpretations of statutory language, one which raises a constitutional issue and one which does not, the statute should be interpreted in a way that does not raise the constitutional issue. The classical constitutional avoidance doctrine directs when one interpretation would be unconstitutional but another fair interpretation exists, the court should adopt the fair interpretation. Finally, some judges now use constitutional avoidance as an ambiguity resolver." Linda D. Jellum, *The Legislative Process, Statutory Interpretation, and Administrative Agencies,* (2nd Ed., Teachers' Edition), (Carolina Acad. Press, 2021).

122. 15 U.S.C. §78(y)(a)(1).

123. *See* 5 U.S.C. § 556.

124. *See* Cochran v. SEC, 20 F.4th 194, 214 (5th Cir. 2021) (en banc) (Oldham J., concurring) (discussing the history and philosophy behind the channeling scheme set forth in § 78(y), which "reflects the thinking of men like Woodrow Wilson . . . [who] wanted administrative agencies to operate in a separate, anti-constitutional, and anti-democratic space—free from pesky things like law and an increasingly diverse electorate"); *see also* Jarkesy v. SEC, 34 F.4th 446, 453 (5th Cir. 2022) (overturning the district court's finding that it lacked subject matter jurisdiction because under the public rights doctrine, "[t]he rights that the SEC sought to vindicate in its enforcement action here arise 'at common law' under the Seventh Amendment.").

125. Harold J. Krent, *Situating Structural Challenges to Agency Authority Within the Framework of the Finality Principle*, IND. L.J. SUPP., 2023 at 1 n.5.

to agency legitimacy . . . [e]ven when litigants challenge the propriety of federal district court orders requiring arbitration or appointment of special masters or magistrates, no appeal as of right is allowed."[126] In the context of court-ordered arbitration, Professor Krent notes that "[o]bjecting parties cannot obtain judicial review of [an] order to arbitrate."[127] He notes the relevance of this blanket denial to the SEC ALJ cases because "[c]omparable to the SEC context, the party . . . is alleging that the order to arbitrate not only is without basis in law, but that undergoing the arbitration exposes the party to the very harm that it seeks to avoid."[128] In short, Professor Krent addresses the "here-and-now injury" and "'wholly collateral" factors from *Thunder Basin*, showing why they do not stand alone as elements and may be occluded by "meaningful review." "To the Court, the interest in the integrity of the administrative process prevailed, as long as judicial review could ultimately be obtained. The first factor . . . [meaningful review] is the most important."[129] Krent's article is a powerful argument against the Fifth Circuit's decision in *Cochran en banc* and Professor Jellum—namely that "concerns for finality and efficiency that underlie the final judgment rule strongly militate holding off judicial review until the administrative agency concludes its proceeding."[130] Professor Krent's argument is a reminder to the Court that when deciding *Cochran* it should look to the broader concerns of civil procedure and judicial power. When considering the broader canvas, neither Professor Jellum nor Ms. Cochran's advocates before the Supreme Court give full consideration to Section 704 of the APA and its requirement for finality nor the rationale thereof.[131]

G. "Intent is 'fairly discernable in the statutory scheme'"[132]

Block states, "[t]he presumption favoring judicial review [is] overcome, whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'"[133] We must ask how and in what way

126. *Id.* at 1.

127. *Id.* at 8.

128. *Id.*

129. *Id.* at 5. Further showing the centrality of meaningful review, Professor Krent noted, "in egregious cases, mandamus is permitted in federal court . . . Thus, a safety valve exists when agencies act contrary to clearly established norms." *Id.* at 10–11.

130. *Id.* at 1–2.

131. 5 U.S.C. § 704. *See generally SEC v. Cochran Oral Argument*.

132. Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207 (1994) (quoting Block v. Cmty. Nutrition Inst., 467 U.S. 340, 351 (1984)).

133. Block, 476 U.S. at 351 (quoting Ass'n of Data Processing Serv. Orgs., Inc. v Camp, 397 U.S. 150, 157 (1970)). *Block* reinterpreted the earlier *Abbot Laboratories* test which required "clear convincing evidence" of legislative intent to preclude judicial review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). It is worth nothing that the *Block* test suggests a desire to be more receptive to preclusion. Indeed, *Block* rejected the circuit court's demand for "unambiguous

congressional intent would be "fairly discernable." There are many examples of statutes which require regulated entities to deal with agency enforcement actions through the agency itself before gaining entry to Article III courts, usually at the courts of appeals level.

The Mine Act of 1977 is one such statutory scheme. Following notification of a violation by the Commission, mine operators have thirty days to appeal, first through an ALJ, then the Commission, which has the explicit authority to issue fines, and finally an opportunity to challenge Commission rulings in courts of appeals.[134] It is clear from the statute that Congress intended to channel appeals of enforcement decisions through the administrative process and not the courts as the Mine Act states, "[i]f, within 30 days from the receipt of the notification . . . the operator fails to notify the Secretary that he intends to contest the citation . . . the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency."[135] District courts have two limited roles under the Mine Act: upon petitions by the Secretary, district courts can enjoin violators and they can compel payment of civil penalties assessed in the administrative process.[136] The streamlining effect of the scheme in the Mine Act enables the agency to deal with factual questions of mine operation, availing itself of agency expertise, while deferring collateral questions such as constitutional issues to courts of appeals.[137]

This channeling feature is repeated throughout administrative law. The Securities and Exchange Act of 1934 provided the SEC with opportunity to channel enforcement actions to agency ALJs in specific actions, for example issuing injunctions to regulated entities such as qualified investors and broker-dealers. Amendments to the Act in 1990, 2002, and 2008 changed the landscape considerably. Currently, under 15 U.S.C. § 78g–78u, the SEC has the option to initiate enforcement proceedings in either district court or in the administrative process.[138] Once a regulated entity receives notice of an administrative enforcement action, a hearing before an ALJ must take place within sixty days, and the ALJ has 300 days thereafter to issue a

proof in the traditional evidentiary scene of a congressional intend to preclude judicial review." Block, 476 U.S. at 350. The Court later reaffirms the "clear and convincing" standard set forth in *Block*. *See* Cuozzo Speed Techs., LLC v Lee, 579 U.S. 261, 273 (citing *Block*, 476 U.S. at 349–350).

Jellum 4 does a deep dive into the derivation of the term "fairly discernable," ultimately concluding- that "the iconic phrase has unknown origins." Jellum, *supra* note 1, at 14 n. 84.

134. 30 U.S.C. § 815(d) (2022).

135. *Id.*

136. *Id.* §§ 818, 820.

137. *See* Thunder Basin Coal Co., 510 U.S. at 217.

138. Securities and Exchange Act of 1934, 15 U.S.C. §§ 78(a)–78(rr) (2020).

recommendation to the SEC.[139] Following the decision of the SEC, "A person aggrieved by a final order of the Commission . . . may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit."[140] Apart from the agency discretion regarding the choice of forum to initiate proceedings, this statutory scheme parallels those available in the Mine Act and the CSRA.

H. The Preemptive Gambit

A petitioner who chafes at his case being heard in the administrative process will likely seek to jump to federal courts after being sued by a federal agency.[141] But can one also seek to preemptively jump ship and go directly to federal court?[142] This occurred in *Hill*, where the Gray Financial Group (co-respondents with Hill) filed suit in federal district court "seeking to enjoin the impending SEC administrative proceeding and requesting a declaratory judgment that the dual layer of tenure for SEC ALJs violates the removal protections of Article II" at the conclusion of the SEC's preliminary investigation but before the SEC initiated its proceedings before the ALJ.[143] It is important for courts to distinguish between this injunction-seeking preemptive action for parties seeking to avoid regulation and petitioners like those in *Free Enterprise Fund*, who seek to enjoin agency action in district courts in lieu of the "bet the farm"[144] strategy of knowingly violating a regulation to challenge the constitutionality of the regulatory mechanism.

I. Applying Free Enterprise Fund

Many of the arguments for circumventing the administrative judiciary rely on the Court's holding in *Free Enterprise Fund* that "the dual for-cause limitations on the removal of Board members contravene the Constitution's separation of powers."[145] Plaintiffs in post-*Lucia* SEC cases (*Hill, Cochran*)

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139. David Zaring, *Enforcement Discretion at the SEC*, 94 TEXAS L. REV. 1155, 1167 (2016).

140. 15 U.S.C. § 78(y)(a)(1) (2022).

141. This is the case with Plaintiff/Petitioners in *Lucia, Bebo,* and *Cochran,* for example. *See* Raymond J. Lucia Cos., Inc. v. SEC, 832 F.3d 277, 280, 282–83 (D.C. Cir. 2016); Bebo v. SEC, 799 F.3d 765, 766–67 (7th Cir. 2015); Cochran v. SEC, 20 F.4th 194, 198 (5th Cir. 2021).

142. These preemptive actions seek to enjoin SEC administrative action before the Agency can bring its case before an ALJ. *See also* Gibson v. SEC, 795 F. App'x 753, 754 (11th Cir. 2019) (suing to enjoin SEC proceedings in front of the constitutionally re-appointed ALJ following *Lucia*); Bennett v. SEC, 844 F.3d 174, 177, 182–83 (4th Cir. 2016) (seeking injunction and declaratory judgment on the same grounds and roughly at the same time as *Hill*); Chau v SEC, 72 F. Supp. 3d 417, 419–20 (S.D.N.Y. 2014) (suing to enjoin SEC administrative enforcement action on due process and equal protection grounds).

143. Hill v. SEC, 825 F.3d 1236, 1240, 1248 (11th Cir. 2016).

144. *See* discussion of *Free Enterprise Fund infra* Section I.I.

145. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010).

claimed that the elimination of dual protections for the Professional Company Accounting Oversight Board (PCAOB) should apply to SEC ALJs.[146] However, the *Free Enterprise Fund* facts are clearly not on all fours with the facts in the SEC ALJ cases.

1. Betting the Farm or Betting the Forum?

SEC petitioners and Jellum allude to the similarities between the SEC cases and *Free Enterprise Fund* petitioners—namely that by undergoing the administrative adjudication they are required to "bet the farm" on the outcome of the adjudication to test the forum's constitutional viability.[147] It is worth contrasting the situations of the petitioners in the SEC cases with that of the petitioners in *Free Enterprise Fund*. Following an investigation of an accounting firm that "produced no sanction," the firm and "Free Enterprise Fund, a nonprofit organization of which the firm is a member, then sued . . . , seeking (among other things) a declaratory judgment that the Board is unconstitutional and an injunction preventing the Board from exercising its powers."[148] The Court took exception to the government's theory that the petitioners were limited to the channeling scheme provided in § 78(y), namely that, "[t]he Government suggest[ed] that petitioners could first have sought Commission review of the Board's 'auditing standards, registration requirements, or other rules.'"[149] The Court noted that "[r]equiring petitioners to select and challenge a Board rule at random is an odd procedure for Congress to choose, especially because only *new* rules, and not existing ones, are subject to challenge."[150]

The Court rejected the idea that petitioners should volunteer to violate a regulation in order to avail themselves of the court system to challenge the constitutionality of the regulatory regime,[151] citing *MedImmune, Inc. v*

146. Complaint at 32–34, Hill v. SEC, 114 F. Supp. 3d 1297 (N.D. Ga. 2015) (No. 1:15-CV-1801-LLM), *vacated*, 825 F.3d 1236 (11th Cir. 2016); *Hill*, 825 F.3d at 1239–40; Brief of Plaintiff-Appellant at *6, Cochran v. SEC, 20 F.4th 194 (5th Cir. 2021) (No. 19-10396).

147. *See, e.g.*, *Jellum*, *supra* note 1, at 376–77, 381, 381 n.307 (critiquing the D.C. Circuit's rationale distinguishing between Jarkesy and the *Free Enterprise Fund* petitioners on the basis that "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.'" (quoting Jarkesy v. SEC, 803 F.3d 9, 20 (D.C. Cir. 2015)); *see SEC v. Cochran Oral Argument* at 22 at 22 (discussing how Cochran would "have to bet the farm because . . . if she won on the merits [in front of the ALJ] . . . she wouldn't be able to present her structural constitutional claim to a court of appeals ever.").

148. Free Enter. Fund, 561 U.S. at 487, 490.

149. *Id.* at 490 (quoting Brief for United States at 16, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010) (No. 08-861)).

150. *Id.*

151. *Id.* at 490–91.

Genetech, Inc.,[152] which holds "that, where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced."[153] In *MedImmune,* Justice Scalia colorfully used an older case to illustrate this point:

> [I]n *Terrace v. Thompson*, 263 U.S. 197 (1923), the State threatened the plaintiff with forfeiture of his farm, fines, and penalties if he entered into a lease with an alien in violation of the State's anti-alien land law. Given this genuine threat of enforcement, we did not require, as a prerequisite to testing the validity of the law in a suit for injunction, that the plaintiff bet the farm, so to speak, by taking the violative action.[154]

While "betting the farm" is a vivid description of the accounting firm's situation in *Free Enterprise Fund*, it is not analogous to the situation of the petitioners in the SEC ALJ cases. Petitioners in *Tilton, Cochran,* and *Bebo* brought action in the district courts once their ALJ adjudications were underway.[155] The difference in the situations between the SEC defendants and the accounting firm in *Free Enterprise Fund* was noted by the district court hearing Laurie Bebo's initial complaint to halt SEC proceedings: "Bebo, of course, does not need to induce an administrative proceeding. Instead, Bebo can raise her arguments before the SEC ALJ and on appeal to the Commission."[156] Even those employing the preemptive strike—like the petitioners in *Jarkesy*, *Hill*, and *Bennett*—sought an injunction after receiving notice of regulatory action by the SEC.[157] Moreover, unlike the accounting firm in *Free Enterprise Fund*, all of the SEC ALJ petitioners had notice of the provisions of Title 15 which they had allegedly violated.[158] When the agency initiates its pre-adjudicative review, does that automatically place the regulated party in the position of needing to "bet the farm?" If the

152. 549 U.S. 118 (2007).

153. *Id.* at 128–29.

154. *Id.* at 129.

155. Tilton v. SEC, 824 F.3d 276, 278–79 (2d Cir. 2016); Cochran v. SEC, 20 F.4th 194, 198 (5th Cir. 2021) (en banc); Bebo v. SEC, 799 F.3d 765, 766 (7th Cir. 2015).

156. Bebo v. SEC, No. 15-C-3, 2015 WL 905349, at *3 (E.D. Wis. Mar. 3, 2015), *aff'd*, 799 F.3d 765 (7th Cir. 2015).

157. Jarkesy v. SEC, 803 F.3d 9, 12–13 (D.C. Cir. 2015); Hill v. SEC, 825 F.3d 1236, 1239–40 (11th Cir. 2016); Bennett v. SEC, 844 F.3d 174, 177 (4th Cir. 2016).

158. Jarkesy v. SEC, 803 F.3d 9, 12–13 (D.C. Cir. 2015); Hill v. SEC, 825 F.3d 1236, 1239–40 (11th Cir. 2016); Bennett v. SEC, 844 F.3d 174, 177 (4th Cir. 2016). In each of these cases, the SEC initiated administrative proceedings against the petitioners, thereby providing them notice of the laws they allegedly violated before the petitioners each sought review of the agency action in federal district court.

investigation never results in adjudicative action, the regulated parties won't have to bet on anything.[159]

For those instances where the agency has already begun an enforcement order, most courts of appeals have held that it is inapposite to say the petitioners are betting the farm, as they are already engaged in administrative adjudication.[160] The circuit courts' rejection of the "bet the farm" analogy in SEC cases aligns with courts' interpretation of the application of this rule in other contexts. For example, in *National Veterans' Affairs Council v Federal Services Impasse Panel*,[161] the Union representing Department of Veterans Affairs employees sought a court injunction on constitutional grounds to avert the Federal Services Impasse Panel from asserting jurisdiction in a collective-bargaining-agreement dispute.[162] Rejecting the Union's argument that going through with the Impasse Panel's process required it to "bet the farm" à la *Free Enterprise Fund*, the D.C. District Court noted, "[T]he Union need not devise some random dispute as a vehicle for its constitutional and statutory challenges. After all, the Panel has already asserted jurisdiction over the alleged impasse before the Union filed suit . . . ."[163] Rather, one might say petitioners are betting the forum.

The analysis of injunctions brought by petitioners seeking to preempt administrative adjudication differs from *Free Enterprise Fund* in the following fundamental (and familiar) ways: whether the statutory scheme provides an adequate remedy,[164] the availability of a meaningful opportunity to hear their claims,[165] and the potential for irreparable injury should the administrative adjudication proceed.[166] The Eleventh Circuit lays this rationale out in *Hill*. Relying on *Thunder Basin* and *Elgin*, the court determined that the statutory scheme "makes it clear that Congress intended to preclude parallel federal district court litigation involving challenges to

159. Note Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158, 160–61, 163 (1967), where the Supreme Court found that the ripeness principles of Abbott Laboratories v. Gardner, 387 U.S. 136 (1976) were not met because the statute may—or may not—close a manufacturing plant that does not allow in an FDA inspector.

160. *See* Jarkesy, 803 F.3d at 20 ("To have his claims heard through the agency route, Jarkesy would not have to erect a Trojan-horse challenge to an SEC rule or 'bet the farm' by subjecting himself to unnecessary sanction. . . . Jarkesy is already properly before the Commission by virtue of his alleged violation of those laws."); *Bebo*, 799 F.3d at 767("If aggrieved by the SEC's final decision Bebo will be able to raise her constitutional claims in this circuit . . . . And because she is already a respondent in a pending administrative proceeding, she would not have to 'bet the farm.'").

161. Nat'l Veterans Affs. Council v. Fed. Serv. Impasse Panel, 552 F. Supp. 3d 21 (D.D.C. 2021).

162. *Id.* at 25.

163. *Id.* at 31.

164. *See* McCarthy v. Madigan, 503 U.S. 140, 146–48 (1992) (evaluating the effect of statutory exhaustion on the plaintiff's ability to bring a claim); Gibson v. Berryhill, 411 U.S. 564, 575 (1973).

165. Ross v. Blake, 578 U.S. 632, 648 (2016); Booth v. Churner, 532 U.S. 731, 740 (2001).

166. McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496–97 (1991).

final Commission orders."[167] Moreover, the court contrasted the petitioners' request for an injunction to that of the petitioners in *Free Enterprise Fund* by the nature of the proceedings "Here, in contrast, the respondents do challenge Commission action—action which, if allowed to proceed, necessarily will result in a final Commission order."[168] The Fourth Circuit came to a similar conclusion in *Bennett,* stating, "[W]e readily discern from the text and structure of the Exchange Act Congress's intent to channel claims first into an administrative forum and then on appeal to a U.S. Court of Appeals."[169]

To address the later rationales—the availability of meaningful judicial review and avoidance of irreparable harm—the Fourth Circuit relied on *Thunder Basin*. Addressing meaningful review, the court noted that, in *Thunder Basin,* "[T]he Supreme Court held that the petitioner could obtain meaningful judicial review through the administrative process, even though the petitioner challenged as unconstitutional that very process itself."[170]

Courts have been skeptical of the claim that undertaking an administrative adjudication itself causes an irreparable harm. Some of this skepticism is caused because the results of the adjudication are not foreordained. In *Hill,* the court notes, "For one thing, the Commission might decide that the respondents violated no securities laws and thus grant the SEC no relief."[171]

The Fifth Circuit diverged from this rationale in *Cochran en banc*:

> The SEC primarily argues that Free Enterprise Fund is distinguishable because, in that case, the PCAOB had not yet commenced an administrative proceeding against the plaintiff accounting firm. Since Cochran is already in the midst of an administrative proceeding, and that proceeding could eventually result in a final SEC order that Cochran may challenge under § 78y, the SEC contends that she has a meaningful opportunity for judicial review. Yet, this difference lacks meaning: although Cochran's case is farther along than in *Free Enterprise Fund*, she is still not guaranteed an adverse final order, as the SEC might resolve her case in her favor. Hence, just as in *Free Enterprise Fund*, it remains possible that Cochran will not be able to obtain judicial review over her removal power claim unless the district court hears it now. In short, Free Enterprise Fund still controls.[172]

Here, the Fifth Circuit's reasoning aligns better with the understanding of "betting the farm" evinced by the anti-SEC petitioners than its sister

167. Hill v. SEC, 825 F.3d 1236, 1243 (11th Cir. 2016).
168. *Id.* at 1243.
169. Bennett v. SEC, 844 F.3d 174, 181 (4th Cir. 2016).
170. Hill, 825 F.3d at 1246 (citing Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215 (1994)).
171. *Id.* at 1247.
172. Cochran v. SEC, 20 F.4th 194, 203 (5th Cir. 2021) (en banc).

circuits. Notably, the Fourth Circuit highlighted the inappositeness of the "betting the farm" analogy by distinguishing Mr. Bennett's position in the SEC adjudication from those of the petitioners in *Free Enterprise Fund*:

> What animated the Court in Free Enterprise was . . . that the choice petitioners in that case faced—incur penalties for non-compliance or challenge a rule at random—made federal judicial review not meaningfully accessible. . . That concern is not present here, because the SEC has instituted disciplinary proceedings against Bennett and she can pursue her claims through the administrative scheme.[173]

J. Should there be a difference in the review given to constitutional versus statutory claims?

The most acceptable rationale for ignoring the administrative process is a narrow exception for facial, constitutional claims. Professor Jellum seems to support this limited view.[174] Nonetheless, it seems the logic of this argument, if accepted, would extend to statutory claims as well. Indeed, in the *Cochran* and *Axon Enterprises* oral arguments, petitioners argued that the case could be normally decided on *Thunder Basin* factors.[175] Justice Kagan noted the broader reach of the argument against implied preclusion during the *Cochran* oral argument in a question she posed to Ms. Cochran's counsel.

> [Y]ou've said many times the structural constitutional claims—the structural constitutional claims are special, different . . . . And Thunder Basin, you know . . . it's really a focus on what kind of claims they are. . . . [B]ut your statutory argument really does not allow you to talk about that because there's nothing in these statutes that . . . would treat . . . structural constitutional claims any differently from any other claims, statutory claims, claims about just evidentiary rulings.[176]

Would it have made a difference if a defendant raised a statutory, rather than a constitutional, claim? The Fourth Circuit did not seem to think so in *Bennett*.[177]

173. Bennett, 844 F.3d at 186.

174. Jellum, *supra* note 1, at 404.

175. *See SEC v. Cochran Oral Argument* at 7 (Statement of Ms. Cochran's counsel: "On the Thunder Basin analysis, ...our position is that the Court should look, in this case, as in any statutory interpretation case, first and foremost to the text of the relevant provisions."). *Axon Enter. v. FTC Oral Argument* at 8–9.

176. *Id.* at 14.

177. Bennett, 844 F.3d at 185.

Jellum's position is that exhaustion should not be required for constitutional questions.[178] But most of her discussion is about statutory factors.[179]

There is a sense that the entire statutory discussion might be irrelevant if one focuses on whether a non-Article III court can even hear a constitutional question. And is the suggestion that they do so itself a separation-of-powers issue? Numbers of courts have suggested so.[180]

Their view is that there is a constitutional problem with the constitutional claim travelling through the administrative judicial system before reaching an Article III court.

Analytically, even if ALJs cannot decide cases, it is not clear why they cannot hear them. One would have to determine that ALJs lack all expertise, both institutional and personal, so that an ALJ's undertaking a hearing in the shadow of a constitutional claim is effectively a waste of the parties' time. And of course, one would need to conclude that such a 'waste of time' outweighs the value of maintaining orderly exhaustion principles including the reality that the petitioner may win on the merits at the administrative level.

One further issue to consider is that accepting Jellum's view that making a constitutional claim would allow you to avoid the administrative process would open a Pandora's box of claims. And the reality is that if one intends to skip the in-house administrative process, there are innumerable constitutional claims one can make—from due process and individual rights to separation of powers and the agency structures. If "artful pleading" of any constitutional claim, whether makeweight or serious, would allow you to avoid the administrative judiciary, is this a satisfactory situation?[181]

Rather, adhering to orderly process would allow a petitioner to make constitutional claims and preserve them for a court of appeals if necessary, and would allow the ALJ to note them for the record. In an Occupational

178. Jellum, *supra* note 1, at 343.

179. *See id.* at 342.

180. *See* Taylor v. Arizona, 972 F.Supp. 1239, 1249 (D. Ariz. 1997) ("Congress could not, without violating separation of powers, give non–Article III courts the power to decide constitutional issues"); *see also* Johnson v. Robison, 415 U.S. 361, 368 (1974) (noting constitutional questions are "beyond the jurisdiction of administrative agencies"); *see also* Johnson v. Robison, 415 U.S. 361, 368 (1974) (noting constitutional questions are "beyond the jurisdiction of administrative agencies").

181. *See* Rosenthal & Co. v. Bagley, 581 F.2d 1258, 1261 (7th Cir. 1978) (noting that considerations such as conservation of judicial resources, particularly in separating frivolous from non-frivolous constitutional claims militate in favor of precluding interlocutory appeals, even on constitutional grounds: "Halting or delaying an administrative proceeding whenever a party is able to allege a constitutional question that is not frivolous would intolerably interfere with the agency's performance of its assigned task and with the pursuit of the administrative remedy granted by Congress.").

Safety and Health Administration (OSHA) adjudicative procedure, for example, a petitioner raised claims that OSHA inspectors not only violated OSHA regulations for inspection but also raised Fourth Amendment claims.[182] The ALJ ruled on the OSHA-procedural questions but "note[d]" the constitutional questions to preserve them for later appeals.[183]

Moreover, consider the following thought experiment. What should be the result if a petitioner raises a constitutional claim when a statute explicitly precludes interlocutory review rather than impliedly doing so? Presumably the collaterality of the issue would be the same. Presumably the here-and-now injury of being subjected to an unconstitutional process is the same. Why, then, should a petitioner be forced to undergo a violation of her rights merely because Congress created a well-crafted statute? It seems as though the harm would be the same, so drawing the line between constitutional and statutory questions in cases of implied preclusion is arbitrary.

Indeed, one might well ask: if it were the case that a Congressional directive explicitly intended to deny an off-ramp to the in-house adjudicative process, why should the *Thunder Basin* factors apply at all? Rather than 'fairly discernable,' if Congressional intent was explicitly discernable this would end the *Thunder Basin* inquiry.[184]

II. The Big Picture

A. Are we talking about law or policy?

Many of the complaints against the SEC adjudicative system reflect considerations of 'fairness' rather than statutory or constitutional interpretation. The fairness issue largely touches on claims of a 'home court advantage' in administrative adjudications. The argument is that the SEC win rate in the ALJ process is significantly greater than in federal court.[185] In addition to being articulated by scholars and the popular press, these arguments are powerfully presented by Judge Jed Rakoff in his highly influential extrajudicial discussion where he noted, "It is hardly surprising . . . [following the expansion of SEC in-house enforcement capabilities in Dodd-Frank] that the SEC won 100% of its internal administrative hearings

182. Buckeye Indus., Inc., 3 BNA OSHC 1837 (No. 8454, 1975), 1975 WL 5244, at *3 (1975).

183. *Id.*

184. *See, e.g.*, Hinck v United States, 550 U.S. 501, 503, 506 (2007) (holding that the Tax Code mandates that the Tax Court is the exclusive forum to challenge assessed interest and penalties, even when petitioners raise due process and equal protection claims challenging the assessment because the "[Court's] analysis is governed by the well-established principle that, in most contexts, 'a precisely drawn, detailed statute pre-empts more general remedies.'"(quoting EC Term of Years Trust v. United States, 550 U.S. 429, 433 (2007))).

185. Jellum, *supra* note 1, at 344.

in the fiscal year [2014], whereas it won only 61% of its trials in federal court during the same period . . . ."[186]

B. Circumventing The Administrative Judiciary

It was historically considered obvious that one would exhaust the administrative process before applying to a federal court. One could debate the reasons, but it is likely that "progressives" of the Roosevelt–Wilson era and again in the New Deal era were focused on developing the administrative bureaucracy. Thus, Justice Brandeis opined in *Myers v. Bethlehem Shipbuilding Corp*[187] that "the long settled rule of judicial administration [is] that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed *administrative remedy has been exhausted.*"[188] The iconic Raoul Berger argued that the exhaustion of administrative remedies should be required even when there is a challenge to the constitutionality of a statute.[189] The question was raised in 1986 in *Ticor Title Insurance Co. v. FTC,*[190] where a title company was sued for unfair competition and raised constitutional issues regarding the authority of the FTC to carry out enforcement actions since, as an independent agency, it was allegedly too insulated from presidential authority.[191] In direct contravention to Professor Jellum's suggestion that facial constitutional challenges should be separated from the rubric when considering implicit preclusion, Judge Edwards noted that "a court should be 'loath to interfere' with ongoing administrative proceedings, even where plaintiffs challenge the very constitutionality of those proceedings."[192]

Conclusion

What is going on here? Professor Jellum, for policy reasons, apparently dislikes the SEC's in-house administrative-adjudication powers. Jellum particularly fears that if the result of implied preclusion is a win in front of the ALJ on the merits, it negates the opportunity to advance the constitutional

186. Judge Jed S. Rakoff, PLI Securities Regulation Institute Keynote Address, "Is the S.E.C. Becoming a Law Unto Itself?" (Nov. 5, 2014) (transcript available on Law360).

187. 303 U.S 41 (1938).

188. *Id.* at 50–51 (emphasis added).

189. Raoul Berger, *Exhaustion of Administrative Remedies*, 18 YALE L.J. 981, 998–99 (1939).

190. 814 F.2d. 731 (D.C. Cir. 1987).

191. *Id.* at 732. Judge Williams noted in a concurring opinion that even if the appeals court "accept[s] the dubious proposition that unconstitutional burdens are *ipso facto* 'heavier' than those of statutory illegality, the constitutional dimension . . . entails a concern that militates powerfully against immediate review: the 'fundamental rule of judicial restraint,' forbidding resolution of constitutional questions before it is necessary to decide them." *Id.* at 748 (Williams, J., concurring). Interestingly, the title company was represented by Theodore Olsen, Larry Symms, and Stephen Landes, considered conservative legal icons all. *Id.* at 731.

192. *Id.* at 738 (quoting Hastings v. Jud. Conf. of U.S., 770 F.2d 1093, 1102 (D.C. Cir. 1985)).

argument which invalidates the ALJs. The Court, if our understanding of their direction following the *Cochran* oral argument is correct, has qualms about the administrative judiciary in general (if not the entire administrative state).

Jellum would allow an entity facing adjudication by an ALJ (or that may face adjudication) to jump ship and go directly to an Article III court notwithstanding a well laid-out administrative scheme. While one can perhaps do so on narrow grounds (e.g., by arguing that *Cochran* should be decided under the *Thunder Basin* factors to waive exhaustion), that may not be enough for a Court intent on lawmaking whatever the facts. If the Court decides *SEC v. Cochran* and *Axon Enterprises v. FTC* broadly—striking a blow against the administrative state by ruling beyond the *Thunder Basin* factors—it would allow not just constitutional but also statutory questions to bypass the administrative judiciary. These consequences would be significant and, I believe, unfortunate.

The development of the administrative adjudication process was an important aspect of the growth of the administrative state. Recently, however, academics and courts have begun to rethink fundamental characteristics of the administrative process. For example, we should note the extensive jeremiad by Judge Oldham in his *Cochran* concurrence against the administrative state and in particular the views of former President Woodrow Wilson.[193] This rethinking has reflected a "new formalism"[194] by which many have begun to question the essential paradigm of the New Deal administrative state. [195] There has been a rethinking of the delegation doctrine as it relates to the breadth of Congress' delegation of power to agencies—a fear of the agency as legislators. There has been considerable analysis of the appointment and removal power as it relates to agencies.[196] And we now see considerable rethinking of the role of the administrative judiciary.[197] The

193. Cochran v. SEC, 20 F.4th 194, 213–20 (5th Cir. 2021) (en banc) (Oldham, J., concurring). I do not believe that "essay" adds much to analyzing the problem at hand.

194. Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088, 1090–1092 (2022).

195. *See, e.g.*, Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for 'Deconstruction of the Administrative State,'* WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html [https://perma.cc/AN66-N84V].

196. *See, e.g.*, Damian M. Schiff & Oliver J. Dunford, *Distinguishing Between Inferior and Non-Inferior Officers Under the Appointments Clause–A Question of "Significance,*" 74 RUTGERS U. L. REV. 469, 518–19 (2022); Jennifer L. Mascott, "*Officers" in the Supreme Court:* Lucia v. SEC*,* 2018 CATO SUP. CT. REV. 305, 307–08 (2018).

197. *See, e.g.*, Jarkesy v. SEC, 34 F.4th 446, 453 (5th Cir. 2022) (arguing that "the rights that the SEC sought to vindicate . . . . arise 'at common law' under the Seventh Amendment."); *see also* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2211 (2020) (holding ALJs as "Officers of the United

Court should take into account the broader canvas of civil procedure and judicial power when seeking to declare rules regulating the modalities of exhaustion, further eroding the role of the administrative judiciary.

Given the seeming desire of the Court to make bold statements about the administrative judiciary and the administrative state,[198] I have no illusions that my approach regarding the administrative judiciary, however meritorious it may be, will carry the day. Indeed, as this Response was going to press, the Court released its decision in *Cochran* and *Axon*, finding against the SEC and FTC respectively.[199] Although Justice Kagan's majority holding was decided narrowly on *Thunder Basin* factors,[200] the likely result of these developments will be to place yet more burden on the concept of the administrative judiciary.

Whatever the parties in *Cochran* might have argued, their case is not properly one of separation of powers.[201] There is no suggestion that the in-house adjudication process is supplanting an Article III decision-maker. A hearing before an Article III judge is still available——just after the in-house adjudicative process. It is, I submit, hard to argue that the SEC-administered in-house adjudication does not reflect a Congressional value judgement preferring to channel cases first through the in-house ALJ process. The question is whether the 'wholly collateral' or 'agency expertise' factors overcome the 'fairly discernable' standard. I believe the neutering of the administrative judiciary to be a profound mistake in governing. After undermining the administrative state, the Court may find the consequences unpalatable and severe; I suspect Professor Jellum would agree.

States" were found to serve at the pleasure of the President thus limiting (some would say withering) *Humphries' Executor*).

198. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022) (holding that under the "major questions doctrine," Congress did not grant the Environmental Protection Agency in Section 111(d) of the Clean Air Act the authority to devise emissions caps based on the generation shifting approach the agency took in the Clean Power Plan).

199. Ronald Mann, *Court approves early challenge to agency proceedings*, SCOTUSBLOG, (Apr. 14, 2023, 6:05 PM), https://www.scotusblog.com/2023/04/supreme-court-approves-early-challenge-to-federal-agency-proceedings [https://perma.cc/FP8A-3CCY].

200. Axon Enter., Inc. v Fed. Trade Comm'n, No. 21–86 (U.S. Apr. 14, 2023), at 7. Available at https://www.supremecourt.gov/opinions/22pdf/21-86_l5gm.pdf [https://perma.cc/JDG9-5WEW].

201. *See, e.g.*, Brief for Respondent at 47, SEC v. Cochran, No. 21-1239 (Jun. 30, 2022).