No. 19-56101

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND J. LUCIA COMPANIES, INC. AND RAYMOND J. LUCIA, SR.,
Plaintiffs-Appellants,
v.
U.S. SECURITIES AND EXCHANGE COMMISSION, JAY CLAYTON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE U.S. SECURITIES AND EXCHANGE COMMISSION, AND WILLIAM P. BARR, IN HIS OFFICIAL CAPACITY AS UNITED STATES ATTORNEY GENERAL,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California
No. 3:18-cv-0269-DMS-JLB
Hon. Dana M. Sabraw

APPELLANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR INJUNCTION PENDING APPEAL

Margaret A. Little
Senior Litigation Counsel
Jessica L. Thompson
Litigation Counsel
New Civil Liberties Alliance
1225 19th St. NW, Ste. 450
Washington, DC 20036
202-869-5210
peggy.little@ncla.legal

Attorneys for Appellants
Raymond J. Lucia Companies, Inc. and
Raymond J. Lucia, Sr.

The Securities and Exchange Commission (SEC) could have lawfully brought its claims against Raymond J. Lucia Companies, Inc. (RJL) and Raymond J. Lucia, Sr. (Mr. Lucia) in 2012 either in U.S. District Court or before the Commission. Instead, it put RJL and Mr. Lucia through a six-year ordeal that began with a six-week administrative trial before an administrative law judge (ALJ) whom SEC didn't properly appoint. From 2012 to 2018, appellants raised this objection at every stage of five layers of administrative and judicial proceedings. Only at the United States Supreme Court were appellants given the Article III judicial relief to which the Constitution's Article II Appointments Clause entitled them, thus making a nullity of years of wasteful administrative and judicial proceedings.

Now, SEC has astoundingly decided to retry RJL and Mr. before an ALJ who the government itself admits has unconstitutional multiple layers of tenure protection. The consequence of this abuse of process is a ruinous and Kafkaesque cycle of repeated, to-be-vacated hearings. This court should enjoin those proceedings, recognizing that *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (*FEF*)—which binds this court—unanimously found jurisdiction in Article III courts and further held that multiple layers of removal protection are unconstitutional.

ARGUMENT

I. SEC HAS SELECTIVELY MISQUOTED AND MISREPRESENTED THE PROCEEDINGS BELOW

Raising for the first time on appeal an argument it did not make below, SEC asserts that:

> plaintiffs actively opposed prompt review of the exact ALJ removal question they now seek to raise, assuring the Court that in the event of a remand, they "would raise the removal issue … *before an SEC ALJ*."

SEC Br. at 3.

This passage grossly misquotes the record in *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (*Lucia I*). Here's the full passage from RJL and Mr. Lucia's brief at the Supreme Court:

> If the proceeding is dismissed, or petitioners are afforded a new trial in an Article III forum, the removal issue would never be presented in this case ... Only if the Commission attempts to try petitioners again before a properly appointed ALJ (assuming, dubitante, that such a trial could conform to minimum due process requirements) would the removal issue arise in this case. In that unlikely event, petitioners would raise the removal issue as a constitutional objection or defense to adjudication before an SEC ALJ.

Reply in Support of Cert. at 9–10, https://go.usa.gov/xpdUE (S. Ct. Dec. 13, 2017) at 11.

This untimely argument[1] employing selective quotation seriously distorts the record and discredits the agency. It is also pointless. Even if the removal argument is raised as a constitutional objection in the administrative proceeding (AP)—which appellants have done[2]—that does not waive RJL and Mr. Lucia's right to bring an appropriate court challenge. This argument, wisely not raised by SEC counsel below, has no merit whatsoever.

SEC's deceptive misconstruction pops up repeatedly in its brief, such as when SEC argues that "plaintiffs' complaint that they are being subjected to serially invalid administrative proceedings should not be credited" because "[t]he need for serial proceedings is entirely a consequence of plaintiffs' own litigation choices." SEC Br. p. 11; *see also id.* at p. 5, 14. First, the Supreme Court's order in *Lucia* required that the proceedings be entirely vacated, ordering a new trial "before a lawfully-appointed ALJ *or the Commission itself*," *Lucia I*, at 2055–56 n. 6 (emphasis added), with all defenses and legal challenges available as in any

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[1] *In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989) ("[I]n this circuit … appellate courts will not consider arguments … not properly raise[d] in the trial courts.") (internal quotation omitted).

[2] *Lucia v. S.E.C.* was decided on June 21, 2018. SEC reassigned this AP to ALJ Foelak on September 12, 2018. Appellants timely filed a motion to dismiss the AP on November 29, 2018; ALJ Foelak denied the motion on July 15, 2019. Admin. Proceeding Ruling Release No. 6628 (July 15, 2019). Appellants' AP is now set for May 26, 2020, *eight years* after the Order Instituting Proceedings was issued. Admin Proceeding Ruling Release No. 6710 (Nov. 21, 2019).

vacated proceeding. Second, the deficiency that took everything from Mr. Lucia, including now seven years of his productive working life (he is nearly 70), was entirely due to SEC's cavalier disregard for its constitutional obligation to have lawfully appointed ALJs. SEC's persistence in prosecuting these parties a second time before an unconstitutional tribunal necessarily calls into question whether its aim is to maneuver them into a posture of depletion, defenselessness, settlement and defeat.

II. SEC IGNORES THE CONTROLLING CASE LAW ON THE MERITS AND FURTHER ASSERTS UNMERITORIOUS ARGUMENTS[3]

A. SEC Outrageously Turns the Law on Its Head by Characterizing Its Breach of Responsibility as a Benefit to Appellants

SEC argues that because "plaintiffs have availed themselves of this review scheme when they were able to overturn a prior Commission order by prevailing on an Appointments Clause claim in the Supreme Court" Gov't Br. at 10, they cannot complain of the process. SEC's Alice-in-Wonderland reasoning extols the virtues of a voided process whereby RJL and Mr. Lucia have endured a

[3] Appellants only have to show that serious questions going to the merits are raised, and that the balance of hardships tips in their favor in order to secure an injunction pending appeal. *Alliance for the Wild Rockies v. Cottrell*, 632 F. 3d 1127, 1134-35 (9th Cir. 2011).

business-destroying, life-altering six-year court fight to vindicate their right to be tried before a lawful judge.

Likewise, SEC's argument that the removal challenge "provides an affirmative defense" to the administrative proceeding demonstrates ignorance. An affirmative defense is an "assertion of facts and arguments that, if true, will defeat the … prosecution's claim, even if all the allegations in the complaint are true." Black's Law Dictionary (10th ed. 2014). Appellants claim only that the ALJ adjudicating their case and defenses is not constitutionally appointed to decide them. And they seek relief only in the form of a proper tribunal in which to be tried. There is no "affirmative defense" here.

SEC next advances an insupportable argument in which it claims that if the ALJ rules in RJL and Mr. Lucia's favor that will moot the constitutional claim. But this only encourages SEC to bury its self-admitted removal problem in administrative proceedings that will either settle (as 98% do) or, in rare cases, resolve favorably for respondents. Post-agency review under § 78y is permitted only to litigants who are "aggrieved" by SEC's "final order." 15 U.S.C. § 78y(a)(1). Thus, should they prevail, § 78y affords the appellants no remedy for the constitutional injury they will already have suffered. To the contrary, success on the merits renders that injury permanent, irreversible and entirely unreviewable. This is likewise true for all such injured parties who settle. SEC's position that

constitutional challenges to ALJs cannot be heard until and unless a final, *and adverse* decision issues, means that agencies have an incentive to make the process as costly as possible, reputationally, financially, and otherwise, to induce settlements that moot the question. This is not constitutional avoidance—it is constitutional emasculation. Worse, forcing the defendants to run this gauntlet has grave distributional consequences that encourage agencies to target easier marks with limited resources—such as Mr. Lucia and his long-since destroyed business—in order to make bad law.

B. SEC Ignores *FEF* and Misconstrues *Thunder Basin*, *Elgin*, and *Standard Oil*

Although *FEF* provides the rule of decision on both jurisdiction and the merits, the case barely makes an appearance in SEC's brief. SEC's principal distinction, that in *FEF* those plaintiffs were not subject to any ongoing enforcement proceeding, only makes the case for finding jurisdiction here more compelling. Under SEC's flawed reading, *FEF* stands for the proposition that parties can bring constitutional claims against SEC in court without ever having been harmed while those who are being *actively* harmed by an unconstitutional

proceeding must wait it out for § 78y judicial review.[4] The central holding of *FEF* is that a person is entitled to federal declaratory and injunctive relief to "ensure that … they are subject … [to] enforce[ment] only by a constitutional agency accountable to the Executive." 561 U.S. at 513.[5]

SEC's brief focuses on three cases, *Thunder Basin v. Reich,* 510 U.S. 200 (1994), *Elgin v. Dept. of Treasury*, 567 U.S. 1 (2012), and an out-of-circuit decision in *Bank of Louisiana v. FDIC*, 919 F. 3d 916 (5th Cir. 2019), without informing the court that each of these cases involve statutory schemes that provide for exclusive review of claims, unlike the securities laws here, which expressly contemplate retention of Article III jurisdiction.[6] Add to that *FEF*'s clear holding that nothing in § 78y precludes district court jurisdiction under §§ 1331 and 2201, even implicitly, and SEC's arguments under these cases wither. *Thunder Basin*

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[4] The Supreme Court has long recognized that parties may challenge agency action before they suffer any harm. *See, e.g., U.S. Army Corps of Eng'rs v. Hawkes Co*., 136 S. Ct. 1807, 1815–16 (2016); *Abbott Labs v. Gardner*, 387 U.S. 136, 139–41, 152–53 (1967); *United States v. Nourse*, 34 U.S. 8, 28–29 (1835) (Marshall, C.J.).

[5] SEC persists in an odd argument that "only the APA provides a private right of action" and appellants must await "final agency action" before challenging that agency's unconstitutional conduct. This misstates the law which provides for jurisdiction for constitutional claims under 28 U.S.C. §§ 1331 and 2201. Unless the statutory scheme strips district court jurisdiction, which § 78y does not, even implicitly, *FEF* at 489, respondents are not required to await final agency action.

[6] *See e.g., Touche Ross & Co. v. SEC*, 609 F.2d 570 (2d Cir.1979); *Checkosky v. SEC*, 23 F.2d 452 (D.C. Cir. 1994); and *Davy v. SEC*, 792 F.2d 1418 (9th Cir. 1986).

itself says "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." 510 U.S. at 215.

FTC v. Standard Oil is likewise inapposite. Unlike here, *Standard Oil* involved only an APA claim, so the final agency action rule provided that the APA didn't confer jurisdiction. *See* 449 U.S. 232 (1980). *Standard Oil* did not challenge the constitutionality of the FTC's tribunal; here, by contrast, RJL and Mr. Lucia make a wholly collateral challenge to the ALJ's unconstitutional removal protections. If they are force to wait until SEC issues a final order, it will be too late to obtain meaningful relief for their constitutional injury.

C. The Relevant Authorities on the Remaining Standards for Grant of an Injunction Support Appellants

SEC makes an unsupported argument that the Wright & Miller treatise's use of "such as" means that its proposition that irreparable harm is presumed for constitutional violations is limited to First Amendment rights or religious freedoms. SEC Br. 19–20. But "such as" merely means for example—it is not a limitation on the types of constitutional injuries that may constitute irreparable harm. Courts have routinely presumed irreparable harm for constitutional violations beyond First Amendment violations. *See, e.g., Mitchell v. Cuomo*, 748

F.2d 804, 806 (2d Cir. 1984) (addressing Eighth Amendment claims; *quoting* Wright & Miller § 2948 on point.).

Siegel v. LePore is not to the contrary. 234 F.3d 1163, 1177–78 (11th Cir. 2000). As the Eleventh Circuit explained, plaintiffs there failed to make a record of irreparable harm, *id.* at 1178. In stark contrast, appellants here have amply demonstrated harm from doomed-to-be-repeated hearings as well as irreparable harm incurred from the last seven years of appeals and beyond.

Standard Oil's characterizations of the respondent's alleged harm as mere "expense and annoyance" or the "social burden of living under government" are also irrelevant to the plight of litigants like the Lucia respondents. 449 U.S. at 244. *Standard Oil* was not dealing with pointless litigation before constitutionally deficient ALJs deliberately foisted for the second time on parties.

III. SEC'S ARGUMENT THAT THE ADMINISTRATIVE PROCEEDING OFFERS AN EFFICIENT AND STREAMLINED CHANNEL OF ADJUDICATION BALANCING THE EQUITIES IN ITS FAVOR IS BELIED BY THE FACTS AND THE AGENCY'S OWN CONDUCT IN THIS CASE

SEC cites legislative history asserting that the scheme "enabl[es] the Commission to move quickly in administrative proceedings" and thus balances the equities in its favor. SEC Br. at 21. That assertion is given the lie by the troubling

facts of this case in which one tortured six-year path to justice bodes to be followed by another, just as protracted.

In 2014, then-Director of SEC Enforcement Division Director Andrew Ceresney proferred the same deceptive justification when he asserted that the administrative scheme, which denies jury trial, evidentiary and procedural protections afforded in Article III courts, was meant to "produce prompt decisions" from hearings "held promptly." Remarks to the American Bar Association's Business Law Section Fall Meeting (Nov. 21, 2014), available at https://www.sec.gov/news/speech/2014-spch112114ac. This promptness was important to all the parties because "[p]roof at trial rarely gets better for either side with age; memories fade and the evidence becomes stale." *Id.*

As of September 30, 2019, the median time for a case to proceed from filing to trial in the Southern District of California was 27.7 months.[7] Whereas, it took RJL and Mr. Lucia six years to vindicate their constitutional rights, and on remand, the ALJ sat on their motion to dismiss for nearly eight months before denying it.

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[7] See U.S. District Courts, Federal Court Management Statistics at https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2019.pdf (last accessed Dec. 20, 2019).

See supra note 2. The administrative proceeding is set to take place eight years after the OIP issued, and *fourteen years* after events dating back as far as 2006 upon which it is based. It will be at least two years before RJL and Mr. Lucia will be able to get before another court qualified to rule on the removal question, and a comparable time to reach the Supreme Court. On this record, SEC's assertion about the efficiency of the administrative scheme is risible. SEC has already robbed Mr. Lucia of his most productive working years. The injustice, prejudice, and gross impairment to RJL and Mr. Lucia's ability to mount an effective defense over a decade and a half after the events at issue is apparent to any impartial observer.

CONCLUSION

For the foregoing compelling reasons, this Court should enjoin RJL and Mr. Lucia's SEC administrative enforcement proceeding pending the outcome of this appeal.

Date: January 9, 2020

New Civil Liberties Alliance

/s/ Margaret A. Little
Margaret A. Little
Jessica L. Thompson

Attorneys for Appellants Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr.

STATEMENT OF RELATED CASES

Appellants are not aware of any related cases pending in the Ninth Circuit.

Date: January 9, 2020

New Civil Liberties Alliance

/s/ Margaret A. Little
Margaret A. Little

Attorney for Appellants Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr.

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Circuit Rules 27-1(1)(d) and 32-3(2) because it contains 2,730 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 27-1(1)(d).

Pursuant to Federal Rule of Appellate Procedure 27(d)(1)(E), this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Office 365 Times New Roman 14-point font.

Date: January 9, 2020

New Civil Liberties Alliance

/s/ Margaret A. Little
Margaret A. Little

Attorney for Appellants Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr.

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: January 9, 2020

New Civil Liberties Alliance

/s/ Margaret A. Little
Margaret A. Little

Attorney for Appellants Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr.