UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15006

In the Matter of

RAYMOND J. LUCIA COMPANIES, INC.
and RAYMOND J. LUCIA, SR.,

Respondents.

Division of Enforcement's Opposition to Respondents' Motion
for an Order Dismissing the Proceedings

Respondents Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr. move to dismiss this proceeding on the theory that a hearing has not been held and an initial decision issued within certain statutory and regulatory time limits. Alternatively, they seek an order referring the matter for trial before the Commission or a stay pending adjudication of a concurrent federal district court action in which they seek to enjoin this proceeding.

Respondents' contention that the Commission disregarded deadlines governing the timing of hearings and initial decisions is grounded in a gross misunderstanding of the procedural context. In *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Supreme Court sustained Respondents' Appointments Clause challenge to the manner of appointment of the Administrative Law Judge ("ALJ") who presided over the original hearing in this matter, but rather than dismiss the case, it held that the appropriate remedy was a new hearing on remand before a properly appointed ALJ. Unsatisfied with that remedy, Respondents now contend that the Commission did not comply with the hearing and initial decision deadlines because the ALJ was not properly appointed when the case was first instituted and those deadlines had passed by the time the case was remanded. Respondents argue that this circumstance entitles them to the drastic remedy of outright dismissal—a remedy that, notably, the Supreme Court itself was unwilling to grant for the underlying constitutional violation. In short, in Respondents' view, the Commission is powerless to grant the precise remedy the Supreme Court ordered and has no choice but to grant the remedy the Court rejected. Respondents' novel proposition finds no support in logic, disregards the text of the relevant provisions, and is contrary to the provisions' purpose. If adopted, Respondents' argument would reduce Commission administrative cease-and-desist proceedings to a one-and-done affair in which any error in the process meriting a remand following judicial (or even Commission) review would render the proceedings a nullity and allow securities law violators to escape sanction without regard to the merits of the allegations of wrongdoing. That cannot be the law.

Respondents' alternative requests should also be rejected. The provisions governing how the ALJ may be removed from office do not violate the Constitution, so there is no need to refer this matter to the Commission. Respondents' request for a stay pending adjudication of their constitutional claims in federal court is unnecessary and foreclosed by Commission precedent.

I. PROCEDURAL BACKGROUND

On September 5, 2012, the Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings ("OIP") against Respondents. The OIP was served on Respondents on September 10, 2012, and Administrative Law Judge ("ALJ") Cameron Elliot was designated to preside over a public hearing, which commenced on November 8, 2012. *See* Order Setting Prehearing Schedule (Sept. 28, 2012).

On July 8, 2013, ALJ Elliot issued an Initial Decision finding that Respondents violated Sections 206(1), 206(2), and 206(4) of the Advisers Act, and imposing remedial sanctions. One month later, the ALJ issued an order on Respondents' motion to correct manifest errors of fact. The Commission, *sua sponte*, remanded the case for further factual findings. ALJ Elliot issued a revised Initial Decision on December 6, 2013. The Commission then granted cross-petitions for review filed by Respondents and the Division of Enforcement.

On September 3, 2015, the Commission issued an order finding violations of Sections 206(1), 206(2), and 206(4), as well as Rule 206(4)-1(a)(5). The Commission barred Mr. Lucia from associating with an investment adviser, broker, or dealer; revoked Respondents' investment adviser registrations; ordered Respondents to cease and desist from further violations of the Advisers Act; and imposed civil penalties.

Respondents sought review in the D.C. Circuit, which rejected their Appointments Clause claim and affirmed the Commission's order. *Lucia v. SEC*, 832 F.3d 277 (D.C. 2016). The D.C. Circuit granted rehearing en banc to consider the Appointments Clause claim, but an equally divided court denied the petition for review.

The Supreme Court granted certiorari and, on June 21, 2018, held that the Commission's ALJs are inferior officers and that ALJ Elliot had not been appointed in the manner required by the Appointments Clause. *Lucia*, 138 S. Ct. 2044. The Court stressed that "the appropriate remedy" for that violation was "a new hearing before a properly appointed official." *Id.* at 2055 (quotation omitted). It further directed that "another ALJ (or the Commission itself) must hold the new hearing." *Id.* The Court remanded the case to the D.C. Circuit for further proceedings consistent with its opinion. *Id.* at 2056. On remand, the D.C. Circuit granted the petition for review, set aside the Commission's decision and order, and remanded the case to the

Commission "for a new hearing either before another [ALJ] or before the Commission, in accordance with *Lucia*." *Lucia v. SEC*, No. 15-1345 (D.C. Cir. Aug. 15, 2018); *see also Harding Advisory LLC et al. v. SEC*, No. 17-1070 (D.C. Cir. Sept. 19, 2018) (order stating that language in *Luci*a concerning remand to Commission for a new hearing "must be treated as authoritative") (quotation omitted), *pet. for rehearing en banc filed* (Nov. 5, 2018).

After the Court's decision in *Lucia*, the Commission stayed this proceeding for sixty days. *See Pending Admin. Proc.*, Securities Act Rel. No 10510 (June 21, 2018) (thirty-day stay); *Pending Admin. Proc.*, Securities Act Rel. No 10522 (July 20, 2018) (additional thirty-day stay). On August 22, 2018, the Commission ended the stay and, consistent with the Supreme Court's and D.C. Circuit's instructions, vacated "any prior opinion" it issued in the matter and ordered that Respondents "be provided with the opportunity for a new hearing before an ALJ who did not previously participate in the matter." *Pending Admin. Proc.*, Securities Act Rel. No 10536 (Aug. 22, 2018). *Pending Admin. Proc.*, Securities Act Rel. No 10536 (Aug. 22, 2018). The order thus left the OIP intact.

As the Commission noted, Rule 360(a)(2) of the Rules of Practice establishes deadlines for a hearing and initial decision following the service of an order instituting proceedings. *Id.* at 2 n.7. But neither it nor any other Commission rule establishes deadlines in the event of a court's remand of a case to the Commission for a new hearing. The Commission therefore instructed ALJs to compute the deadlines for scheduling a hearing and issuing an initial decision as specified in Rule 360(a)(2) but "from the date the proceeding is assigned to a hearing officer pursuant to this order, rather than the date of service of the relevant order instituting proceedings." *Id.* at 2 n.7.

Shortly thereafter, this case was reassigned to ALJ Foelak, who ordered the parties to submit a joint proposal for the conduct of further proceedings. *Order*, Admin. Proc. Rulings Rel. No. 6133 (Oct. 2, 2018). On November 28, 2018, Respondents filed an action in federal district court seeking to enjoin this proceeding. *See Raymond J. Lucia, Cos., Inc. & Raymond J. Lucia, Sr. v. SEC et al.*, No. 3:18-cv-02692 (S.D. Cal.). The following day, Respondents filed a motion with ALJ Foelak seeking dismissal of this proceeding or, in the alternative, either an order referring the matter for trial before the Commission or an order staying the matter pending resolution of their district court action. On November 30, 2018, the parties submitted a joint proposal for the conduct of further proceedings, in which Respondents preserved their objections to the reinstated proceeding.

II. ARGUMENT

A. The Commission complied with statutory and regulatory deadlines.

Respondents' motion to dismiss should be denied for the simple reason that the Commission has complied with the applicable statutory and regulatory deadlines. Section 21C of the Securities Exchange Act of 1934 and Section 203(k) of the Investment Advisers Act of 1940 provide that a "notice instituting [administrative cease-and-desist] proceedings . . . shall fix a hearing date not earlier than 30 days nor later than 60 days after service of the notice unless an earlier or a later date is set by the Commission with the consent of any respondent so served." 15 U.S.C. §§ 78u-3(b), 80b-3(k)(2). Consistent with this requirement, the OIP ordered that a public hearing before an ALJ "shall be convened not earlier than 30 days and not later than 60 days from service of this Order." OIP at 10. The OIP was served on September 10, 2012, and the hearing commenced fifty-nine days later, on November 8, 2012.[1]

In addition, pursuant to Rule 360(a)(2) of the then-applicable Rules of Practice, the OIP directed that the ALJ "shall issue an initial decision no later than 300 days from the date of service of this Order." OIP at 11. Rule 360(a)(2) further delineated how this timeframe "shall" be divided: "approximately 4 months" from OIP to the hearing, "approximately 2 months" for review of the hearing transcript and filing of briefs, and "approximately 4 months" for the ALJ to issue an initial decision. 17 C.F.R. § 201.360(a)(2) (Effective June 2003). As noted, the hearing began on November 8, 2012, within the "approximately 4 months" timeframe contemplated by Rule 360(a)(2). And ALJ Elliot issued his Initial Decision on July 8, 2013—301 days after the OIP was served.[2]

Respondents thus cannot—and do not—argue that the November 2012 hearing and July 2013 Initial Decision were untimely. Sections 21C and 203(k) require that the OIP "fix a hearing date" to commence between thirty and sixty days after it is served. 15 U.S.C. §§ 78u-3(b), 80b-3(k)(2). As discussed above, the OIP in this case, which has not been vacated, complied with that requirement. And the hearing itself did in fact commence within 60 days of when the OIP was served. Respondents' instead contend (Mot. 11-12) that, because the Commission's subsequent order has been vacated pursuant to the *Lucia* decision, it is as if the Commission "fail[ed] to bring the hearing and fail[ed] to have a hearing officer issue an initial

1 The hearing was originally set to commence on October 22, 2012, but the parties agreed to a brief postponement. *See* Order Setting Prehearing Schedule (Sept. 28, 2012); Joint Motion to Vacate Hearing Date and Set Prehearing Conference (Sept. 18, 2012).

2 Respondents never objected to the decision on timeliness grounds or claimed to have been prejudiced by the one-day delay.

decision" at all. But this contention finds no support in the text of Section 21C or Section 203(k), neither of which speaks directly to the effect of a court-ordered vacatur of a Commission order and remand for a new hearing. That should be the end of the matter.

But there is more. Congress enacted Sections 21C and 203(k) as part of an effort "to give the SEC greater authority and flexibility in the conduct of its law enforcement efforts and strengthen the remedial effect of the SEC's enforcement programs." S. Rep. No. 101-337 at 2; *see also* H.R. Rep. 101-616 at 13-14. Sections 21C and 203(k), in particular, were intended to enable the Commission "to resolve cases without protracted negotiation or litigation" and "to respond in a more timely fashion to violat[ive] conduct or practices." S. Rep. No. 101-337 at 18; *see also* H.R. Rep. 101-616 at 23 (noting that the provisions "permit[] swift remedial action in response to illegal conduct"). Respondent's interpretation would thwart that purpose, transforming the deadline into a statute of limitations on the Commission's ability to conduct new hearings in enforcement matters that courts have remanded. It would also make it impossible for the Commission to determine whether it had complied with the deadline until a reviewing court resolved a subsequent petition for review. And in defending the validity of the proceeding, the Commission would risk losing its ability to remedy the underlying securities law violations. Respondents identify no evidence that Congress intended to frustrate the Commission's mission in this manner. Nor is there any reason to believe Congress intended to create a more severe sanction for constitutional violations than the Constitution itself requires, *see Lucia*, 138 S. Ct. at 2055 ("appropriate remedy" for an Appointments Clause violation is a new hearing).

Respondents' interpretation is equally inconsistent with the text and purpose of Rule 360(a)(2). That provision, like Sections 21C and 203(k), does not address whether compliance with the hearing and initial decision deadlines might depend on the outcome of a challenge to the Commission's order. As the Commission has explained, the purpose of Rule 360 is "to provide for the timely and efficient disposition of proceedings." 81 Fed. Reg. 50,212, 50,212 & n.2 (July 29, 2016); *see also* 68 Fed. Reg. 35,787 (June 17, 2003). Respondents' interpretation would instead inject uncertainty into the timeliness of any given hearing or initial decision: As with their theory of the statutory deadline, it would mean that one could never be certain whether an initial decision was timely until every opportunity for a reviewing court to vacate and remand a subsequent Commission order had passed. And every remand would create a new opportunity to argue that what had previously been deemed a timely decision was now impermissibly untimely. Respondents' theory could thus transform constitutional violations into procedural violations that might trigger a more severe remedy than the constitutional violation alone would justify, an outcome that cannot be reconciled with the rule's express statement that "[t]hese deadlines confer no substantive rights on respondents." *See* 17 C.F.R. § 201.360(a)(2).

Respondents' argument (Mot. 13-15) that the Commission impermissibly "waive[d]" or "extend[ed]" Rule 360's deadlines in its August 22, 2018 order is also meritless. Having satisfied the statutory and regulatory deadlines, the Commission had no need to waive or extend them. Rather, because the Rules of Practice do not address the deadlines that govern a new hearing on remand, the Commission reasonably instructed ALJs on how to compute deadlines in cases on remand due to *Lucia*. *See* 15 U.S.C. § 80b-11 (granting Commission authority to issue "such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon the Commission elsewhere in [the Advisers Act]"); 17 C.F.R.§ 201.100(c) (Commission may apply "alternative procedures" if in "the interests of justice" and no party would be prejudiced).

B. Even if the Commission had violated the statutory and regulatory deadlines, Respondents would not be entitled to dismissal of the proceeding.

The Supreme Court has repeatedly held that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63-64 (1993). And the Court has firmly rejected the very argument that Respondents proffer here (Mot. 17-18)—that a statute's use of the term "shall" is sufficient indication of congressional intent to enforce a deadline through dismissal. Rather, the Court has long recognized, the "mere use of the word 'shall'" in a statutory timing provision "is not enough to remove [an agency's] power to act after [the deadline]." *Brock v. Pierce County*, 476 U.S. 253, 262 (1986); *see also Montford & Co., Inc. v. SEC*, 793 F.3d 76, 83 (D.C. Cir. 2015) (noting "strong presumption that, where Congress has not stated that an internal deadline shall act as a statute of limitations, courts will not infer such a result"); *William G. Tadlock Constr. v. U.S. Dep't of Defense*, 91 F.3d 1335, 1341 (9th Cir. 1996) ("Although the statutory term 'shall' suggests that limits are mandatory, failure of an agency to act within a statutory time frame does not bar subsequent agency action absent *a specific indication that Congress intended the time frame to serve as a bar*.") (quotation omitted).

Sections 21C and 203(k) do not specify any consequences for failing to hold a hearing within the thirty-to-sixty day window, nor have Respondents "pointed to any language in [the statutes] or [their] legislative history that indicates that Congress intended [their] time frames to serve as bars to agency action." *William G. Tadlock Constr.*, 91 F.3d at 1341. There is thus no basis to conclude that Congress "intended the [Commission] to lose its power to act." *Brock*, 476 U.S. at 260. And given that "important public rights are at stake" in Commission enforcement actions, such a "drastic" remedy would be particularly inappropriate here. *Id. See* *also Montford & Co., Inc.*, Advisers Act Rel. No. 3829 (May 2, 2014), at 16 (refusing to dismiss action brought outside statutory period to file within 180 days of a Wells notice in part because "dismissal of the action would harm the investing public by foreclosing the Commission from taking appropriate remedial measures"), *aff'd*, 793 F.3d 76.

Indeed, Respondents fail to demonstrate that *any* sanction—let alone dismissal—is justified under the circumstances. The notion that the Commission "flout[ed] the purpose of the rules" governing the timing of hearings and initial decisions (Mot. 21) ignores reality. The Commission convened a hearing within sixty days of the OIP, presided over by an ALJ whose manner of appointment had never been questioned by any court. Respondents only later raised an Appointments Clause claim, and even then did not suggest that it called into question the timeliness of the hearing or Initial Decision. If that is nonetheless the logical consequence of the subsequent Appointments Clause holding in *Lucia*—and as discussed above, it is not—the procedural violation was hardly "egregious" (Mot. 15).

Nor would dismissal be an appropriate exercise of courts' authority under *Brock* to order "equitable relief to compensate for an [agency's] failure to act" within a statutory time limit, as Respondents suggest (Mot. 21). *Sierra Pac. Indus. v. Lyng*, 866 F.2d 1099, 1111 (9th Cir. 1989); *see also Brock*, 476 U.S. at 260 & n.7 (contemplating availability of "less drastic remedies" than barring agency action beyond a deadline, such as compelling the agency to act). Courts may not use that equitable authority to impose the drastic remedy of dismissal when, as here, "the normal indicia of congressional intent" offer no evidence that Congress intended that result. *Brock*, 476 U.S. at 260, 262 n.9; *see also Sierra Pac. Indus.*, 866 F.2d at 1112 (chosen remedy should not "thwart the statutory purpose"). Respondents are unable to identify a single case dismissing an agency proceeding based on a failure to comply with a statutory deadline; the case law actually supports the opposite conclusion. *See, e.g., Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 191, 193 (D.C. Cir. 2016), cited at Mot. 16, 20, 22 (refusing to impose any remedy despite an agency's "systematic failure" to meet statutory deadlines, and instead giving the agency "a reasonable period of time" to bring itself into compliance).

Respondents' suggestion (Mot. 15-20) that the *Accardi* doctrine alters the result here is equally unpersuasive. That doctrine applies when an agency violates its own regulations to the prejudice of others. *See Battle v. FAA*, 393 F.3d 1330, 1336 (D.C. Cir. 2005). Rule 360's purpose is to facilitate timely completion of proceedings. *See* 81 FR 50,212 & n.2, 50,214. It expressly "confers no substantive rights on respondents." 17 C.F.R. § 201.360(a)(2).[3] Respondents must therefore show "substantial prejudice" to obtain any remedy, let alone dismissal. *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538-39 (1970). And even if the rule was meant to protect respondents, Respondents would still have to show some prejudice. *Lopez v. FAA*, 318 F.3d 242, 248 (D.C. Cir. 2003); *Hernandez-Luis v. INS*, 869 F.2d 496, 498 (9th Cir. 1989).[4] But the timing of the new hearing that Respondents claim prejudices

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3 Contrary to Respondents' suggestion (Mot. 18), neither *Abdi v. Duke*, 280 F. Supp. 3d 373 (W.D.N.Y. 2017) nor *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. 2018), suggests that this statement is "irrelevant" to the *Accardi* analysis. In those cases, courts held that a similar disclaimer was not, on its own, a basis to conclude that an agency directive setting forth what the Government had elsewhere conceded were binding protections for asylum-seekers actually conferred no binding rights. *Damus*, 313 F. Supp. 3d at 337-38. Here, by contrast, the disclaimer reinforces what is already evident from the nature and history of Rule 360—that it was not adopted to protect respondents.

4 None of the cases Respondents cite remotely supports the proposition (Mot. 9) that the alleged procedural violation here "void[s]" the proceeding "even without a showing of prejudice." *See, e.g.*, *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 n.5, 952 & n.6 (D.C. Cir. 1986) (setting aside the "revocation of a properly granted license" because it violated the agency's "clear and applicable rules," which, contrary to Respondents suggestion (Mot. 10), did not involve an "adjudication deadline"); *Garcia v. Johnson*, No. 14-CV-01775, 2014 WL 6657591, at *6-7 (N.D. Cal. Nov. 21, 2014) (action by detained asylum-seekers
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them was dictated by the remedy the Supreme Court ordered for Respondents' Appointments Clause challenge. Respondents' theory that the very relief they obtained from the Supreme Court constitutes the prejudice barring the Commission from carrying out that relief is absurd.

Nor were the alleged deadline violations the reason why Respondents remained subject to an industry bar while litigating their Appointments Clause claim or why they have incurred significant legal fees. *See* Mot. 19. The Commission rejected Respondents' motion for a stay of the industry bar pending appeal, concluding that they had not met their burden to establish that a stay was justified. *See Lucia*, Exchange Act Release No. 76241 (Oct. 22, 2015). Respondents could have sought a stay from the D.C. Circuit, but did not. *See, e.g.*, *Harding Advisory LLC et al. v. SEC*, No. 17-1070 (D.C. Cir. May 17, 2017) (order granting stay of industry bar pending resolution of *Lucia*). And a "litigant's financial and emotional costs in litigating the initial proceeding are simply the price of participating in the American legal system," and not a basis for ousting the Commission of jurisdiction. *Tilton v. SEC*, 824 F.3d 276, 285 (2d Cir. 2016).

C. The ALJ's removal protections do not violate the Constitution.

Respondents wrongly assert (Mot. 23) that the ALJ "may not adjudicate this matter without violating constitutional [removal] protections" and thus must declare the proceeding invalid. Article II of the Constitution vests "[t]he executive Power . . . in a President of the United States of America," who must "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; *id.* § 3. Unlike its specific directives governing the power of appointment, "[t]he

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to compel compliance with regulatory deadline for completing reasonable fear determination); *Int'l Labor Mgmt. Corp. v. Perez*, No. 1:14CV231, 2014 WL 1668131, at *10, 13 (M.D.N.C. Apr. 25, 2014) (compelling compliance with regulatory deadline where delays had caused irrecoverable economic harm). Even under the Third Circuit's approach (*see* Mot. 9), Respondents would still have to show prejudice because Rule 360's requirements are not grounded in *any* statutory or constitutional right, let alone a "fundamental" one like the right to counsel.

Constitution is silent with respect to the power of removal from office, where tenure is not fixed." *In re Hennen*, 38 U.S. 230, 258 (1839). The "power of removal" nonetheless has been viewed as "incident to the power of appointment." *Id.* at 259; *see also Myers v. United States*, 272 U.S. 52, 164 (1926) (the Constitution implicitly reserves to the President the "power of removing those for whom he cannot continue to be responsible").

The Supreme Court has long recognized that Congress may impose limited restrictions on the removal power. Congress may, for example, impose a for-cause removal restriction on the President's power to remove principal officers of certain independent agencies. *See Free Enter. Fund*, 561 U.S. at 493-94. And the Court has countenanced for-cause limitations on a principal officer's ability to remove inferior officers. *Id.* at 494.

In *Free Enterprise Fund*, however, the Court held that the "novel" and "rigorous" barrier to removing members of the Public Company Accounting Oversight Board by the Commission, whose members are presumed to enjoy "for cause" removal protection, left the President with insufficient ability to supervise the PCAOB's execution of the laws. 561 U.S. at 496. The Court noted that it had "previously upheld limited restrictions on the President's removal power" but only where "one level of protected tenure separated the President from an officer exercising executive power." *Id.* Two levels of "for cause" removal for an officer exercising "executive power," the Court held, "result[s] i[n] a Board that is not accountable to the President, and a President who is not responsible for the Board." *Id.*

For two reasons, *Free Enterprise Fund* does not compel the conclusion that the statute providing that the Commission ALJs' may be removed only for "good cause" (5 U.S.C. § 7521) violates the separation of powers. First, in his brief in *Raymond J. Lucia, et al. v. Securities & Exchange Commission* (S. Ct. No. 17-130), the Solicitor General offered an interpretation of

ALJs' "good cause" removal protection that comports with constitutional constraints. Drawing from constitutional avoidance principles, the Solicitor General explained (SG Br. 51) that, even where ALJs are embedded "in a structure involving more than one layer of tenure protection," a proper construction of "good cause" may alleviate constitutional concerns. The statutory scheme, the Solicitor General stated (SG Br. 47), must be understood to allow "[a]gency heads [to] be able to remove ALJs who refuse to follow agency policies and procedures, who frustrate the proper administration of adjudicatory proceedings, or who demonstrate deficient job performance." Under that view, Section 7521 should be "interpreted to permit an agency to remove an ALJ for personal misconduct or for failure to follow lawful agency directives or to perform his duties adequately." *Id.* at 45. At the same time, an ALJ may not be removed " 'at the whim or caprice of the agency or for political reasons,' " *id.* at 49 (quoting *Ramspeck v. Federal Trial Exam'rs Conference*, 345 U.S. 128, 142-43), and "an ALJ would still be protected from removal for invidious reasons otherwise prohibited by law," *id.* at 50.

According to the Solicitor General, that interpretation of Section 7521 avoids the constitutional defects at issue in *Free Enterprise Fund.* There, "the PCAOB's members could be removed only under an 'unusually high standard' that required a 'willful' violation of the law, a 'willful' abuse of their authority, or an 'unreasonable' failure to enforce legal requirements"; here, by contrast, "[t]he intrusion on presidential authority is significantly less." SG Br. 51 (quoting *Free Enterprise Fund*, 561 U.S. at 503). "ALJs could accordingly be held accountable, by the Heads of Departments and the President who appoint them, for failure to execute the laws faithfully." *Id.*[5]

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[5] The Solicitor General also stated that Section 7521(a)—which allows for removal "only for good cause established and determined by the Merit Systems Protection Board [MSPB] on the record after opportunity for hearing before the Board"—should be

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Second, crucial to the Court's decision to invalidate the dual for-cause structure in that case was the fact that PCAOB Board members exercised quintessential "executive" functions—and not solely "quasijudicial" functions. 561 U.S. at 496, 502, 505, 507 n.10. Indeed, the Court refused to extend its holding to ALJs, who "of course perform adjudicative rather than enforcement or policymaking functions, or possess purely recommendatory powers." *Id.* at 507 n.10. The Solicitor General in *Lucia* similarly drew a line (SG Br. 45, 50) between quasijudicial duties and purely executive functions when he explained that the President, acting through principal officers, cannot remove an ALJ "to influence the outcome in a particular adjudication," and noted the need to "respect[ ] the independence of ALJs in adjudicating individual cases."

That is reflective of the Supreme Court's longstanding recognition that Congress's ability to enact limited removal protections depends in part on the functions of the particular office. In *Wiener v. United States*, 357 U.S. 349 (1958), for example, the Court upheld statutory removal restrictions of War Claims Commission members because the members performed "quasijudicial" rather than purely executive functions. *Id.* at 353-54. And in *Morrison v. Olson*, 487 U.S. 654 (1988), the Court upheld good-cause restrictions on the removal of an "independent counsel," who was an executive officer with the power to investigate allegations of crime by high officers, because the restrictions provided structural independence necessary to the

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construed so that "the MSPB's review is limited to determining whether factual evidence exists to support the agency's proffered good faith grounds." SG Br. 39, 52. Such an approach ensures that the Department Head retains primary control in the decision to remove an ALJ. But it is not necessary to address this aspect of the statutory scheme at this juncture; regardless of how the MSPB's role in the removal process is understood, agencies like the Commission "possess the authority to reassign responsibilities away from ALJs while awaiting MSPB review of a removal decision." *Id.* at 53, 55. Consequently, "[t]hat authority avoids the possibility that an ALJ might continue to adjudicate cases beyond the point at which the Department Head has lost confidence in the ALJ's ability to exercise appropriate judgment." *Id.* at 55.

proper functioning of the particular office, and the independent counsel had "limited jurisdiction and tenure and lack [of] policymaking or significant administrative authority." *Id.* at 689-91, 695-96.

Accordingly, Congress has the latitude to impose removal restrictions to ensure the structural independence necessary for ALJs to properly perform their quasijudicial functions—which is precisely what the Commission explained when rejecting a removal challenge premised on *Free Enterprise Fund. See Timbervest, LLC*, Advisers Act Release No. 4197, 2015 WL 5472520, at *27 (Sept. 17, 2015).

D. A stay pending judicial review is unwarranted.

In requesting a stay of the administrative proceeding pending adjudication of their constitutional challenges in federal district court (Mot. 30), Respondents fail to acknowledge, much less distinguish, Commission precedent foreclosing that request. Because "no specific provision [of the Rules of Practice] govern[s] stays of an administrative proceeding pending a related civil proceeding," the Commission construes such motions as requests for postponement or adjournment under Rule 161. *John Thomas Capital Mgmt. Grp. LLC*, Exchange Act Release No. 74345, 2015 WL 728006, at *2 (Feb. 20, 2015) ("*John Thomas*"); *see also Lynn Tilton et al.*, Advisers Act Release No. 4735, 2017 WL 3214456, at *1 (July 28, 2017). The Commission "adhere[s] to a policy of strongly disfavoring such requests absent a strong showing of substantial prejudice and consider[s] the pendency of an appeal generally an insufficient basis upon which to prolong a Commission proceeding." *Id.* (quotation and alteration omitted); *see also* 17 C.F.R. § 201.161(b).

Respondents' contention that this administrative proceeding lacks adequate due process protections (Mot. 26-30) does not suffice to establish the prejudice necessary to justify a stay under Rule 161. Their position is essentially the same as that of the respondents in *John Thomas*: that "they should not be forced to participate in the instant proceeding because they believe the Commission is an improper and biased decision-maker." *John Thomas*, 2015 WL 728006, at *4 (quotation omitted). But as the Commission pointed out in rejecting that argument as the basis for a stay, "the 'expense and disruption of defending . . . a protracted adjudicatory proceeding[]' does not constitute irreparable harm, even when the party questions the lawfulness of the agency's proceedings." *Id.* (quoting *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980)); *see also Christopher M Gibson*, Exchange Act Release No. 80509, 2017 WL 1425432, at *1 (Apr. 21, 2017) (same). Respondents "ha[ve] no inherent right to avoid an administrative proceeding at all," and any injuries they face as a result of "continuing to undergo the Commission proceeding" are no different from "the burdens abided by any respondent in an enforcement proceeding or any criminal defendant who must wait for vindication." *Jarkesy*, 803 F.3d at 27; *see also Tilton*, 824 F.3d at 286-87; *John Thomas*, 2015 WL 728006, at *4; *Tilton*, 2017 WL 3214456, at *2.

At the same time, other factors counsel strongly against a stay. A postponement pending resolution of Respondents' federal court litigation "could significantly delay the outcome of this proceeding," frustrating "the strong public interest in the prompt enforcement of the federal securities laws." *Tilton*, 2017 WL 2314456, at *2; *see also Francis V. Lorenzo*, Exchange Act Release No. 82755, 2018 WL 994316, at *1 (Feb. 21, 2018). And on the merits, Respondents' "broad attacks on the procedures of the administrative process have been repeatedly rejected by the courts." *Charles L. Hill, Jr.*, Exchange Act Release No. 79459, 2016 WL 7032731, at *3

(Dec. 2, 2016) (quotation omitted).[6] Finally, Respondents are also unlikely to convince the district court to enjoin this proceeding or to hear their claims on the merits. *See, e.g.*, *Jarkesy*, 803 F.3d at 24 (rejecting attempt "to short-circuit the administrative process through the vehicle of a district court complaint"); *Tilton*, 824 F.3d at 282 ("[P]ersons responding to SEC enforcement actions are precluded from initiating lawsuits in federal courts as a means to defend against them.").

Commission and federal appellate precedent thus confirm that Respondents must first present their constitutional claims in this proceeding. If the Commission issues an adverse decision, "a court of appeals is available to hear those challenges." *Jarkesy*, 803 F.3d at 20. Because all of Respondents' arguments for circumventing this established process are ones the Commission and the courts have already rejected on multiple occasions, their request for a stay should be denied.

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6 Jury trial: *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977).
Structural bias: *Elliot v. SEC*, 36 F.3d 86, 87 (11th Cir. 1994); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *see also Timbervest, LLC et al.*, Advisers Act Release No. 4197, 2015 WL 5472520, at *22 (Sept. 17, 2015); David Zaring, *SEC's In-House Judges Not Too Tough, a Review Shows*, N.Y. Times (Aug. 31, 2015).
Procedural unfairness: *Jarkesy*, 803 F.3d at 21-22; *Blinder, Robinson, & Co., Inc. v. SEC*, 837 F.2d 1099, 1107 (D.C. Cir. 1988); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978).

Respondents' motion to dismiss, and their alternative motions to refer this matter to the Commission or to stay the proceeding, should be denied.

Respectfully submitted,

DIVISION OF ENFORCEMENT

Dated: December 21, 2018

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CERTIFICATE OF SERVICE

I certify that on December 21, 2018, I caused the foregoing document to be served on the following persons, by electronic mail, facsimile, or by UPS overnight mail as stated:

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