No. 19-11969

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHRISTOPHER M. GIBSON,

Plaintiff-Appellant,

v.

SECURITIES AND EXCHANGE COMMISSION, et al.

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia
No. 1:19-cv-01014-WMR
Hon. William M. Ray II

APPELLANT'S PETITION FOR REHEARING EN BANC

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Date: February 13, 2020

/s/ Richard A. Samp
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STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment that:

(1) The panel decision conflicts with the United States Supreme Court decision *Free Enterprise Fund v. Pub. Co. Accounting Oversight Board*, 561 U.S. 477 (2010) (*FEF*), on both jurisdiction and the merits and that consideration by the full court is necessary to secure and maintain conformity of the court's decisions to the rule of law set forth in that opinion;

(2) The panel decision presents a question of exceptional importance because it will consign appellant, and similarly situated respondents in this Circuit, to a cycle of repeated to-be-vacated administrative proceedings that violate the Constitution and their due process rights in conflict with decisions of the United States Supreme Court, as well as being in conflict with a correct reading of the statutory scheme under the securities laws that are the subject of this appeal.

/s/ Richard A. Samp
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STATEMENT OF THE ISSUES THAT MERIT EN BANC REVIEW

Appellant Christopher M. Gibson (Gibson) seeks en banc review of a per curiam panel decision affirming dismissal of his case for lack of jurisdiction. His case challenges his SEC administrative law judge's (ALJ) unconstitutional multiple layers of removal protection. The panel's ruling conflicts with the United States Supreme Court's holding in *Free Enterprise Fund v. Pub. Co. Accounting Oversight Board*, 561 U.S. 477 (2010) (*FEF*), which unanimously held that Article III district courts have jurisdiction over constitutional questions like the one presented here. *FEF* also held that Officers of the United States may not enjoy more than one layer of removal protection. Hence, appellant's reinstated administrative proceeding is preordained to become a nullity.

Adherence to the flawed reasoning of the panel, and the circuit precedent it followed, *Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016), will expose appellant to pointless but costly, life-altering, business and reputation-destroying proceedings. The Government itself admits that SEC's ALJs preside in violation of the Constitution. It is exceptionally important that this case be resolved correctly. Otherwise this appellant—and others similarly situated—and agencies, courts, and taxpayers will suffer repeating rounds of wasteful, unconstitutional, to-be-vacated proceedings never intended by Congress under a plain reading of the statute.

Stare decisis cannot justify adherence to an approach that Supreme Court precedent forecloses. *Fed. Trade Comm'n v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 767 (7th Cir. 2019). "*[S]tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Courts justly require a compelling reason to overturn circuit precedent; "[h]owever, important as *stare decisis* is, it is equally important for us to respect the statutes that Congress has passed and to correct any problems we see in our prior interpretations of those statutes." *Credit Bureau*, 937 F.3d at 785. Although a federal circuit court must give weight to its prior decisions, it is not bound by them absolutely and may overturn them for compelling reasons. Even in the realm of statutory interpretation, a Supreme Court decision "on an analogous issue that compels us to reconsider our position" counts as a compelling reason to overturn precedent. *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 915 (7th Cir. 2009); *Johnson v. DeSoto Cty. Bd. of Comm'rs*, 72 F.3d 1556, 1559 n.2 (11th Cir. 1996) ("[B]inding precedent and *stare decisis*, are distinct[;] […] *stare decisis* accords a court discretion to depart from one of its own prior holdings if a compelling reason to do so exists. […] The binding precedent rule affords a court no such discretion where a higher court has already decided the issue before it."). In such circumstances, circuit courts cannot favor their own decisions over those of the Supreme Court. *Credit Bureau*, 937 F.3d at 767.

STATEMENT OF FACTS AND DISPOSITION OF CASE

In 2014, the SEC investigated Gibson for trades he made in September-November of 2011. App.12, 30. An Order Instituting Proceedings (OIP) for alleged violations of the securities laws followed. App.33. After a hearing, an ALJ found he violated the securities laws and imposed a lifetime associational bar and other penalties. App.35. Gibson petitioned SEC to review that decision, which was granted. Though fully briefed, it sat undecided by the Commission for over two years. App.35–36.

In June 2018, the Supreme Court's decision in *Lucia v. SEC*, 138 S.Ct. 2044 (2018), vacated the ALJ's decision. In October 2018, SEC served Gibson with a new OIP seven years after the underlying events. The statute of limitations for securities laws violations is five years. 24 U.S.C. § 2462.

Although SEC ALJs still enjoy protections from removal that are unconstitutional, SEC nonetheless subjected Gibson to a second administrative hearing before another defective SEC ALJ in 2019. No decision has issued.

Gibson sued to enjoin this unconstitutional proceeding. The district court, citing *Hill*, 825 F. 3d 1236, declined to exercise jurisdiction and dismissed Gibson's complaint. Gibson appealed and a panel of this court (JJ. Wilson, Anderson and Dubina) affirmed the district court's dismissal by a per curiam order dated December 30, 2019.

SUMMARY OF ARGUMENT

There is no more sacred duty the government has than to do equal and impartial justice for its citizens. That duty includes only subjecting its citizens to trials before adjudicators who are empowered to preside over the government's claims and lawfully rule on them. The Government admits its ALJs are unlawful. Further, neither the Commission nor its ALJs have any authority to decide constitutional questions. Congress has only empowered them to decide liability under the securities laws, and no more. Federal courts, not an ALJ whose very authority to act is in question, must adjudicate this matter to preserve due process and to protect the structural integrity of our Constitution.

The reinstituted proceeding against Gibson is just as unconstitutional as the original proceeding—and the SEC knows it. If the SEC is allowed by this court to force Mr. Gibson again into the maw of an agency's statutory review process and he loses, as do 90% of respondents,[1] he must again await Commission and subsequent circuit court review that will likely take many years.[2]

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[1] Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315, 346-53 (2017); Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J. (MAY 6, 2015).

[2] If Gibson settles or wins, his constitutional claims will be extinguished altogether. That prevents percolation of removal questions from courts charged with authority to decide them, and runs contrary to the Supreme Court's admonition to incentivize such structural constitutional challenges. *Lucia*, 138 S. Ct. 2055 n.5.

Gibson's appeal at the circuit, years from now, will be the first time this circuit's precedent would allow him to address whether his administrative trial was constitutional. And when Gibson prevails, as *FEF* instructs he must, he will be back to square one facing yet a *third* retrial a decade or more after this all began. No rational—or constitutional—system of justice would operate in this fashion. And in fact, ours does not. For precisely this reason federal courts are vested with jurisdiction to decide threshold constitutional questions—such as the validity of the tribunal before which Gibson is to be tried.

Although the SEC could have originally—or even now—brought its claims before the Commission[3] or directly in federal court, it has persisted in its unlawful choice. By so doing, the SEC has defied the Supreme Court's instruction to give Gibson "a new hearing before a *properly appointed official*," *Lucia*, 138 S. Ct. at 2055 (emphasis added). This circuit should rehear Gibson's case en banc, rein in a lawless and defiant agency, and course-correct the law of this circuit.

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[3] *Lucia* held, "[t]o cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Mr. Lucia is entitled. 138 S. Ct. at 2055. "*The SEC may decide to conduct Lucia's rehearing itself.* Or it may assign the hearing to an ALJ who has received a constitutional appointment independent of the ratification." *Id*. at 2055 n.6 (emphasis added).

ARGUMENT

I. SEC ALJs Enjoy Multiple Layers of Tenure Protection and Therefore Sit in Violation of the Constitution

A. *FEF* Unambiguously Holds that Layers of Tenure Protection Are Unconstitutional for Federal Officers

FEF forbids more than a single layer of tenure protection for officers of the United States. 561 U.S. at 492:

> We deal with the unusual situation, never before addressed by the Court, of two layers of for-cause tenure. […] [T]wo layers are not the same as one. […] While we have sustained in certain cases limits on the President's removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President's authority in this way.

Id. at 501, 514.

The multiple layers that protect SEC ALJs from removal make them unaccountable to either the President or a Head of Department.[4] When Congress nests protections in Matryoshka-doll-like fashion—an "officer" who is only removable for cause by another "officer" who is only removable for cause by a

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[4] SEC ALJs may only be removed for "good cause" determined by the Merit Systems Protection Board (MSPB), 5 U.S.C. § 7521(a). Members of the MSPB, in turn, may not be removed except for "good cause shown." 5 U.S.C. at § 7211(e)(6). SEC Commissioners cannot remove ALJs without approval from the MSPB, 5 U.S.C. at § 7521, and may not themselves be removed except for "inefficiency, neglect of duty, or malfeasance in office." *See FEF*, 561 U.S. at 487.

department head who is only removable for cause by the President—it effectively immunizes executive officers of the President from removal, defeating the design of Article II. Justice Breyer called this the "embedded constitutional question" in *Lucia*. 138 S. Ct. at 2060 (Breyer, J., concurring).

B. The Government Admits that SEC ALJs Are Unconstitutionally Protected from Removal

In *Lucia*, the Solicitor General, on behalf of the government took the extraordinary step of confessing error and *agreed* with Mr. Lucia that SEC ALJs were unconstitutionally appointed. *Id.* at 2050. Not only did the government admit the constitutional violation in *Lucia*, it *raised* the second, corollary consequence that the status of ALJs as inferior officers meant they also had unconstitutional removal protections. Citing *FEF*, the government acknowledged "the statutory scheme provides for at least two, and potentially three, levels of protection against presidential removal authority." Respondent's Brief in Support of Certiorari at 20, *Lucia v. SEC*, No. 17-130 (filed Nov. 29, 2017). "It is critically important," argued the government, that the Court address removal along with appointments to "avoid needlessly prolonging the period of uncertainty and turmoil caused by litigation of these issues." *Id*. at 21. *Lucia*'s majority declined to decide the removal question, stating, "No court has addressed that question, and we ordinarily await "thorough lower *court* opinions to guide our analysis of the merits." *Lucia*, 138 S. Ct. at 2050 n.1(emphasis added). *Lucia* encouraged parties to raise and correct these structural

problems early: "Appointments Clause remedies are designed not only to advance those purposes directly, but also to create 'incentive[s] to raise Appointments Clause challenges.'" *Id.* at 2055 n.5.

II. THIS COURT IS BOUND TO FOLLOW *FEF*'S RULE OF DECISION ON JURISDICTION

A. The Supreme Court Has Already Decided the Question

The Supreme Court unanimously held in *FEF* that nothing in 15 U.S.C. § 78y ousts federal court jurisdiction, even implicitly, to hear removal questions:

> The Government reads § 78y as an exclusive route to review. But the text does not expressly limit the jurisdiction that other statutes confer on district courts. See, *e.g.,* 28 U.S.C. §§ 1331, 2201 […] We do not see how petitioners could meaningfully pursue their constitutional claims under the Government's theory [of exclusive jurisdiction]. […] Petitioners' constitutional claims are also outside the Commission's *competence* and expertise. […] We therefore conclude that § 78y did not strip the District Court of jurisdiction over these claims[.]

561 U.S. at 489–91 (emphasis added). The *FEF* Court noted:

> [E]quitable relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally[.]"[5]"[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution[.]"[6] […] If the Government's point is that an Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim, it offers no reason and cites no authority why that might be so.

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[5] *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001).
[6] *Bell v. Hood*, 327 U.S. 678, 684 (1946)

Id. at 491 n.2.[7]

B. *Lucia* Calls for *En Banc* Reassessment of *Hill*

The *SEC ALJ Cases*[8] including *Hill*, all decided before *Lucia*, should be reexamined because they were decided without the knowledge that SEC ALJs are federal officers. Other federal courts, in well-reasoned and comprehensive opinions, have found Article III jurisdiction to hear these claims. *See, e.g., Tilton v. SEC*, 824 F.3d 276, 292–99 (2d Cir. 2016) (Droney, J., dissenting); *Gupta v SEC*, 796 F. Supp. 2d 503 (S.D.N.Y. 2011) and *Duka v. SEC*, 103 F. Supp. 3d 382 (S.D.N.Y. 2015) (both abrogated by *Tilton*); *Hill v. SEC*, 114 F. Supp. 3d 1297 (N.D. Ga 2015) and *Ironridge Global IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294 (N.D. Ga 2015)(both vacated and remanded by *Hill*).

The Fifth Circuit, sitting en banc in *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019), recently recognized the importance of enforcing the Constitution's structural provisions when considering agency removal protections.

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[7] A federal court "properly appealed to in a case over which it has by law jurisdiction" is duty-bound to take such jurisdiction. *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, 358 (1989). "The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Id.*

[8] *Bennett v. SEC*, 844 F.3d 174 (4th Cir. 2016); *Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016); *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016); *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015); *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015).

Two federal circuits have also rendered decisions in conflict with the *SEC ALJ Cases*. The Third Circuit recently rejected the government's arguments that Social Security claimants must exhaust administrative proceedings:

> [E]xhaustion is generally inappropriate where a claim serves to vindicate structural constitutional claims like Appointments Clause challenges, which implicate both individual constitutional rights and the structural imperative of separation of powers. *Glidden v. Zdanok*, 370 U.S. 530, 536–37 (1962).
>
> The importance of the Appointments Clause has been recognized since our nation's founding. […] By requiring that all "Officers of the United States" be appointed by the president, a head of department, or a court of law[…] our Founders sought to replace that "despicable and dangerous system," *The Federalist No. 77*, […] with one that favored political accountability and neutrality, and our Supreme Court has upheld the protection of the Clause in various cases for the express purpose of "protec[ting] individual liberty," *NLRB v. Noel Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring) (citation omitted), and upholding the "principle of separation of powers," *Buckley v. Valeo*, 424 U.S. 1, 121 (1976).

Cirko v. Commissioner of Social Security, 2020 WL 370832, *2 (Jan. 23, 2020).

Cirko dismissed the government's argument that *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), required exhaustion as a "patent misreading of *Elgin*, which neither dealt with exhaustion nor remarked upon the agency's competence to hear constitutional claims." *Cirko*, at *5, n.10. Further, the relief must be something the ALJ is capable of providing, *i.e.*, within its *competence*, which *FEF*

tells us resolution of Art. II claims are not.[9] *Id.* *Cirko* also notes that the rationale of giving an agency first shot at error correction does not hold water:

> We need not give an agency the opportunity for error correction that it is incapable of providing […] it is not "empowered to grant effective relief." […] At neither the trial nor the appellate levels could the SSA's administrative judges cure the constitutionality of their own appointments[.]

Cirko, at *16.

The Fifth Circuit also recently issued an injunction pending appeal in *Cochran v. SEC*, No. 19-10396 (5th Cir. Sept. 24, 2019) (per curiam) (JJ. Jones, Higginson, and Oldham), finding that an identical removal challenge presented (1) a substantial case on the merits involving a serious legal question; (2) irreparable harm absent an injunction; (3) SEC not substantially injured if enjoined; and (4) the public interest favored movant. *Cochran* is awaiting decision on the merits.[10]

C. The Securities Laws Do Not Strip Federal Courts' Jurisdiction

Nowhere in the relevant statutes is there any indication that Congress meant to strip jurisdiction from an Article III court of its duty to hear constitutional

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[9] *Cirko* recognized the inhospitable incentives and incapacity of agencies to correct constitutional error, noting "the likely futility of claimants raising such concerns" in agency proceedings. *Cirko*, at *5, n. 12. *Although* "the SSA was aware that the ALJ appointments might be rendered unconstitutional by the Supreme Court [it] declined to take corrective action until well after *Lucia* was decided." *Id.*

[10] Undersigned counsel from New Civil Liberties Alliance is representing Cochran.

claims. Quite to the contrary, the SEC is permitted, if not obligated, to bring such actions in the district courts. *See* Exchange Act, 15 U.S.C. § 78aa "The district courts … shall have *exclusive* jurisdiction of violations of" the Exchange Act. (emphasis added). Beyond this apparent command of *exclusive* federal court jurisdiction, SEC is authorized by 15 U.S.C. § 78u(d)(3)(A) to enforce securities laws in federal court.

The panel further misconstrues 15 U.S.C. § 78y(a)(1), which is explicitly permissive, not mandatory—an aggrieved litigant "may" seek post-agency review of a final order in a court of appeals. Crucially, § 78y(a)(3) makes clear that appellate court jurisdiction becomes exclusive only after the SEC issues a final order, only if an aggrieved litigant chooses to invoke circuit court review, and even then only when the SEC files its administrative record with the court. 15 U.S.C. § 78y(a)(3). None of those predicates applies here; and neither party contends otherwise. *FEF* recognized that, as is true here, "not every Board action is encapsulated in a final Commission order or rule" which is the *only* basis for a claim of exclusive jurisdiction. *FEF*, 561 U.S. at 490.

Finally, 15 U.S.C. § 78bb(a)(2) explicitly preserves existing jurisdiction: "the rights and remedies provided by this chapter shall be in addition to *any and all* other rights and remedies that may exist at law or in equity." (emphasis added).

Read together, these statutes make it impossible to infer any intent by Congress to limit, much less divest, district courts of jurisdiction under § 1331 to adjudicate constitutional challenges raised well before any final order could ever be issued. Both the panel decision and *Hill* fail to acknowledge or reconcile this statutory structure.

D. The Logic of the Jurisdictional Question Commands a Federal Court Decision, as Does Sound Public Policy

Article III courts must address the removal question *before* Gibson is subjected further to ongoing, unconstitutional proceedings. To do otherwise is to invite serial, vacated hearings. Agencies and ALJs lack power to right such constitutional wrongs. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (agencies' powers limited to those granted by Congress).

Hill's approach generates costly inefficiencies, clogs the courts and agencies with to-be-voided proceedings, and eviscerates the promise of rapid review that was the administrative scheme's *sine qua non*.[11]

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[11] In 2014, then-Director of the SEC Enforcement Division Andrew Ceresney justified an administrative scheme which denies jury trial, evidentiary and procedural protections afforded in Article III courts because it would "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.*

III. THE ILLOGIC AND PUNITIVE CONSEQUENCES OF ADHERENCE TO *HILL* AND THE PANEL DECISION REQUIRE *EN BANC* REVIEW

Policy concerns raised by wasted government resources and the high human cost of adherence to *Hill* are not hypothetical. Gibson will have to wait for years to get this issue before a court with the power to decide it, only to face a third trial before the SEC or in a court,[12] since the removal defect can only be cured by Congress. Judicial assumptions about the efficiency of administrative proceedings are sadly betrayed by the multiplied proceedings that follow in the wake of *Hill* as the law of this circuit.[13] The depletion of resources and tax on human fortitude to wait it out for federal appellate review[14] that is the inevitable consequence of *Hill*—calls out for review by the full circuit.

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[12] Median time for civil cases from filing to disposition in N. D. Ga. is 6.2 months, for filing to trial, 32 months. *See* U.S. Dist. Ct., Fed. Court Mgmt. Statistics at https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2019.pdf (last accessed Feb. 12, 2019).

[13] "SEC administrative proceedings also occur much more quickly than federal court actions." *Hill*, 114 F.Supp.3d at 1302, *accord Hill*, 825 F.3d at 1238. The facts of this case, *Lucia, Cochran* and many other SEC cases falsify that assumption.

[14] Those few respondents with the resources or gumption to fight for due process, do so under crippling lifetime industry bans and penalties that render them unemployable in any profession. Even though Mr. Gibson's first ALJ opinion was vacated by *Lucia*, that decision still sits on the SEC website (App.39, ¶88) daily defaming him, sentencing him to occupational oblivion without a valid judgment to justify that damage.

CONCLUSION

Good law, as recognized by Chief Justice Roberts in *CSX v. McBride*, 564 U.S. 685, 715 (2011), is not made by totaling up temporary batting averages among the circuits. Enduring law is made by examining the reasoning—and its consequences—in the development of law that is meant to serve the purpose of fair administration of justice. By this metric, *Hill*, the *SEC ALJ Cases*, and the panel decision fail badly.

Appellant recognizes that this conclusion departs from the consensus view of four sister circuits. But two other circuits are coming around. Moreover, when deciding whether to overturn precedent, each circuit should "not merely … count noses. The parties are entitled to our independent judgment. *United States v. Hill*, 48 F.3d 228, 232 (7th Cir. 1995)." A prior panel's holding binds only "until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc.*" *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).[15]

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[15] *Accord*, *United States v. Gallo*, 195 F.3d 1278, 1284 (11th Cir.1999) ("prior precedent is no longer binding once it has been substantially undermined or overruled by [...] Supreme Court jurisprudence.").

The *SEC ALJ Cases* are flawed in logic and consequences. The observations made by the district court in an identical case pending in the Fifth Circuit should raise grave concerns about SEC's administration of justice if unchecked:

> The court is deeply concerned with the fact that plaintiff already has been subjected to extensive proceedings before an ALJ who was not constitutionally appointed, and contends that the one she must now face for further, undoubtedly extended, proceedings likewise is unconstitutionally appointed. She should not have been put to the stress of the first proceedings, and, if she is correct in her contentions, she again will be put to further proceedings, undoubtedly at considerable expense and stress, before another unconstitutionally appointed administrative law judge.

Cochran v. SEC, No. 4:19-CV-066-A, 2019 WL 1359252, at *2 (N.D. Tex. Mar. 25, 2019).

This Court should recognize the analytical errors of the panel decision and *Hill*—as well as their life-altering, proceeding-prolonging effects—and reverse the error. It should abandon the Kafkaesque consequences of its logic that guarantees Gibson a third trial and a decade of litigation. Above all, it should follow the controlling Supreme Court rules of decision in *FEF* and *Lucia*.

Dated: February 13, 2020

New Civil Liberties Alliance

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 35(b)(2)(A) because this brief contains 3,868 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Eleventh Circuit Local Rule 35-1.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Office365 Times New Roman 14-point font.

Date: February 13, 2020

New Civil Liberties Alliance

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Richard A. Samp

Attorney for Appellants
Christopher M. Gibson

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2020 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify that I have appended hereto a copy of the opinion sought to be reheard.

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

Date: February 13, 2020.

New Civil Liberties Alliance

/s/ Richard A. Samp
Richard A. Samp

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Christopher M. Gibson

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11969
Non-Argument Calendar

D.C. Docket No. 1:19-cv-01014-WMR

CHRISTOPHER M. GIBSON,

Plaintiff - Appellant,

versus

SECURITIES AND EXCHANGE COMMISSION,
CHAIRMAN OF THE SECURITIES AND EXCHANGE COMMISSION,
UNITED STATES ATTORNEY GENERAL,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(December 30, 2019)

Before WILSON, ANDERSON and DUBINA, Circuit Judges.

PER CURIAM:

Appellant, Christopher M. Gibson, appeals the district court's order denying his motion for preliminary injunctive relief, requesting that the district court preliminarily enjoin, based on constitutional grounds, the Securities and Exchange Commission ("SEC") from continuing an administrative proceeding against him. Relying on circuit precedent, the district court determined that it lacked subject matter jurisdiction over the case, denied the request for injunctive relief, and dismissed Gibson's complaint in its entirety. After reviewing the record and reading the parties' briefs, we affirm the district court's order.

I. BACKGROUND

In 2016, the SEC instituted an administrative enforcement proceeding against Gibson to determine whether he had violated the Securities and Exchange Act by acting as an investment adviser to a private pooled investment fund. The allegation was that in his role, Gibson had "engaged in a deceptive scheme to front-run [the Fund's] trades and benefit himself and those close to him at the expense of the Fund and his other clients by exploiting the investment advice he provided to the Fund." *See* Order Instituting Administrative and Cease-and-Desist Proceedings, at 9 (SEC Mar. 29, 2016) (Violations E. 54.), https://go.usa.gov/xVA7g. An Administrative Law Judge ("ALJ") held a hearing and issued an initial decision adverse to Gibson. The SEC granted Gibson's

request to review that initial decision and ordered merits briefing. While Gibson's case was pending, the United States Solicitor General submitted a brief in the Supreme Court in *Lucia v. SEC*, No. 17-130, agreeing with the petitioner's argument that the ALJ's are inferior officers under the Appointments Clause who must be appointed by the President, a Court of Law, or the Head of a Department, such as the SEC. Because of this brief, the SEC issued an order that ratified the previous appointments of its ALJs and remanded all pending administrative proceedings, including Gibson's case, to its ALJs. The ALJ assigned to Gibson's case ratified her earlier decision, and Gibson petitioned for SEC review.

While Gibson's petition for review was pending, the Supreme Court issued its decision in *Lucia v. SEC*, ___ U.S. ___, 138 S. Ct. 2044 (2018), holding that the SEC's ALJs were inferior officers who had not been properly appointed at the time of petitioner's administrative proceeding. The Court's remedy was a remand to the agency for a new hearing before a properly appointed officer; however, the properly appointed officer could not be the same officer who previously heard the case. *Id.* at ___, 138 S. Ct. at 2055. Hence, the SEC remanded Gibson's case for a new hearing before a different, properly appointed, ALJ.

Gibson filed an answer and raised several objections to the administrative proceedings, such as (1) the proceedings violated the separation of powers, (2) the

statutory restrictions on removing the SEC's ALJs violated Article II, (3) the SEC's ALJs had not been properly appointed, (4) the proceedings were based on an impermissible delegation of legislative authority, (5) the proceedings violated his due process rights, (6) the proceedings violated his equal protection rights, (7) the proceedings violated his right to a jury trial, (8) the statute of limitations had run, and (9) the proceedings were barred by laches. The ALJ held proceedings in July and August 2019, took the case under advisement, but has not issued an initial decision.

While these administrative proceedings were underway, Gibson sued in the district court to enjoin these proceedings. Gibson raised in the district court many of the same claims he raised in his administrative proceeding. The district court dismissed the complaint for lack of jurisdiction based on our court's holding in *Hill v. SEC*, 825 F.3d 1236, 1237 (11th Cir. 2016), which construed the judicial review provisions of the Securities and Exchange Act, 15 U.S.C. § 78y. The district court also denied Gibson's motion for preliminary injunctive relief.

II. DISCUSSION

On appeal, Gibson primarily challenges the district court's reliance on our *Hill* decision by attempting to distinguish his case from the *Hill* case. He also argues that the SEC administrative proceedings deny him his Seventh Amendment

right to a jury trial, that the district court should exercise its jurisdiction to consider whether the SEC proceedings are now barred by the statute of limitations, and that his due process claims can only be determined by the district court. We are unpersuaded by Gibson's arguments.

We review *de novo* the district court's determination of subject matter jurisdiction. *Hill*, 825 F.3d at 1240. We note that federal district courts generally have jurisdiction over claims that seek declaratory and injunctive relief based on constitutional violations. *See* 28 U.S.C. §§ 1331, 2201. However, Congress may allocate to an administrative body the initial review of such claims, and when it does, the court must undertake the analysis set forth in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 114 S. Ct. 771 (1994).

In *Hill*, we employed the framework established in *Thunder Basin* to examine whether Congress allocated initial review of claims raising constitutional challenges that seek declaratory and injunctive relief to the SEC's administrative process. *Hill*, 825 F.3d at 1241. We first decided whether Congress's intent to preclude initial review in the district court is "fairly discernible in the statutory scheme." *Id*. (quoting *Thunder Basin*, 510 U.S. at 207, 114 S. Ct. at 776). We then considered whether the respondents' claims were "of the type Congress intended to be reviewed within this statutory structure." *Id.* (quoting *Thunder*

Basin, 510 U.S. at 212, 114 S. Ct. at 779). We also examined whether the respondents' claims would receive meaningful judicial review within the statutory structure. Lastly, we questioned whether "agency expertise could be brought to bear on the . . . questions presented" and the extent to which the litigants' claims are "wholly collateral to [the] statute's review provisions." *Id.* (quoting *Thunder Basin*, 510 U.S. at 212, 214–15, 114 S. Ct. at 780). Applying this framework, we concluded that the respondents' claims had to proceed initially in the administrative forum and then through the judicial review scheme enacted by Congress in 15 U.S.C. § 78y. *Id.*

As our court noted, Congress authorized the SEC to bring civil actions to enforce violations of the Securities and Exchange Act in either federal district court or in an administrative proceeding before the SEC. *Id.* at 1237 (citing 15 U.S.C. § § 78u(d), 78u-1, 78u-2, 78u-3). "An SEC administrative enforcement action culminates in a final order of the Commission, which in turn is reviewable exclusively by the appropriate federal court of appeals." *Id.* (citing 15 U.S.C. § 78y). We concluded that respondents in an SEC administrative enforcement action could not bypass the Exchange Act's review scheme by filing a collateral lawsuit in federal district court challenging the administrative proceedings on constitutional grounds. *See id.* at 1243. Because we discerned no Congressional

intention to exempt the type of claims the respondents raised from the review process Congress created, we vacated the district court's preliminary injunction orders and remanded to the district court with instructions to dismiss the actions for lack of jurisdiction. *Id.* at 1252.

Like the district court, we conclude that *Hill* controls in this case. Gibson can receive meaningful judicial review of his claims in a court of appeals, and if the appellate court finds merit in any of his claims, it may vacate or set aside any adverse SEC order. Moreover, the SEC may bring its expertise to bear on Gibson's claims because it will necessarily have to decide threshold issues, such as whether Gibson has violated the securities laws or whether the statute of limitations has expired. Further, Gibson's constitutional and statutory claims are "inextricably intertwined with the conduct of the very enforcement proceeding the statute grants the SEC the power to institute and resolve as an initial matter." *Jarkesy v. SEC*, 803 F.3d 9, 23 (D.C. Cir. 2015). Accordingly, we conclude that because Gibson cannot bypass the SEC statutory scheme by filing a collateral action in federal district court, the district court properly dismissed his action for lack of jurisdiction. Moreover, we find no merit to the other arguments raised by Gibson on appeal.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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December 30, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-11969-AA
Case Style: Christopher Gibson v. Securities and Exchange Comm., et al
District Court Docket No: 1:19-cv-01014-WMR

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Pursuant to Fed.R.App.P. 39, costs taxed against appellant.

Please use the most recent version of the Bill of Costs form available on the court's website at www.ca11.uscourts.gov.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call T. L. Searcy, AA at (404) 335-6180.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6151

OPIN-1A Issuance of Opinion With Costs