No. 16-906

In the Supreme Court of the United States

LYNN TILTON, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that jurisdiction over petitioners' challenge to pending administrative proceedings of the Securities and Exchange Commission lies exclusively in the federal courts of appeals on review of a final Commission order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 824 F.3d 276. The opinion of the district court (Pet. App. 48a-75a) is not published in the *Federal Supplement* but is available at 2015 WL 4006165.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2016. A petition for rehearing was denied on August 23, 2016 (Pet. App. 76a-77a). On October 27, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including January 20, 2017, and the petition was filed on January 18, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has created a comprehensive scheme for the commencement, adjudication, and judicial review of proceedings brought by the Securities and Exchange Commission (SEC or Commission) in its role as enforcer of the Nation's securities laws. As relevant here, the Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.*, and the Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.*, authorize the Commission to address statutory violations either by filing a civil enforcement action in federal district court or by instituting proceedings before the agency. See, *e.g.*, 15 U.S.C. 80a-9(b), 80a-41(d) and (e), 80b-3(e), (f), and (k), 80b-9(d) and (e).

a. In an administrative enforcement proceeding, the Commission itself may preside and issue a final decision. 17 C.F.R. 201.110. In the alternative, Congress has authorized the Commission to delegate "its functions to a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board." 15 U.S.C. 78d-1(a). Under this authority, the Commission may delegate an initial stage of the proceeding to a "hearing officer." 17 C.F.R. 201.110. The hearing officer can be an Administrative Law Judge (ALJ), a single Commissioner, multiple Commissioners (short of a quorum of the Commission), or "any other person duly authorized to preside at a hearing." 17 C.F.R. 201.101(a)(5).

A hearing officer generally has a specified number of days to issue an "initial decision." 17 C.F.R. 201.360. That initial decision may be reviewed by the Commission on its own initiative or at the request of a party or aggrieved person. 15 U.S.C. 78d-1(b); 17 C.F.R. 201.410, 201.411(c). The Commission reviews the initial deci-

sion *de novo*; it also may take additional evidence, 17 C.F.R. 201.452, and may "make any findings or conclusions that in its judgment are proper and on the basis of the record," 17 C.F.R. 201.411(a). Whether or not a party seeks the full Commission's review of the initial decision, no sanction may take effect unless the Commission itself issues a final order. 17 C.F.R. 201.360(d).

b. A respondent who is aggrieved by a final order of the Commission may seek judicial review of that order by filing a petition for review directly in a federal court of appeals. The petition may be filed in the federal court of appeals "within any circuit wherein such person resides or has his principal office or place of business, or in the United States Court of Appeals for the District of Columbia." 15 U.S.C. 80a-42(a), 80b-13(a). The court of appeals then has "exclusive" jurisdiction, and its judgment "affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by" this Court. *Ibid.*

2. Petitioners manage a number of "Collateralized Loan Obligation" funds that raise capital by issuing secured notes and use the proceeds to purchase commercial loans. 111 S.E.C. Docket 987, 2015 WL 1407564, at *1, *3 (Mar. 30, 2015). Following an investigation by the Commission's Division of Enforcement, the Commission issued an order instituting public administrative cease-and-desist proceedings against petitioners to determine if they violated the Investment Advisers Act and the Investment Company Act. *Id.* at *1. The order contained allegations that petitioners defrauded investors in three funds they manage—which had raised more than $2.5 billion—by providing

false and misleading information and by engaging in deceptive conduct relating to the values of assets in those funds. *Ibid.* The Commission's order specified that the hearing officer for the administrative proceedings would be an ALJ. *Id.* at *11.

3. Petitioners filed suit in the United States District Court for the Southern District of New York, seeking to enjoin the Commission from conducting the enforcement proceedings before an ALJ. Pet. App. 6a-7a. As relevant here, petitioners contended that the Commission's ALJs should be considered "inferior Officers" of the United States and that their appointments do not comport with the Appointments Clause (U.S. Const. Art. II, § 2, Cl. 2) because they are not appointed by the President or the Head of a Department (the Commission itself). Pet. App. 7a.[1]

The district court dismissed petitioners' suit for lack of jurisdiction, holding that Congress has vested judicial review of the Commission's proceedings exclusively in the courts of appeals. Pet. App. 49a. The district court accordingly did not address the merits of petitioners' constitutional objections.

Petitioners appealed the dismissal of their suit to the Second Circuit, which granted their motion to expedite the appeal and heard oral argument on September 16, 2015. After argument, the court of appeals issued an order staying the Commission's administrative proceedings "pending [its] decision in this appeal." Pet. App. 1a, 8a.

4. The court of appeals affirmed the dismissal of petitioners' suit for lack of jurisdiction. Pet. App. 1a-

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[1] Petitioners further contended that limitations on the President's ability to remove an ALJ from office violate separation-of-powers principles. Pet. App. 7a n.2.

29a. The court held that, "[b]y enacting the SEC's comprehensive scheme of administrative and judicial review, Congress implicitly precluded federal district court jurisdiction over the appellants' constitutional challenge." *Id.* at 4a. In so doing, the court observed, it was agreeing with two other courts of appeals that had "recently reached similar conclusions." *Id.* at 9a (citing *Jarkesy* v. *SEC*, 803 F.3d 9 (D.C. Cir. 2015), and *Bebo* v. *SEC*, 799 F.3d 765 (7th Cir. 2015), cert. denied, 136 S. Ct. 1500 (2016)).

At the outset, the court of appeals addressed the question whether it is "'fairly discernible' from the 'text, structure, and purpose' of the securities laws that Congress intended the SEC's scheme of administrative and judicial review 'to preclude district court jurisdiction.'" Pet. App. 8a (quoting *Elgin* v. *Department of Treasury*, 567 U.S. 1, 9-10 (2012)). That inquiry, the court explained, "is guided by the proposition that 'generally, when Congress creates procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive.'" *Id.* at 8a-9a (quoting *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010)). The court determined that "the text, structure, and purpose of the securities laws make clear that Congress intended the SEC's scheme of administrative review to permit the Commission to bring its expertise to bear in enforcing the securities laws." *Id.* at 9a-10a. Thus, the court concluded, the statutory scheme generally precludes "persons responding to SEC enforcement actions * * * from initiating lawsuits in federal courts as a means to defend against them." *Id.* at 10a; see *id.* at 11a ("[Petitioners] do not contest that conclusion.").

Next, the court of appeals considered petitioners' argument that their Appointments Clause challenge is "a distinct type of claim" that "falls outside the exclusive purview of the SEC's administrative review scheme." Pet. App. 11a. To address that argument, the court of appeals sought "guid[ance]" from this Court's decisions in *Elgin*, *Free Enterprise Fund*, and *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994). Pet. App. 9a. Those decisions identified three pertinent "considerations," which the court of appeals described as "the *Thunder Basin* factors": (1) whether petitioners' claim could receive meaningful judicial review under the special statutory review scheme created by Congress; (2) whether the claim is wholly collateral to the statutory review provisions; and (3) whether the claim lies outside the agency's expertise. *Ibid.*

Addressing the first *Thunder Basin* factor, the court of appeals concluded that petitioners "will have access to meaningful judicial review of their Appointments Clause claim through administrative channels." Pet. App. 20a. Any adverse decision by the Commission, the court explained, is subject to judicial review by a court of appeals, which may vacate a final administrative order and remand for a new proceeding. *Id.* at 17a. Such post-proceeding relief thus "suffices to vindicate the litigant's constitutional claim." *Ibid.* Although petitioners argued that "post-proceeding judicial review of their Appointments Clause claim [would] be meaningless," the court found that argument "not merely unsupported by" Supreme Court precedent, but "also at odds with established practice in federal court regarding analogous challenges to a tribunal's constitutional legitimacy." *Id.* at 16a.

The court of appeals concluded that the second and third *Thunder Basin* factors "present closer questions," Pet. App. 12a, but nevertheless support review of petitioners' Appointments Clause claim within the framework established by Congress. With respect to the second factor, the court determined that petitioners' suit is not "wholly collateral" to the pending administrative enforcement proceeding. *Id.* at 21a-22a. To the contrary, the court explained, petitioners' "Appointments Clause claim arose directly from that enforcement action and serves as an affirmative defense within the proceeding." *Id.* at 22a; see *id.* at 24a (Petitioners' claim "targets an aspect of an ongoing administrative proceeding."). The constitutional claim is thus "a 'vehicle by which' the [petitioners] seek to prevail in the [administrative] proceeding," rather than something collateral to that proceeding. *Id.* at 23a (quoting *Elgin*, 567 U.S. at 22).

With respect to the third *Thunder Basin* factor, the court of appeals determined that the Commission might "bring its expertise to bear on" petitioners' Appointments Clause claim "by resolving accompanying, potentially dispositive issues in the same proceeding." Pet. App. 25a. The Commission might, for instance, "'fully dispose of the case' in [petitioners'] favor" by deciding that petitioners "did not violate the Investment Advisers Act, in which case the constitutional question would become moot." *Ibid.* (quoting *Elgin*, 567 U.S. at 23). Indeed, "[o]ne of the principal reasons to await the termination of agency proceedings is to obviate all occasion for judicial review." *Id.* at 28a (quoting *FTC* v. *Standard Oil Co. of Cal.*, 449 U.S. 232, 244 n.11 (1980)).

Having found that each of the three relevant considerations weighed in favor of channeling petitioners' Appointments Clause claim through the statutory-review scheme, the court of appeals affirmed the district court's dismissal for lack of jurisdiction and vacated its stay of further administrative proceedings. Pet. App. 29a.

Judge Newman joined the court of appeals' opinion and filed a concurring opinion. Pet. App. 30a-31a. In his view, petitioners' collateral attack on the administrative proceedings should be precluded for an additional reason: the doctrine of "colorable jurisdiction." Under that doctrine, "even if the constitutionality of a statute is in doubt, an order issued by a court under that statute must be obeyed and enforced even by criminal contempt." *Id.* at 30a (discussing *United States* v. *United Mine Workers of Am.*, 330 U.S. 258 (1947)). Here, Judge Newman explained, the ALJ conducting the administrative proceeding has "colorable jurisdiction" over that proceeding, which will be followed by an "opportunity to seek review before the Commission and then petition for review of a final order in a Court of Appeals." *Id.* at 31a.

Judge Droney dissented. Pet. App. 32a-47a. In his view, this case "is nearly indistinguishable from" *Free Enterprise Fund*, and the panel majority placed undue reliance on the only "significant" difference between the two cases, which, in his view, was that administrative proceedings against petitioners in this case had already begun. *Id.* at 32a.

5. Following an unsuccessful petition for rehearing en banc, Pet. App. 76a-77a, petitioners applied to this Court for a stay pending the filing and disposition of a petition for a writ of certiorari. The Court denied the

application without comment on September 27, 2016. No. 16A242.

ARGUMENT

Petitioners argue (Pet. 12-21) that this Court should grant review to decide whether the district court had jurisdiction to consider their collateral attack on the agency enforcement proceedings pending against them. The court of appeals correctly resolved that question, and its ruling is consistent with all other courts of appeals to have considered it.

Petitioners also contend (Pet. 21-24) that this Court should grant certiorari to decide whether the Commission's ALJs are inferior officers whose appointments must satisfy the Appointments Clause. Neither the district court nor the Second Circuit addressed that argument, which is the subject of pending cases in the courts of appeals on review from final decisions of the Commission. Petitioners identify no reason that this Court should depart from its customary practice by addressing it here for the first time.

1. The sole issue decided below is whether the comprehensive statutory framework governing SEC administrative proceedings—which provides for direct review of the Commission's final orders by the courts of appeals—precludes petitioners' district court challenge to the administrative proceedings that are currently pending against them. The court of appeals, applying this Court's decisions in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994); *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010); and *Elgin* v. *Department of Treasury*, 567 U.S. 1 (2012), correctly held that it does. Pet. App. 3a-29a.

a. Petitioners primarily contend (Pet. 13) that the court of appeals, in applying the *Thunder Basin* factors, rendered a decision "flatly at odds with" *Free Enterprise Fund*. That contention is incorrect.

In *Free Enterprise Fund*, an accounting firm had been the subject of an unfavorable report from, and then was under investigation by, the Public Company Accounting Oversight Board. The firm sought a declaratory judgment that the Board was unconstitutional because the "Board's existence" violated the Appointments Clause and the separation of powers. 561 U.S. at 487, 490. In determining whether the accounting firm could bring its constitutional challenge in district court, this Court recognized that the applicable statutory-review provision, 15 U.S.C. 78y, "provides only for judicial review of *Commission* action," yet "not every Board action is encapsulated in a final Commission order or rule." 561 U.S. at 490. Therefore, in order to have its constitutional claim adjudicated within the statutory scheme for administrative and judicial review, the accounting firm would have been required "to select and challenge a Board rule at random," clearly "an odd procedure for Congress to choose." *Ibid.* In that sense, the Court explained, the firm's challenge "to the Board's existence" was "'collateral' to any Commission orders or rules from which review might be sought" in a court of appeals. *Ibid.* (citation omitted).

The Court also rejected the suggestion that the firm might secure judicial review by refusing to comply with a Board request for documents or testimony and then "rais[ing] [its] claims by appealing a Board sanction." *Free Enterprise Fund*, 561 U.S. at 490. That approach would not furnish a "meaningful ave-

nue of relief," the Court explained, because courts "normally do not require plaintiffs to bet the farm by taking the violative action before testing the validity of the law." *Id.* at 490-491 (ellipsis, citation, and internal quotation marks omitted).

Unlike the accounting firm in *Free Enterprise Fund*, petitioners need not challenge a random action of the Commission, nor must they flout a Commission order, to create an opportunity to test the validity of an ALJ appointment. Rather, as the court of appeals explained, petitioners are *already* subject to pending SEC administrative enforcement proceedings. Pet. App. 12a-14a, 16a-20a. Petitioners' constitutional claims are based entirely on the fact that those already-pending proceedings are initially presided over by a Commission ALJ.[2] Those proceedings "necessarily will result in a final Commission order." *Hill* v. *SEC*, 825 F.3d 1236, 1243 (11th Cir. 2016). If petitioners are aggrieved by that order, they will be able to petition for review in a court of appeals, which could then consider their constitutional claims *de novo*. Thus, "[t]o have [their] claims heard through the agency route, [petitioners] would not have to erect a Trojan-horse challenge to an SEC rule or 'bet the farm' by subjecting [themselves] to unnecessary sanction under the securities laws." *Jarkesy* v. *SEC*, 803 F.3d 9, 20 (D.C. Cir. 2015). Indeed, similarly situated parties in other SEC proceedings have already taken advantage of that avenue for judicial review to raise similar constitutional claims in the courts of appeals. See, *e.g.*,

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[2] The hearing before the ALJ has been completed, and the parties have submitted post-hearing briefs. The ALJ has not yet issued an initial decision. See https://www.sec.gov/litigation/apdocuments/ap-3-16462.xml (administrative docket).

Bandimere v. *SEC*, 844 F.3d 1168 (10th Cir. 2016), pet. for reh'g filed, No. 15-9586 (10th Cir. Mar. 13, 2017); *Raymond J. Lucia Cos.* v. *SEC*, 832 F.3d 277 (D.C. Cir. 2016) (*Lucia*), reh'g en banc granted, No. 15-1345 (D.C. Cir. Feb. 16, 2017).

As the Second Circuit explained, petitioners' opportunity to raise their constitutional claim in a court of appeals—and, if successful, to obtain vacatur of an unfavorable Commission order—demonstrates that they "will have access to meaningful judicial review of their Appointments Clause claim." Pet. App. 20a. Although petitioners complain (Pet. 14) that they would first have to expend resources in an administrative proceeding, the opportunity to challenge a final agency order "suffices to vindicate the litigant's constitutional claim." Pet. App. 17a; see *In re al-Nashiri*, 791 F.3d 71, 80 (D.C. Cir. 2015) ("Vacatur, even at the appeal-from-final-judgment stage, would fully vindicate" an Appointments Clause claim.); see also *Bennett* v. *United States SEC*, 844 F.3d 174, 179 (4th Cir. 2016) (constitutional claims may be "meaningfully addressed in the Court of Appeals" even where a petitioner challenges the constitutionality of the administrative proceeding itself) (quoting *Thunder Basin*, 510 U.S. at 215).

Petitioners' contention in this regard is similar to arguments that this Court rejected in *FTC* v. *Standard Oil Co. of California*, 449 U.S. 232 (1980) (*Standard Oil*), in which an oil company filed a district court action to enjoin an allegedly unlawful administrative proceeding before the Federal Trade Commission. *Id.* at 235. This Court rejected the attempt to halt the FTC's administrative proceeding, explaining that the "expense and annoyance of litigation is part of the social burden of living under government," and

that, after the agency proceeding had concluded, a court of appeals would be able to review the alleged unlawfulness. *Id.* at 244-245 (citations and internal quotation marks omitted). In this case, for the same reasons, "[e]ven assuming" that petitioners were correct in asserting that the proceeding against them is unlawful, they have "no inherent right to avoid an administrative proceeding at all," and they would be able to "vindicate[]" their asserted rights "by a reversal of the Commission's final order" upon review in a court of appeals. Pet. App. 20a (quoting *Jarkesy*, 803 F.3d at 27).

Petitioners attempt (Pet. 19) to distinguish *Standard Oil* on the ground that that case did not involve a constitutional challenge. Yet this Court, in making clear that the "expense and annoyance of litigation is part of the social burden of living under government," *Standard Oil*, 449 U.S. at 244 (citation and internal quotation marks omitted), never suggested that the burden depends upon whether agency proceedings allegedly violate a statute or the Constitution. Nor would such a distinction make sense. Accord *Bennett*, 844 F.3d at 185 ("Bennett argues that *Standard Oil* is inapposite because it did not involve a constitutional claim. But that distinction makes no material difference for assessing the meaningfulness of judicial review here.").[3]

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[3] Petitioners also argue (Pet. 19) that they face what they characterize as the "irreparable constitutional injury here of being forced to defend oneself before an unconstitutionally appointed adjudicator." But this Court has made clear that only when individuals "suffer otherwise justiciable injury" and participate "in a proper case" may they argue a structural constitutional objection.

b. Petitioners further contend (Pet. 7-8) that the court of appeals' analysis focused too heavily on the first *Thunder Basin* factor (*i.e.*, whether the special review framework established by Congress provides for meaningful judicial review) to the exclusion of the other two factors. But as the court of appeals correctly explained, the other *Thunder Basin* factors also weigh against petitioners in this case.

Regarding the second *Thunder Basin* factor, petitioners' constitutional challenge is not "wholly collateral" to the administrative proceeding, because it arises "directly from that enforcement action" and is being asserted "as an affirmative defense within the proceeding." Pet. App. 22a. Like the "constitutional claims" in *Elgin*, petitioners' claims here are "the vehicle by which they seek" to prevail in the administrative proceedings, and therefore those claims are not "wholly collateral" to the framework that provides for an administrative decision followed by review in a court of appeals. 567 U.S. at 22.

Regarding the third *Thunder Basin* factor, the SEC's expertise is relevant to resolution of the Appointments Clause claim. As the court of appeals noted, the Commission could moot the constitutional claim by resolving the case in petitioners' favor on other grounds. Pet. App. 27a. That potential to "obviate all occasion for judicial review" is itself a "principal reason[] to await the termination of agency proceedings." *Standard Oil*, 449 U.S. at 244 n.11 (citations omitted); cf. *Bond* v. *United States*, 134 S. Ct. 2077, 2087 (2014) (noting the "well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court

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Bond v. *United States*, 564 U.S. 211, 223 (2011); see *Bennett*, 844 F.3d at 185 n.11.

will not decide a constitutional question if there is some other ground upon which to dispose of the case") (quoting *Escambia Cnty.* v. *McMillan*, 466 U.S. 48, 51 (1984) (per curiam)).

But even apart from the possibility that the Commission's securities-law expertise might obviate the need for any judicial resolution of petitioners' constitutional contentions, the Commission has expertise that bears directly on resolution of the constitutional claim itself. The Commission knows what its ALJs actually do; it can construe the statutory provisions, rules, and regulations that govern proceedings before them; and its views can inform a court's determination of whether the ALJs' duties rise to a level that makes them inferior officers of the United States for purposes of the Appointments Clause. See Pet. 30 (arguing that Commission ALJs are officers based on Commission regulations and practices). For instance, in ruling on the Appointments Clause challenge in *Lucia*, *supra*, the D.C. Circuit relied on the Commission's explanation of an ALJ's power to issue a final decision that on its own imposes practical consequences (it cannot) and the Commission's control over the administrative record (it is comprehensive). See 832 F.3d at 286, 288.

c. Four other circuits have addressed the same jurisdictional question in the context of constitutional challenges arising from proceedings before the Commission's ALJs. All four of those courts have reached the same result. See *Bennett*, 844 F.3d at 176; *Hill*, 825 F.3d at 1237-1238; *Jarkesy*, 803 F.3d at 12; *Bebo* v. *SEC*, 799 F.3d 765, 767 (7th Cir. 2015), cert. denied, 136 S. Ct. 1500 (2016). After examining this Court's decisions, each of those courts held, consistent with the ruling below, that Congress intended constitution-

al claims like petitioners' "to be reviewed within the SEC's exclusive statutory structure." Pet. App. 29a (citation and internal quotation marks omitted); see *Bennett*, 844 F.3d at 181 ("[W]e readily discern from the text and structure of the Exchange Act Congress's intent to channel claims first into an administrative forum and then on appeal to a U.S. Court of Appeals."); *Hill*, 825 F.3d at 1252 ("[W]e fairly discern Congress's general intent to channel all objections to a final Commission order—including challenges to the constitutionality of the SEC ALJs or the administrative process itself—into the administrative forum and to preclude parallel federal district court litigation."); *Jarkesy*, 803 F.3d at 30 ("[T]he securities laws provide an exclusive avenue for judicial review that [plaintiff] may not bypass by filing suit in district court."); *Bebo*, 799 F.3d at 774 ("Congress intended [plaintiffs] to proceed exclusively through the statutory review scheme established by [15 U.S.C.] 78y because that scheme provides for meaningful judicial review.").

Conceding that all courts of appeals that have addressed this question have reached the same conclusion, petitioners argue (Pet. 19) that the "[u]nanimity [a]mong [t]he [c]ircuits" justifies this Court's review. That argument misses the mark: This Court has made clear that it is *conflict* among the courts of appeals, not unanimity, that ordinarily counsels in favor of review. See Sup. Ct. R. 10(a). Petitioners also assert (Pet. 21) that, without this Court's intervention, the ruling below "will inevitably be replicated in every circuit and effectively set in stone." But the fact that the courts of appeals have unanimously and correctly applied this Court's precedents and are likely to continue to do so furnishes no reason for this Court's

review. And if petitioners were correct that the court of appeals in this case committed legal errors that are "clear" (Pet. 14, 20), or that its ruling was "flatly at odds with" (Pet. 13) and "[i]n direct contravention of" (Pet. 21) this Court's precedents, then there would be no reason for the Fourth, Seventh, Eleventh, and D.C. Circuits to have reached the same conclusion, nor any reason to assume that the other courts of appeals will "inevitably" follow suit.

2. Petitioners contend (Pet. 21-33) that this Court should address the merits of their Appointments Clause challenge. But that challenge was not passed upon at either stage below, and the Court could not even reach that question without addressing petitioners' jurisdictional argument, which five courts of appeals have rejected and which does not warrant this Court's review.

This Court, as it has often observed, is "a court of final review and not first view" and therefore does not ordinarily "decide in the first instance issues not decided below." *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (citations omitted). That practice carries special force in the context of constitutional questions. See, *e.g., ibid.*; *Department of Transp.* v. *Association of Am. R.Rs.*, 135 S. Ct. 1225, 1234 (2015); *Bond*, 564 U.S. at 226; *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). And the Court has been particularly reluctant to address a merits claim that the lower courts did not reach due to a ruling on a threshold question. See *Zivotofsky*, 566 U.S. at 201. Here, neither the court of appeals nor the district court addressed the merits of petitioners' Appointments Clause argument, resolving the case instead on threshold

jurisdictional grounds. Under the circumstances, no compelling reason exists for departing from this Court's usual approach of awaiting lower-court review.

Indeed, as petitioners acknowledge (Pet. 26-27), two other courts of appeals have addressed the merits of Appointments Clause arguments that were properly presented on direct review of a final Commission order. Those courts reached conflicting outcomes. *Bandimere*, 844 F.3d at 1188 (Commission ALJs are inferior officers); *Lucia*, 832 F.3d at 289 (Commission ALJs are not inferior officers). Petitioners argue (Pet. 28) that this 1-1 split "is a compelling reason for granting the petition" in this case. Yet lower-court proceedings in both cases are still ongoing: On February 16, 2017, the D.C. Circuit voted to grant en banc review in *Lucia*, and the government filed a petition for rehearing en banc in *Bandimere* on March 13, 2017. Moreover, parties to Commission proceedings have raised similar Appointments Clause challenges in a number of other cases that are currently pending in the courts of appeals. See *J.S. Oliver Capital Mgmt., L.P.* v. *SEC*, No. 16-72703 (9th Cir.); *Aesoph* v. *SEC*, No. 16-3830, and *Bennett* v. *SEC*, No. 16-3827 (8th Cir.) (consolidated); *Timbervest, LLC* v. *SEC*, No. 15-1416 (D.C. Cir.); see also *Young* v. *SEC*, No. 16-1149 (D.C. Cir.) (raising Appointments Clause argument for the first time on petition for review; held in abeyance pending *Lucia*). Because the question whether Commission ALJs are constitutional officers is currently percolating, this Court will have ample opportunity to address that question in a proper case, if it so chooses.[4]

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[4] For the reasons stated in the Government's petition for rehearing en banc in *Bandimere*, No. 15-9586, Doc. 10450828 (10th Cir.

Finally, petitioners are incorrect (Pet. 32-33) that this Court's decisions justify a departure from the normal practice of declining to address an issue not passed upon below. In *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), the Court addressed an Appointments Clause challenge to the powers of Tax Court special trial judges, notwithstanding that the petitioners "fail[ed] to raise a timely objection to the assignment of their cases to a special trial judge." *Id.* at 878. Yet the petitioners raised the issue on appeal, and the court of appeals held that the "petitioners had waived any constitutional challenge to this appointment by consenting to a trial" before a special trial judge. *Id.* at 872. This Court ultimately "exercise[d] [its] discretion" to forgive the waiver. *Id.* at 879. The circumstances of this case, in which petitioners' constitutional challenge was not resolved on the merits because of a threshold jurisdictional ruling, are not comparable.

Petitioners' other authorities are equally unavailing. Two of the cases cited by petitioners (Pet. 32) concerned only questions of official immunity—and in each case, the district court had in fact ruled upon the question presented. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 517 (1985) (the district court had denied the motion for summary judgment on the basis of official immunity); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 740-741 (1982) (the district court had rejected the claim of immunity, and the court of appeals also "had rejected this claimed immunity defense" in a prior case). And in *Carlson* v. *Green*, 446 U.S. 14 (1980), this Court emphasized both that the "respondent d[id] not ob-

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Mar. 13, 2017), the Commission's ALJs are not inferior officers and therefore need not be selected in accordance with the Appointments Clause.

ject" to resolution of a question not decided below and that the issue was "squarely presented." *Id.* at 17 n.2. Neither of those factors applies here: The Commission does object to resolution of petitioners' Appointments Clause argument in this case; and resolution of that question is further complicated by the Second Circuit's threshold jurisdictional determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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