

1 DRONEY, *Circuit Judge*, dissenting:

2 This case is nearly indistinguishable from *Free Enterprise Fund*
3 *v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010). It differs
4 in only one significant way: administrative proceedings have begun
5 against the appellants. The majority concludes that this distinction
6 alone warrants a different outcome, finding that the fact of the
7 ongoing proceedings means that the three factors identified by the
8 Supreme Court in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994)
9 for determining whether Congress intended to limit jurisdiction of
10 the district courts are satisfied. Consequently, the majority holds
11 that there was no subject matter jurisdiction before the district court.

12 I respectfully dissent. The majority's application of the
13 *Thunder Basin* factors has stripped the "wholly collateral" and
14 "outside the agency's expertise" factors of any significance: in its
15 view, as long as administrative proceedings have been initiated,
16 those two factors are always satisfied. The majority bases its

1 understanding of this substantive-to-procedural switch in those two
2 factors on their application by the Supreme Court in *Elgin v.*
3 *Department of Treasury*, 132 S. Ct. 2126 (2012), but the nature of the
4 constitutional claim presented in *Elgin* was entirely different. I
5 disagree with the majority's interpretation of *Elgin* and conclude
6 that those two *Thunder Basin* factors must be analyzed substantively
7 to determine their weight in each particular case.

8 I conclude that *Free Enterprise* controls here. In my view, those
9 two factors here have precisely the same weight as they did in *Free*
10 *Enterprise*, and the application of the remaining factor does not
11 change the result. Thus, I would find that the district court had
12 subject matter jurisdiction to consider the constitutional challenge.

13 **I. The *Thunder Basin* Factors**

14 The Supreme Court in *Thunder Basin* identified the following
15 three factors as helpful in determining whether a statute which
16 provides for administrative review of agency action was intended by

1 Congress to preclude district court jurisdiction over claims before a
2 final administrative determination: whether the claims are “wholly
3 collateral to a statute's review provisions,” whether they are
4 “outside the agency's expertise,” and whether “a finding of
5 preclusion could foreclose all meaningful judicial review.” *Id.* at
6 212–13 (internal quotation marks omitted). The Court referred to
7 each as helping determine whether it is “fairly discernible” from a
8 “statutory scheme” that Congress “has allocated initial review to an
9 administrative body.” *Id.* at 207, 212–13.¹

10 I disagree somewhat with the majority's interpretation of the
11 third factor, “meaningful judicial review,” but it is the majority's

¹ The majority describes the *Thunder Basin* factors as coming into play only in the second part of a two-part test, seemingly splitting the analysis between asking (1) whether Congress intended to preclude district court jurisdiction and (2) whether Congress intended for the claims at issue to be reviewed within the statutory structure. Majority Op. at 10–11. I disagree with this dichotomy and the conclusion that the factors are relevant only to the second inquiry. *See, e.g., Elgin*, 132 S. Ct. at 2136 (referring to *Thunder Basin* factors as relevant to the single argument characterized variously as: “Congress does not intend to limit district court jurisdiction” (alterations omitted) and “[Petitioners'] claims are not the type that Congress intended to be reviewed within the [administrative] scheme”). However, the majority opinion does not return to this schema and thereafter focuses on the *Thunder Basin* factors as answering the ultimate question of whether the appellants are precluded from bringing their constitutional claims in the district court.

1 application of the two other factors—“wholly collateral” and
2 “outside the agency’s expertise” —with which I most disagree.

3 There are three cases in which the Supreme Court has
4 reviewed the application of these three factors: *Thunder Basin*, *Free*
5 *Enterprise*, and *Elgin*. In each, the Supreme Court’s analysis of the
6 “wholly collateral” and “outside the agency’s expertise” factors has
7 focused on the substance of the claims.

8 In *Thunder Basin*, a non-union mine owner filed an action in
9 district court challenging its employees’ designation of certain union
10 representatives to be involved in safety inspections under the
11 Federal Mine Safety and Health Amendments Act (“Mine Act”).
12 The Mine Act provided for administrative hearings and decisions
13 concerning safety issues, and ultimate appeal to the Courts of
14 Appeals. Respondents contended that this “comprehensive review
15 process,” *id.* at 208, in the Mine Act indicated that Congress
16 intended that the safety claim be exclusively reviewed in the

1 “statutory structure,” *id.* at 212, and that there was no subject matter
2 jurisdiction for the mine owner’s suit in the district court.

3 In its analysis of whether the mine owner’s claims must first
4 be brought in an administrative proceeding, the Supreme Court
5 analyzed the “wholly collateral” and “outside the agency’s
6 expertise” factors only by considering the substance of the claims
7 with no mention of the procedural aspects of the case. *Id.* at 213–14
8 (noting that “Petitioner’s statutory claims at root require
9 interpretation of the parties’ rights and duties under [the Mine Act
10 and accompanying regulations], and as such arise under the Mine
11 Act and fall squarely within the Commission’s expertise” and that
12 the agency has “extensive experience interpreting the walk-around
13 rights” that were at issue).

14 The Supreme Court engaged in the same sort of substantive
15 analysis in *Free Enterprise*. In *Free Enterprise*, an accounting firm filed
16 an action in the district court which challenged a report issued by

1 the newly created Public Company Accounting Oversight Board
2 (“PCAOB”). The PCAOB was created as an accounting reform in
3 the Sarbanes-Oxley Act of 2002 and its members were appointed by
4 the SEC. The report had criticized the firm’s accounting procedures,
5 but no sanctions were imposed. Thus, the accounting firm could not
6 utilize the statutory administrative review proceedings available
7 before the SEC. The action in the district court by the accounting
8 firm challenged the appointments of the PCAOB members by the
9 SEC, claiming that they violated the Appointments Clause of the
10 Constitution and the members had no authority to issue the negative
11 report. The PCAOB sought to dismiss the action on the basis that
12 the district court had no subject matter jurisdiction to consider the
13 accounting firm’s claim.

14 In its analysis of the “wholly collateral” and “outside the
15 agency’s review” factors, the *Free Enterprise* Court examined the
16 substance of the constitutional claim as it related to agency expertise,

1 561 U.S. at 491 (“[T]he statutory questions involved do not require
2 technical considerations of agency policy.” (quotation marks and
3 alterations omitted)), and explained the “wholly collateral” factor in
4 terms of the substantive content of the challenge, *id.* at 490.
5 (“[P]etitioners object to the Board’s existence, not to any of its
6 auditing standards. Petitioners’ general challenge to the Board is
7 collateral to any Commission orders or rules from which review
8 might be sought.”). It made no reference to the procedural aspects
9 of the claim.

10 II. *Elgin v. Department of Treasury*

11 The third case in which the Supreme Court addressed the
12 *Thunder Basin* factors was *Elgin v. Department of Treasury*, 132 S. Ct.
13 2126 (2012). The majority concludes that the *Elgin* Court
14 considerably altered the “wholly collateral” and “outside the
15 agency’s expertise” factors, but I disagree. I believe the outcome in

1 *Elgin* was not produced by varying those factors, but by the different
2 type of constitutional claim presented.

3 In *Elgin*, the plaintiffs challenged their dismissal from federal
4 employment for failure to comply with the Military Selective Service
5 Act by not registering for the draft. Although the plaintiffs had
6 available to them the right to challenge their dismissals through
7 administrative hearings before the Merit Systems Protection Board
8 (“MSPB”) and subsequent judicial review in the Federal Circuit, they
9 instead brought suit in federal district court.² Their constitutional
10 arguments were that the Selective Service Act discriminates on the
11 basis of sex by requiring only males to register and is a bill of
12 attainder. *Id.* at 2131. Notably, the plaintiffs made no challenge to
13 the available administrative process; they argued only that the
14 *substance* of the laws being enforced against them—laws routinely
15 administered by the MSPB—was unconstitutional. Unsurprisingly,

² One of the plaintiffs did pursue remedies through the MSPB, but declined to appeal the decision he received within the administrative system, instead joining the others in their suit in district court. *Elgin*, 132 S. Ct. at 2131.

1 then, the Supreme Court’s analysis of the “wholly collateral” and
2 “outside of the agency’s expertise” factors, and its conclusion that
3 those two factors in *Elgin* weighed in favor of dismissal of the
4 district court action, was necessarily quite different from that in *Free*
5 *Enterprise*.

6 The Supreme Court’s application of the “wholly collateral”
7 factor rejected the plaintiffs’ argument that their constitutional
8 claims had “nothing to do” with the “day-to-day personnel actions
9 adjudicated by the MSPB.” *Id.* at 2139. The Supreme Court pointed
10 out that a challenge to dismissal from employment based on federal
11 statutes is “precisely the type of personnel action regularly
12 adjudicated by the MSPB and the Federal Circuit within the [Civil
13 Service Reform Act (“CSRA”)] scheme.” *Id.* at 2140. Whether or not
14 that particular challenge involved a constitutional question, it was—
15 in the words of the Supreme Court—“a challenge to CSRA-covered

1 employment action brought by CSRA-covered employees requesting
2 relief that the CSRA routinely affords." *Id.*

3 The majority here concludes that *Elgin* held that "a claim is
4 not wholly collateral if it has been raised in response to, and so is
5 procedurally intertwined with, an administrative proceeding,"
6 Majority Op. at 27, pointing to the Supreme Court's statement that
7 the constitutional claims in *Elgin* were "the vehicle by which [the
8 petitioners] s[ought] to reverse the removal decisions" made against
9 them, *id.* at 2139. However, that overstates what the Supreme Court
10 did in its application of that factor. That portion of the opinion
11 meant nothing more than that the plaintiffs were challenging actions
12 against them under the statutes committed to the MSPB by attacking
13 the constitutionality of those very statutes—it does not suggest that
14 *no challenge* that would end ongoing proceedings could be
15 considered collateral to a statute's review provisions. Such an
16 interpretation would swallow the rule, for there would no longer be

1 any need to evaluate the substance of a claim as long as the claim
2 could somehow serve to end administrative proceedings in a
3 plaintiff's favor. This is inconsistent with *Thunder Basin* and *Free*
4 *Enterprise* (and, in fact, with *Elgin*, which looked carefully at the
5 substance of the challenge). It would also turn the factor into an
6 easy, binary question: Is a proceeding ongoing? If yes, then no claim
7 that would end the proceeding can be wholly collateral. This cannot
8 be what the *Elgin* Court intended. In my view, it held only that a
9 claim involving the substance of the very act entrusted to the agency
10 for implementation and requesting the types of relief that the agency
11 regularly gives—a far cry from the present case, where the
12 constitutional claim has no relation to the securities laws entrusted
13 to the SEC and the requested remedy of disallowing the proceedings
14 before the ALJ is obviously not a routine outcome—cannot be
15 considered “wholly collateral” to the administrative scheme.

1 As for the “outside the agency’s expertise” factor, the *Elgin*
2 Court made clear that this factor would weigh against jurisdiction in
3 cases where a claim needing agency expertise was a “threshold” or
4 “preliminary question” that would “obviate the need to address the
5 constitutional challenge.” *Id.* at 2140. This described the situation in
6 *Elgin*, where before deciding that the Selective Service Act was
7 unconstitutional the MSPB had to decide “threshold questions” to
8 which the MSPB could apply its expertise, such as whether
9 constructive discharge occurred as well as whether additional
10 claimed violations of employment statutes took place, which “might
11 fully dispose of the case.” *Id.* Those decisions could be informed by
12 its agency expertise in the area of employment law. *Id.* In such a
13 context, the MSPB’s expertise could properly be “brought to bear”
14 on the constitutional claim. *Id.* (quoting *Thunder Basin*, 510 U.S. at
15 214–15). The majority here acknowledges that an issue of federal
16 jurisdiction or the appropriate composition of an adjudicatory

1 body—such as the Appointments Clause challenge presented in this
2 case—logically precedes a merits adjudication; therefore, there is no
3 “threshold” or “preliminary” question that would “obviate the need
4 to address the constitutional challenge.”

5 The majority nonetheless concludes that the *Elgin* Court
6 interpreted this factor to mean that “an agency may bring its
7 expertise to bear on a constitutional claim indirectly, by resolving
8 accompanying, potentially dispositive issues in the same
9 proceeding.” Majority Op. at 32. It does so by citing the *Elgin*
10 Court’s reference to a situation in which an appeal involves “other
11 statutory or constitutional claims that the MSPB routinely considers,
12 in addition to a constitutional challenge to a federal statute.” *Elgin*,
13 132 S. Ct. at 2140. The majority thus concludes that an issue to
14 which an agency may apply its expertise need only be dispositive,
15 not necessarily “preliminary,” for it to weigh against jurisdiction.
16 Majority Op. at 33-34.

1 That interpretation does not comport with the language of
2 *Elgin*, however, which explicitly set that description out as an
3 *example* of a situation in which there might be “threshold questions”
4 that would allow the initial agency reviewing the case to *not reach*
5 the constitutional question.³ Nor would such an expansive
6 interpretation be consistent with the facts underlying and the setting
7 of *Elgin*, where the potentially dispositive issue was clearly a
8 “preliminary” or “threshold question.”

9 To read *Elgin* as broadly as the majority does would mean that
10 as long as a proceeding is ongoing, the “outside the agency’s
11 expertise” factor *must* weigh against jurisdiction—because any time
12 a proceeding has commenced there is of course some possibility that
13 a plaintiff may prevail on the merits. This would turn a substantive

³ That paragraph in *Elgin* makes clear that each of the sentences cited by the majority at Majority Op. 33 are examples of cases with “threshold questions,” not additional pathways to preclusion. See *Elgin*, 132 S. Ct. at 2140 (“But petitioners overlook the many threshold questions that may accompany a constitutional claim and to which the MSPB can apply its expertise. Of particular relevance here, preliminary questions unique to the employment context may obviate the need to address the constitutional challenge. *For example*, . . . *In addition*, *Or*, an employee’s appeal may involve other statutory or constitutional claims that the MSPB routinely considers, in addition to a constitutional challenge to a federal statute.” (emphases added)). The Supreme Court has elsewhere defined a “threshold question” as one “that must be resolved . . . before proceeding to the merits [of another claim].” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 88–89 (1998).

1 factor into a purely procedural—and binary—one, which is
2 inconsistent with the description of the factor in *Thunder Basin*, *Free*
3 *Enterprise*, or *Elgin* itself.

4 In sum, to agree with the majority’s interpretation of *Elgin*,
5 one must conclude that the Supreme Court intended to eliminate
6 any substantive analysis of the “wholly collateral” and the “outside
7 the agency’s expertise” factors in any case where an administrative
8 proceeding is ongoing.⁴ To the contrary, *Elgin* itself engages with
9 the substance of the precluded claims in a way that the majority
10 seems to believe is now unnecessary.

11 The majority’s interpretation also serves to move the *Thunder*
12 *Basin* factors away from their original function, which was to assist
13 in a holistic analysis to determine whether it is “fairly discernible”
14 from a “statutory scheme” that Congress “has allocated initial
15 review to an administrative body.” *Thunder Basin*, 510 U.S. at 207.

⁴ In fact, in *Elgin*, only one of the plaintiffs had initiated administrative proceedings; the others had filed suit directly in the district court but *could have* initiated proceedings. *Elgin*, 132 S.Ct. at 2131. Consequently, the implication of the majority’s reading of *Elgin* is likely to be even greater than this.

1 *Elgin* recognized this function: it engaged in an extensive analysis of
2 the history and structure of the relevant statutes before turning to
3 the *Thunder Basin* factors, which it referred to as “three additional
4 factors in arguing that [the petitioners’] claims are not the type that
5 Congress intended to be reviewed within the CSRA scheme.” 132 S.
6 Ct. at 2136.

7 I would apply the three *Thunder Basin* factors for divining
8 legislative intent faithful to *Thunder Basin*, *Free Enterprise* and *Elgin*.

9 **III. Application of the *Thunder Basin* Factors**

10 **A. “Wholly Collateral to a Statute’s Review Provisions”**

11 The Supreme Court in *Free Enterprise* concluded that the
12 constitutional claim there was “wholly collateral” to any
13 administrative proceedings that might be brought against the
14 plaintiffs. That challenge was essentially the same as the challenge
15 here: that the appointment of the members of the PCAOB by the
16 SEC violated the Appointments Clause of the Constitution. It
17 explained that the plaintiffs’ “general challenge to the Board is

1 'collateral' to any Commission orders or rules from which review
2 might be sought" because they "object to the Board's *existence*, not to
3 any of its auditing standards." *Free Enterprise*, 561 U.S. at 490
4 (emphasis added). Here, as well, the appellants object to the very
5 existence of SEC administrative proceedings conducted by ALJs
6 who are, in their view, not appointed in accordance with the
7 Appointments Clause.

8 The majority finds that this factor weighs against jurisdiction
9 based only on its interpretation of *Elgin*, which I have addressed
10 above. I would reject that interpretation. I see no difference
11 between the Appointments Clause challenge in *Free Enterprise* and
12 here; it is completely collateral to the work of the PCAOB as well as
13 to the work of the SEC and its ALJs. I would find that this factor
14 weighs strongly in favor of jurisdiction.

15 **B. "Outside the Agency's Expertise"**

16 In *Free Enterprise*, the Supreme Court explained that the
17 Appointments Clause claim relating to the appointment of the

1 PCAOB by the SEC was “outside the Commission’s competence and
2 expertise,” requiring no understanding of a particular industry and
3 no “technical considerations of agency policy.” *Id.* at 491 (internal
4 quotation marks and alterations omitted). The same conclusion
5 applies to the Appointments Clause issue here. Like the
6 determination of the appointment authority for the PCAOB
7 members in *Free Enterprise*, the SEC has no particular expertise in
8 determining whether the system of appointing its Administrative
9 Law Judges comports with the Appointments Clause of the
10 Constitution.

11 The majority agrees as far as *Free Enterprise* goes, concluding
12 only that this *Thunder Basin* factor has been changed by *Elgin*. For
13 the reasons discussed above, I disagree. I see no difference in the
14 application of this factor here to the SEC and its application to the
15 SEC in *Free Enterprise*. I would find that this factor also weighs
16 strongly in favor of jurisdiction.

1 **C. “Meaningful Judicial Review”**

2 The “meaningful judicial review” factor presents the only
3 significant difference between the present case and *Free Enterprise*. I
4 agree with the majority that this factor tends to weigh in favor of
5 preclusion because a subsequent appeal to this Court following a
6 final Commission order is available.

7 Nonetheless, I do not believe that the difference between the
8 available judicial review in *Free Enterprise* and in this case is so
9 significant as to justify a different outcome, given the identical
10 application of the other two factors, as well as a substantial question
11 as to whether subsequent judicial review here would be
12 “meaningful.”

13 The majority is correct in noting that *Free Enterprise* differed
14 from this case in that no reviewable administrative order was
15 possible unless the plaintiff “manufactur[ed] a new, tangential
16 dispute that *would* require a Commission order.” Majority Op. at
17 17. And as the *Free Enterprise* Court noted, “[w]e normally do not

1 require plaintiffs to bet the farm by taking the violative action before
2 testing the validity of [a] law.” 561 U.S. at 490 (internal quotation
3 marks and alterations omitted).

4 The *Free Enterprise* situation was not so different from the
5 present one as to require a different outcome, however. Here, the
6 administrative proceedings once concluded would have led to an
7 order subject to judicial review—but only if the appellants had
8 continued litigating before the SEC ALJ and lost on the merits.⁵

9 Forcing the appellants to await a final Commission order
10 before they may assert their constitutional claim in a federal court
11 means that by the time the day for judicial review comes, they will
12 already have suffered the injury that they are attempting to prevent.
13 The majority finds that the “litigant’s financial and emotional costs

⁵ Given that the vast majority of all SEC administrative proceedings end in settlements rather than in actual decisions, it might well be that choosing to litigate is, in fact, equivalent to “betting the farm.” See Brian Mahoney, *SEC Could Bring More Insider Trading Cases In-House*, LAW360 (June 11, 2014), <http://www.law360.com/articles/547183/sec-could-bring-more-insider-trading-cases-in-house> (quoting Andrew Ceresney, the head of the SEC’s Division of Enforcement, as explaining that the “vast majority of our cases settle,” and stating, “I will tell you that there have been a number of cases in recent months where we have threatened administrative proceedings, it was something we told the other side we were going to do and they settled”).

1 in litigating the initial proceeding are simply the price of
2 participating in the American legal system,” Majority Op. at 22, but
3 the issue is less the costs and burden of litigation and more that the
4 appellants are challenging the very existence of the ALJs as a part of
5 the statutory scheme. The appellants seek to enjoin the SEC
6 proceedings, but by the time that they access any judicial review, the
7 proceedings will be complete, rendering the possibility of obtaining
8 an injunction moot even if the final Commission order is vacated. In
9 my view, this diminishes the weight of this factor, for while there
10 may be review, it cannot be considered truly “meaningful” at that
11 point.

12 The majority cites a number of decisions for the principle that
13 “post-proceeding relief . . . suffices to vindicate the litigant’s
14 constitutional claim,” Majority Op. at 21–22, but none involves an
15 analysis of the “meaningful judicial review” prong of this test.
16 *Germain v. Connecticut National Bank*, 930 F.2d 1038, 1040 (2d Cir.

1 1991) involved an interlocutory appeal of the denial of a jury trial
2 demand in a bankruptcy proceeding and the application of the
3 collateral order doctrine exception that an order be “effectively
4 unreviewable on appeal.” *D’Ippolito v. American Oil Co.*, 401 F.2d
5 764, 765 (2d Cir. 1968) addressed the question of whether an order
6 by a district court transferring an antitrust action to another district
7 was a “final judgment” under 28 U.S.C. § 1291. *In re al-Nashiri*, 791
8 F.3d 71, 79 (D.C. Cir. 2015), addressed the “irreparable injury” test
9 meriting the grant of a writ of mandamus to stop a military
10 commission trial. And *FTC v. Standard Oil Co. of California*, 449 U.S.
11 232, 244 (1980) concerned whether the issuance of a complaint by the
12 Federal Trade Commission caused “irreparable injury” allowing for
13 judicial review or whether final agency action was necessary.

14 When it comes to the “meaningful judicial review” factor, it is
15 my view that we need look no further than *Free Enterprise* itself to
16 understand that being forced to undergo an allegedly

1 unconstitutional proceeding may play into the analysis of whether
2 judicial review is “meaningful.” The Court in *Free Enterprise*
3 identified a number of *possible* ways that the plaintiffs in that case
4 could obtain review of their constitutional claims against the board
5 (such as “select[ing] and challeng[ing] a Board rule at random” or
6 “incur[ring] a sanction (such as a sizable fine) by ignoring Board
7 requests for documents and testimony,” 561 U.S. at 490); it simply
8 decided that none of the options were reasonable to ask of the
9 plaintiffs and therefore none provided “meaningful” judicial review.
10 *Id.* at 490–91.

11 The Supreme Court in *Free Enterprise* also explained that the
12 plaintiffs were “entitled to declaratory relief sufficient to ensure that
13 the reporting requirements and auditing standards to which they are
14 subject *will be enforced only by a constitutional agency accountable to the*
15 *Executive,*” and it allowed the plaintiffs to bring their claim at a time
16 where no administrative proceedings had yet been formally brought

1 against them. 561 U.S. at 513 (emphasis added). This suggests that
2 the Supreme Court considers the very *process* of enforcement by an
3 unconstitutional body to be an injury that can be relevant to the
4 determination of whether post-proceeding review is “meaningful.”

5 **IV. Conclusion**

6 For all these reasons, I am unpersuaded that the “meaningful
7 judicial review” prong has enough weight to overpower the other
8 two factors and result in a finding of no jurisdiction. The other two
9 factors clearly mirror those in *Free Enterprise*, and the available
10 review is not meaningful enough to set those two factors aside.
11 Thus, the Appointments Clause challenge here is not “of the type
12 Congress intended to be reviewed within th[e] statutory structure.”⁶
13 *Thunder Basin*, 510 U.S. at 212.

⁶ Since the purpose of the application of the *Free Enterprise* factors is to determine whether Congress intended to deprive district courts of subject-matter jurisdiction to hear pre-administrative-adjudication claims, it seems relevant that Congress continues to authorize the SEC to choose whether it will pursue violations before its ALJs in administrative proceedings or in the district court as civil actions. To permit those subject to SEC enforcement actions to challenge administrative proceedings in the district courts on the basis of constitutional challenges that have nothing to do with the expertise of the SEC or with factual matters relevant to their own particular circumstances would seem consistent with that Congressional intent.

1

2 I would reverse the decision of the district court and remand

3 for an adjudication of the merits of the Appointments Clause claim.