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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16383

In the Matter of:	)	**REPLY BRIEF IN SUPPORT OF MOTION OF RESPONDENT CHARLES L. HILL, JR. FOR LEAVE TO FILE SUBPOENA *DUCES TECUM***
CHARLES L. HILL, JR.,	)	
Respondent.	)	
	)	

Respondent Charles L. Hill, Jr. hereby files his Reply Brief in support of the Motion for Leave to File Subpoena *Duces Tecum* (the "Discovery Motion"). In its Opposition to the Discovery Motion, the Division essentially claims that the Commission can discriminate at will, as long as it cloaks its action under the guise of "discretion." But, as federal courts have repeatedly cautioned, regulatory discretion can be abused, and the clearest example of abuse is when a governmental entity uses its discretion to treat similarly situated individuals differently without a rational basis.[1] The Division's argument has no limiting principle. If its assertions were correct—and they are not—the Commission could do whatever it wanted, with total impunity and without ever having to explain itself to anyone. The practical ramifications of the Division's position should be frightening to anyone who values constitutional rights. Accordingly, this Court should reject the Division's arguments and grant the Discovery Motion.

[1] *See Gupta v. SEC*, 796 F. Supp. 2d 503, 513 (S.D.N.Y. 2011) ("even if the SEC were acting within its discretion when it imposed disparate treatment on Gupta, that would not necessarily exculpate it from a claim of unequal protection if the unequal treatment was still arbitrary and irrational"); *see also* Michael Dvorak, *SEC Administrative Proceedings and Equal Protection "Class of One" Challenges: Evaluating Concerns About SEC Forum Choices*, 2015 Colum. Bus. L. Rev. 1195, 1212-13 ("Discretion can stretch only so far and deference to discretionary decisions should not be allowed to mask violations of core constitutional rights.").

A. The Commission's Opinions in *Riad*, *Bandimere* and *Timbervest* Are Not Controlling and Mr. Hill Has a Legally Cognizable Equal Protection Claim.

The Division argues that Mr. Hill's equal protection claim is "foreclosed by binding Commission precedent holding that a 'class of one' theory of equal protection is 'not legally cognizable' in the context of the Commission's inherently discretionary decision to bring charges in one forum rather than another."[2] However, each of the opinions of the Commission that the Division cites—*Riad*, *Bandimere* and *Timbervest*—gave an impermissibly overbroad reading to the U.S. Supreme Court's decision in *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591 (2008). No federal court has ever reviewed or approved the Commission's erroneous interpretation of *Engquist*. In contrast, at least one federal district court judge has ruled against the Commission on a motion to dismiss the "class-of-one" equal protection claim.[3]

In *Engquist*, the Supreme Court carefully circumscribed its decision, explicitly stating that "all we decide" is "that the class-of-one theory of equal protection has no application ***in the public employment context.***"[4] In so holding, the Court affirmed the Ninth Circuit, which interpreted Supreme Court cases to "have routinely afforded government greater leeway when it acts as employer rather than ***regulator.***"[5] The Court distinguished its prior precedent as follows:

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[2] (Opposition at 2.) Even if the Division were correct in its interpretation of Commission precedent, this Court should still allow the requested discovery so that Mr. Hill may make a proper record. Just last week, the SEC represented to a federal court that respondents in administrative proceedings like Mr. Hill have the ability to develop a record to support equal protection claims. *See* SEC Letter Brief at 2 & 4, *Tilton v. SEC*, No. 1:16-cv-07048 (S.D.N.Y. Oct. 4, 2016) (attached hereto as Exhibit A).

[3] *See Gupta*, 796 F. Supp. 2d at 513; *see also Arjent LLC v. SEC*, 7 F. Supp. 3d 378, 384–85 (S.D.N.Y. 2014) (applying *Gupta* but dismissing implausibly pleaded equal protection claim).

[4] 553 U.S. 591, 607 (2008) (emphasis added).

[5] *Id.* at 596 (emphasis added); *see also id.* at 598 ("Our traditional view of the core concern of the Equal Protection Clause as a shield against arbitrary classifications, combined with unique *(cont'd)*

"Unlike the context of arm's-length regulation, such as in [*Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)], treating seemingly similarly situated individuals differently in the employment context is par for the course."[6] In other words, when the government acts as an arm's-length regulator, the Supreme Court's decision in *Olech* controls. Here, there is no question that the Commission is acting as an arm's-length regulator. Accordingly, a class-of-one equal protection claim remains viable.

Nonetheless, despite the Supreme Court's limiting language, the Commission has extended *Engquist* to preclude all equal protection claims based on the Commission's "choice of forum in pursuing a civil enforcement action for a violation of the securities laws."[7] Because choice of forum is "inherently discretionary," the Commission views its forum choice as unassailable.[8]

Mr. Hill does not dispute that the Commission has discretion, pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), to bring an AP against an unregulated individual accused of insider trading. Rather, Mr. Hill argues that the Commission's

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considerations applicable when the government acts as employer ***as opposed to sovereign***, lead us to conclude that the class-of-one theory of equal protection does not apply in the public employment context.") (emphasis added).

[6] *Id.* at 604.

[7] *Timbervest, LLC*, Investment Advisers Act Rel. No. 4197, 2015 WL 5472520, at *29 (Sept. 17, 2015).

[8] *See Mohammed Riad & Kevin Timothy Swanson*, Exchange Act Rel. No. 78049, 2016 WL 3226836, at *50 (July 7, 2016) ("the Commission's decision to bring charges in one forum rather than another is an inherently discretionary one"); *David F. Bandimere*, Exchange Act. Rel. No. 76308, 2015 WL 6575665, at *18 (Oct. 29, 2015) ("an equal-protection claim is not legally cognizable in the context of an inherently discretionary governmental decision to bring charges in one forum rather than another").

exercise of this discretion has been used arbitrarily and irrationally ***only*** against Mr. Hill.[9] Accordingly, Mr. Hill's case is controlled by *Olech* rather than *Engquist.*[10]

In *Olech*, a property owner had asked the Village of Willowbrook to connect her property to the municipal water supply. Although the Village had required only a 15-foot easement from other property owners seeking access to the water supply, the Village conditioned Olech's connection on a grant of a 33-foot easement. Olech sued the Village, claiming that the Village's requirement of an easement 18 feet longer than the norm violated the Equal Protection Clause. Although Olech had not alleged that the Village had discriminated against her based on membership in an identifiable class, the Court held that her complaint stated a valid claim under the Equal Protection Clause because it alleged that she had "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."[11]

As the Court in *Engquist* observed, "[w]hat seems to have been significant in *Olech* and the cases on which it relied was the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed. There was no indication in *Olech* that the zoning board was exercising discretionary authority based on subjective, individualized determinations—at least not with regard to easement length, however typical such determinations may be as a general zoning matter."[12] Rather, the complaint alleged that the board consistently required only a 15-foot easement, but subjected Olech to a 33-foot

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[9] *See Gupta*, 796 F. Supp. 2d at 513.
[10] *See* 2015 Colum. Bus. L. Rev. at 1218 ("[T]he SEC's conduct in the types of cases discussed above is more like that in *Olech* than that in *Engquist*. Individuals like Gupta, Jarkesy, Chau, and Peixoto should be able to bring equal protection challenges against the SEC's choice of forum under the class of one doctrine.").
[11] *Olech*, 528 U.S. at 564 (citations omitted).
[12] *Id.* at 602.

easement.[13] This differential treatment raised a concern of arbitrary classification, and the Court therefore required that the government provide a rational basis for it. *Id.*

The Division argues that "there is nothing untoward about the Commission's instituting proceedings in the forum that Congress made available, as it was entitled to do," citing the D.C. Circuit's ruling that "[n]othing in Dodd-Frank or the securities laws explicitly constrains the SEC's discretion" in choosing between and AP and federal court.[14] While the Division's argument could be true if the Commission had a standard of instituting contested APs against unregulated persons accused of insider trading, the Commission's standard is, in fact, the opposite—it brings all contested enforcement actions against unregulated individuals accused of insider trading in federal court, with the sole exception of the case against Mr. Hill.[15] In terms of *Olech*, the Commission proposes subjecting Mr. Hill to "a 33-foot easement," while it consistently requires only a "15-foot easement" from all others.[16]

Moreover, each of *Riad*, *Bandimere* and *Timbervest* is distinguishable from Mr. Hill's case. In *Riad*, the Commission noted both (1) the failure of the respondents to show "that the Commission otherwise has a practice of pursuing large and complex cases only in federal court," and (2) "it was particularly rational for us to pursue this enforcement matter in the administrative

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[13] *Id.* at 603.
[14] (Opposition at 5.)
[15] *See Gupta*, 796 F. Supp. 2d at 513.
[16] *See* 2015 Colum. Bus. L. Rev. at 1218 ("[T]he SEC undoubtedly exercises a great deal of discretion in conducting its affairs; the enforcement of securities law generally involves a degree of subjectivity. Yet, just as the zoning decisions in *Olech* departed from the typical subjectivity and operated in a seemingly automatic and non-individualized way, the forum decisions by the SEC arguably lack many markers of truly discretionary or particularized thought.").

forum because the proceedings involved a request for an associational bar."[17] Similarly, in *Bandimere*, (1) the respondent undercut his equal protection claim by acknowledging "a dozen other cases have in fact been brought against Ponzi schemers administratively," including his case, and (2) the Commission had "a jurisdictional basis for the remedy the Division sought, and that we have imposed . . . an associational bar for the protection of investors in the public interest—a statutory remedy that Congress made available to the Commission in administrative proceedings."[18] In *Timbervest*, the Commission noted that (1) respondents "allege only vaguely that the Commission 'has brought cases, including cases against investment advisers in federal court,'" and (2) "it was particularly rational to pursue this enforcement matter in the administrative forum because the proceedings involved a request for an associational bar."[19]

In other words, the *Riad*, *Bandimere* and *Timbervest* opinions all addressed situations lacking the clear evidence of disparate treatment that Mr. Hill has presented here. Those respondents alleged general equal protection claims not supported by clear evidence of disparate treatment and the Commission could point to a rational basis for the forum selection. No respondent in those cases or otherwise has shown the overwhelming statistical evidence of a violation of equal protection as Mr. Hill has presented in the Discovery Motion. To place Mr. Hill's evidence in context, among respondents who have brought "class-of-one" equal protection claims, the sample size of "similarly situated" individuals put forth as *prima facie* evidence of disparate treatment is as follows: Hill—461[20]; Peixoto—156; Gupta—28, Jarkesy—9; and

[17] 2016 WL 3226836, at *51.
[18] 2015 WL 6575665, at *18-19.
[19] 2015 WL 5472520, at *29.
[20] *See* Discovery Motion at 5-7.

Chau—4.[21] And, the Commission has never come forward with any rational basis for its disparate treatment of Mr. Hill.

B. Mr. Hill Has Made a Threshold Showing of Disparate Treatment to Justify the Requested Discovery.

The Division argues that Mr. Hill has failed to show "an extremely high degree of similarity" by comparing himself to "all unregulated persons defending contested allegations of insider trading."[22] It is difficult to fathom what more the Division would have Mr. Hill show. He has already presented evidence that of all the proceedings against 461 individuals for alleged insider trading since Dodd-Frank, his case is the only contested AP against an unregulated individual. Furthermore, he has presented evidence that *SEC v. Avent*, a case alleging insider trading in the very same stock during the very same period, is proceeding in federal court. Accordingly, Mr. Hill has more than met his threshold burden.[23]

Attempting to undermine Mr. Hill's threshold showing, the Division points to the fact that the Commission has not brought a Section 10(b) claim against Mr. Hill as evidence that the *Avent* defendants and Mr. Hill are not "identical in all relevant respects."[24] However, the choice of statute for an insider-trading claim is a distinction without a difference, at least for purposes of

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[21] *See* 2015 Colum. Bus. L. Rev. at 1212 ("[E]vidence that twenty-eight similar individuals faced a different forum or that only three out of 156 similar cases have gone through administrative proceedings would lend credibility to [equal protection claims]. This evidence is especially convincing given the significant differences between administrative proceedings and action in federal court and the complete absence of explanation for the SEC's forum decisions.").

[22] (Opposition at 3.)

[23] *See Cordi-Allen v. Conlon*, 494 F.3d 245, 251 (1st Cir. 2007) ("While the applicable standard does not require that there be an exact correlation, there must be sufficient proof on the relevant aspects of the comparison to warrant a reasonable inference of substantial similarity."), cited by *Myriad Interactive Media, Inc.*, Exchange Act. Rel. No. 75791, 2015 WL 5081238, at *9 (Aug. 28, 2015).

[24] (Opposition at 4.)

equal protection claims. Both *Avent* and this case allege insider trading, regardless of how denominated, in the same stock during the same time period. Furthermore, while the SEC brought insider trading claims under both Section 10(b) and Section 14(e) against Defendants Avent and Pirrello in *Avent*, the Division fails to mention that the SEC brought **only** a Section 14(e) claim against Defendant Penna, which is identical to the sole charge against Mr. Hill.[25] The only plausible reason (at least, the only reason apparent without the requested discovery) that the Commission failed to bring Section 10(b) charges against Mr. Hill and Penna was that the Commission was concerned that it could not prove the elements for a Section 10(b) claim as required by *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014). The Division's opposition essentially concedes disparate and adverse treatment against Mr. Hill.

C. Having Made a *Prima Facie* Case, Mr. Hill Needs and Is Entitled to Discovery to Prove His Equal Protection Claim.

The Division's Opposition fails to address the merits of Mr. Hill's equal protection claim. Rather, the Division faults Mr. Hill for not "negat[ing] every conceivable basis which might support the Commission's action," and that "administrative convenience" could suffice as a rational basis.[26] The Division's argument has at least two fatal flaws. First, the case cited by *Timbervest* for the proposition that a respondent must "negat[e] every conceivable basis which might support the Commission's action," was a federal court case.[27] Of course, in a federal court case, the plaintiff will generally have an opportunity to conduct discovery as to his equal

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[25] *See* Complaint, *SEC v. Avent*, No. 1:16-CV-02459-SCJ (N.D. Ga. July 7, 2016).
[26] (Opposition at 3 (citing *Timbervest*).)
[27] *See Warren v. City of Athens, Ohio*, 411 F.3d 697, 711 (6th Cir. 2005) ("A 'class of one' plaintiff may demonstrate that a government action lacks a rational basis in one of two ways: either by 'negativ[ing] every conceivable basis which might support' the government action or by demonstrating that the challenged government action was motivated by animus or ill-will.").

protection claims—otherwise, negating every conceivable basis for the government's action would be impossible. Second, while the Division cites "administrative convenience," it provides no explanation as to how pursuing Mr. Hill's case is more convenient in the administrative forum or that the Commission, in fact, chose to pursue Mr. Hill's case in the administrative forum for that reason.

Mr. Hill needs and is entitled to discovery so that he can prove the merits of his equal protection claim. Mr. Hill must be allowed to develop a record of the Commission's "clear standard" against which its departure in this case can be assessed. As noted, the Division's purported reliance on *Engquist* is unavailing—the Supreme Court there carefully circumscribed its holding to apply only in the context of public employment. The requested discovery is necessary for Mr. Hill to develop a record in support of his equal protection claim.

D. Mr. Hill's Substantial Need Outweighs the Asserted Privileges.

Finally, each of the privileges or doctrines—attorney-client, work product, and deliberative process—relied on by the Division has exceptions. Not one of them is inviolate or absolute. Mr. Hill has exhaustively addressed why those privileges do not apply in prior filings with this Court, and expressly incorporates those arguments and authority here.[28] The deliberative process privilege does not apply because (1) the SEC fails to assert it with specificity, (2) the privilege is inapplicable in this suit about the constitutionality of the SEC's deliberative process and adjudicative procedures, and (3) in any event, even if the privilege

[28] *See* Respondent Charles L. Hill, Jr.'s Response to Opposition to Request for the Issuance of Subpoena *Duces Tecum* (May 28, 2015).

applied to some documents, it does not shield all from discovery.[29] The attorney-client privilege and work product doctrine also do not apply because (1) the SEC failed to explain with sufficient particularity why they apply to the requested documents, (2) Mr. Hill has a substantial need for the documents, which overrides the claimed privileges, and, in any event, (3) even if the privileges applied to some documents, they do not shield all from discovery.[30] More importantly, this Court correctly rejected the Division's overbroad and erroneous privilege claims in its earlier rulings.[31] Nothing in the Division's Opposition warrants reconsideration.

As demonstrated above, Mr. Hill has already established a *prima facie* case for his equal protection claim. The only way that Mr. Hill can make a further record—a record sufficient for potential review by a federal court—is to gain access to documents and information that are exclusively within the possession of the Commission and its staff. Mr. Hill has thus demonstrated a compelling need for discovery that overrides the asserted privileges.

For all these reasons, and for the reasons set forth in the Discovery Motion, this Court should grant Mr. Hill's request for discovery and permit issuance of the subpoena *duces tecum*.[32]

Dated: October 11, 2016

Respectfully submitted,

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[29] *See id.* at 4-10.
[30] *See id.* at 10-12.
[31] *See* Order Granting in Part Subpoena Request, *Charles L. Hill, Jr.*, Admin. Proc. Rulings Release No. 2706, 2015 SEC LEXIS 2016 (May 21, 2015).
[32] (Exhibit A to Discovery Motion.)

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2016, I filed an original and three copies of the foregoing REPLY BRIEF IN SUPPORT OF MOTION OF RESPONDENT CHARLES L. HILL, JR. FOR LEAVE TO FILE SUBPOENA DUCES TECUM, with attachments referenced therein, with the Office of the Secretary, Securities and Exchange Commission, Attn: Secretary of Commission Brent J. Fields, 100 F Street NE, Mail Stop 1090, Washington, DC 20549, by Federal Express overnight delivery and filed a copy by facsimile transmission to (202) 772-9324, and served a true and correct copy upon the following by electronic mail, as follows:

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EXHIBIT A

U.S. Department of Justice

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October 4, 2016

By ECF
The Honorable Ronnie Abrams
United States District Court, Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: *Tilton et al. v. Securities and Exchange Commission*, 16 Civ. 7048 (RA)

Dear Judge Abrams:

We represent defendant the Securities and Exchange Commission ("SEC") in the above-referenced matter. Pursuant to the Court's order dated September 20, 2016 (ECF No. 8), we write respectfully in response to plaintiffs' letter dated September 27, 2016 ("Pls.' Ltr.") (ECF No. 13). As set forth below, the Second Circuit's opinion in *Tilton v. Securities and Exchange Commission*, 824 F.3d 276 (2d Cir. 2016) ("*Tilton I*"), controls this case, and establishes that this Court lacks subject-matter jurisdiction over plaintiffs' claims. Accordingly, this matter should be dismissed.

Tilton I held that "persons responding to SEC enforcement actions are precluded from initiating lawsuits in federal courts as a means to defend against them," because "the text, structure, and purpose of the securities laws make clear that Congress intended" to channel any such challenges through the administrative process, with judicial review available exclusively in the courts of appeals at the process's conclusion. 824 F.3d at 282-83. In addition, applying the three-factor analysis articulated by the Supreme Court in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), the Second Circuit held that plaintiffs' Appointments Clause challenge did not fall outside of that scheme because it would "be subject to meaningful judicial review through administrative channels, a fact that weighs strongly against district court jurisdiction," *id.*, plaintiffs' claim was not "wholly collateral" to the SEC's ongoing administrative proceeding, *id.* at 287-89, and the claim was not outside the scope of the agency's expertise, *id.* at 289-91.

Having failed in their Appointments Clause challenge, plaintiffs now present a new set of constitutional claims in yet another attempt to derail their administrative proceedings. But *Tilton I*'s analysis applies with equal force to plaintiffs' due process and equal protection claims in this matter, and compels the same outcome. Plaintiffs should not be permitted to further disrupt their administrative proceedings by pressing claims that are plainly foreclosed.

I. The Second Circuit's Holding in *Tilton I* Applies to Plaintiffs' Claims

At the threshold, for the purpose of assessing this Court's jurisdiction, plaintiffs' due process and equal protection challenges are not "materially different" from the Appointments Clause challenge they raised in *Tilton I*. *See* Pls.' Ltr. 2. Plaintiffs' attempt to distinguish their claims by alleging that they are "pattern and practice" claims, and therefore that this Court has jurisdiction pursuant to the Supreme Court's holding in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), lacks merit.

McNary did not carve out an exception conferring district court jurisdiction over "pattern and practice" claims. That case focused on section 210(e)(1) of the Immigration and Nationality Act ("INA"), which restricted judicial review of "a determination respecting an application for adjustment of status." 8 U.S.C. § 1160(e)(1). By statute, such a determination could be reviewed only by an appellate court within the context of its review of a final deportation order. *McNary*, 498 U.S. at 485-86. The *McNary* plaintiffs brought a class action alleging that the procedures used by the Immigration and Naturalization Service for processing applications for "special agricultural worker" status deprived applicants of due process. *Id.* at 487-88. The Supreme Court concluded that INA section 210(e)(1) did not bar the class's claims because it applied only to "*a* determination" related to "*an* application" for status. *Id.* at 492-93 (emphasis added). Thus, the provision only limited jurisdiction over claims seeking review of individual status determinations. *Id.* And, as *Tilton I* recognized, this review was only available with the "additional and irremediable risk" attendant to undocumented aliens "'voluntarily surrender[ing] themselves for deportation,' a 'price . . . tantamount to a complete denial of judicial review for most undocumented aliens.'" 824 F.3d at 286 (distinguishing *McNary* on this ground).

Unlike *McNary*, this case does not involve a statutory provision that expressly limits federal court jurisdiction for only a narrowly defined category of claims. Here, the securities laws broadly preclude federal court jurisdiction by providing a "comprehensive structure for the adjudication of securities violations in administrative proceedings," and setting forth in "painstaking detail" procedures for courts of appeals to review the results of those administrative proceedings. *Jarkesy v. Sec. & Exch. Comm'n*, 803 F.3d 9, 16-17 (D.C. Cir. 2015); *see also Tilton I*, 824 F.3d at 281 ("[T]he 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."). Accordingly, *McNary*'s case-specific reasoning does not apply.

Plaintiffs also argue that the administrative review process is necessarily inadequate for purposes of their pattern and practice claims. Specifically, they contend that, as in *McNary*, "[t]o establish the unfairness of the SEC practices," they will have to introduce evidence about other SEC administrative proceedings that cannot be developed in their individual action. Pls.' Ltr. 3. But that argument fails for at least two reasons. First, plaintiffs are asking this Court merely to assume that they could not create an appropriate record in the context of the SEC administrative proceeding. But plaintiffs acknowledge that the SEC has relatively permissive rules about what constitutes relevant evidence in its administrative hearings. *See* Compl. (ECF No. 1) ¶ 41. And as discussed further below, even if there were gaps in the administrative record, an appellate court would have the power on review to remand to the agency for further factual development

and to take judicial notice of certain facts related to plaintiffs' constitutional claims. *See Jarkesy*, 803 F.3d at 22.

Second, plaintiffs' ability to present their constitutional claims does not hinge on whether they can adduce evidence from other individuals' enforcement proceedings. All of the alleged SEC practices that plaintiffs challenge can be addressed in the context of their individual enforcement case. Indeed, plaintiffs are already challenging these practices in their administrative proceedings, and the rulings on those challenges will ultimately be reviewable by the court of appeals. *See, e.g.*, Order, Release No. 4162, Admin. Proc. File No. 3-16462 (ALJ Sept. 16, 2016); Order, Release No. 4118, Admin. Proc. File No. 3-16462 (ALJ Sept. 1, 2016); Order, Release No. 4116, Admin. Proc. File No. 3-16462 (ALJ Sept. 1, 2016); Order Denying Pet. for Interlocutory Review & Pet. to Apply the Comm'n's Am. Rules of Practice, Admin. Proc. File No. 3-16462 (SEC Aug. 24, 2016). By raising the same allegations here, plaintiffs are attempting to obtain premature judicial review of their administrative proceedings. *See, e.g.*, Compl. ¶¶ 63 (challenging the ALJ's decision on the timing of plaintiffs' administrative hearing); 66-67 (challenging the ALJ's rulings on plaintiffs' *Daubert* motions, and complaining that the ALJ "ignored numerous federal court decisions"). But "'[i]t makes good sense to consolidate all of [plaintiffs'] issues before one court for review, and only after an adverse Commission order that makes that review necessary.'" *Tilton I*, 824 F.3d at 291 (quoting *Jarkesy*, 803 F.3d at 29-30). In the meantime, plaintiffs cannot be permitted "to short-circuit the administrative process through the vehicle of a district court complaint." *Jarkesy*, 803 F.3d at 24 (citation and quotation marks omitted).

It is also hard to see how many of plaintiffs' claims could be addressed on a collective basis, instead of in the context of individual enforcement cases. For example, whether a particular charging document is too vague depends on the particular charges at issue in a given enforcement proceeding. Similarly, whether certain material should be disclosed as exculpatory, and how to resolve any related assertions of privilege, is a context-specific inquiry. Plaintiffs admit that these questions are frequently raised and sometimes remedied during the course of individual administrative proceedings. *See* Compl. ¶¶ 38, 46. Indeed, it is particularly appropriate for such fact-specific determinations first to be addressed in the administrative process, where the Commission can bring to bear its expertise regarding the federal securities laws and its internal procedures.

Plaintiffs cannot bypass the mandatory administrative and judicial review scheme by calling their claim a "pattern and practice claim" and pointing out that they are not the only ones to ever raise *Daubert* challenges, move for a more definite statement, seek extensions of time, or demand production of privileged materials in SEC administrative proceedings. *See Aguilar v. U.S. Immigration & Customs Enforcement Div.*, 510 F.3d 1, 16 (1st Cir. 2007) (criticizing plaintiffs who alleged "pattern or practice" claims for their "strategic behavior designed to sidestep exhaustion requirements"). In reality, plaintiffs are trying to dodge the Second Circuit's ruling in *Tilton I* by identifying a series of actions that the SEC has allegedly taken in their case, pointing to persons who have raised loosely related objections in other enforcement cases, and calling their claim a "pattern and practice" claim. But "merely conglomerating individual claims and posturing the conglomeration as a pattern and practice claim does not have talismanic effects." *Aguilar*, 510 F.3d at 16.

II. This Court Lacks Jurisdiction Under *Tilton I*'s Analysis

Because, for jurisdictional purposes, plaintiffs' current constitutional claims are indistinguishable from their prior ones, *Tilton I*'s analysis applies with equal force here. Accordingly, the Court should dismiss this case for lack of subject-matter jurisdiction.

First, if plaintiffs were to receive an adverse ruling in their administrative proceedings, they could obtain meaningful judicial review of their constitutional claims. *See Tilton I*, 824 F.3d at 282-87; *Thunder Basin*, 510 U.S. at 215. Plaintiffs do not, and cannot, dispute that, under the applicable statutory scheme, if they are "aggrieved" by a "final order of the Commission" entered at the conclusion of their administrative proceedings, they may immediately seek review of that order in a court of appeals pursuant to the jurisdiction-channeling provision in the review scheme. *See* 15 U.S.C. § 78y(a)(1). The appellate court, in turn, can decide whether to grant them relief by setting aside the final order, *see id.* §78y(a)(2), after considering their constitutional arguments or any other grounds for appeal they validly raise. While this administrative scheme requires plaintiffs to bear the costs of litigating the administrative action whose constitutionality they challenge, such costs are "simply the price of participating in the American legal system," and do not undermine the meaningfulness of any subsequent judicial review. *Tilton I*, 824 F.3d at 285. Put simply, as with the constitutional claims raised in *Tilton I*, "post-proceeding relief, although imperfect, suffices to vindicate [plaintiffs'] constitutional claim." *Id.*

As noted above, plaintiffs allege that their claims "require significant factual development that cannot be achieved in an individual administrative proceeding or on remand under the SEC's rule," and thus that the administrative record would be insufficient to provide meaningful review of their claims. Pls.' Ltr. 4. But the Supreme Court rejected precisely that argument in *Elgin v. Department of the Treasury*, finding instead that the statutory scheme at issue could accommodate any fact-finding necessary to flesh out a record upon which to resolve plaintiff's constitutional challenges, and further noting that, in any event, an appellate court could take "judicial notice of facts relevant to the constitutional question." 132 S. Ct. 2126, 2138 (2012); *accord Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 23-24 (2000) (appellate courts have "adequate authority to resolve any statutory or constitutional contention that the agency does not, or cannot, decide, including, where necessary, the authority to develop an evidentiary record" (citation omitted)). The same fact-finding tools as in *Elgin* would be available here in the event the record generated by plaintiffs' administrative proceedings were insufficient to resolve their due process and equal protection claims. *See Jarkesy*, 803 F.3d at 9. Indeed, plaintiffs *have* obtained discovery on many of the issues they seek to litigate here in the course of their administrative proceedings—and to the extent some of their requests for such discovery have been denied, the statutory scheme provides that those denials may be reviewed, in the ordinary course, by an appellate court. *See, e.g.*, Order, Release No. 4116, Admin. Proc. File No. 3-16462 (ALJ Sept. 1, 2016).

The district court decision in *Gupta v. Securities and Exchange Commission*, 796 F. Supp. 2d 503 (S.D.N.Y. 2011), does not disturb the "meaningful judicial review" analysis. *See* Pls.' Ltr. 4. At the threshold, it is unclear at best whether *Gupta*'s reasoning has survived *Tilton I* and the Supreme Court's decision in *Elgin*. The district court in *Gupta* found that the plaintiff

could not obtain meaningful judicial review because the SEC's administrative process purportedly would not allow for adequate discovery on the equal protection claim, and the SEC would be inherently biased in ruling on any such claim. 796 F. Supp. 2d at 513-14. As discussed above, at least the first of these assumptions is incorrect: plaintiffs in this case have already been permitted to take discovery related to their equal protection claims. And any deficiencies or alleged bias at the administrative level will not ultimately preclude meaningful judicial review, because plaintiffs' constitutional claims can be fully considered on review before the court of appeals. *See Elgin*, 132 S. Ct. at 2136–37.

Second, the constitutional challenges that plaintiffs raise here are not "wholly collateral" to their administrative enforcement proceedings. *Tilton I*, 824 F.3d at 287-89. Plaintiffs assert that their current claims are wholly collateral because those claims do not amount to an "affirmative defense" in their administrative proceedings, and a favorable ruling on these issues "would not serve to end [their] administrative proceedings altogether." Pls.' Ltr. 5 (citations and quotation marks omitted). But that argument defies *Tilton I*, which explained that plaintiffs' claims are not wholly collateral because they are "procedurally intertwined with[] [their] administrative proceeding," and depend on "a purported error in the way the Commission has sought to enforce the securities laws." 824 F.3d at 287, 289. Put another way, plaintiffs' 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*, 803 F.3d at 23 (citation and quotation marks omitted). Indeed, many of the arguments they raise here are the types of arguments they have raised, with varying degrees of success, in their administrative proceedings themselves.

Finally, resolution of plaintiffs' due process and equal protection challenges falls within the SEC's expertise for the simple reason that "a favorable Commission order" could "obviate any need for judicial review." *Tilton I*, 824 F.3d at 290. And notwithstanding plaintiffs' characterization of their claims as raising "pattern and practice" challenges, most if not all of their claims—for example, their challenges to the speed of the Commission's proceedings, or to the purported limits on their ability to develop a factual record—are governed by the SEC's own Rules of Practice, and thus are best interpreted, in the first instance, by the SEC itself. *See Ill. Council*, 529 U.S. at 24.

III. Conclusion

The Court lacks jurisdiction over plaintiffs' claims, and this matter should be dismissed in its entirety, in accordance with the Second Circuit's decision in *Tilton I*. We thank the Court for its consideration of this letter.

Respectfully submitted,

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