ORAL ARGUMENT SCHEDULED FOR MAY 24, 2017

No. 15-1345

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RAYMOND J. LUCIA COMPANIES, INC., AND RAYMOND J. LUCIA,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of an Order of the
Securities and Exchange Commission

EN BANC BRIEF OF *AMICI CURIAE* IRONRIDGE GLOBAL IV, LTD. AND IRONRIDGE GLOBAL PARTNERS, LLC

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GLOSSARY OF ABBREVIATIONS

Abbreviation	Definition
ALJ	Administrative Law Judge
FDIC	Federal Deposit Insurance Corporation
Global IV	Ironridge Global IV, Ltd.
Global Partners	Ironridge Global Partners, LLC
SEC	Securities and Exchange Commission
STJ	Special Trial Judge

INTEREST AND IDENTITY OF *AMICI CURIAE*

Ironridge Global IV, Ltd. is an institutional investor that invests in small public companies. Ironridge Global Partners, LLC is its former parent corporation. Like petitioners, *amici* were subjected to an SEC enforcement proceeding before an Administrative Law Judge ("ALJ") not appointed pursuant to the Appointments Clause. Also like petitioners, *amici* face allegations based on what the SEC itself has described as "novel" theories of securities law liability. The SEC alleged that Global IV violated Section 15(a) of the Securities Exchange Act of 1934 by acting as a dealer without registering with the SEC—an allegation based solely on Global IV's participation in court-approved exchanges that are *exempt from registration* under Section 3(a)(10) of the Securities Act of 1933.[1] The SEC also alleged that Global Partners was liable under Section 20(b) of the Exchange Act for Global IV's conduct even though Global Partners was a mere shareholder in Global IV.[2]

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[1] *But see, e.g.*, *Oceana Capit[a]l Grp. Ltd. v. Red Giant Entm't, Inc.*, 150 F. Supp. 3d 1219, 1225 (D. Nev. 2015) ("Exchange Act registration requirements do not apply to participants in court-approved Section 3(a)(10) exchanges."); *Chapel Invests., Inc. v. Cherubim Interests, Inc.*, 177 F. Supp. 3d 981, 990 (N.D. Tex. 2016) ("Reselling the freely tradeable shares acquired in a court approved Section 3(a)(10) exchange does not make the person receiving the shares a dealer that would be required to register."); Michael Park & Patrick Strawbridge, *A Look at Sales of Securities Acquired in Section 3(a)(10) Exchanges*, 22 Westlaw J. Sec. Litig. & Reg. 1 (2017) ("from the very beginning, the SEC recognized the congressional purpose to encourage and protect resales by excusing dealer registration with regard to the resale of exempted securities").

[2] *But see, e.g.*, *SEC v. Coffey*, 493 F.2d 1304, 1318 (6th Cir. 1974) ("Under section 20(b), there must be shown to have been knowing use of a controlled

Amici moved to enjoin the SEC proceeding in federal district court on the ground that the ALJ's selection violated the Appointments Clause. The district court agreed that *amici* would likely succeed on the merits and granted a preliminary injunction. *Ironridge Glob. IV, Ltd. v. SEC*, No. 15-cv-2512, 2015 WL 7273262 (N.D. Ga. Nov. 17, 2015). The SEC appealed. *Ironridge Glob. IV, Ltd. v. SEC*, No. 16-10205 (11th Cir.). While that appeal was pending, the Eleventh Circuit decided in a related case that litigants in *amici*'s position must exhaust administrative proceedings within the SEC before challenging the constitutionality of the ALJ's selection in federal court. *See Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016). *Amici* then voluntarily dismissed their appeal and district court action.

Because *amici* are facing proceedings before the same SEC in-house tribunal at issue in this case, they unquestionably have a direct and substantial interest in the outcome of this case. *Amici* filed a brief in support of petitioners at the panel stage of this case and in support of petitioners raising the same constitutional question in *Timbervest, LLC v. SEC*, No. 15-1416 (D.C. Cir.), and *Bandimere v. SEC*, No. 15-9586 (10th Cir.). All parties have consented to the filing of this brief.[3]

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person by a controlling person before a controlling person comes within its ambit."); *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1170-71 (D.C. Cir. 1978).

[3] Counsel for *amici* certify that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici*

INTRODUCTION AND SUMMARY OF ARGUMENT

The Framers of the Constitution could not have envisioned our sprawling administrative state, which "wields vast power and touches almost every aspect of daily life." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 499 (2010). Nor could they have imagined executive branch officials called "administrative law judges" sitting in judgment and meting out punishment to citizens accused of violating the law. But they knew all too well the danger of unaccountable government—in particular, that vesting power in obscure administrative officials "subverts democratic government" by preventing the people from tracing government action to responsible elected leaders. *Freytag v. Comm'r*, 501 U.S. 868, 885 (1991). And they wrote into the Constitution a structural safeguard against unaccountable administration: the Appointments Clause, which requires that any officer of the United States must be appointed by the President, the head of a department, or a court of law. By "limiting the appointment power" to such visible, high-ranking officials, the Clause ensures that administrators entrusted with significant authority are "accountable to political force and the will of the people." *Id.* at 884.

This case presents one of the most egregious and important violations of the Appointments Clause to come before this Court in many years. There is no dispute that ALJs at the SEC wield broad coercive powers. In this case, an ALJ revoked

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or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

petitioner's registration as an investment advisor and barred him from associating with investment professionals for life—the "securities industry equivalent of capital punishment." *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007). In *amici*'s case, an ALJ approved novel theories of securities liability in an opinion that conflicts with multiple Article III courts. In numerous other cases, the SEC has brought complex or novel enforcement actions before its "home-court" ALJs rather than Article III judges.

Yet, by the SEC's own admission, the ALJs exercising this significant adjudicatory power were not appointed by the President, a head of department, or a court of law. Indeed, at the outset of this litigation, the government lawyers representing the SEC apparently did not even know how its ALJs were hired. Eventually they explained that hiring is overseen by some combination of the Office of Personnel Management, the SEC Office of Human Resources, and the SEC's chief ALJ—who was hired in 1988 through means no one can remember. It is hard to imagine a starker example of a "diffuse process that does not lend itself to the accountability that the Appointments Clause was written to secure." *Bandimere v. SEC*, 844 F.3d 1168, 1181 (10th Cir. 2016).

The Commission responds that its ALJs—the same ALJs who can banish a person from a profession—are mere functionaries not subject to the Appointments Clause. But every court to consider that question (other than the panel of this

Court issuing the now-vacated decision in this case) has recognized that SEC ALJs exercise significant authority and are thus officers of the United States subject to the Appointments Clause. As Judge Matheson explained for the Tenth Circuit, that result is dictated by the Supreme Court's unanimous decision in *Freytag* applying the Appointments Clause to Tax Court special trial judges who exercise almost exactly the same authority as SEC ALJs. *Id.* at 1181-82.

The SEC has one purportedly contrary authority: this Court's divided decision in *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), which held that ALJs at the Federal Deposit Insurance Corporation ("FDIC") are not officers because they do not issue final decisions. As an initial matter, *Landry* does not govern this case, because the FDIC ALJs in *Landry* issued only *recommended decisions* that had to be reviewed by the FDIC, whereas SEC ALJs issue *initial decisions* that can and routinely do become final without SEC review. More fundamentally, however, *Landry* rests on a misreading of *Freytag*. As one panel member recognized at the time, and as every other court to review the question has recognized since, final decision-making power is not dispositive of whether an administrative official is an officer or an employee. *Id.* at 1141-43 (Randolph, J., concurring in judgment); *see, e.g.*, *Bandimere*, 844 F.3d at 1184. Indeed, the government itself has conceded in multiple cases before the Supreme Court that officials who lack final decision-making power are nevertheless officers of the United States subject to the

Appointments Clause. *Landry*'s contrary holding on this point is wrong and should be overruled to restore compliance with binding Supreme Court precedent.

Applying the Appointments Clause to SEC ALJs need not cause any major disruption. The SEC Commissioners collectively constitute a head of department, *see PCAOB*, 561 U.S. at 512-13, and accordingly could appoint their ALJs themselves, as the Federal Trade Commission recently did. As a matter of democratic principles, however, the stakes are high. By subjecting citizens like petitioner and *amici* to proceedings before and punishment by an ALJ that no politically accountable officer appointed, the SEC denies one of the "long term, structural protections against abuse of power" that the Framers deemed "critical to preserving liberty." *Id.* at 501. Moreover, by channeling complex and novel enforcement actions to unaccountable ALJs, the SEC moves us closer to a "government … ruled by functionaries" instead of officers appointed by elected leaders accountable to the people. *Id.* at 499. "It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting). Whatever else may be said of a system that permits administrative agencies to serve as prosecutor, judge, jury, and executioner, an agency that seeks to hold individuals accountable before its own tribunals make at least itself accountable for those who decide the cases.

ARGUMENT

I. The History And Purpose Of The Appointments Clause Show That It Covers A Broad Range Of Officials Who Exercise Significant Authority Pursuant To The Laws Of The United States.

Of the Founding Generation's many grievances against the Crown, "one of the … greatest" was the "manipulation of official appointments." *Freytag*, 501 U.S. at 883. British royal authorities had wielded the appointment power as "the most insidious and powerful weapon of eighteenth century despotism." *Id.* The Declaration of Independence itself charged that the King had "erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people." ¶12.

The problem was not only the number of officers, but the "excessively diffuse" nature of appointments, which made it impossible to trace government action to its source. *Freytag*, 501 U.S. at 885. As Alexander Hamilton explained, without clear lines of executive accountability, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." *The Federalist* No. 70, at 476 (J. Cooke ed., 1961); *see PCAOB*, 561 U.S. at 498. Put differently, "[w]hen citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring). Thus, "a fundamental precondition of accountability in administration" is enabling

the public to "understand the sources and levers of bureaucratic action." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2332 (2001). That requires, among other things, "clear lines of command and to simplify and personalize the processes of bureaucratic governance." *Id.*

The Framers in Philadelphia addressed these concerns by "carefully husbanding the appointment power to limit its diffusion." *Freytag*, 501 U.S. at 883. The Appointments Clause "prevents Congress from dispensing power too freely" by "limit[ing] the universe of eligible recipients of the power to appoint." *Id.* at 880. Namely, principal officers must be appointed by the President with the advice and consent of the Senate, while inferior officers can be appointed only by the President, a head of department, or a court of law. U.S. Const. art. II, §2. By vesting the appointment power in such visible, high-ranking officials—and *only* in such officials—the Appointments Clause "subjects the selection process to public scrutiny," *Olympic Fed. Sav. & Loan Ass'n v. Dir., Office of Thrift Supervision*, 732 F. Supp. 1183, 1189 (D.D.C. 1990), and makes clear "where the appointment buck stops," *Bandimere*, 844 F.3d at 1181. Such clear lines of authority enable the people to trace government action back to responsible officials, thereby allowing citizens to "pass judgment on" the appointing official's performance and providing "long term, structural protections against abuse of power … critical to preserving liberty." *PCAOB*, 561 U.S. at 498, 501; *see Edmond v. United States*, 520 U.S.

651, 659 (1997) (Appointments Clause is "among the significant structural safeguards of the constitutional scheme"); *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) (Appointments Clause serves "not merely to assure effective government but to preserve individual freedom").

Consistent with the underlying purposes of the Appointments Clause, early authorities took a broad view of the "officers of the United States" subject to the Clause. The First Congress, for example, subjected more than 90 percent of executive branch positions to Article II selection mechanisms, including clerks in the cabinet departments, customs inspectors who weighed and gauged imports, internal revenue officials, and many others holding federal "offices." *See* Jennifer L. Mascott, *Who Are 'Officers of the United States'?*, at 8, 37-53 (Feb. 16, 2017), *available at* http://bit.ly/2liIyWf. The practices of the First Congress, which included many Framers of the Constitution, provide "contemporaneous and weighty evidence of the Constitution's meaning." *PCAOB*, 561 U.S. at 492.

Likewise, early courts recognized that the holders of even relatively minor government offices, especially those connected to adjudication, qualified as officers. In 1806, Chief Justice Marshall explained for a unanimous Supreme Court that a justice of the peace qualified as an "officer." *Wise v. Withers*, 7 U.S. 331, 336 (1806) (Marshall, C.J.). So too did district court clerks, *Ex parte Hennen*, 38 U.S. 230, 258 (1839); circuit court commissioners, *United States v. Allred*, 155

U.S. 591, 594 (1895); and various other officials including an assistant-surgeon, an election supervisor, a federal marshal, a cadet engineer, and a vice consul exercising the duties of consul, *see Bandimere*, 844 F.3d at 1173-74.

In his influential treatise on constitutional law, Justice Story explained that officer status extended "especially [to] those connected with the administration of justice," including clerks and court reporters. 3 Joseph L. Story, *Commentaries on the Constitution of the United States* §1530 at 387 (1833). Another respected treatise likewise identified a wide variety of officers under the Appointments Clause and state law analogs, including court criers, notaries public, school board members and trustees, assessors and tax collectors, and public commissioners. Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* 12-19 (1890).[4] In short, the term "officer" referred to "all persons who can be said to hold an office under the government." *United States v. Germaine*, 99 U.S. 508, 510 (1878).

As the federal government expanded, the number of personnel "subordinate to officers of the United States" naturally multiplied. *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976). Synthesizing nearly two centuries of Appointments Clause precedent, the Supreme Court in *Buckley* explained that an "officer of the United

[4] The Supreme Court has relied on Mechem's treatise. *See, e.g.*, *Bogan v. Scott-Harris*, 523 U.S. 44, 50 n.4 (1998); *Moore v. Mitchell*, 281 U.S. 18, 24 (1930).

States" subject to the Appointments Clause is a person who "exercis[es] significant authority pursuant to the laws of the United States." *Id.* at 126. In contrast, "employees of the United States" not subject to the Appointments Clause include "lesser functionaries subordinate to officers of the United States." *Id.* at 126 n.162. Critically, in adopting this definition, *Buckley* reiterated the Founding-era understanding that the term "officer" is "intended to have substantive meaning," as opposed to "merely dealing with etiquette or protocol." *Id.* at 125-26. *Buckley* also expressly incorporated the Court's earlier decisions finding officials ranging from district court clerks to postmasters to be officers subject to the Appointments Clause. *Id.* at 126; *see Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 86 (2007) (*Buckley*'s definition incorporates historical understanding and treats some "arguably insignificant positions as offices").

Applying *Buckley*, the Supreme Court has confirmed that officer status extends to a wide a range of quasi-judicial officials. In its most extensive discussion of the officer/employee divide, the Court held that special trial judges in the Tax Court who "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders" are officers subject to the Appointments Clause because they possess significant "duties and discretion" and "perform more than ministerial tasks." *Freytag*, 501

U.S. at 881-82. The Court reached that conclusion notwithstanding that special trial judges "lack authority to enter a final decision" in all cases. *Id.* at 881.

The Court likewise held that certain military judges are officers subject to the Appointments Clause, even when their decisions are subject to review by superiors. *See Edmond*, 520 U.S. at 662; *Weiss v. United States*, 510 U.S. 163, 169-70 (1994). Magistrate judges are also officers subject to the Appointments Clause. *See Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 545 (9th Cir. 1984) (en banc) (Kennedy, J.); *Landry*, 204 F.3d at 1143 (Randolph, J., concurring). And, of particular relevance here, several Supreme Court opinions have concluded that *all* ALJs are officers for purposes of the Appointments Clause. *See Freytag*, 501 U.S. at 910 (Scalia, J., concurring); *PCAOB*, 561 U.S. at 542 (Breyer, J., dissenting); *see also Butz v. Economou*, 438 U.S. 478, 513 (1978) (role of ALJ is "functionally comparable to that of a judge").

* * *

In short, in light of the Appointments Clause's history and purpose of ensuring accountability for government action, "efforts to define" the range of "officers" subject to the Clause "inevitably conclude that the term's sweep is unusually broad." *Id.* at 539.

II. SEC ALJs Exercise Significant Authority Pursuant To The Laws Of The United States, As *Amici*'s Case Illustrates.

Under the precedents discussed above, the critical question in this case is whether SEC ALJS "exercise[e] significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126. The SEC does not dispute that its ALJs exercise "authority pursuant to the laws of the United States." *Id.* Nor could it. *See* 5 U.S.C. §556 (establishing authority of ALJs); 15 U.S.C. §78d-1(a) (authorizing SEC to delegate authority to ALJs); 17 C.F.R. §200.30-9 (delegating authority to ALJs). This case accordingly turns on whether SEC ALJs exercise *significant* authority. As *amici*'s experience illustrates, they most certainly do.

A. The Significant and Ever-Expanding Authority of SEC ALJs.

When Congress created the SEC in the 1930s, "its enforcement powers were largely limited to seeking injunctions in federal district courts to enjoin violations of the securities laws, and the only express provision for administrative hearings was to suspend or expel members or officers of national securities exchanges." Jed S. Rakoff, *PLI Securities Regulation Keynote Address: Is the SEC Becoming A Law Unto Itself?*, at 3 (Nov. 5, 2014) ("Rakoff"). Over time, the SEC "obtained or asserted" additional administrative enforcement powers, "but in each instance, the expansion was tied to the agency's oversight of regulated entities or those representing those entities before the Commission." *Id.*

In 1990, Congress expanded the SEC's adjudicative authority by authorizing it to seek cease-and-desist orders against any person and to impose civil monetary penalties on *regulated* entities through administrative proceedings. Pub. L. No. 101-429, 104 Stat. 931 (1990). But the SEC still had to bring enforcement actions for monetary penalties against *unregulated* entities in federal court. *See, e.g.*, *Gupta v. SEC*, 796 F. Supp. 2d 503, 507 (S.D.N.Y. 2011). That changed in 2010 when Congress passed the Dodd-Frank Act, which authorized the SEC to impose substantial monetary penalties through its own administrative proceedings on *any* individual for securities law violations. Pub. L. No. 111-203, 124 Stat. 1376, §929P (2010); 15 U.S.C. §§77h-1, 78u-2(a). In sum, "the SEC can today obtain through internal administrative proceedings nearly everything that it might obtain by going to court"—a "sea-change" in the law that represents a startling example of "administrative creep." Rakoff at 5-6.

The vast expansion of the SEC's administrative enforcement authority also proved to be a vast expansion of authority for its ALJs. Congress has authorized the SEC to delegate any of its functions to ALJs, 15 U.S.C. §78d-1(a), and the SEC has assigned its ALJs responsibility "for the fair and orderly conduct of" enforcement proceedings, including proceedings to impose monetary penalties on unregulated parties under Dodd-Frank. 17 C.F.R. §200.14. ALJs thus now preside over proceedings that were once the exclusive province of federal district judges.

In conducting those proceedings, ALJs have authority to administer oaths, issue subpoenas, rule on motions and offers of proof, examine witnesses, determine credibility, enter orders of default, regulate the course of hearings, and sanction parties for contemptuous conduct. *Id.*; *id.* §§201.155, 201.180(a). ALJs also rule on motions for summary disposition, with review of a denial available "only in extraordinary circumstances." *Id.* §§201.250(b), 201.400. At the end of the proceeding, the ALJ prepares "an initial decision containing the conclusions as to the factual and legal issues presented, and issue[s] an appropriate order." *Id.* §200.14(a)(8). If neither party appeals to the Commission, the ALJ's order becomes final. 15 U.S.C. §78d-1(c). If a party appeals, the Commission has discretion to decline to review the decision in all but a few limited circumstances. 17 C.F.R. §201.410, 201.411(b). In deciding whether to grant review, the Commission considers whether a party has made a reasonable showing that the ALJ's "finding or conclusion of material fact … is *clearly* erroneous." *Id.* §201.411(b)(2)(ii)(A) (emphasis added). About 90 percent of ALJ decisions "become final without any review or revision from an SEC Commissioner." *Bandimere*, 844 F.3d at 1187.

A party who unsuccessfully appeals an ALJ's decision to the Commission may obtain review in this Court or a regional court of appeals. 15 U.S.C. §78y(a)(1). But factual findings in the ALJ's decision will be affirmed if they are

supported by substantial evidence, and the ALJ's interpretation of statutes may also receive considerable deference. *See Horning v. SEC*, 570 F.3d 337, 343 (D.C. Cir. 2009); Rakoff at 10 ("the law as determined by an administrative law judge in a formal administrative decision must be given deference by federal courts").

In recent years, the SEC has dramatically increased the number of cases it brings before ALJs—including complex cases that were once tried exclusively in federal court. *See* Alexander I. Platt, *SEC Administrative Proceedings: Backlash and Reform*, 71 Bus. Law. 1, 8-9 (2015) (collecting data); Jean Eaglesham, *SEC Is Steering More Trials to Judges It Appoints*, Wall St. J. (Oct. 21, 2014), http://on.wsj.com/2mKswGA. That development is hardly surprising: Over the past five years, "the SEC's dominant advantage in its own enforcement proceedings" has yielded victories for the agency in "95 percent of its administrative proceedings and 88 percent of its appeals of administrative law judge decisions." Perrie Weiner, et al., *Will the SEC Lose Its Home-Court Advantage?*, 30 Westlaw J. White-Collar Crime 1 (2016); *see also* Rakoff at 7 (Between September 2013 and September 2014, the SEC "won 100% of its internal administrative hearings … whereas it won only 61% of its trials in federal court"). In other words, the SEC has steered enforcement actions to in-house tribunals in which the SEC prevails nearly every time—a dramatic home-court advantage that underscores the significance of the authority exercised by its ALJs.

B. The Enforcement Action Against *Amici* Illustrates the Significant Authority of SEC ALJs.

The SEC's enforcement action against *amici* illustrates the significant authority exercised by ALJs. Global IV's business involved making equity investments in small-cap public companies by settling their debt in exchange for issued securities through an agreement approved by a court after a fairness hearing. Section 3(a)(10) of the Securities Act expressly exempts such transactions from the Act's registration requirement. 15 U.S.C. §77c(a)(10). The SEC nevertheless instituted an enforcement action—functionally putting *amici* out of business—on the novel theories that Global IV had violated the registration requirement in Section 15(a)(1) of the Exchange Act by failing to register as a dealer and that Global Partners violated Section 20(b) of the Exchange Act by knowingly causing Global IV to commit that violation. 15 U.S.C. §78*o*(a)(1), §77t(b).

In keeping with its recent pattern, the SEC pursued that action through an administrative proceeding before an ALJ, not a district court action before an Article III judge. No Article III judge has ever interpreted Section 15(a)(1) or Section 20(b) in the manner advanced by the SEC, and all published authority (including the SEC's own prior guidance) is to the contrary. *See supra* n.1. Yet the ALJ denied *amici*'s motion for summary disposition in a wide-ranging opinion that confronted multiple novel questions of statutory interpretation, concluded that there were factual disputes about (among other things) whether Global IV is a

dealer under the Exchange Act, and, with regard to Global Partners, openly split from longstanding decisions of two circuits on the scope of liability under §20(b). *In re Ironridge Glob. Partners, LLC*, Release No. 3298 (Nov. 5, 2015), http://bit.ly/1nbyajF. *Amici* accordingly returned to the proceedings before the ALJ, who will develop the facts that create the record for appellate review under a deferential standard.

In short, the authority exercised by the ALJ is not only significant but fundamental to the process of SEC adjudication. The ALJ's role is structural, and it is impossible to unwind the effects of ALJ decisions. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 123 (D.C. Cir. 2015) ("an Appointments Clause violation is a structural error that warrants reversal regardless of whether prejudice can be shown"). As the district court in *amici*'s case correctly concluded, only an officer can play such a significant role. *Ironridge*, 2015 WL 7273262 at *14.

III. The SEC's Process For Hiring ALJs Violates The Appointments Clause.

Because SEC ALJs are officers of the United States, the Appointments Clause requires that they be appointed by the President, a head of department, or a court of law. The SEC concedes, however, that its ALJs are not appointed by any of those entities. Indeed, until recent litigation, it was apparently unclear even to the government lawyers representing the SEC who hires SEC ALJs. The SEC

ultimately submitted an affidavit explaining that "the hiring process for Commission ALJs is overseen by the U.S. Office of Personnel Management," which provides a list of eligible candidates to the SEC'S chief ALJ, who hires a candidate in conjunction with "an interview committee," subject to approval by the SEC Office of Human Resources. Notice of Filing at 2, *Timbervest, LLC*, File No. 3-15519 (June 4, 2015), *available at* http://bit.ly/2meC6Dy. As for the selection of the chief ALJ, she "began work at the agency in 1988 and information regarding hiring practices at that time is not readily accessible." *Id.* at 3.

The SEC's only defense of its hiring process is that ALJs are not in fact officers but are mere employees—"lesser functionaries subordinate to officers of the United States"—and therefore not subject to the Appointments Clause. *Buckley*, 424 U.S. at 126 n.162. But not a single court that has addressed that question (with the exception of the panel of this Court that issued the now-vacated decision in this case) has agreed. And no lower court could agree, because binding Supreme Court precedent forecloses the SEC's position.

A. Every Court That Has Considered the Question Has Determined that SEC ALJs Are Officers Subject to the Appointments Clause.

This is a straightforward case under binding precedent interpreting the Appointments Clause. As the Tenth Circuit recently explained in an opinion by Judge Matheson (joined by Judge Briscoe), "SEC ALJs closely resemble" the Tax Court special trial judges (STJs) that the Supreme Court unanimously found to be

officers in *Freytag*. *Bandimere*, 844 F.3d at 1181. Both SEC ALJs and Tax Court STJs "occupy offices established by law; both have duties, salaries, and means of appointment specified by statute; and both exercise significant discretion while performing 'important functions' that are 'more than ministerial tasks.'" *Id.* Accordingly, "*Freytag* governs [the] result." *Id.* at 1185.

The Tenth Circuit acknowledged the panel decision in this case (which had not yet been vacated) holding that SEC ALJs are not officers because, in the panel's view, they lack final decision-making authority. *Id.* at 1182. But the Tenth Circuit squarely rejected this Court's rule that an absence of final decision-making authority is dispositive, finding that position irreconcilable with *Freytag*. *Id.* at 1182-84. Indeed, as the Tenth Circuit noted, *Freytag* expressly "rebutted the government's argument that STJs were inferior officers when they lacked final decision-making power … because the argument 'ignore[d] the significance of the duties and discretion that [STJs] possess.'" *Id.* at 1183. The Tenth Circuit concluded that its position was consistent not only with *Freytag*, but also with the "purposes of the Appointments Clause" to ensure accountability and clarify "where the appointment buck stops." *Id.* at 1181.

Every other court to address that question has reached the same conclusion. In *Hill v. SEC*, 114 F. Supp. 3d 1297 (N.D. Ga. 2015), for example, the district court found that SEC ALJs' powers "are nearly identical" to those of the STJs in

Freytag and rejected this Court's holding in *Landry* that final decision-making authority is necessary for officer status. *Id.* at 1318; *see Ironridge*, 2015 WL 7273262 at *15 (same). Likewise, a district court in the Southern District of New York concluded that SEC ALJs must be officers for the same reasons as the STJs in *Freytag*, disagreeing with this Court's contrary understanding. *Duka v. SEC*, No. 15-cv-357, 2015 WL 4940057 (S.D.N.Y. Aug. 3, 2015). Those district court decisions, which arose from collateral challenges to SEC administrative proceedings, were ultimately vacated on jurisdictional grounds. *See Hill*, 825 F.3d at 1237-38; *Tilton v. SEC*, 824 F.3d 276, 279 (2d Cir. 2016); *but see id.* at 292 (Droney, J., dissenting). No court, however, has disagreed with their reasoning on the merits.

B. SEC ALJs Are Officers Subject to the Appointments Clause Notwithstanding *Landry*.

The SEC's legal argument essentially begins and ends with *Landry*. As explained further below, the en banc Court should overrule *Landry* because it conflicts with *Freytag*. If the Court prefers a narrower resolution, however, it can and should conclude that SEC ALJs are officers of the United States subject to the Appointments Clause notwithstanding *Landry*.

The crux of *Landry*'s reasoning is that *Freytag* found "the STJs' power of final decision in certain classes of cases … critical to" their status as officers. 204 F.3d at 1134. Even taking *Landry* on its own terms, SEC ALJs are officers because

they issue "initial decisions" that can and in the vast majority of cases do become final without review. *See* 15 U.S.C. §78d-1(c); *supra* at p. 15. By contrast, the FDIC ALJs in *Landry* made only a "*recommended* decision" that could not become final without the FDIC's review. 204 F.3d at 1133. If finality makes all the difference, this case should be decided differently from *Landry*.

Moreover, this Court has already taken a step away from *Landry*'s rigid finality requirement. In *Tucker v. Commissioner*, 676 F.3d 1129 (D.C. Cir. 2012), a panel of this Court explained that at least three "main criteria" are relevant in "drawing the line between inferior Officers and employees": "(1) the significance of the matters resolved by the officials, (2) the discretion they exercise in reaching their decisions, and (3) the finality of those decisions." *Id.* at 1133. The panel implied that those factors are applied on a sliding scale, observing that the lack of discretion exercised by the Internal Revenue Service officials in question "offset[] the effective finality" of their decisions. *Id.* at 1134. The panel's reference to "effective finality" also suggests that finality can be measured in less rigid terms than *Landry* envisioned. Here, the SEC cannot seriously dispute that ALJs resolve significant matters and exercise broad discretion. Thus, even if the Court were not to overrule *Landry*, and even if it looked only to the fact that SEC ALJ decisions are "effectively final" in 90 percent of cases, *Tucker* would provide a basis for finding that SEC ALJs are officers subject to the Appointments Clause.

C. The En Banc Court Should Overrule *Landry*.

Given that the Court has granted en banc review to reconsider *Landry*, the appropriate resolution here is to overrule *Landry*'s divided holding as irreconcilable with binding Supreme Court precedent. As the Tenth Circuit and multiple other courts have found, *Landry* rests on a basic misreading of *Freytag*. *See Bandimere*, 844 F.3d at 1182-85. *Landry* interpreted *Freytag* as holding that "final decision-making power is necessary to render an official an inferior officer rather than an employee." SEC Panel Br. 30 n.6; *see Landry*, 204 F.3d at 1134. *Landry*'s reading, however, is not only inconsistent with *Freytag*'s actual holding, but adopts a position that *Freytag* expressly rejected: "The Commissioner reasons that special trial judges may be deemed employees in [certain] cases because they lack authority to enter a final decision. But this argument *ignores the significance of the duties and discretion that special trial judges possess*." *Freytag*, 501 U.S. at 881 (emphasis added). Remarkably, the SEC's panel brief in this case admits that *Freytag* "rejected"—unanimously—the government's argument that final decision making authority is dispositive. SEC Panel Br.23. That concession comes close to a confession of error, particularly now that the en banc Court is reconsidering *Landry*. Simply put, *Freytag* "did not make final decision-making power the essence of inferior officer status." *Bandimere*, 844 F.3d at 1184. Nor should this Court.

To be sure, *Freytag* went on to add, after concluding that STJs were officers, that its (just stated) conclusion would not be altered if the duties of STJs under the provision in question "were not as significant" as the Court had found because other provisions gave the STJs authority to enter final decisions. 501 U.S. at 882. *Landry* reasoned that "this explanation would have been quite unnecessary if the purely recommendatory powers were fatal in themselves." 204 F.3d at 1134. But *Landry*'s conclusion simply does not follow from its premise. *Freytag*'s discussion of finality was in fact unnecessary, but that just makes it an alternative holding. *Id.* at 1142 (Randolph, J., concurring).

In all events, the Supreme Court's decision in *Edmond* lays to rest any doubt that an official can be an officer for Appointments Clause purposes even if the official lacks final decision-making authority. In *Edmond*, the Court held that certain military appellate judges were inferior officers precisely *because* they "have no power to render a final decision … unless permitted to do so by other Executive officers." *Edmond*, 520 U.S. at 665. Indeed, as the SEC has acknowledged, the Government conceded that the military judges in *Edmond* were officers despite their lack of final decision-making authority. SEC Panel Br.30. Instead, the Government in *Edmond* argued (successfully) that final decision-making authority speaks to the difference between a *principal* officer and an *inferior* officer, not the difference between an *officer* and an *employee*.

The SEC recently reiterated that view in the Supreme Court, noting that "*Edmond* makes clear [that] the Board's inability to render a final decision … is itself indicative of inferior, not principal, officer status." Br. for United States, *PCAOB*, 561 U.S. 477 (No. 08-861), 2009 WL 3290435 at *32 n.10 (Oct. 13, 2009) (emphasis omitted). The SEC weakly contends that *Edmond* (not to mention *PCAOB*) is somehow less authoritative because of the Government's concession, SEC Panel Br.30, but that only underscores how untenable the Commission's position here is. In short, the SEC is asking this Court to accept an argument that lost 9-0 in *Freytag* and that the Government conceded before the Supreme Court in *Edmond* and *PCAOB*, all based on a 2-1 panel decision in *Landry*. *Stare decisis* does not require—and binding precedent does not permit—the en banc Court to accept that invitation. *See Bandimere*, 844 F.3d at 1184 (Supreme Court "has not equated significant authority with final decision-making power in *Buckley*, *Freytag*, *Edmond*, or elsewhere.").

Finally, finding SEC ALJs to be mere employees would create precisely the kind of accountability problem that the Appointments Clause was intended to avoid. In *Freytag*, the Government was able to argue (ultimately unsuccessfully) that the Tax Court STJs exercised "no *independent* authority whatever." Br. for United States, *Freytag*, 501 U.S. 868 (No. 90-762), 1991 WL 11007941 at *30 (Apr. 3, 1991). The SEC cannot plausibly take even that position here. The SEC's

own website declares that "[a]dministrative law judges serve as independent adjudicators," SEC, Office of Administrative Law Judges, Oct. 22, 2015, http://bit.ly/1oTAcXz; *see also In re Ernst & Whinney*, Release No. 271, 1986 WL 175658 at *4 (July 1, 1986) (ALJs "perform[] duties which are functionally comparable to Federal District Court judges"); *Economou*, 438 U.S. at 513 (role of ALJ is "functionally comparable to that of a judge"). Moreover, the SEC has relied on that independence in defending the legitimacy of its adjudicatory process against due process and related partiality challenges. *See, e.g.*, *Sheldon v. SEC*, 45 F.3d 1515, 1518-19 (11th Cir. 1995). Yet in this litigation the SEC characterizes its ALJs as mere employees who are wholly subordinate to the Commission. The SEC cannot have its cake and eat it too, arguing that ALJs are independent and impartial while simultaneously dismissing them as mere employees who need not be appointed by any accountable officer. Such a "diffuse process … does not lend itself to the accountability that the Appointments Clause was written to secure." *Bandimere*, 844 F.3d at 1181.

* * *

Because SEC ALJs exercise significant authority pursuant to the laws of the United States and are therefore officers of the United States, they must be appointed pursuant to the Appointments Clause. Adopting that position here need not cause any great disruption to the SEC or administrative adjudication more

generally. Although there are some 1,600 ALJs in the federal government, this case concerns only the 5 ALJs at the SEC. Arrangements at different agencies that select ALJs in a different manner or assign them different responsibilities may present different constitutional considerations. The Federal Trade Commission, for example, recently decided to directly appoint its ALJs. *In re LabMD, Inc.*, No. 9357, 2015 WL 5608167, at *2 (F.T.C. Sept. 14, 2015). Yet the SEC steadfastly refuses to take similar responsibility.

Appointing ALJs is of course not the only option; the SEC may also bring its enforcement actions before Article III judges in district court. But what it may not do is subject litigants like petitioners and *amici* to administrative proceedings before officers who do not satisfy one of "the significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659. If the SEC seeks to hold individuals accountable before its own tribunals, it must make itself accountable for those who decide the cases.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for review.

Respectfully submitted,

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