ORAL ARGUMENT SCHEDULED FOR MAY 24, 2017

United States Court of Appeals for the District of Columbia Circuit

No. 15-1345

RAYMOND J. LUCIA COMPANIES, INC.;
and RAYMOND J. LUCIA,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of a Decision and Order of the Securities and Exchange Commission

BRIEF OF MARK CUBAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS ON EN BANC REHEARING

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* The principal authorities relied on in this brief are the excerpts of the legislative history of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Administrative Procedure Act of 1940, which are provided in the separately-bound Addendum to the brief of *Amicus Curiae* Mark Cuban filed on this docket on February 8, 2016 (Document #1597866) ("ADD.").

Public Law

Administrative Adjudications

Other Authorities

GLOSSARY OF ABBREVIATIONS

ABA	American Bar Association
ALJ	Administrative Law Judge
APA	Administrative Procedure Act
SEC or Commission	U.S. Securities and Exchange Commission

STATUTES, REGULATIONS AND LEGISLATIVE HISTORY

All applicable statutes, etc., are contained in the Addendum to Brief for Petitioners. Pertinent and applicable excerpts of the legislative history of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Administrative Procedure Act of 1940 are reproduced in the separately bound Addendum to the brief of *Amicus Curiae* Mark Cuban filed on this docket on February 8, 2016 (Document #1597866) ("ADD.").

INTEREST OF *AMICUS CURIAE*

Mark Cuban is a successful businessman and investor who defeated an attempt by the U.S. Securities and Exchange Commission (the "SEC" or "Commission") to sanction him as an "insider trader" based on an incorrect legal theory and defective facts. As a first-hand witness to and victim of SEC overreach, Mr. Cuban has an interest in supporting petitioners' appeal in this case, and in particular demonstrating that both statutory language and legislative history clearly show that Congress specifically intended that SEC hearings only be held before constitutional officers.

According to its website, "[t]he mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[1] When the laws are applied inconsistently or the process by which they are enforced is rigged to favor the government, capital formation is impeded because market participants do not have clear rules for understanding their investment risks. Put differently, investment risk from arbitrary and biased securities law enforcement is no less a threat to capital formation than investment risk resulting from lax enforcement; they are two sides of the same coin.

[1] *See* http://www.sec.gov/about/whatwedo.shtml (last visited Mar. 9, 2017).

As a businessman who has faced down a misguided SEC enforcement litigation, Mr. Cuban has an abiding interest in challenging the SEC when it takes misguided and incorrect positions in litigation. Here, the SEC has done exactly that in claiming that Congress's chosen language is "irrelevant" and that the Commission can degrade the significant stature of those who preside at SEC hearings despite specific contrary legislative language and history.

SUMMARY OF ARGUMENT

The *Lucia* panel's holding that the SEC Administrative Law Judges ("ALJs") were not "inferior officers," but rather "mere employees," *Lucia v. SEC*, No. 15-1345, slip op. at 11 (D.C. Cir. Aug. 9, 2016), contradicts clear statutory language and congressional intent. The use of the word "officer" in the relevant provisions of the securities laws, the plain wording of the relevant provisions of the Administrative Procedure Act ("APA"), as well as their respective legislative histories, all manifest congressional intent that Commission hearings be held by officers of the United States only.

The *Lucia* panel dismissed the language of the federal securities laws commanding that hearings be held before the Commission or "*an officer or officers of the Commission designated by it*," *see, e.g.*, 15 U.S.C. § 77u, by adopting the SEC's formulation that "there is no indication Congress intended these officers to be synonymous with 'Officers of the United States.'" *Lucia*, slip op. at 18; *see*

also, Opinion of the Commission at 33 n.122, *In re Raymond J. Lucia Cos., Inc.*, Admin. Proc. File No. 3-15006 (Sept. 3, 2015). The deliberate use of the words "officer or officers" is, of course, one such indication because the word "officer" is imbued with constitutional meaning. The relevant legislative history is another. Yet, the panel was silent in response to Mr. Cuban's statutory interpretation points, as it was in response to the legislative-history evidence demonstrating that Congress did mean and understand that the terms "constitutional officers" and "officers" were synonyms. The panel sidestepped those points by noting that nothing in the legislative history of the securities laws indicated congressional intent "that the ALJ who presides at an enforcement proceedings [sic] be delegated the sovereign power of the Commission to *make the final decision*." *Lucia*, slip op. at 14 (emphasis added). Setting aside that the panel was incorrect that mere inability to render a final decision could strip officer status from someone who performs other significant executive functions, that observation confuses *what* may be delegated with *to whom*. As demonstrated below, Congress intended SEC hearings to be held before officers of the United States: either the Commission, one or more of the Commissioners, or another officer designated for the purpose. Moreover, it is clear from the legislative history that Congress's intent was not dependent on delegation of power to issue final decisions; Congress required that hearings be held by officers because of the seriousness of the subject matter as well

as the powers attendant to conducting them (and even gathering evidence in advance of them). Congress clearly thought that the powers thus delegated—even short of the ability to render final decisions—were significant executive powers requiring performance by a constitutional "officer." To allow the SEC to delegate its hearing powers, or any of subset of them, to someone who is not an officer would thwart that plain congressional intent.

The panel was also silent in response to the point that the securities laws' appointment provisions in combination with the relevant APA provisions show that while Congress did allow for the possibility that not all ALJs had to be "officers," it clearly intended that SEC ALJs did.

ARGUMENT

I. THE SECURITIES LAWS REQUIRE THAT OFFICERS HOLD SEC HEARINGS.

Congress chose the following language to authorize SEC hearings:

> All hearings shall be public and may be held before the Commission or ***an officer or officers of the Commission designated by it***[.]

Securities Act of 1933, 15 U.S.C. § 77u (emphasis added).[2]

[2] *See also* Securities Exchange Act of 1934, 15 U.S.C. § 78v ("Hearings . . . may be held before the Commission, any member or members thereof, or any officer or officers of the Commission designated by it . . . ."); Investment Advisors Act of 1940, 15 U.S.C. § 80b-12 (same); Investment Company Act of 1940, 15 U.S.C. § 80a-40 (same).

Plain language of legislation must be given its plain meaning. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) ("[W]e begin by analyzing the statutory language, assuming that the ordinary meaning of that language accurately expresses the legislative purpose. We must enforce plain and unambiguous statutory language according to its terms." (citations and internal quotation marks omitted)). Unless contrary intent is apparent, in other words, one must assume that Congress meant "officers of the United States" when it used the word "officers" simply because the word "officer" is imbued with significant meaning in our constitutional framework. *See Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976). Also, the grouping of the Commission itself with its officers in this provision implies a parity of stature—*i.e.*, this is a reference to constitutional officers because they are empowered to "'exercis[e] significant authority pursuant to the laws of the United States.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 486 (2010) (quoting *Buckley*, 424 U.S. at 125-26).

Moreover, even if there were some ambiguity to Congress's chosen language justifying a search for intent, the relevant legislative history is clear and unambiguous. Congress carefully considered the stature of those presiding over hearings, as well as the Appointments Clause concerns, and deliberately chose the word "officers" because it intended those presiding to be officers. Indeed,

Congress chose its words deliberately as a check on the powers of the newly-expanded administrative state.

A. The legislative history of the Securities Act shows that Congress intended to delegate executive power to constitutional officers.

Congressional debate in connection with the House bill that eventually became the Securities Act of 1933 reflects deep concerns about vesting with any non-judicial officer the power to hold hearings, administer oaths and affirmations, compel attendance, and recommend severe sanctions. Indeed, initially there was even dissension as to whether the Commission itself and any of its members—all principal officers—should hold this power.

A predecessor provision to Sections 20 and 21 in the initial House draft would have authorized the Commission to revoke a company's registration if, among other things, it found that the company was in unsound condition. ADD. 732-35.[3] Certain members of Congress expressed concern that the power to take away someone's business because it was "unsound" was both unprecedented and immense. *See, e.g.*, ADD. 163 (Representative Clarence Lea described this power as "a rather radically different field" than the one of controlling publicity or disclosures).

[3] The current provision for Cease-And-Desist Proceedings appears at 15 U.S.C. § 77h-1; the current provision for Injunctions and Prosecution of Offenses appears at 15 U.S.C. § 77t; and the current provision for Hearings appears at 15 U.S.C. § 77u.

To address these concerns, drafters initially proposed vesting such powers only in *principal* officers of the United States. For example, an early draft bill, H.R. 4314, placed officers empowered to act for the Commission on the same footing as Commission members who were principal officers:

> SEC. 6. That the Commission may revoke the registration of any security by entering an order to that effect, if upon examination . . . . In making such examination ***the Commission or <u>other</u> officer or officers designated by it*** shall have access to and may compel the production of all the books and papers of such issuers . . . and may administer oaths to and examine the officers of such issuers . . . and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities . . . .

ADD. 732-35 (emphasis added). This draft would have empowered the Commission or *other* officer or officers designated by it. Initial drafts of this legislation always contemplated that members of the Commission would be principal officers.[4] Therefore, the use of the word "other" to modify the words "officer or officers" suggests parity; reflecting congressional intent that investigations and hearings be conducted either by principal officers who are Commissioners or other principal officers designated by the Commission for that purpose.

[4] Congress initially imbued the Federal Trade Commission with the authority to enforce the Securities Act of 1933. That Commission was and is "composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate." 15 U.S.C. § 41.

Congress was concerned about vesting this amount of control and power *even* with principal officers. In one illuminating exchange during the hearings, the Chairman of the relevant House Committee questioned whether *any* administrative officer of the government should have that much power. ADD. 253 ("Do you believe that ***an administrative officer of the Government*** ought to be given that much power, as a general principle—to pass upon whether or not a man's business is based on sound principles? . . . but the question this committee has got to determine is whether or not they want to give ***anybody*** that kind of authority." (emphasis added)). This concern was echoed at various times throughout the House and Senate Committee hearings. *See, e.g.*, ADD. 253-54 ("And yet we are committing [these powers] into the hands of a commission, of men appointed by the President, and, of course, confirmed by the Senate. But you know . . . a board or commission, is just about as good in its administration, or as bad, ***as the personnel of the commission***." (emphasis added)); ADD. 473 ("That is quite a lot of power to give an official, to determine that in his opinion a given enterprise is not based upon sound principles.").

Similarly, a related draft provision authorizing investigations and giving powers to compel production of evidence and take sworn testimony provided:

> For the purpose of all investigations which, in the opinion of the Commission are necessary and proper for the enforcement of this Act, ***the Commission and officer or officers designated by it*** are empowered to subpena [sic] witnesses, examine them under oath, and

> require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry.

ADD. 747 (emphasis added).[5] Given the revocation debate context, the only reasonable interpretation of this language is that it too referred to constitutional officers.

A later draft bill, H.R. 5480, narrowed Section 6 and removed the power to revoke registration of securities based on an unsound condition of an issuer. ADD. 761-63. It allowed the Commission to enter a stop order suspending a registration statement if it appeared that the statement included any untrue statement of material fact or omitted a material fact. ADD. 765. Additionally, it slightly modified the language regarding who was authorized to conduct stop order examinations by replacing the words "other officer" with the words "any officer." ADD. 766 ("In making such examination the Commission or ***any*** officer or officers designated by it shall . . . ." (emphasis added)).

This modification shows two things: First, by replacing the word "other" with the word "any," the new draft provision empowered both inferior and principal officers. One can infer that once Congress narrowed the grounds on

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[5] The current provision states: "For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this subchapter [15 U.S.C. §§ 77a et seq.], ***any member of the Commission or any officer or officers designated by it*** are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry." 15 U.S.C. § 77s(c) (emphasis added).

which the Commission could revoke a registration, Congress permitted inferior officers to hold examinations and exercise attendant powers. Second, this is a deliberate, considered change because it obviously changes the meaning of the provision. H.R. 5480 was passed on May 5, 1933. ADD. 24-69.

The original Senate draft bill, S. 875, largely tracked the original House bill, H.R. 4314; it too included a clause that would have allowed revocation of a registration of an "unsound" business. ADD. 801-04. However, the Senate passed a modified version of H.R. 5480. ADD. 70-91. The differences between the two chambers' bills were reconciled in a Conference Report, and the final public law had three key parts:

(1) It retained the language in H.R. 5480 regarding the powers of "***the Commission or any officer or officers designated by it***" to subpoena witnesses, examine them under oath, and require the production of documents in connection with a stop order examination, ADD. 95 (emphasis added);[6]

(2) It modified the language of H.R. 5480 regarding investigations, so that "***any member of the Commission or any officer or officers designated by it*** are empowered to administer oaths and affirmations, subpena [sic]

[6] The current language is: "Examination for issuance of stop order. The Commission is empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d). ***In making such examination the Commission or any officer or officers designated by it shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine*** . . . ." 15 U.S.C. § 77h(e) (emphasis added).

witnesses, take evidence, and require the production" of documents for purposes of investigations, ADD. 97 (emphasis added);[7] and

(3) It added a section entitled "Hearings by Commission," directing that: "All hearings shall be public and may be held before ***the Commission or an officer or officers of the Commission designated by it*** . . . ," ADD. 97-8 (emphasis added).

The Conference Report was subsequently agreed to by both the House and the Senate. ADD. 104; ADD. 115.

In sum, Congress chose the word "officer" carefully and calibrated its grant of authority to executive officers based on the scope of delegated powers.

B. The legislative history of the Securities Exchange Act shows that Congress intended to delegate executive power to constitutional officers.

The following year, Congress passed a companion act, the Securities Exchange Act of 1934. This act, of course, set up the SEC. In it, Congress imbued the Commission and the officers it designated with certain executive functions, such as subpoenaing witnesses, administering oaths, and compelling the production of documents.

Notably, the initial version of the Senate bill included much of the same language and structure as the Securities Act on the relevant issues. That draft started by outlining the "Special Powers of the Commission" in Section 18:

[7] Note that "and" was replaced with "or," resulting in "the Commission ***or*** officer or officers," and indicating that Congress was focused on this provision.

> (e) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this Act, ***any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena [sic] witnesses, compel their attendance, take evidence, and require the production of*** any books . . . .

ADD. 1000. As with the Securities Act, this was a grant of executive power to the Commission members and any officers designated by the Commission (and no one else).[8]

The attention to the wording of the provision authorizing hearings in the Exchange Act further indicates that Congress intended hearings to be held by constitutional officers. The draft provided:

> SEC. 21. All hearings shall be public and may be held before the Commission, ***any member or members thereof*** or an officer or officers of the Commission designated by it, and appropriate records thereof shall be kept.

ADD. 1005 (emphasis added). Note that the highlighted language was an addition to the language in the Securities Act's analogous provision, making it even more explicit that not all hearing officers needed to be principal officers, *i.e.*, Commission members. Apparently, having resolved (with the Securities Act's passage) that inferior officers could also hold hearings, Congress added the

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[8] The current provision provides: "For the purpose of any such investigation, or any other proceeding under this chapter [15 U.S.C. §§ 78a et seq.], ***any member of the Commission or any officer designated by it*** is empowered to administer oaths and affirmations, subpena [sic] witnesses, compel their attendance, take evidence, and require the production of any books, papers, [etc.] . . . ." 15 U.S.C. § 78u(b) (emphasis added).

highlighted language to reflect that. In short, Congress chose carefully who could wield the hearing-related powers it was delegating. That careful choice would be upended were one to read "employee" where Congress said "officer."

Another reason to conclude that Congress meant that hearings be held by officers of the United States is the use of the word "officer" in the Exchange Act provision for cases of contumacy or refusal to comply with Commission subpoenas. Under that provision, too, the federal courts would only be able to order a person to appear before the Commission, one of its members, or any officer of the Commission. 15 U.S.C. § 78u(c). However, that provision of the Exchange Act is slightly different than a similar provision of the Securities Act and different in a manner that confirms Congress's intent that hearings be held before constitutional officers. In the Exchange Act, the words "or member or officer designated by the Commission" replace the words "one of its examiners designated by it" in the Securities Act. *Compare* 15 U.S.C. § 78u(c), *with* 15 U.S.C. § 77v(b). Two things follow from this change: one, the choice of the word "officer" was deliberate; and two, because these are two references to the same individuals, Congress used the word "examiners" in the Securities Act as a descriptive term for all officers who were designated to conduct hearings or investigations, including, of course, Commission members.

Finally, Congress understood that the choice of the words "employee" or "officer" in the Exchange Act carried legal implications. For example, the use of the word "appoint" in Section 4, which establishes the Commission and authorizes it to employ staff, indicates that Congress was sensitive to the significance of the term "officer."[9] Specifically, initial House and Senate drafts did not authorize the Commission to "appoint" officers or anyone else. *See, e.g.*, ADD. 939, 956; *see* ADD. 956 (initial Senate draft: "The Commission is further authorized, in accordance with the civil service laws, to employ . . . such officers and employees . . . as may be necessary . . . ."). The addition of the word "appoint" in the enacted law signified that Congress understood that the Commission needed authority to appoint "officers."[10]

II. THE LEGISLATIVE HISTORY OF THE APA DEMONSTRATES THAT SEC ALJs ARE INFERIOR OFFICERS.

The plain language and legislative history of the APA also clearly indicate congressional intent that SEC ALJs be inferior constitutional officers. In fact, under the APA, ALJs' method of appointment—following lengthy discussions and

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[9] Section 4(b) of the final enacted law reads, in relevant part: "The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and other experts as may be necessary . . . and the Commission may . . . appoint such other officers and employees as are necessary . . . ." ADD. 824.

[10] The current provision is: "The Commission shall appoint and compensate officers, attorneys, economists, examiners, and other employees in accordance with section 4802 of title 5, United States Code." 15 U.S.C. § 78d(b)(1).

analysis—was determined with the constraints of the Appointments Clause in mind.

A. The APA places ALJs on the same footing with principal officers.

To begin with the plain statutory language again, in parallel to the placement of hearing officers on par with the Commission members in the securities laws, the APA also places ALJs on par with heads of departments, *i.e.*, principal officers; to wit:

> There shall preside at the taking of evidence—(1) the agency; (2) one or more members of the body which comprises the agency; or (3) one or more administrative law judges appointed under section 3105 of this title [5 U.S.C. § 3105].

5 U.S.C. § 556(b).[11] As the discussion below shows, this was no accident; this language reflects Congress's policy choices and careful analysis.

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[11] In 1978, Congress amended the United States Code to change the title of "hearing examiners" to "Administrative Law Judges" and to increase the number of such positions at the GS-16 level. *Hearing Examiners Reclassified as Administrative Law Judges*, Pub. L. No. 95-251, 92 Stat. 183 (Mar. 27, 1978) (note that later that year, the "supergrade" levels, including GS-16, were reclassified). Before this public law was enacted, the Senate Committee on Governmental Affairs issued a Senate Committee Report. ADD. 1749. In it, Congress explained that ALJs "are an integral part of the rule making and adjudicatory procedures required by the [APA] . . . . To insure [sic] the independence and impartiality of the administrative process, section 556 of title 5 requires ALJs to serve as presiding officers with respect to rule making or adjudicatory hearings (unless the agency itself, or one or more of its members, presides)." *Id.* It also explained that "***individuals appointed as ALJs hold a position with tenure very similar to that provided for Federal judges under the Constitution***." *Id*. (emphasis added).

B. Empowerment of ALJs was a reaction to earlier functioning of administrative agencies.

The APA stemmed from a review of administrative agencies following the expansion of the administrative state after the Great Depression. A report by the Attorney General's Committee on Administrative Procedures outlined certain procedural and substantive defects in the then-current administrative functions, including in formal adjudications, and provided a proposed draft of the APA. *See generally* ADD. 1017. The concerns raised in the Report animated the passage of the APA and informed much of its language.

The Committee recommended that:

- agency heads delegate much of the investigatory and prosecutorial functions to capable officers and the initial adjudicative functions to other independent officers. ADD. 1076; *see also* ADD. 1075-77.

- the status of all hearing officers be elevated to allow them to exercise independent and executive functions. ADD. 1063-64, 1066.

- the hearing officers' initial decisions be given real weight, *i.e.*, the initial decision would become final absent clear error. ADD. 1071.

- Congress empower the hearing officers to exercise certain executive or sovereign functions:

> Hearing commissioners should be fully empowered by statute to preside at hearings, issue subpoenas, administer oaths, rule upon motions, carry out other duties incident to the proper conduct of hearings, and make findings of fact, conclusions of law, and orders for the disposition of matters coming before them. ADD. 1070.

- an independent body be in charge of approving candidates to ensure that they are well qualified, noting:

> [***T]he hearing commissioner is in a very real sense acting for the head of the agency***. He is hearing cases because the heads cannot as a practical matter themselves sit. . . . The entire usefulness of the agency may be destroyed if the hearing officers are incompetent ***or if the public loses confidence in their fairness***. ADD. 1067 (emphasis added).

C. Congress intended ALJs to be "presiding officers," appointed in accordance with the Appointments Clause.

Acting on the above-described prescriptions, Congress drafted a public law, which, as detailed below: (1) made the hearing examiners "presiding officers"; (2) granted them certain executive powers; (3) mandated that the decisions of subordinate officers be given weight and force; and (4) made certain that the appointment of ALJs are made in conformity with the Appointments Clause.

1. Congress referred to hearing examiners as "presiding officers."

To start, Congress referred to hearing examiners as "presiding officers" in the original legislation, to wit:

> SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—
> (a) ***PRESIDING OFFICERS***.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act. . . . The ***functions of all presiding officers and of officers participating in decisions*** in conformity with section 8 shall be conducted in an impartial manner.

ADD. 1255-56 (emphasis added). Parallel to the Exchange Act, this provision covered three categories of persons: the Commission acting together, individual Commissioners, and other persons appointed to hold the hearing. The words "the functions of all presiding officers" referred to all three of these categories. The sole sensible reading of this language is that the grouping of examiners with principal officers in this section indicates the elevation of examiners to officer status.

The very next provision of the APA as originally adopted supports this reading. It states:

> (b) HEARING POWERS.—***Officers presiding at hearings shall have authority***, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas [sic] . . . and (9) take any other action authorized by agency rule consistent with this Act.

ADD. 1256 (emphasis added). The phrase "officers presiding" means officers who preside; presiding is a verb in a sentence whose subject is "officers." Moreover, that "hearing examiners" were given the same powers as principal officers of the United States is yet another indication that Congress intended delegation of sovereign powers, rendering them inferior officers.

2. The statutory definitions of "officer" and "employee" confirm that Congress intended SEC ALJs to be "inferior officers."

In 1965, in connection with the adoption of the revised Title 5, Congress restated "in comprehensive form, without substantive change, the statutes in effect before July 1, 1965, that relate to Government employees, the organization and

powers of Federal agencies generally, and administrative procedure . . . .” ADD. 1675. In short, Congress made language changes to streamline and standardize terms across various interrelated statutory provisions without changing their meaning. ADD. 1676.[12]

Among other things, Congress defined the terms “officer” and “employee” in new Sections 2104 and 2105, respectively. *See generally* ADD. 1682, 1684, 1686-87. Applying these definitions, Congress amended the hearing-authorizing provisions of the APA thus: The words “employee” and “employees” [were] substituted [in Section 556(b)] for “officer” and “officers” ***in view of the definition of “employee” in Section 2105***. The sentence “A presiding or participating employee may at any time disqualify himself[,]” is substituted for “Any such officer may at any time withdraw if he deems himself disqualified.” ADD. 1687

[12] The House Judiciary Committee’s Report accompanying these language changes provides, in relevant part:

> ***Substantive change not intended***.—Like other recent codifications undertaken as a part of the program of the Committee on the Judiciary of the House of Representatives to enact into law all 50 titles of the United States Code, there are no substantive changes made by this bill enacting title 5 into law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged.

ADD. 1677 (citations omitted) (emphasis in original).

(emphasis added). Similar changes and qualifying comments were made in Section 557. *Id.* By noting that the substitution of "employee" for "officer" was made in view of the expansive definition of "employee," Congress indicated that it understood that "officer" and "employee" were not interchangeable terms and that, therefore, as originally drafted, officer did not mean employee. *Id.* An analysis of these definitions shows that SEC ALJs are officers under the APA.

"Officer" is defined thus:

> (a) For the purpose of this title, "officer," except as otherwise provided by this section or when specifically modified, means a justice or judge of the United States and ***an individual who is***—
>
> > (1) ***required by law to be appointed*** in the civil service ***by*** one of the following acting in an official capacity—
> >
> > > (A) the President;
> > > (B) a court of the United States;
> > > (C) ***the head of an Executive agency***; or
> > > (D) the Secretary of a military department;
> >
> > (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
> >
> > (3) subject to the supervision of an authority named by paragraph (1) of this section, or the Judicial Conference of the United States, while engaged in the performance of the duties of his office.
>
> (b) Except as otherwise provided by law, an officer of the United States Postal Service or of the Postal Regulatory Commission is deemed not an officer for purposes of this title.

5 U.S.C. § 2104 (emphasis added).

"Employee" is defined thus:

> (a) For the purpose of this title, "employee," except as otherwise provided by this section or when specifically modified, ***means an officer*** and an individual who is—
>
> > (1) appointed in the civil service by one of the following acting in an official capacity—
> >
> > > (A) the President;
> > > (B) a Member or Members of Congress, or the Congress;
> > > (C) a member of a uniformed service;
> > > (D) an individual who is an employee under this section;
> > > (E) the head of a Government controlled corporation; or
> > > (F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;
> >
> > (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
> >
> > (3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

5 U.S.C. § 2105 (emphasis added). Principal and inferior officers are "employees" under this definition.

Since SEC ALJs are not appointed or directly supervised by any of the persons listed in Section 2105(a)(1), SEC ALJs meet the definition of "employee" solely by virtue of their status as "officers." SEC ALJs are not covered by subsections (a)(1) and (a)(3) of Section 2105 because they must be designated by the Commission under the securities laws (as discussed above) and, under the APA, they must be appointed by the "agency." *See* 5 U.S.C. § 3105 ("Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title.").

Similarly, they are not directly supervised by anyone listed in Section 2105(a)(1). But, SEC ALJs are officers under Section 2104 because they (1) must be appointed by the Commission; (2) perform their duties under authority of law; and (3) are subject to supervision by the head of an executive agency—the Commission.[13] Accordingly, because they are officers under Section 2104, they also are "employees" under the preambular language of Section 2105(a).

D. Congress explicitly made certain that ALJs' appointment complied with the Appointments Clause.

The Attorney General's Committee Report recommended that hearing officers be appointed by an independent government body. ADD. 1067-68. To accomplish this, the Committee recommended the formation of an "Office of

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[13] The word "agency" refers to the entire body that comprises the agency, *i.e.*, all Commissioners acting together as a Commission. The Commission acting together is the head of the agency. *See* Opinion of the Commission at 41 n.137, *In re Timbervest*, Admin. Proc. File No. 3-15519 (Sept. 17, 2015) ("The Commission constitutes the 'head of a department' when its commissioners act collectively." (quoting *Free Enter. Fund*, 561 U.S. at 512-13)). "Agency" is, therefore, another term for the agency head. In fact, if "agency" meant something other than "agency head," SEC ALJs would not even be employees under Section 2105 because an "agency" is not an "individual who is an employee" or any of the other categories listed in Section 2105(a)(1).

"'Executive agency' means an Executive department, a Government corporation, and an independent establishment." 5 U.S.C. § 105. The Commission is neither an executive department nor a government corporation. *See* 5 U.S.C. §§ 101, 103. It is, however, an independent establishment. *See* 5 U.S.C. § 104 ("[A]n establishment in the executive branch (other than the United States Postal Service or the Postal Regulatory Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment").

Administrative Justice," whose Director would be appointed by the Judicial Conference and who would, in turn, appoint hearing examiners. ADD. 1291-92.

This proposal was rejected because it ran afoul of the Appointments Clause. As explained by the Senate Judiciary Committee:

> The legal difficulty with the suggestion, however, is that the ***Constitution provides for the placing of powers of appointment*** "in the courts of law" whereas the Judicial Conference is a committee and not a court and hence may ***not be within the constitutional authorization for appointing powers***.

ADD. 1292 (emphasis added).

The same concerns were voiced in the House hearings. The then-President of the American Bar Association ("ABA") testified as follows:

> Third is a suggestion that the Judicial Conference appoint an officer to appoint and remove examiners. This suggestion is attractive, but may present constitutional problems as to the appointing power. Perhaps a solution would be for the Presidential appointment of such an officer or officers, with provision for the Judicial Conference to make recommendations to the President.

ADD. 1300. The Chairman of the Special Committee on Administrative Law for the ABA concurred:

> The third proposal has been made recently, and that is that ***either the selection or the approval of the examiner be vested in some official appointed by the Judicial Conference***. That was put forward as a rather good solution because it would fit into what was conceived to be a nonpolitical office and therefore would require less provision concerning how it should operate. However, ***that presents a very serious constitutional question as to whether you could have the Judicial Conference make the appointment of an executive official when the Constitution vests the power of appointment only in the***

> ***President, the head of a department[, or] a court.*** The Judicial Conference is not a court.

ADD. 1332 (emphasis added).

The very next suggestion taken up (and ultimately adopted) by the Senate Judiciary Committee was that the "examiners be appointed '***by*** each agency' rather than [just] 'for each agency.'" ADD. 1292 (emphasis in original). In those instances where agency heads are heads of departments, such as the SEC, this change ensured proper Article II appointments.

E. Congress was conferring significant executive powers in the APA.

Were Congress not conferring significant executive powers on ALJs, it would not have bothered with the Appointments Clause. The following comment is illuminating:

> It has been suggested that this bill should grant the subpena [sic] power to all hearing officers, ***whether or not the agency has been granted such power***. It may seem logical that hearing officers should have compulsory process powers, but it has been felt that the grant of such powers is of a nature and so important as to be better left to Congress in connection with specific legislation rather than dealt with by a general statute.

ADD. 1279-80 (emphasis added). There would be no reason to consider giving ALJs *independent* subpoena powers if Congress meant them to be mere employees whose job was limited to serving as aids to the Commission, as the Commission asserted in its *Lucia* opinion. *See* Opinion of the Commission at 28-33, *In re Raymond J. Lucia Companies*, Admin. Proc. No. 3-15006. Note that the decision

not to vest ALJs with independent subpoena power did not rest on their status as mere employees or aids. Rather, Congress saw the delegation of subpoena power to be significant enough to require a specific statutory grant. *A fortiori*, the grant of subpoena powers to SEC ALJs is a delegation of significant executive power.

To be sure, the original APA text distinguished between supervising officers and subordinate officers, but that distinction does not bear on whether the subordinate officer is a constitutional officer because every inferior officer, by definition, is subordinate to, and is subject to supervision by, a principal officer. In referring to subordinate examiners, therefore, Congress used the word "officer":

> (a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, ***the officer who presided*** (or, in cases not subject to subsection (c) of section 5, ***any other officer or officers*** qualified to preside at hearings pursuant to section 7) shall . . . Whenever ***such officers*** make the initial decision . . . . On appeal from or review of the initial decisions ***of such officers*** . . . . Whenever the agency makes the initial decision without having presided at the reception of the evidence, ***such officers*** . . . .
>
> (b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the ***decision of subordinate officers*** . . . .

ADD 1256-57 (emphasis added). It is hard to fathom what Congress could have meant here if not that the persons conducting hearings were constitutional officers—*i.e.*, Commission members who are subordinates for this purpose or their subordinates, inferior officers.

In short, Congress empowered ALJs purposefully and knowingly. In the Senate Committee Report, the Senate Judiciary Committee explained that the APA was "designed to assure that the presiding officer will perform a real function rather than serve merely as a notary or policeman." ADD. 1456; *see also* ADD. 1517.

CONCLUSION

The relevant statutory language and legislative history show that Congress intended SEC ALJs to be inferior officers. Congress delegated significant executive powers to them. Congress also made sure that their appointments comport with the Appointments Clause. SEC ALJs, therefore, must be appointed in accordance with constitutional and congressional mandates.

Dated: March 10, 2017

Respectfully submitted,

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