[FINAL VERSION]

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 A Decision And Order
Of The Securities And Exchange Commission

BRIEF FOR PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28, Petitioners Raymond J. Lucia Companies, Inc., and Raymond J. Lucia (collectively, "petitioners"), respectfully submit this Certificate as to Parties, Rulings, and Related Cases:

A. Parties

The parties that appeared before the Securities and Exchange Commission ("SEC" or "Commission") are Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, who are petitioners in this Court.

The Commission is the respondent in this Court.

Cato Institute, Ironridge Global IV, Ltd. and Ironridge Global Partners LLC, Mark Cuban, RD Legal Group, Tennessee Walking Horse National Celebration and SHOW Inc., and U.S. Chamber of Commerce are *amici* for petitioners. There are no intervenors.

B. Rulings Under Review

Petitioners seek review of the final decision and order of the Commission, captioned *In the Matter of Raymond J. Lucia Companies, Inc., et al.*, Opinion of the Commission, Release No. 75,837, Admin. Proc. File No. 3-15006, 2015 WL 5172953 (Sept. 3, 2015) (J.A.129-69); *In the Matter of Raymond J. Lucia Companies, Inc., et al.*, Order Imposing Remedial Sanctions, Release No. 75,837, Admin.

Proc. File No. 3-15006, 2015 WL 5172953 (Sept. 3, 2015) (J.A.170-71). The Commission's decision and order—issued over the dissent of two Commissioners, *see* Opinion of Commissioner Gallagher and Commissioner Piwowar, Dissenting from the Opinion of the Commission (Oct. 2, 2015) (J.A.172-73)—affirmed in part and reversed in part an initial decision issued by an Administrative Law Judge, captioned *In the Matter of Raymond J. Lucia Cos., Inc.*, Initial Decision on Remand, Release No. 540, Admin. Proc. File No. 3-15006, 2013 WL 6384274 (ALJ Dec. 6, 2013) (J.A.67-128). The December 6, 2013, initial decision was issued to "supplemen[t]" and "updat[e]" (*id.* at *1-2 (J.A.67-68)) a prior initial decision by the same Administrative Law Judge, *In the Matter of Raymond J. Lucia Cos., Inc.*, Initial Decision, Release No. 495, Admin. Proc. File No. 3-15006, 2013 WL 3379719 (ALJ July 8, 2013) (J.A.12-57), after the Commission remanded the case for further findings, *see* Initial Decision on Remand, 2013 WL 6384274, at *2 (J.A.68) (citing *In the Matter of Raymond J. Lucia Cos., Inc.*, Order Remanding Case for Issuance of Initial Decision Pursuant to Rule of Practice 360, Admin. Proc. File No. 3-15006 (Aug. 8, 2013) (J.A.63-66)). On August 9, 2016, a panel of this Court issued an order affirming the SEC's decision. *Raymond J. Lucia Cos., Inc. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016). The Court subsequently granted petitioners' petition for rehearing en banc and vacated the judgment. Order, *Raymond J. Lucia Cos., Inc. v. SEC*, No. 15-1345 (Feb. 16, 2017).

C. Related Cases

This matter has not previously been before this Court. Counsel for petitioners are not aware of any related cases currently pending in this Court or in any other court within the meaning of Circuit Rule 28(a)(1)(C).

Counsel for petitioners note, however, that the constitutionality of the method of appointment of the Commission's Administrative Law Judges has been raised in a number of other active proceedings in courts around the country, including the following:

- *Tilton v. SEC*, No. 16-906 (S. Ct.)
- *Timbervest, LLC v. SEC*, No. 15-1416 (D.C. Cir.)
- *Riad v. SEC*, No. 16-1275 (D.C. Cir.)
- *Bennett v. SEC*, No. 16-3827 (8th Cir.)
- *Aesoph v. SEC*, No. 16-3830 (8th Cir.) (consolidated with *Bennett*, No. 16-3827, *supra*)
- *Feathers v. SEC*, No. 15-70102 (9th Cir.)
- *J.S. Oliver Capital Management v. SEC*, No. 16-72703 (9th Cir.)
- *Bandimere v. SEC*, No. 19-9586 (10th Cir.)
- *Imperato v. SEC*, No. 15-11574 (11th Cir.)
- *RD Legal Capital LLC v. SEC*, No. 16-5104 (D.N.J.)

In addition, the following proceedings open before the Commission according to its website were previously identified by either petitioners or the Commission as involving the same constitutional issue:

- *In the Matter of Laurie Bebo & John Buono, CPA*, File No. 3-16293
- *In the Matter of Bennett Group Financial Services, LLC & Dawn J. Bennett*, File No. 3-16801
- *In the Matter of Gregory T. Bolan, Jr.*, File No. 3-16178
- *In the Matter of Frank H. Chiappone, et al.*, File No. 3-15514
- *In the Matter of Edward M. Daspin, et al.*, File No. 3-16509
- *In the Matter of Gilles T. De Charsonville*, File No. 3-16712
- *In the Matter of Barbara Duka*, File No. 3-16349
- *In the Matter of Equity Trust Company*, File No. 3-16594
- *In the Matter of Gray Financial Group, Inc., et al.*, File No. 3-16554
- *In the Matter of Harding Advisory LLC & Wing F. Chau*, File No. 3-15574
- *In the Matter of Charles L. Hill, Jr.*, File No. 3-16383
- *In the Matter of Ironridge Global Partners, LLC & Ironridge Global IV, Ltd.*, File No. 3-16649
- *In the Matter of John Thomas Capital Management Group LLC d/b/a Patriot28, & George R. Jarkesy, Jr.*, File No. 3-15255
- *In the Matter of J.S. Oliver Capital Management, L.P., & Ian O. Mausner*, File No. 3-15446
- *In the Matter of Lawrence M. Labine*, File No. 3-15967
- *In the Matter of Paul Edward "Ed" Lloyd, Jr., CPA*, File No. 3-16182
- *In the Matter of Natural Blue Resources, Inc., et al.*, File No. 3-15974
- *In the Matter of Gordon Brent Pierce*, File No. 3-13109
- *In the Matter of Spring Hill Capital Markets, LLC*, File No. 3-16353
- *In the Matter of Lynn Tilton, et al.*, File No. 3-16462

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and this Court's Rule 26.1, petitioners respectfully submit the following corporate disclosure statement:

Petitioner Raymond J. Lucia Companies, Inc. ("RJLC"), is a California corporation, formerly operated as a registered investment adviser, but which currently has no ongoing operations. RJLC has no parent company, and no publicly held corporation has a 10% or greater ownership interest in RJLC.

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GLOSSARY

ALJ	Administrative Law Judge
APA	Administrative Procedure Act
Commission (or SEC)	Respondent Securities and Exchange Commission
Enforcement Division	Securities and Exchange Commission Enforcement Division
FDIC	Federal Deposit Insurance Corporation
OLC	Office of Legal Counsel
OPM	Office of Personnel Management
RJLC	Petitioner Raymond J. Lucia Companies, Inc.

INTRODUCTION

Long before the advent of the modern administrative state, the Framers understood that curbing abuses of executive power requires carefully cabining the prerogative to *appoint* those who wield it. In prescribing the exclusive means of appointing any "Office[r] of the United States," U.S. Const., art. II, § 2, cl. 2, the Appointments Clause "preserve[s] … the Constitution's structural integrity" by ensuring that officials invested with significant federal authority remain "accountable to political force and the will of the people." *Freytag v. Comm'r*, 501 U.S. 868, 878, 884 (1991).

The five "hearing officers," or Administrative Law Judges ("ALJs"), of the Securities and Exchange Commission ("SEC" or "Commission") exercise significant authority under the federal securities laws and implementing regulations. In this case, for example, the ALJ imposed career-ending sanctions, including a lifetime bar, on an investment professional with an unblemished 40-year record for conduct that concededly caused no investor harm.

The Supreme Court's precedents establish beyond a shadow of a doubt that SEC ALJs are inferior "Officers" of the United States who must be appointed in accordance with the Appointments Clause. *Freytag*, 501 U.S. at 881-82; *see also*, *e.g.*, *Edmond v. United States*, 520 U.S. 651, 664-65 (1997). They are *not*, however,

appointed pursuant to the constitutionally prescribed method. The SEC's sole defense of the *status quo* is that its ALJs are mere employees, not Officers; but that argument cannot be reconciled with the Constitution as construed by the Supreme Court. *See Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016) (holding that SEC ALJs are Officers). To the extent the divided decision in *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), suggests otherwise, it should be overruled.

STATEMENT OF JURISDICTION

The SEC's decision and order under review were issued on September 3, 2015. J.A.129, 170. On October 2, 2015, petitioners timely filed a petition for review in this Court, which has jurisdiction under 15 U.S.C. § 78y. On August 9, 2016, a panel of this Court denied the petition for review in a published decision. J.A.174. On February 16, 2017, the en banc Court vacated the panel's judgment and set the case for reargument following additional briefing. J.A.228-29.

STATEMENT OF THE ISSUES

As specified by the Court's en banc order, the questions presented are limited to:

I. Whether the SEC Administrative Law Judge who handled this case was an inferior Officer rather than an employee for purposes of the Appointments Clause of Article II of the Constitution.

II. Whether the Court should overrule *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

Pertinent constitutional, statutory, and regulatory provisions are reproduced in the separately bound Addendum.

STATEMENT OF THE CASE

After a hearing, an SEC ALJ found that petitioners made material misrepresentations in connection with the provision of investment advice, and imposed sanctions, including a lifetime bar. The Commission, by a 3-2 vote, affirmed the liability and sanctions determinations, and rejected petitioners' contention that the ALJ had not been constitutionally appointed. A panel of this Court denied the petition for review. The en banc Court granted rehearing limited to the constitutional question.

1. Congress has charged the SEC with executing and enforcing the federal securities laws, 15 U.S.C. § 78d(a), including the Investment Advisers Act of 1940, *id.* § 80b-3. Congress authorized the Commission to "delegate … any of its functions" except rulemaking to various subordinates, including "administrative law judge[s]." *Id.* § 78d-1(a). The Commission can enforce these laws by electing either to sue in federal court or to commence an administrative hearing. *See id.* §§ 78u, 78u-2, 78v. Where the Commission elects to commence an administrative hearing, an ALJ with delegated authority presides over the hearing. *See* 17 C.F.R. § 201.111.

In establishing this statutory scheme, Congress repeatedly referred to SEC ALJs as "officers of the Commission," 15 U.S.C. §§ 77u, 78v, 80a-40, 80b-12; set forth their duties, 5 U.S.C. §§ 556-57, and salaries, *id.* § 5372(b); and prescribed that the "*agency* shall appoint [its] administrative law judges," *id.* § 3105 (emphasis added)—a manner of appointment that, if followed by the SEC, would comport with the Appointments Clause. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 512-13 (2010) (Commission acting as a body is a "Head of Department" under the Appointments Clause). In fact, however, SEC ALJs are selected from a pool of candidates identified by the Office of Personnel Management ("OPM") and hired by the Chief Administrative Law Judge—a method of appointment that undisputedly does not comply with the Appointments Clause. *See Bandimere v. SEC*, 844 F.3d 1168, 1176-77 (10th Cir. 2016).

The Commission has deemed its ALJs "hearing officer[s]" and delegated to those "officer[s] … the authority to do all things necessary and appropriate to discharge" their duties. 17 C.F.R. § 201.111. ALJs wield extensive authority, including the powers to oversee hearings and discovery, rule on motions (including summary disposition), enter default judgments, and impose or modify sanctions. *See generally id.* (non-exhaustive list of ALJs' powers); *see also id.* §§ 201.155 (default), .180 (sanctions), .230 (document production), .232-.234 (subpoenas and dep-

ositions), .250 (summary disposition), .320 (evidence). They also can make credibility findings, to which the Commission defers absent "overwhelming evidence to the contrary," *In the Matter of Clawson*, Release No. 48,143, 2003 WL 21539920, at *2 (July 9, 2003), and impose appropriate penalties and sanctions, 17 C.F.R. § 201.360(b).

An SEC ALJ enters an "initial decision," 17 C.F.R. § 201.360(a)(1), that can and normally does "become final," *id.* § 201.360(d)(2). Although the Commission "retain[s] a discretionary right to review" any "action" by an ALJ, whether *sua sponte* or upon a petition for review, 15 U.S.C. § 78d-1(b), "[i]f the right to exercise such review is declined" or not timely sought, the ALJ's action is by statute "deemed the action of the Commission," *id.* § 78d-1(c), and the Commission "will issue an order that the decision has become final," 17 C.F.R. § 201.360(d)(2). "The decision becomes final upon issuance of the order." *Id.*

2. Petitioner Ray Lucia, formerly the sole owner of petitioner Raymond J. Lucia Companies ("RJLC"), Inc., is a 66-year-old investment professional who—until this proceeding—had an unblemished record spanning nearly forty years. *See* J.A.69-70, 126. Mr. Lucia has worked variously as an investment adviser, registered representative of a broker-dealer, and public speaker, maintaining a sterling reputa-

tion. J.A.69-70, 126. Because of the sanctions imposed in these proceedings, however, Mr. Lucia is unemployable in his lifelong profession and on the verge of bankruptcy.

In free seminars for potential clients, Mr. Lucia promoted a retirement strategy colorfully named "Buckets of Money," which advocated a diversified portfolio from which, in retirement, investors would spend lower-risk investments first to give riskier investments time to grow. J.A.73-74, 192-93. Mr. Lucia used a slideshow that compared fictional investors following his strategy with investors following other strategies in hypothetical scenarios. J.A.75-76, 193. Two examples, which the slides described as "backtests," were based partly on historical data, such as stock returns, and partly on assumptions for other variables, such as inflation and real-estate rates of return. Both Mr. Lucia (orally) and the slides (in writing) repeatedly disclosed this use of assumptions, and the slides included dozens of disclaimers that the examples were "hypothetical." J.A.132 n.10, 134 n.14, 151, 193-98.

Before Mr. Lucia's slideshow was publicly distributed, broker-dealers with oversight of RJLC repeatedly approved the slides without raising any concerns that the slides were misleading. J.A.155, 238-40, 322. In 2003, the Commission's examination staff also reviewed a version of Mr. Lucia's slideshow and raised no concerns that it was misleading. J.A.155, 322. Indeed, about 50,000 people attended the seminars—at which no securities were offered or sold—over the years, but none

lodged any complaint that the slideshow was misleading. J.A.74, 113, 242-43, 248, 306-07, 313, 338-39, 345.

3. In September 2012, the Enforcement Division charged petitioners with violating the anti-fraud provisions of the Investment Advisers Act of 1940 and SEC rules, J.A.1, and elected to proceed in its captive administrative tribunal rather than attempting to prove its case in federal court. After a hearing, the ALJ issued an initial decision, J.A.12, and the Commission remanded for further factual findings, J.A.63. The Commission explained that the ALJ's factual findings were "a matter of considerable importance" to the Commission. J.A.65.

On remand, the ALJ found that the presentations were misleading because they used the word "backtest"—a term with no statutory or regulatory definition—to describe hypotheticals that were not based solely on historical data. J.A.68-69, 91-122. Despite expressly finding that the Enforcement Division had failed to prove any investor losses, the ALJ sanctioned Mr. Lucia by imposing a lifetime associational bar, revoking his company's registration, and assessing civil penalties of $300,000. J.A.123-26.

4. Petitioners timely sought Commission review, challenging the ALJ's decision on the merits and arguing that the ALJ's appointment violated the Appointments Clause. J.A.130-31. In a 3-2 decision, the Commission found the presentations misleading because, the majority asserted, a backtest must use "historical data"

and petitioners' hypotheticals relied in part on assumptions that did not track historical data. J.A.145-46. Relying on this Court's divided decision in *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), the Commission majority further concluded that its ALJs are mere "employees," and thus "are not subject to the requirements of the Appointments Clause," because "it is 'the Commission's issuance of a finality order' that makes [the ALJ's] decision effective and final." J.A.156, 159, 161 n.121.

In the only written dissent of 2015, Commissioners Gallagher and Piwowar sharply disagreed with the majority on the merits. *See* J.A.172-73. The dissent explained that the majority had "create[d] from whole cloth specific requirements for advertisements that include the word 'backtest,'" and then applied to petitioners a new rule deeming it misleading "if a backtest fails to use actual historical rates—even if the slideshow presentation specifically discloses the use of assumed rates for certain components." J.A.172. The dissenters also noted that Article III courts should decide the Appointments Clause issue. J.A.173.

5. A panel of this Court denied a timely petition for review. J.A.175. The panel stated that, under *Landry*, the constitutional "analysis begins, and ends," with "whether Commission ALJs issue final decisions of the Commission." J.A.184. The panel summarily rejected petitioners' objection that this approach is inconsistent with the Supreme Court's decisions in *Freytag* and *Edmond*: "[T]his court has rejected that argument, and *Landry* is the law of the circuit." J.A.184. The panel then

held that SEC ALJs are not Officers because their decisions are subject to Commission review. J.A.185-88. The panel also sustained the Commission's decision affirming the ALJ's liability and sanctions determinations. J.A.191-204.[1]

Petitioners timely filed a petition for rehearing en banc, which this Court granted on February 16, 2017. J.A.228.

SUMMARY OF ARGUMENT

I. The ALJ who presided over the hearing in this case was an "Officer" who was not appointed pursuant to constitutional requirements.

A. "Officers of the United States" can be appointed only pursuant to the Appointments Clause. U.S. Const. art. II, § 2, cl. 2. The ALJ here undisputedly was not. If the ALJ is an Officer, then the decision and order under review must be vacated. The SEC's contention that its ALJ is a mere employee, and thus exempt from appointment in the constitutionally prescribed manner, cannot be reconciled with the Appointments Clause as construed by the Supreme Court. The Supreme Court has instructed that all officials in posts "established by law" who exercise "significant authority" are "'Officer[s]'"—full stop. *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976) (per curiam). That includes officials who act as first-line trial judges—even if they *cannot* render final decisions, and certainly if they *can*. *See*

[1] Although the merits determinations are beyond the scope of the en banc order, petitioners respectfully submit that for the reasons set forth in the panel-stage briefing they cannot be held liable or sanctioned for the conduct at issue here.

Edmond v. United States, 520 U.S. 651, 664-65 (1997); *Freytag v. Comm'r*, 501 U.S. 868, 881-82 (1991). The wide range of officials the Supreme Court has deemed "Officers" confirms as much. *See*, *e.g.*, *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839).

B. The positions and powers of SEC ALJs are established by law; indeed, federal statutes and SEC regulations *refer* to them as "officers." SEC ALJs also exercise broad authority: They oversee hearings and related proceedings and issue initial decisions that by statute can—and in most cases do—become the final decision of the SEC itself. Their authority is at least as great as that exercised by other adjudicators the Supreme Court, in a long line of decisions exemplified by *Freytag* and *Edmond*, has concluded are constitutional Officers.

C. The SEC's litigating position runs counter to the legal and policy positions of all three branches of the federal government. Congress has expressly identified ALJs as "officers" and specified a manner of appointment that, if followed, would satisfy the Constitution. The Office of Legal Counsel—whose authoritative opinions the SEC has conspicuously ignored—has repeatedly confirmed that adjudicatory officials, even if their decisions are subject to further review, are inferior Officers. And every other court to decide the issue has held that SEC ALJs are inferior Officers.

II. This Court took a wrong turn in *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), when the majority held that ALJs of a different agency were not Officers because they could not issue final decisions. *Landry* was wrongly decided, as Judge Randolph explained at the time and the Tenth Circuit recently reiterated in declining to follow it. *See Bandimere v. SEC*, 844 F.3d 1168, 1182 (10th Cir. 2016) ("*Landry* place[s] undue weight on final decision-making authority"). While final decision-making can serve as an indicium of significant authority, it is not a requirement for inferior-Officer status; indeed, one of the hallmarks of an *inferior* Officer is that a *superior* Officer makes the final decision. Now is the time to overrule *Landry* and bring this Court's decisions in line with the Appointments Clause and Supreme Court precedent.

STANDARD OF REVIEW

This Court reviews legal and constitutional questions *de novo* and "owes no deference to [an] agency's pronouncement on a constitutional question." *J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041, 1044 (D.C. Cir. 2009) (internal quotation marks omitted). It will set aside the agency's decision if it is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Rapoport v. SEC*, 682 F.3d 98, 103 (D.C. Cir. 2012) (quoting 5 U.S.C. § 706(2)(A)).

STANDING

Petitioners have standing as "person[s] aggrieved by a final order of the Commission." 15 U.S.C. § 78y(a)(1); *see Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002).

ARGUMENT

The decision and order under review should be vacated because the ALJ who rendered the initial decisions was an "Office[r] of the United States" but was not appointed pursuant to the Appointments Clause.

I. SEC ALJs ARE INFERIOR "OFFICERS" OF THE UNITED STATES

The Framers considered "'the power of appointment to offices'" to be "'the most insidious and powerful weapon of eighteenth century despotism.'" *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991) (citation omitted). The "'manipulation of official appointments' had long been one of the American revolutionary generation's greatest grievances against executive power." *Id.* (citation omitted). To prevent such manipulations, the Framers "carefully husband[ed] the appointment power" to "limit its diffusion," *id.* at 883, and to ensure that "*all ... officers* of the Union, will … be the choice, though a remote choice, of the people themselves," The Federalist No. 39, at 271 (James Madison) (Cynthia B. Johnson ed., 2006) (emphasis added).

In light of these concerns, the Appointments Clause of Article II provides that "[t]he President":

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

The Appointments Clause prescribes the exclusive means for appointing any "Office[r] of the United States"—*i.e.*, any government official whose position is "established by Law" and who exercises "significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam). "Unless their selection is elsewhere provided for" in the Constitution—such as the President himself—"*all* officers of the United States are to be appointed in accordance with the Clause"; "[n]o class or type of officer is excluded because of its special functions." *Id.* at 132. Only mere employees who wield no significant federal authority or serve temporarily are exempt. *See*, *e.g.*, *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) (holding that "merchant appraiser" chosen "to aid in ascertaining the value of [imported] goods … is not an 'officer,' within the meaning of the [Appointments] [C]lause" because "[h]e has no general functions, nor any employment which has any duration as to time," "[h]is position is without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily").

The Appointments Clause recognizes two types of Officers—principal and inferior Officers—and permits distinct methods of appointment for each. *See United States v. Germaine*, 99 U.S. 508, 509-10 (1879). Principal Officers—including ambassadors, ministers, heads of departments, judges, and others who report directly to the President, *see Edmond v. United States*, 520 U.S. 651, 659 (1997)—can be appointed only by the President with the Senate's consent. Other, "inferior" Officers may be appointed, if Congress so provides, by the President alone, a Department head, or in appropriate contexts, the courts. U.S. Const. art. II, § 2, cl. 2; *Buckley*, 424 U.S. at 125, 132; *see also Morrison v. Olson*, 487 U.S. 654, 670 (1988). But in no event may *any* Officer be appointed by anyone other than the President, a Department head, or a court. *Buckley*, 424 U.S. at 132-33.

This explicit constitutional limitation is much "more than a matter of 'etiquette or protocol'": It is a crucial "structural safeguar[d] of the constitutional scheme." *Edmond*, 520 U.S. at 659. The Appointments Clause's restrictions "preserv[e] … the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag*, 501 U.S. at 878. The Framers "understood … that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people." *Id.* at 884. That limitation applies to the appointment of both principal *and* inferior Officers. *Id.* at 886 ("[c]abinet-level departments are limited in number and easily identified," and

"[t]heir heads are subject to the exercise of political oversight and share the President's accountability to the people"); *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1239 (2015) (Alito, J., concurring) (the "exception from the ordinary rule of Presidential appointment for 'inferior Officers,' … has accountability limits of its own").

The "structural safeguar[d]" afforded by the Appointments Clause, *Edmond*, 520 U.S. at 659, is so fundamental that an impropriety in an Officer's appointment "goes to the validity of the [underlying] proceeding" itself. *Freytag*, 501 U.S. at 879; *see also United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (defect in the appointment of Officer is "an irregularity which would invalidate a resulting order"). Like other "structural" defects, the participation of an adjudicator exercising authority in violation of Article II impugns the entire proceeding. As the Supreme Court has stressed, the "separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995); *see also Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 123 (D.C. Cir. 2015) ("[A]n Appointments Clause violation is a structural error that warrants reversal regardless of whether prejudice can be shown.").

These principles compel vacatur of the Commission's decision here. As the Commission conceded, "[i]t is undisputed that" the SEC's ALJs—including the ALJ

who decided this case—are "*not* appointed by the President, the head of a department, or a court of law." J.A.157 (emphasis added). Instead, SEC ALJs are hired by the Commission's Office of Administrative Law Judges, with input from the Chief Administrative Law Judge, who may only choose among candidates identified by the Office of Personnel Management. *See* Notice of Filing 1-3, *In the Matter of Timbervest, LLC*, Admin. Proc. File No. 3-15519 (June 4, 2015), https://www.sec.gov/litigation/apdocuments/3-15519-event-139.pdf; *see also* 5 C.F.R. § 930.204(a) (ALJs must either be chosen from "list of eligibles provided by [the Office of Personnel Management]" or be specially approved by the OPM). As pertinent here, only a quorum of the Commission when it acts as a body is a "Head of a Department" under the Appointments Clause. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 512-13 (2010) (internal quotation marks and brackets omitted). None of the SEC personnel involved in selecting SEC ALJs is constitutionally competent to appoint Officers.

The Commission took the position below that its ALJs are exempt from the Appointments Clause altogether: "[A] Commission ALJ," it asserted, "is a 'mere employee'—not an 'officer'—and thus the appointment of a Commission ALJ is not covered by the Clause." J.A.131. The Commission has never disputed that, if SEC ALJs are Officers, the petition for review must be granted. *See Bandimere v. SEC*,

844 F.3d 1168, 1181 & n.31 (10th Cir. 2016) (granting petition for review on this basis).[2]

A. The Category Of Constitutional Officers Is Expansive

Every federal-government official whose position is "established by Law" and who exercises "significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by" the Appointments Clause. *Buckley*, 424 U.S. at 125, 132. That simple, expansive definition is consistent with the Clause's "'unusually broad'" text. *Bandimere*, 844 F.3d at 1184 (citation omitted); 2 Samuel Johnson, *A Dictionary of the English Language*, s.v. "officer" (6th ed. 1785) ("A man employed by the publick"); 2 Noah Webster, *An American Dictionary of the English Language*, s.v. "officer" (1828) ("A person commissioned or authorized to perform any public duty"); *see also* William Blackstone, 3 *Commentaries on the Laws of England* 327-46 (1765)

[2] In particular, the Enforcement Division did not argue before the Commission, and the Commission did not argue before the panel, that the structural constitutional error in the improper appointment of its ALJ can be overlooked or excused under harmless-error, ratification, *de facto*-officer, or any similar doctrines; nor has the government disputed in this case that the only available and appropriate remedy for this constitutional violation is vacatur of the challenged orders. *See L.A. Tucker Truck Lines*, 344 U.S. at 38. At this stage of the proceeding, the government cannot assert any such argument for the first time under basic principles of forfeiture and waiver, as well as the doctrine that an agency decision may not be defended on grounds not set forth therein. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). Moreover, any such argument would be procedurally improper because it is not within or encompassed by the issues to which the en banc order is "limited." J.A.229.

("officer" refers to, among other persons, "sheriffs; coroners; justices of the peace; constables; surveyors of highways; and overseers of the poor"). And it is faithful to the Framers' understanding of "the word office" to have "[a]n extensive meaning." Jonathan Elliot, 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 454-55 (1836); *id.* at 43-44 ("inferior officers of the United States" include even those with "trifling" duties). Reading "Officer" broadly honors the Clause's purpose of "preventing the diffusion of the appointment power," *Freytag*, 501 U.S. at 878; a crabbed definition, in contrast, would invite an army of federal officials armed with significant authority, but accountable to no one, to replicate themselves *ad infinitum*, *cf. id.* at 885 ("a holding that every organ in the Executive Branch" has appointment power "would multiply indefinitely the number of actors eligible to appoint").

Buckley's controlling definition was drawn from over a century of Supreme Court precedent holding a wide range of officials to be "Officers" and therefore subject to the Appointments Clause, including:

- district-court clerks, *Hennen*, 38 U.S. (13 Pet.) at 258;
- a clerk to an "assistant treasurer" in Boston, *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393-94 (1868);
- an "assistant-surgeon" and "cadet-engineer" appointed by the Secretary of the Navy, *United States v. Moore*, 95 U.S. 760, 762 (1878); *United States v. Perkins*, 116 U.S. 483, 484 (1886);

- "thousands of clerks in the Departments of the Treasury, Interior and the othe[r]" departments, *Germaine*, 99 U.S. at 511, responsible for "the records, books, and papers appertaining to the office," *Hennen*, 38 U.S. (13 Pet.) at 259;

- election monitors, *Ex parte Siebold*, 100 U.S. 371, 397-99 (1880);

- federal marshals, *Siebold*, 100 U.S. at 397;

- "commissioners of the circuit courts" who "t[ook] … bail for the appearance of persons charged with crime," *United States v. Allred*, 155 U.S. 591, 594 (1895);

- extradition commissioners, *Rice v. Ames*, 180 U.S. 371, 378 (1901); and

- U.S. attorneys, *Myers v. United States*, 272 U.S. 52, 159 (1926).

The Supreme Court's post-*Buckley* cases confirm the Appointments Clause's broad scope and reaffirm that the touchstone is whether an office is "established by Law" and empowers the incumbent to exercise "significant authority." In particular, the Court has consistently and repeatedly held that government officials who preside over adjudicative proceedings in the role of a trial judge exercise just such authority, and so constitute "inferior Officers." That conclusion should not surprise: Federal adjudicators—who by definition wield the power of federal law to sanction transgressors—are the kind of officials who *ought* to be accountable, directly or indirectly, to the public. The SEC's endorsement of a cadre of unaccountable adjudicators is totally incompatible with the Appointments Clause.

The critical decision is *Freytag*, 501 U.S. 868, which squarely addressed whether non-Article III judges employed to preside over trials and make preliminary

dispositions—"special trial judges" of the U.S. Tax Court—are "Officers" under the Appointments Clause. *Id.* at 880-82. Special trial judges were authorized to oversee litigation and conduct trials in any case assigned to them by the Tax Court's Chief Judge. *Id.* at 873. While in certain types of cases they could render decisions "subject to such conditions and review as the [Tax Court] may provide," 26 U.S.C. §§ 7443A(b)-(c) (1988), in the type of case at issue in *Freytag*, the judge could only "propos[e] findings and an opinion," while a Tax Court judge would render the "actual decision." 501 U.S. at 873.

Freytag unanimously held that special trial judges are Officers and therefore must be appointed pursuant to the Clause. 501 U.S. at 880-82; *accord id.* at 901 (Scalia, J., concurring in part and concurring in the judgment). Special trial judges, the Court explained, satisfied both of *Buckley*'s requirements for "Officers." *Id.* at 881 (majority op.). First, "[t]he office of special trial judge is 'established by Law'"; unlike special masters appointed on a "temporary, episodic basis," "the duties, salary, and means of appointment for" special trial judges "are specified by statute." *Id.* (citation omitted). Second, *Freytag* "agree[d]" with lower courts that special trial judges' "authority" was "so significant that it was inconsistent with the classifications of lesser functionaries or employees." *Id.* (internal quotation marks omitted) (citing *Samuels, Kramer & Co. v. Comm'r*, 930 F.2d 975, 981 (2d Cir. 1991) ("Although the ultimate decisional authority in cases under section 7443A(b)(4) rests with

the Tax Court judges, the special trial judges do exercise a great deal of authority in such cases. … They exercise a great deal of discretion and perform important functions, characteristics that we find to be inconsistent with the classifications of 'lesser functionary' or mere employee.")). The *Freytag* Court emphasized that special trial judges "perform more than ministerial tasks," such as "tak[ing] testimony," "conduct[ing] trials," and "rul[ing] on the admissibility of evidence." *Id.* at 881-82.

Freytag expressly rejected the government's argument that special trial judges were mere "employees" because they did "no more than assist the Tax Court judge in taking the evidence and preparing the proposed findings and opinion" and "lack[ed] authority to enter a final decision" in the type of proceeding at issue in *Freytag*. 501 U.S. at 880-81. That argument, the Court held, "ignore[d] the significance of the duties and discretion that special trial judges possess." *Id.* While final decision-making power can be independently *sufficient* to demonstrate significant authority, the Court concluded, special trial judges' exercise of federal authority would render them Officers *even if* they had lacked final decision-making power in all cases. *Id.* at 881-82.

The Supreme Court has since recognized that the Appointments Clause applies to military judges as well. In *Weiss v. United States*, 510 U.S. 163 (1994), the Court explained that, "because of the authority and responsibilities [military judges] possess"—which included ruling on procedural and legal issues and adjudicating

offenses under the Uniform Code of Military Justice—military judges "act as 'Officers' of the United States." *Id.* at 169. In *Ryder v. United States*, 515 U.S. 177 (1995), the Court held that the *de facto*-officer doctrine could not cure the invalid method of appointment of a military judge on the Coast Guard Court of Military Review, who the Court had no difficulty concluding was an Officer. *Id.* at 180-88. And in *Edmond*, the Court recognized that intermediate appellate military judges are Officers because they "independently 'weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact.'" 520 U.S. at 662, 665-66 (quoting 10 U.S.C. § 866(c)). Those judges were not *principal* Officers because they were subordinate to a presidential appointee and "ha[d] no power to render a final decision" on their own. *Id.* at 665. But that subordination and lack of power to render unreviewable final decisions is precisely what made them "*inferior* [Officers] within the meaning of Article II." *Id.* at 666 (emphasis added).

Supreme Court precedent thus makes clear that the Appointments Clause applies to any federal official who holds a post established by law and exercises significant federal authority. The Court's cases further demonstrate that adjudicators—officials who oversee proceedings and make decisions regarding liability and its consequences under federal law—are Officers even if their decisions are subject to review by a superior Officer and thus they lack final decision-making authority. (Again, this should not surprise: Federal magistrate judges are obviously Officers

even though their judgments are subject to review by a district court and on appeal.) Whether a federal adjudicator has final decision-making authority may bear on whether the adjudicator is a *principal* or *inferior* Officer, but it is not dispositive of the question whether he is an Officer as opposed to a mere employee. Indeed, since the Founding, the Supreme Court has never found an adjudicative official to be a mere employee.

B. SEC ALJs Have The Characteristics Of Officers

Under an unbroken line of Supreme Court authority, SEC ALJs are "Officers" because their offices are "'established by law'" and they exercise "'significant authority.'" *Freytag*, 501 U.S. at 881 (quoting U.S. Const. art. II, § 2, cl. 2, and *Buckley*, 424 U.S. at 126). While this Court need not decide whether *all* agency ALJs are Officers, the SEC's ALJs are Officers as a result of the important functions they serve and substantial discretion they exercise pursuant to the securities laws and the SEC's regulations. They must therefore be appointed in the manner prescribed in the Appointments Clause.

1. Offices Established By Law

The positions held by SEC ALJs are "'established by Law.'" *Freytag*, 501 U.S. at 881 (citation omitted); *Bandimere*, 844 F.3d at 1179. Like the special trial judges in *Freytag*, their "duties, salary, and means of appointment" are all "specified by statute." 501 U.S. at 881. The U.S. Code establishes the positions of

SEC ALJs as permanent employees, and specifies their duties, salary, and method of appointment. *See* 5 U.S.C. §§ 556-557 (establishing ALJs' position and powers in hearings); *id.* § 5372 (establishing salaries); *id.* § 3105 (establishing hiring practices). An ALJ's position is also not "temporary," *Freytag*, 501 U.S. at 881, as ALJs "receiv[e] a career appointment," 5 C.F.R. § 930.204(a), and may be removed only for cause, *see* 5 U.S.C. § 7521(a).

The duties of SEC ALJs are further delineated in the securities laws and Commission regulations. Federal statutes establish that the SEC may "delegate … any of its functions to … an administrative law judge." 15 U.S.C. § 78d-1(a). The Commission has done so, adopting regulations specifying ALJs' powers, 17 C.F.R. § 200.14, including adjudicative authority, *id.* § 200.30-9, and providing that the authority delegated to SEC ALJs is as broad as the Administrative Procedure Act ("APA") permits, *id.* § 201.111. There can be no serious dispute that SEC ALJs hold offices established by law.

2. Significant Federal Authority

The SEC's ALJs also unquestionably "'exercis[e] significant authority pursuant to the laws of the United States.'" *Freytag*, 501 U.S. at 881 (quoting *Buckley*, 424 U.S. at 126); *Bandimere*, 844 F.3d at 1178, 1188 (table summarizing SEC ALJs' duties showing they "carry out 'important functions'" and "'exercis[e] significant authority'"). The Commission has endowed them with a litany of substantive and

procedural powers involving the exercise of broad discretion in enforcement proceedings, which closely parallel the authority of the special trial judges in *Freytag*.

SEC ALJs are responsible for "conduct[ing] hearings in proceedings instituted by the Commission" pursuant to authority vested in them by "the Administrative Procedure Act and the federal securities laws." 17 C.F.R. § 200.14(a). In overseeing these proceedings, ALJs exercise authority over a wide range of matters at every stage of the case, including:

- amending charging documents, *id.* § 201.200(d)(2);
- entering orders of default, *id.* § 201.155;
- consolidating proceedings, *id.* § 201.201(a);
- "[a]dminister[ing] oaths and affirmations," *id.* §§ 200.14(a)(1), 201.111(a);
- "[i]ssu[ing] subpoenas," *id.* §§ 200.14(a)(2), 201.111(b);
- ordering depositions and acting as the "deposition officer," *id.* §§ 201.233-.234;
- ordering production of evidence and regulating document production, *id.* §§ 201.111(b), .230, .232;
- issuing protective orders, *id.* § 201.322;
- "[r]ul[ing] upon motions," including motions for summary disposition, *id.* §§ 200.14(a)(7), 201.111(h), .250;
- rejecting filings for procedural noncompliance, *id.* § 201.180(b);
- granting extensions of time and stays, *id.* § 201.161;

- "[h]old[ing] pre-hearing conferences" and "requir[ing]" attendance at such conferences, *id.* §§ 200.14(a)(6), 201.111(e), .221(b);
- ordering prehearing submissions, *id.* § 201.222(a);
- "[r]egulat[ing] the course of [the] hearing," *id.* §§ 200.14(a)(5), 201.111(d);
- receiving "relevant evidence" and ruling upon admissibility, *id.* § 201.111(c);
- "[r]ul[ing] on offers of proof," *id.* §§ 200.14(a)(3), 201.111(c);
- "[e]xamin[ing] witnesses," *id.* § 200.14(a)(4);
- regulating the scope of cross-examination, *id.* § 201.326;
- regulating "the conduct of the parties and their counsel," *id.* § 201.111(d); and
- imposing sanctions for "contemptuous conduct," *id.* § 201.180(a).

At the hearing's conclusion, unless the Commission directs otherwise or the parties waive an ALJ ruling, the ALJ must "prepare an initial decision containing the conclusions as to the factual and legal issues presented" and "issue an appropriate order." 17 C.F.R. §§ 200.14(a)(8), 201.111(i), .141(b), .360(a). The ALJ must also prescribe the deadline for seeking review of that decision by the Commission, which the ALJ may "exten[d]" "for good cause shown." *Id.* § 201.360(b).

Although the parties may request review of the ALJ's initial decision by the Commission, 17 C.F.R. § 201.410(a), such review is the exception, not the rule. The SEC issues in each case a "Notice That Initial Decision Has Become Final," stating

whether review was sought and granted (either upon request or *sua sponte*). *See*, *e.g.*, *In the Matter of Horizon Wimba, Inc.*, Release No. 75,929, 2015 WL 5439958 (Sept. 16, 2015). A review of those notices from 2014 and 2015 shows that in approximately 90% of such cases, no further review was conducted. *See* SEC, ALJ Initial Decisions, https://www.sec.gov/alj/aljdec.shtml (all Internet sites last visited Mar. 9, 2017). Parties do not always seek Commission review, and even when a party seeks review, it is generally discretionary: Aside from certain specific categories of cases reviewable as matter of right enumerated in SEC regulations—such as Commission action suspending trading in a security, and denials of requests for Commission action regarding registration statements, *see* 17 C.F.R. §§ 201.411(b)(1)(i)-(iii)—the Commission can "decline to review any other decision[s]," *id.* § 201.411(b)(2). The Commission has exercised this discretion to decline review. *See In the Matter of Bellows*, Release No. 40,411, 1998 WL 611766 (Sept. 8, 1998). In deciding whether to review an ALJ's decision, moreover, the Commission employs a "clearly erroneous" standard for factual findings. 17 C.F.R. § 201.411(b)(2)(ii)(A). A respondent thus may have to show clear error just to *receive* SEC review. And although the Commission may grant review *sua sponte*, *id.* § 201.411(c), such review is similarly purely "discretionary," 15 U.S.C. § 78d-1(b).

When the Commission does *not* grant discretionary review—for whatever reason—the ALJ's initial decision is by statute the agency's final word: In such cases,

"the action of any … administrative law judge … shall, for all purposes, including appeal or review thereof, be deemed *the action of the Commission*." 15 U.S.C. §§ 78d-1(b)-(c) (emphasis added). SEC regulations echo this, providing that, "[i]f a party … entitled to review fails to file timely a petition for review … , and if the Commission does not order review of a decision on its own initiative, the Commission *will* issue an order that the *decision has become final* as to that party." 17 C.F.R. § 201.360(d)(2) (emphases added). The SEC simply tacks on a pro forma, ministerial order confirming that fact. *See*, *e.g.*, *Horizon Wimba*, 2015 WL 5439958, at *1 ("The time for filing a petition for review of the initial decision in this proceeding has expired. … Accordingly, notice is hereby given … that the initial decision of the administrative law judge has become the final decision of the Commission."). This process parallels the APA, under which, absent a proper appeal, ALJs' "initial decisions" automatically become final "*without further proceedings*." 5 U.S.C. § 557(b) (emphasis added).

SEC ALJs also have power to issue default orders, which the Commission has acknowledged are immediately judicially "enforceable" without *any* further Commission action. *In the Matter of Alchemy Ventures, Inc.*, Release No. 70,708, 2013 WL 6173809, at *4 (Oct. 17, 2013). Although the SEC has concluded that "issuing initial decisions in cases of default is the proper approach going forward," it expressly "emphasize[d] that this conclusion does not mean that prior default orders

are invalid or judicially unenforceable if an initial decision was not issued in those cases." *Id.*

SEC ALJs, in short, have most of the powers of federal district judges (and magistrate judges), whom no one would describe as mere "aides" (J.A.157) to reviewing courts. The Commission itself has compared its ALJs to Article III judges. *See* SEC, Office of Administrative Law Judges, https://www.sec.gov/alj (ALJs "conduct public hearings … in a manner similar to non-jury trials in the federal district courts"). This case could have been brought *either* in federal district court *or* in the SEC's administrative tribunal; the same federal laws are being applied by the adjudicators in both instances. But whereas Article III judges are insulated from political pressures by life tenure, ALJs are creatures of the Commission itself. If the Commission chooses to bring cases in its pet court, the Commission—as a body—has to take responsibility for its captive adjudicators.

The authority exercised by SEC ALJs mirrors—and in some ways, exceeds—that of the special trial judges in *Freytag*, whom the Supreme Court held are Officers by dint of their ability to "take testimony," "conduct trials," "rule on the admissibility of evidence," and otherwise perform "more than ministerial tasks." 501 U.S. at 881-82. SEC ALJs do all of those things, and more. *See Bandimere*, 844 F.3d at 1179-82 ("SEC ALJs closely resemble the STJs described in *Freytag*"). Rather than

address these powers—which are not contested—the Commission fixated on a single power ALJs lack: authority to punish disobedience of discovery and other orders with contempt sanctions. *See* J.A.161. But the Commission never explained why that cherry-picked power should be pivotal to an official's status under the Appointments Clause. And its ALJs undisputedly can *issue* subpoenas and discovery orders, 17 C.F.R. §§ 200.14(a)(2), 201.111(b), .230, .232-.234, .322, which the Commission surely expects litigants to obey.

In fact, SEC ALJs also have even greater discretion and adjudicative authority than the military judges in *Weiss*, *Ryder*, and *Edmond*. They hear evidence, resolve factual issues, decide outcomes, and employ broad, effectively unreviewable discretion overseeing discovery, issuing subpoenas, and sanctioning parties. Since those other adjudicators are inferior Officers, *a fortiori* the SEC's ALJs are Officers as well. *Cf. Buckley*, 424 U.S. at 126 ("If a postmaster first class, and the clerk of a district court, are inferior officers of the United States within the meaning of the Appointments Clause, as they are, surely the Commissioners before us are at the very least such 'inferior Officers' within the meaning of that Clause" (citations omitted)).

C. All Three Branches Have Recognized That ALJs Are Officers

"Neither Congress nor the Executive can agree to waive th[e] structural protection" of the Appointments Clause. *Freytag*, 501 U.S. at 880; *see Bandimere*, 844

F.3d at 1185-86. The determination whether SEC ALJs are Officers is vested in this Court (and, if need be, the Supreme Court). Nevertheless, it is telling that the SEC's litigating position in this case runs counter to the legal and policy positions of *all three* branches of the federal government.

1. Legislative

The securities laws *refer* to ALJs as "officers." The Securities Act of 1933 states that "[a]ll hearings … may be held before the Commission or an *officer* or *officers* of the Commission designated by it." 15 U.S.C. § 77u (emphases added); *see also id.* §§ 78v, 80a-40, 80b-12 (same). "[C]onduct[ing] hearings" is precisely what SEC ALJs do. 17 C.F.R. § 200.14(a). That undoubtedly is why the SEC's own rules define a "hearing *officer*" as including "*administrative law judge[s]*." *Id.* § 201.101(a)(5) (emphases added).

This characterization of ALJs who conduct hearings as "officers" was no accident. When Congress uses terms like "officer" that have a settled legal meaning, courts presume that Congress adopted that meaning, absent clear evidence to the contrary. *See Beck v. Prupis*, 529 U.S. 494, 500-01 (2000). And Congress had this settled understanding of "officer" in mind when it amended the APA to define an "officer" as (*inter alia*) "an individual who is … required by law to be appointed in the civil service by … *the head of an Executive agency*." 5 U.S.C. § 2104(a)(1)(C) (emphasis added); *accord* U.S. Dep't of Justice, *Attorney General's Manual on the*

Administrative Procedure Act 81-83 (1947) ("*Manual*") (repeatedly referring to ALJs as "presiding officers"). Congress had the same understanding in crafting the securities laws. It referred to the "officers" who hold hearings in cases before the Commission, *i.e.*, ALJs, in direct relation to *principal* constitutional Officers (the members of the Commission) who "designat[e]" them. 15 U.S.C. § 77u. This direct "relationship with … higher ranking," Senate-confirmed "officer[s]" is a hallmark of constitutional-Officer status. *Edmond*, 520 U.S. at 662-63.

The Tenth Circuit recently rejected the SEC's suggestion that "Congress intended its ALJs to be employees," since the SEC had neither "statutory language" nor "legislative history" on its side. *Bandimere*, 844 F.3d at 1185. The most the SEC could point to was Congress's "placing the position within the civil service and tasking the OPM to prescribe rules governing ALJ hiring." *Id.*; *see also Ramspeck v. Fed. Trial Exam'rs Conference*, 345 U.S. 128, 131-32 (1953). But, the *Bandimere* majority rightly concluded, any weight the *general* rules for ALJs carried was counteracted by the "significant authority" granted SEC ALJs in both "the APA" and, specifically, "the Exchange Act." 844 F.3d at 1185.

2. Executive

Although the SEC possesses independent litigating authority in cases arising under the securities laws, it has no special expertise or institutional competence to construe the Appointments Clause. That responsibility resides in the Office of Legal

Counsel within the Department of Justice ("OLC"), which has rendered a formal opinion entitled "Officers of the U.S. Within the Meaning of the Appointments Clause." 31 Op. O.L.C. 73 (2007). That opinion has never been withdrawn or disavowed by the President or the Attorney General, and thus it stands as the authoritative view of the Executive Branch on the question in this case.

The OLC opinion confirms, in so many words, that an official who holds "any position … , however labeled," that is both "continuing" and "invested by legal authority with a portion of the sovereign powers of the federal Government" is an "'Office[r] of the United States' [subject] to the procedures specified in the Appointments Clause." 31 Op. O.L.C. at 73-74. "'[I]ndependent discretion' is not a necessary attribute of delegated sovereign authority," and "[t]he question … is simply whether a position possesses delegated sovereign authority to act in the first instance, whether or not that act may be subject to direction or review by superior officers." *Id.* at 93, 95. Instead, as the OLC has explained in a subsequent opinion, direction and supervision by a superior distinguishes inferior and principal Officers. *See Whether the Special Master for Troubled Asset Relief Program Executive Compensation Is a Principal Officer Under the Appointments Clause*, 34 Op. O.L.C. 1, 8-9 (2010). Indeed, the OLC has opined that ALJs with similar functions to SEC ALJs are inferior Officers. *See Sec'y of Educ. Review of Admin. Law Judge Decisions*, 15 Op. O.L.C. 8, 14 (1991).

All of these OLC opinions are contrary to the SEC's position in this case. Yet the SEC has never cited any of them, and even though Justice Department attorneys have appeared in this Court, they have not endeavored to explain the inconsistency between the agency's position here and the OLC's "authoritative legal advice." DOJ, Office of Legal Counsel, http://www.justice.gov/olc. In other cases, the government correctly conceded the Officer status of officials who, like SEC ALJs, perform significant adjudicatory functions and issue decisions that are subject to discretionary review. *See* U.S. Br. 5-6, *Ryder v. United States*, No. 94-431, 1995 WL 130573 (Mar. 23, 1995) (not disputing that an Appointments Clause violation had occurred); *Edmond*, 520 U.S. at 656; *Weiss*, 510 U.S. at 169. The government's refusal to do so here is both unexplained and inexplicable. It does the Executive Branch no credit to announce neutral principles in advance, only to ignore them in particular cases for reasons of enforcement expediency.

3. Judicial

The Supreme Court has specifically noted that "the role of the … administrative law judge … is 'functionally comparable' to that of a judge." *Butz v. Economou*, 438 U.S. 478, 513 (1978). "He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions." *Id.* And a number of Supreme Court Justices have expressed the view that, as a general matter, ALJs are inferior Officers. *See Freytag*, 501 U.S. at 910 (Scalia, J., joined by

O'Connor, Kennedy, and Souter, JJ., concurring in part and concurring in the judgment) (federal government's "corps of administrative law judges numbering more than 1,000 … are all executive officers") (emphasis omitted); *Free Enter. Fund*, 561 U.S. at 542 (Breyer, J., joined by Stevens, Ginsburg, and Sotomayor, JJ., dissenting) (same).

As noted above, the Tenth Circuit has squarely disagreed with the panel decision in this case in concluding that SEC ALJs are inferior Officers. *Bandimere*, 844 F.3d 1168. Every other court to have considered the question has reached the same conclusion. *Ironridge Glob. IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294 (N.D. Ga. 2015), *appeal dismissed*, No. 16-10205 (11th Cir. Sept. 27, 2016); *Duka v. SEC*, 103 F. Supp. 3d 382 (S.D.N.Y. 2015), *vacated on other grounds*, No. 15-2732 (2d Cir. June 13, 2016); *Gray Fin. Grp., Inc. v. SEC*, 166 F. Supp. 3d 1335 (N.D. Ga. 2015), *vacated on other grounds sub nom. Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016); *Hill v. SEC*, 114 F. Supp. 3d 1297, 1319 (N.D. Ga. 2015), *vacated on other grounds*, 825 F.3d 1236 (11th Cir. 2016).

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SEC ALJs possess the defining characteristics of constitutional "Officers": They hold offices established by law and exercise significant federal authority. *See* Jennifer L. Mascott, *Who Are 'Officers of the United States'?*, 70 Stan. L. Rev. (forthcoming 2017) (draft at https://tinyurl.com/zewj8z2); Kent Barnett, *Resolving*

the ALJ Quandary, 66 Vand. L. Rev. 797, 799-803, 810-14 (2013). By not properly appointing its ALJs, the Commission abdicated its responsibility to "direc[t] and supervis[e]" its Officers' selection and behavior, *Edmond*, 520 U.S. at 663, and eschewed the "reputational stake in the quality of the individuals" it must appoint, *Freytag*, 501 U.S. at 907 (Scalia, J., concurring). "The current ALJ hiring process whereby the OPM screens applicants, proposes three finalists to the SEC, and then leaves it to somebody at the agency to pick one," in short, "is a diffuse process that does not lend itself to the accountability that the Appointments Clause was written to secure." *Bandimere*, 844 F.3d at 1181. The current regime enables the SEC to pretend that its administrative tribunal is independent when, in fact and in law, it is not. That is a prime example of the abuse—unaccountability—that the Appointments Clause was included in the Constitution to prevent.

II. *LANDRY* SHOULD BE OVERRULED

The SEC's sole authority for unilaterally declaring its ALJs exempt from the Appointments Clause (J.A.131, 156-61) was this Court's divided decision in *Landry*, which (according to the Commission) established additional requirements that SEC ALJs do not possess. *Landry* was wrongly decided 16 years ago and has not improved with age. It should be explicitly overruled.

A. *Landry* Was Wrongly Decided

Landry deemed two factors—authority to issue final decisions, and the agency's standard of review—dispositive of Officer status. *See* 204 F.3d at 1132-34. As Judge Randolph explained in his *Landry* concurrence, however, neither factor "survives close attention." *Id.* at 1140-43 (Randolph, J., concurring in part and concurring in the judgment). The Tenth Circuit recently declined to follow *Landry* for precisely this reason. *Bandimere*, 844 F.3d at 1182.

1. Final Decision-Making Power

Landry's holding that officials who "never render the [agency's] decision" are not Officers, 204 F.3d at 1133, cannot be squared with *Freytag*, which expressly *rejected* the argument that officials who enter proposed opinions "may be deemed employees … because they lack authority to enter a final decision," 501 U.S. at 881. Compounding *Landry*'s error, the SEC interpreted *Landry* as exempting from the Appointments Clause all officials whose decisions *can and do* become the agency's final word, so long as those decisions are subject to discretionary review. J.A.156-59. That interpretation, too, contravenes Supreme Court precedent and quite literally rewrites the Constitution.[3]

[3] SEC ALJs have both types of final decision-making power, regardless. By statute, when the Commission declines to review (as it does in 90% of cases), the ALJ's action "shall, for all purposes, … be deemed the action of the Commission." 15 U.S.C. § 78d-1(c). SEC ALJs thus have final decision-making power under

a. The *Landry* majority mistakenly concluded that the "power of final decision … was critical to the [*Freytag*] Court's decision," and that Federal Deposit Insurance Corporation ("FDIC") ALJs were not Officers because they lacked such power. 204 F.3d at 1134. Although *Freytag* discussed that power, 501 U.S. at 882, the *Landry* "majority neglect[ed] to mention" that the Supreme "Court clearly designated this as an *alternative* holding." 204 F.3d at 1142 (Randolph, J., concurring in part and concurring in the judgment) (emphasis added). In short, *Landry* conflated what is typically a *sufficient* feature of Officer status with a gateway requirement for the Appointments Clause to apply at all.

Freytag expressly rejected the contention that lack of power to make final decisions takes officials outside the Appointments Clause. *See* 501 U.S. at 881-82. *Freytag* first explained that Tax Court special trial judges exercised "significant" authority in overseeing day-to-day trial proceedings. *Id.* at 881. After holding that special trial judges were Officers based on *those* duties, the Court rejected the government's argument that the judges were not Officers "because they lack authority to enter a final decision." *Id.* "[T]his argument," the Court held, "ignore[d] the

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Landry because—unlike in *Landry*, 204 F.3d at 1133—the ALJ's decision is not *replaced* by a final agency order, but *itself* "become[s] final," 17 C.F.R. § 201.360(d)(2); *see Horizon Wimba*, 2015 WL 5439958, at *1. Even under the SEC's implausible extension of *Landry*, SEC ALJs have final decision-making authority because they have statutory authority to issue default orders that are judicially "enforceable" without *any* SEC review. *Alchemy Ventures, Inc.*, 2013 WL 6173809, at *4; *see also* 17 C.F.R. § 201.155.

significance of the duties and discretion that special trial judges possess." *Id*. Their "important functions" in conducting hearings, including power to "take testimony," "rule on the admissibility of evidence, and … to enforce compliance with discovery orders," standing alone satisfied *Buckley*'s test. *Id.* at 881-82.

To be sure, the *Freytag* Court held *in the alternative* that "*[e]ven if* the duties of special trial judges … were not *as significant as we … have found them to be*, our conclusion would be unchanged." 501 U.S. at 882 (emphases added). But as Judge Randolph cogently explained, that "conclusion" was "[t]he conclusion" the *Freytag* Court "had reached in the preceding paragraphs"—"namely, that although special trial judges may not render final decisions, they are nevertheless inferior officers of the United States." 204 F.3d at 1142 (Randolph, J., concurring in part and concurring in the judgment); *see Freytag*, 501 U.S. at 881 (citing *Samuels*, 930 F.2d at 985). Indeed, the Supreme Court expressly "agree[d]" with the Second Circuit's *Samuels* decision, 501 U.S. at 881, which held that special trial judges are inferior Officers because they "exercise a great deal of discretion and perform important functions" in cases where they issue only proposed opinions and "the ultimate decisional authority … rests with the Tax Court judges," 930 F.2d at 985. The *Freytag*

Court's conclusion remained "unchanged" by the fact that special trial judges *also* had the authority to issue final decisions in other cases. *Freytag*, 501 U.S. at 882.[4]

As the Tenth Circuit recently confirmed, "*Freytag*'s holding undermines [*Landry*'s] contention" that "*every* inferior officer *must* possess final decision-making power." *Bandimere*, 844 F.3d at 1184; *see id.* at 1182 ("We disagree … that final decision-making power is dispositive to the question at hand"). "[P]roperly read," the Tenth Circuit concluded, "*Freytag* did not place 'exceptional stress' on final decision-making power," but rather held that special trial judges are "inferior officers *even though* 'the ultimate decisional authority … rests with the Tax Court judges.'" *Id*. at 1182-83 (emphasis added) (quoting *Freytag*, 501 U.S. at 985). The Tenth Circuit is correct: *Landry* "place[s] undue weight" on a factor that, though perhaps "*relevant* in determining whether a public servant exercises significant authority," is not a "*predicate* for inferior officer status." *Id*. at 1183 (emphases added).

Neither *Freytag* nor any other Supreme Court decision has equated significant authority with final decision-making power. Indeed, the Supreme Court has repeatedly deemed adjudicators who *lacked* such authority constitutional "Officers." *See*,

[4] Although the government in *Freytag* argued that petitioners lacked standing to make this additional argument because special trial judges lacked final decision-making authority in the type of case at bar, the Court rejected the government's standing argument as "beside the point." *Freytag*, 501 U.S. at 882. "If a special trial judge is an inferior officer [in cases where he can issue a final decision]," the Court reasoned, "he is an inferior officer within the meaning of the Appointments Clause." *Id.*

e.g., *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 354 (1931) ("All the [Officer's] acts … were preparatory and preliminary to a consideration of the charge by a grand jury and … the final disposition of the case in the district court"); *Allred*, 155 U.S. at 595 (commissioners are "subject to the orders and directions of the court appointing them"); *accord Weiss*, 510 U.S. at 168 ("No sentence imposed [by the Officer] becomes final until it is approved by the officer who convened the court-martial"). *None* of these officials would be Officers under *Landry*'s finality test, yet the Supreme Court has held that *all* of them are. Even federal magistrate judges—who wield wide authority and plainly are Officers under *Buckley*—would not be Officers under *Landry* because they cannot (absent consent) render final decisions on the merits. 28 U.S.C. § 636(b)(1)(A). Since all of these officials are Officers notwithstanding their lack of final decision-making ability, *Landry* was wrong in holding that such ability is essential to Officer status.

Landry's finality rule turns the Appointments Clause on its head. The Supreme Court has made clear that an official's inability to render final decisions is often a *defining feature* of inferior Officers that distinguishes them from principal Officers. *Edmond*, for example, held that judges on the Coast Guard Court of Criminal Appeals are inferior Officers precisely because they "have no power to render a final decision … unless permitted to do so by other Executive officers." 520 U.S. at 665; *see also Ass'n of Am. R.Rs.*, 135 S. Ct. at 1239 (Alito, J., concurring) ("Inferior

officers can do many things, but nothing final should appear in the Federal Register unless a Presidential appointee has at least signed off on it"). This Court, too, has concluded that the ability to "issue decisions that are final for the executive branch" is the mark of a principal—not inferior—Officer. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1340 (D.C. Cir. 2012); *see also Free Enter. Fund v. PCAOB*, 537 F.3d 667, 672 (D.C. Cir. 2008) (holding that PCAOB members were inferior Officers because their "exercise of [broad] duties is subject to check by the Commission at every significant step"), *rev'd in part on other grounds*, 561 U.S. 477 (2010).

By treating a defining feature of inferior Officers as a basis for *exempting* officials from the Appointments Clause, *Landry* dramatically shrinks (to the extent it does not eliminate) the category of inferior Officers, and in doing so seriously perverts the Framers' design. Article II provides for execution of the laws by the President, aided by principal Officers *and* a cadre of inferior Officers they direct. The Appointments Clause by its terms covers both types of Officers, simply allowing (at Congress's option) a different appointment method for the latter. U.S. Const. art. II, § 2, cl. 2. Under *Landry*'s finality rule, however, only officials with final decision-making authority—who primarily if not exclusively will be *principal* Officers—are subject to the Clause, removing the Constitution's structural safeguard from those officials who exercise significant federal authority but whose decisions

are subject to review. All first-line adjudicators would be relegated to employee status. That outcome cannot be squared with *Edmond* or with the duality expressed in the Appointments Clause itself.

b. Whereas *Landry* stressed that FDIC ALJs issue only "'*recommended* decision[s]'" and can "never render the decision of the FDIC," 204 F.3d at 1133 (brackets and citation omitted), SEC ALJs do not issue purely recommendatory decisions. Rather, they enter initial decisions that can *and do* "become final" in the 90% of cases that the Commission does not review. 17 C.F.R. § 201.360(d)(2); *see also Bandimere*, 844 F.3d at 1184 n.36. This distinction is not semantic, but reflects Congress' careful distinction between *initial* decisions, which are final unless overturned, and *recommended* decisions, which have no effect unless affirmatively adopted by the agency. *See* 5 U.S.C. § 557(b); *Manual* at 82-83. As the Department of Justice explained shortly after the enactment of the APA, a "recommended decision"—unlike an initial decision—"is advisory in nature" and is "followed by an 'initial' decision by the agency." *Manual* at 82-83. An "initial decision," in contrast, "*will become the agency's final decision* in the absence of an appeal to or review by the agency." *Id.* at 82 (emphasis added).[5]

[5] In *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015), this Court noted that the SEC "alone possesses the authority to issue a final order." *Id.* at 12-13. But that passing statement—in the background section of the Court's opinion—had no bearing on the

By eliding this significant distinction, the Commission significantly expanded *Landry's* erroneous finality rule to hold that officials whose decisions are subject to discretionary review cannot be Officers. The Commission reasoned that SEC ALJs do not issue final decisions because their decisions "are not final unless the Commission takes some further action" by declining to review. J.A.161. The Commission's interpretation of *Landry*, however, contravenes multiple Supreme Court precedents.

In *Edmond*, for example, the Supreme Court held that military judges whose decisions were subject to discretionary review—whether upon a *sua sponte* order of the Judge Advocate General or after the Court of Appeals for the Armed Forces granted discretionary review—were inferior Officers. 520 U.S. at 664-65; *see also* 10 U.S.C. § 867(a). The Department of Justice has amplified this point, explaining that, "while decisions of the Court of Criminal Appeals are subject to further review" by higher authorities, "that court nevertheless renders the ultimate decision in numerous cases where" further review is not obtained. Br. in Opp. 12 n.4, *Landry v. FDIC*, No. 99-1916 (U.S. Aug. 28, 2000), 2000 WL 34013905 ("*Landry* BIO"); *see also* J.A.221 (similar). However one labels authority to render decisions subject to

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Court's holding that administrative respondents may not bypass SEC review in ongoing enforcement proceedings by filing suit in federal court. Whether the ALJ's ruling *would* have been final if the SEC had *denied* review made no difference to *Jarkesy*'s reasoning or result.

discretionary review—whether as the ability to render "final" decisions because those decisions become final when review is declined (as the government has repeatedly argued), or as something less than the ability to render "final" decisions—*Edmond* makes clear that such authority is sufficient for Officer status.

In fact, the Supreme Court has repeatedly held that officials who cannot render an unreviewable final decision of the Executive Branch are nevertheless Officers:

Case	Adjudicator	Officer?	Unreviewable Final Decisions?
Go-Bart Importing Co., 282 U.S. 344	U.S. Commissioners	**Yes.** 282 U.S. at 352.	**No.** 282 U.S. at 354.
Allred, 155 U.S. at 594	U.S. Circuit Commissioners	**Yes.** 155 U.S. at 594-95.	**No.** 155 U.S. at 595.
Weiss, 510 U.S. 163	Military judges	**Yes.** 510 U.S. at 169.	**No.** 510 U.S. at 168.
Ryder, 515 U.S. 177	Judges of Coast Guard Court of Military Review	**Yes.** 515 U.S. at 180-88.	**No.** *Edmond*, 520 U.S. at 653, 665.
Edmond, 520 U.S. 651	Judges of Coast Guard Court of Criminal Appeals	**Yes.** 520 U.S. at 662-66.	**No.** 520 U.S. at 665.
Free Enter. Fund, 561 U.S. 477	Public Company Accounting Oversight Board	**Yes.** 561 U.S. at 486.	**No.** 537 F.3d at 673.

In none of these cases could the officials bind the Executive Branch without any review by a superior, yet these officials nevertheless *all* are Officers. The SEC's administrative conclusion that discretionary review *exempts* officials from the Appointments Clause is directly inconsistent with that precedent, as the government has since tacitly admitted. *See* J.A.222-23.

The Tenth Circuit's recent repudiation of the SEC's unprecedented finality rule is instructive. That court explained that the Commission's reasoning "is incomplete" because "the agency has no duty, based on the regulation's plain language, to review an unchallenged initial decision before entering an order stating the decision is final." *Bandimere*, 844 F.3d at 1180 n.25 (citing 17 C.F.R. § 201.360(d)(2)). On the contrary, there are multiple paths for "an initial decision to become final without plenary agency review." *Id.* at 1184 n.36. In the absence of a petition for review, for example, "the agency may simply enter an order stating an initial decision is final *without engaging in any review*." *Id.* (emphasis added) (citing 17 C.F.R. § 201.360(d)(2)). The SEC has pointed to no law, regulation, or even internal agency procedure that requires it to undertake any review before entering a finality order. Even where review is sought, moreover, nothing compels the SEC to grant it. SEC rules underscore that "[t]he Commission may decline to review any [ALJ] decision," 17 C.F.R. § 201.411(b)(2), and the Commission has declined review even when requested by its own Enforcement Division, *see Bellows*, 1998 WL 611766.

As the Commission conceded below, Congress indisputably *permitted* the SEC to treat ALJ initial decisions as final. Because SEC ALJs thus are authorized to make final decisions, whether or not they do so as a matter of practice is irrelevant. Under *Buckley*, a federal official invested with significant powers under the laws of the United States is an Officer—regardless of whether she ever uses (or is permitted

by her superiors to use) those powers. *See* 424 U.S. at 140-41. What matters, in short, is the official's *authority*, not the actual exercise of that authority. *See Freytag*, 501 U.S. at 882 ("The fact that an inferior officer on occasion performs duties that may be performed by an employee … does not transform his status under the Constitution"). Superiors and agencies change their practices with respect to discretionary review—which may fluctuate in response to other business, budget and staffing concerns, or other exogenous considerations. It would subvert the constitutional design if an agency could opt its officials out of the Clause based on policy choices or day-to-day practices that the agency could change tomorrow. *See United States v. Stevens*, 559 U.S. 460, 480 (2010) (the Constitution "does not leave us at the mercy of *noblesse oblige*").

Under any interpretation, therefore, *Landry*'s finality rule is wrong.

2. Standard Of Review

Landry also placed weight on the fact that the FDIC—unlike the Tax Court in *Freytag*—did not defer to its ALJs' factual findings. 204 F.3d at 1132-33. *Freytag* itself, however, ascribed no significance to the agency's standard of review. *See* 501 U.S. at 880-82. Indeed, the Court stressed that the Tax Court's rule prescribing that deferential standard was "not relevant to [its] grant of certiorari." *Id.* at 874 n.3; *see also Landry*, 204 F.3d at 1142 (Randolph, J., concurring in part and concurring in the judgment).

It would have been remarkable, in fact, if the *Freytag* Court *had* attributed constitutional significance to the degree of deference an agency applies in reviewing decisions of those to whom it has delegated authority. In cases where the initial adjudicator's decision becomes the agency's final word without review, the standard of internal review is irrelevant. Moreover, in many cases—including *Freytag* and this case—the standard of review is the agency's own creation. The Tax Court applied deferential review based on an "internal rule of procedure," and that court "had discretion to pick whatever standard of review it saw fit." *Landry*, 204 F.3d at 1142 (Randolph, J., concurring in part and concurring in the judgment). Whether the Appointments Clause applies to an adjudicator cannot turn on how thoroughly the agency *chooses* to review the adjudicator's decisions. The Constitution entrusts the decisions of whether to create inferior Officers—and whether to exempt them from the default requirements of presidential appointment and Senate confirmation—to *Congress*, not to agencies themselves.

Even if *Landry* had been correct on this point, SEC ALJs still would be inferior Officers because the SEC (unlike the FDIC) need not and does not review most ALJ decisions, and when it does grant review, the Commission defers to its ALJs' credibility findings. Because the FDIC's ALJs issue only *recommended* rulings, whereas the FDIC itself issues the agency's final decision, the FDIC must consider every case. *See* 12 C.F.R. §§ 308.40(a), (c); *Landry*, 204 F.3d at 1133. The SEC,

in contrast, can choose not to review a case at all, 17 C.F.R. § 201.411(b)(2), and in such cases, there is no opportunity for the Commission to "'cur[e]'" "'procedural errors,'" "'hear additional evidence,'" or "'make any findings or conclusions.'" J.A.159 (citation omitted).

When the SEC grants review, moreover, it does not "mak[e] its own factual findings" or review the ALJ's factual findings *de novo*, as the FDIC does. *Landry*, 204 F.3d at 1133. To the contrary, the SEC will "accept [its ALJ's] credibility finding absent *overwhelming evidence to the contrary*." *Clawson*, 2003 WL 21539920, at *2 (emphasis added); *see also*, *e.g.*, *In the Matter of Bridge*, Release No. 9068, 2009 WL 3100582, at *18 n.75 (Sept. 29, 2009) ("The credibility determination of an initial fact finder [*i.e.*, an ALJ] is entitled to considerable weight and deference"). Indeed, even before review is granted, the SEC first considers whether, among other factors, the record contains "[a] finding or conclusion of material fact that is *clearly erroneous*." 17 C.F.R. § 201.411(b)(2)(ii)(A) (emphasis added). Requiring a respondent to make a reasonable showing of clear error *before* obtaining review has no analogue in the FDIC process.

The Commission's limited review of ALJs' factual findings is not merely a policy choice, but also the product of the practical realities of the appellate process. Unlike the ALJ, who observes witnesses' testimony and other evidence firsthand, the SEC reviews only a cold record—itself shaped by the ALJ's rulings on motions,

objections, and discovery disputes. *Cf. Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). And the SEC's ability to do even that is constrained by the Commissioners' extensive *other* duties monitoring and regulating the securities markets and their participants. *See* SEC, *FY 2016 Congressional Budget Justification* 6 (2015), https://www.sec.gov/about/reports/secfy16congbudgjust.pdf. As the Commission emphasized in this very case, SEC ALJs thus play a "vital role" in the adjudicative process, as they are "'in the best position to make findings of fact … and resolve any conflicts in the evidence.'" J.A.65 (citation omitted). That role simply does not compare to an ALJ's role where the "Board makes its own factual findings." *Landry*, 204 F.3d at 1133.

Unsurprisingly, SEC ALJs' rulings are in fact rarely disturbed. The ALJ here, for example, had apparently *never* been reversed by the SEC in more than 50 prior cases. Sarah N. Lynch, *SEC Judge Who Took on the "Big Four" Known for Bold Moves*, Reuters (Feb. 3, 2014), http://tinyurl.com/hlu76fl; *see also* Jean Eagleshem, *SEC Wins With In-House Judges*, Wall St. J. (May 6, 2015), http://tinyurl.com/o9vsozr (finding that in four-and-a-half-year period SEC ruled for the agency in 95% of its cases (53 of 56)—including 88% of cases where the underlying conduct was disputed—and remanded 5 others). The SEC's established practice of rubber-stamping ALJ decisions heightens the importance of ensuring that the Commission itself take political accountability for those decisions.

B. *Stare Decisis* Does Not Require Retaining *Landry*

Landry cannot be reconciled with the Supreme Court's Appointments Clause precedents or the Constitution itself, as the Tenth Circuit recognized in declining to follow it. *See Bandimere*, 844 F.3d at 1182-83 & n.32. As this case establishes, *Landry* has metastasized from a supposedly narrow decision "focus[ing] on the role of a particular ALJ" "within a specific decision-making structure"—as the Solicitor General characterized it in successfully opposing Supreme Court review, *Landry* BIO 7—into an across-the-board rule that a government official's final-decision-making power is the "begin[ning]" and "en[d]" of the "analysis" for Appointments Clause purposes. J.A.184. This Court should excise it now, before it does further harm to the body politic.

Although some "special justification" is required to overrule a previous decision, "an *en banc* court may set aside its own precedent 'if, on reexamination of an earlier decision, it decides that the panel's holding on an important question of law was fundamentally flawed.'" *United States v. Burwell*, 690 F.3d 500, 504 (D.C. Cir. 2012) (en banc) (quoting *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc)). Constitutional precedents are entitled to less *stare decisis* force than statutory cases, because only the Judiciary can correct constitutional errors. *E.g.*, *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

Because this Court "play[s] a different role in the federal system than the Supreme Court," "the principle of *stare decisis*" applies differently "to circuit precedent" than to Supreme Court precedent. *Critical Mass*, 975 F.2d at 876. In particular, unlike at the Supreme Court, "circuit precedent is generally established by the majority vote of just three circuit judges," and one circuit's decision does not "establish the ultimate judicial precedent" on an issue. *Id.* Another court of appeals' disagreement with a decision diminishes the traditional justifications for keeping an erroneous decision on the books. *See*, *e.g.*, *Groves v. Ring Screw Works, Ferndale Fastener Div.*, 498 U.S. 168, 172 n.8 (1990).

Overruling *Landry* would not require this Court to upend well-established and foundational precedent upon which further doctrinal developments have relied. Until the panel decision in this case, this Court had never relied on *Landry*'s pronouncement that final decision-making authority is the *sine qua non* of Officer status. *Cf. Tucker v. Comm'r*, 676 F.3d 1129 (D.C. Cir. 2012) (relying on *Freytag* to conclude that "lack of discretion is determinative" of employee status). Nor has *Landry* engendered any meaningful reliance interests. The Office of Legal Counsel did not even cite *Landry* in comprehensively addressing "which positions are required by [the Appointments] Clause to be filled pursuant to its procedures" (and it reached a contrary conclusion, to boot). *See* 31 Op. O.L.C. 73. Certainly no private parties have structured their conduct in reliance on *Landry*.

Nor should the prospect of a slippery slope deter the Court from overruling *Landry*. This case involves only the five ALJs who decide SEC enforcement cases. The ALJs, examiners, and other adjudicators who make decisions for other federal agencies are not before the Court. There is no information in this record regarding their manner of appointment; nor is there any information regarding their offices, powers, and duties. It would be both premature and unnecessary to decide whether any or all of them also are Officers. *See Bandimere*, 844 F.3d at 1189 (Briscoe, J., concurring) ("*Freytag* … commands that courts engage in a case-by-case analysis"). The Court should make that decision as to SEC ALJs—as to which the record is fully developed, the constitutional argument properly preserved, and the issues fairly joined—without regard to its potential consequences in other, future, cases. *Id.* at 1188 (majority op.) (refusing to issue advisory opinion on "[q]uestions about officer removal, officer status of other agencies' ALJs, civil service protection, rulemaking, and retroactivity").[6]

To be sure, adhering to the Constitution may eventually require this Court and others to consider carefully whether other agencies' ALJs are Officers, as well as other constitutional consequences of recognizing SEC ALJs' Officer status.

[6] Separation-of-powers concerns raised by the statutory restrictions on removal of SEC ALJs are beyond the scope of the Court's en banc order. In the event that the case involves further proceedings before a properly appointed SEC ALJ, petitioners reserve the right to raise such a challenge.

> But that was no less true when [*Freytag*] was decided. … A "risk" always exists that a court will be called on to decide whether *any* particular federal employee or group of employees has been delegated sufficient authority to fall within the ambit of the Appointments Clause, … the Constitution's structural safeguard tethering key personnel—Officers—to the sovereign power of the United States, and thus to the people.

Bandimere, 844 F.3d at 1188 (Briscoe, J., concurring) (citations omitted). This Court cannot abdicate its duty to enforce the Appointments Clause (and separation-of-powers principles more generally) in accordance with Supreme Court precedent because other cases involving similar issues might arise.

Because the SEC ALJ who presided over petitioners' proceeding was an improperly appointed Officer exercising significant authority under the laws of the United States, the petition for review must be granted, and the decision and orders under review vacated *in toto*. That outcome is dictated by our Constitution, as construed in *Freytag* and a host of other Supreme Court decisions; if *Landry* stands as an obstacle to granting the petition for review, then it is that decision rather than the Appointments Clause which must give way.

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The SEC's regime of unaccountable adjudicators has left countless casualties on the field—not least Ray Lucia. After an unblemished career spanning forty years, Mr. Lucia has been rendered unemployable in his profession and on the verge of bankruptcy—even though his free presentations, at which no securities were offered

or sold and which concededly caused no investor harm, did not remotely amount to intentional fraud. The ALJ who presided over this case imposed on him "the securities industry equivalent of capital punishment." *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013) (internal quotation omitted). The Framers designed the Appointments Clause precisely to prevent such abuses of power by unaccountable officials. This is not even a close question: SEC ALJs are Officers of the United States.

CONCLUSION

The Court should grant the petition for review and vacate the Commission's decision and order.

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Respectfully submitted,

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