[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

REPLY BRIEF FOR PETITIONERS

Caitlin J. Halligan
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, N.Y. 10166
(212) 351-4000

Jonathan C. Dickey
Marc J. Fagel
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105
(415) 393-8200

Mark A. Perry
Counsel of Record
Jason Neal
Kellam M. Conover
Shannon U. Han
Ryan N. Watzel
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MPerry@gibsondunn.com

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES
(continued)

Page(s)

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES
(continued)

Page(s)

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES
(continued)

Page(s)

Administrative Adjudications

Other Authorities

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES
(continued)

Page(s)

---

* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

ALJ	Administrative Law Judge
APA	Administrative Procedure Act
Cato Br.	*Amicus* Brief of Cato Institute in Support of Petitioners
Chamber Br.	*Amicus* Brief of Chamber of Commerce for the United States of America in Support of Petitioners
Commission (or SEC)	Respondent Securities and Exchange Commission
Cuban Br.	*Amicus* Brief of Mark Cuban in Support of Petitioners
FDIC	Federal Deposit Insurance Corporation
Ironridge Br.	*Amicus* Brief of Ironridge Global IV, Ltd. and Ironridge Global Partners, LLC in Support of Petitioners
Manual	U.S. Department of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947)
OLC	Office of Legal Counsel
Pet. Br.	Opening Brief for Petitioners Raymond J. Lucia Companies, Inc., and Raymond J. Lucia
SEC Br.	Brief for Respondent Securities and Exchange Commission

INTRODUCTION AND SUMMARY OF ARGUMENT

The Appointments Clause "ensure[s] public accountability" for individuals exercising significant authority under federal law, *Edmond v. United States*, 520 U.S. 651, 660 (1997)—to make clear "where the appointment buck stops," *Bandimere v. SEC*, 844 F.3d 1168, 1181 (10th Cir. 2016). In the overwhelming majority of cases brought in the SEC's administrative tribunal, including this one, the ALJ is the only decisionmaker that matters. About 90% of ALJ decisions are never reviewed by the SEC, *id.* at 1187, and the SEC affirms almost all ALJ decisions it does review—including *every* decision issued by the ALJ who decided this case, Pet. Br. 51. The Commission's enforcement-driven position that such a federal judicial officer, invested with the power to try cases under the federal securities laws, is an employee on par with a file clerk or secretary simply blinks reality. No mere employee could have deprived Ray Lucia of his livelihood—but that is what the ALJ, under the aegis of federal law, did here.

In arguing that its ALJs are not Officers, the Commission is forced to rewrite or ignore Supreme Court precedent, misread authoritative OLC opinions, and distort statutes enacted by Congress. In reality, these authorities conclusively demonstrate that SEC ALJs are inferior Officers who must be appointed in accordance with the Constitution.

The principal basis of the Commission's decision was *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), yet the Commission refuses to defend *Landry* on its own terms. *Landry* should be overruled.

ARGUMENT

I. SEC ALJs Are Officers Of The United States

A. Supreme Court Precedent Establishes That ALJs Are Officers

The Supreme Court has explained that *every* federal official who exercises "significant authority" in a post "'established by Law'" is an "'Officer'" who must be appointed pursuant to the Appointments Clause. *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976) (per curiam) (citation omitted); *see NLRB v. SW Gen., Inc.*, No. 15-1251, 2017 WL 1050977, at *16-18 (U.S. Mar. 21, 2017) (Thomas, J., concurring). SEC ALJs easily meet that standard, and the Commission does not even try to argue otherwise. This point bears emphasis: *Nowhere* in its en banc brief does the Commission dispute that its ALJs are Officers under the standard as actually articulated by the Supreme Court in *Buckley*.

Instead, the Commission insists that an Officer must *also* exercise "independent" authority "in his own right." SEC Br. 1, 3, 11, 12-13, 34-35. Although the Commission pretends that this additional requirement is found in *Buckley*, it is not; nor does it appear in any other Supreme Court decision. Indeed, the Supreme Court rejected essentially the same argument in *Freytag v. Commissioner*, 501 U.S. 868

(1991)—and despite the SEC's entreaties, this Court has no authority to reconsider that decision. Applying the standard mandated by Supreme Court precedent leads to only one conclusion: SEC ALJs are inferior Officers, and thus must be appointed pursuant to the Appointments Clause. *Bandimere*, 844 F.3d at 1172-88.

1. *Buckley* held that an "Officer" is one whose position is "established by Law" and who exercises "*significant* authority pursuant to the laws of the United States." 424 U.S. at 125-26, 132 (emphasis added). It is not disputed that SEC ALJs hold offices established by law, or that they exercise authority—including ruling on the admissibility of evidence, taking testimony, and conducting trials—previously deemed sufficiently "significant" to confer Officer status. *Freytag*, 501 U.S. at 881-82. The Court need go no further to conclude that SEC ALJs are Officers.

Nowhere does *Buckley* or any other Supreme Court decision suggest that an Officer must exercise "*independent*" authority "*in his own right*," as the Commission repeatedly states. SEC Br. 1, 3, 11-13 (emphases added). To the contrary, *Freytag* specifically rejected the argument that an Officer is one who exercises "independent" judicial authority not subject to further review. The government in *Freytag* asserted that special trial judges were employees who "act[ed] only as an aide to the Tax Court" because they had "no *independent* authority whatever" in the case at bar. U.S. Br. 29-31, *Freytag v. Comm'r*, 501 U.S. 868 (1991) (No. 90-762), 1991 WL 11007941. The Supreme Court disagreed that a lack of independence made special

trial judges employees. "[T]his argument," the Court held, "ignores the significance of the duties and discretion that special trial judges possess." 501 U.S. at 881; *see Bandimere*, 844 F.3d at 1174-76, 1183. *Freytag* explained that special trial judges act as Officers in *all* cases because their office, salaries, and duties are established by law and they "perform more than ministerial tasks"—including "tak[ing] testimony, conduct[ing] trials, rul[ing] on the admissibility of evidence, and hav[ing] the power to enforce compliance with discovery orders." 501 U.S. at 881-82. The Court further "agree[d]" with the Second Circuit's decision in *Samuels, Kramer & Co. v. Commissioner*, 930 F.2d 975, 985-86 (2d Cir. 1991), that this authority was "so 'significant' that it was inconsistent with the classifications of 'lesser functionaries' or employees." *Freytag*, 501 U.S. at 881 (citation omitted).

Buckley recognized that employees, or "lesser functionaries subordinate to" Officers, are not subject to the Appointments Clause. 424 U.S. at 126 n.162. But contrary to the SEC's intimation (at 12, 24), "subordinat[ion]" is not the test for employee status. *Every* inferior Officer is "subordinate" to one or more principal Officers. *Edmond*, 520 U.S. at 662-65. To be an employee rather than an Officer, an individual must *also* lack one or both of the *Buckley* criteria—*i.e.*, a post established by law or the power to exercise significant authority under federal law. For example, the *Buckley* footnote illustrated the employee category by citing *Auffmordt*

v. Hedden, 137 U.S. 310 (1890)—which involved a position "without tenure, duration, continuing emolument, or continuous duties," *id.* at 321, 326-27. This is worlds away from the SEC's cadre of five full-time ALJs charged with adjudicating cases under the federal securities laws.

To the extent ALJs are subordinate to the Commission, they might not be *principal* Officers; but that does not answer the question whether SEC ALJs are *inferior* Officers. Such Officers need not, as the Commission bewilderingly contends, act independently of their superiors; rather, their "direct[ion] and supervis[ion]" from above is a *defining feature* that distinguishes inferior from principal Officers. *Edmond*, 520 U.S. at 662-63. In determining whether an official is an Officer at all, what matters is whether he exercises "*significant*" authority—not whether that authority is controlled by, or contingent on, higher-ranking officials. *Buckley*, 424 U.S. at 132 (emphasis added). On that score, the Commission completely fails to rebut petitioners' showing that SEC ALJs perform important functions and exercise significant authority involving considerable discretion in presiding over trials before the Commission. Pet. Br. 23-30. In fact, for the most part the Commission does not even acknowledge the wide range of powers that its ALJs do exercise.

2. The Commission argues (at 29-36) that its ALJs do not wield sufficiently significant authority under federal law because they cannot impose fines or

imprisonment for contempt, and because their decisions are not independently final. Neither point withstands analysis.

a. The Supreme Court has *never* held that a federal adjudicator is a mere employee, while holding that many quasi-judicial officials—including clerks, commissioners, and non-Article III judges—*are* Officers. Pet. Br. 18-19, 45-46; *see*, *e.g.*, *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931). ALJs wield a similar arsenal of federal powers (*see* Pet. Br. 24-30; Cato Br. 4-10; Ironridge Br. 13-16; Chamber Br. 14-18), and four sitting Justices have said that, as a general matter, agency ALJs are Officers. Pet. Br. 34-35. The Commission tries to avoid the obvious import of this cavalcade of authority by arguing that "[t]he power of contempt is a hallmark of an adjudicative official's status as a constitutional officer." SEC Br. 32. But it provides no doctrinal basis for this suggestion, which has never been adopted by the Supreme Court or, to our knowledge, any other court.

The SEC first tries to distinguish the special trial judges in *Freytag* on the ground that they exercised "a portion of the *judicial* power." SEC Br. 31 (emphasis added). That is wrong. *Freytag* did not hold that *special trial judges* exercised the "judicial power," or that Officers generally must do so—indeed, most executive Officers are invested with none of the judicial power. *Freytag* explained that the *Tax Court* "exercises a portion of the judicial power of the United States" because it "interpret[s] and appl[ies] the Internal Revenue Code in disputes between taxpayers

and the Government"—a determination that was relevant only to *Freytag*'s holding that the Tax Court can be a "Cour[t] of Law" eligible to *appoint* under the Appointments Clause. 501 U.S. at 891 (internal quotation marks omitted). The judicial power was irrelevant to the special trial judges' status as Officers. *See id.* at 908-14 (Scalia, J., concurring in part and concurring in the judgment).

Nor did *Freytag* even hint that the *contempt* power is indispensable to Officer status. In explaining that special trial judges "perform more than ministerial tasks," the Court listed several significant functions, of which "the power to enforce compliance with discovery orders" was one. 501 U.S. at 881-82. *Freytag* no more stressed that power than it did special trial judges' authority to "take testimony, conduct trials, [and] rule on the admissibility of evidence," *id.*—all of which the Commission concedes SEC ALJs possess. Similarly, the Court in *Edmond* did not even *mention* the military judges' power to enforce compliance with discovery orders.

There was, in short, nothing talismanic about federal adjudicators' power to enforce compliance in *Freytag*, *Edmond*, or any other Supreme Court case. Nor could there be, since many Officers lack such power: The Equal Employment Opportunity Commission, for instance, must apply to a district court for enforcement of its subpoenas. *See McLane Co. v. EEOC*, No. 15-1248, 2017 WL 1199454 (U.S. Apr. 3, 2017). The SEC, moreover, overstates (at 31-32) the enforcement power that special trial judges *do* exercise. Like SEC ALJs, special trial judges may issue

subpoenas and take depositions, *see* 26 U.S.C. § 7456(a); but only the Tax Court itself has the power to sanction or solicit aid from the U.S. Marshals, *see id.* § 7456(c); 28 U.S.C. § 566(a).

In any event, the Commission's ALJs concededly *can* sanction parties for "contemptuous conduct," including by "[s]ummarily suspend[ing]" persons from practicing law in an enforcement proceeding. 17 C.F.R. § 201.180(a). Like *Freytag*'s special trial judges, SEC ALJs therefore *do* have "the power to demand immediate obedience" without "the need for authorization by any other federal officer." SEC Br. 32. The Commission does not explain why *these* enforcement powers are insignificant, or insufficient.

b. Contrary to the Commission's suggestion (at 29) that "authority to enter final decisions was … critical to the holding in *Freytag*," the Supreme Court expressly *rejected* the contention that officials "may be deemed employees … because they lack authority to enter a final decision." *Freytag*, 501 U.S. at 881. The Commission seizes on one of *Freytag*'s statements—that "[i]f a special trial judge is an inferior officer for" some purposes, then "he is an inferior officer"—which it contends (at 29) is part-and-parcel of *Freytag*'s alternative holding that final decision-making authority may be *sufficient* to demonstrate Officer status. 501 U.S. at 882. But the Commission omits the punchline: *Freytag* examined special trial judges' final decision-making authority only to confirm they would be Officers "*[e]ven if*"—

i.e., whether or not—their "duties … were not as significant as we … have found them to be." *Id.* (emphasis added); *see Bandimere*, 844 F.3d at 1183 (*Freytag*'s "'even if' argument did not modify or supplant its holding that [special trial judges] were inferior officers based on the 'significance of [their] duties and discretion'" (quoting 501 U.S. at 881)).

The Commission further contends (at 30) that "[i]t was uncontested in *Freytag* that the Tax Court's special trial judges could and did issue final decisions" and that the Court therefore "had no reason … to address the status of personnel who do not bind the government in any class of cases." Yet *Freytag* did exactly that. *Freytag* could have decided the case based on its alternative holding that special trial judges' power to enter final decisions in other cases made them Officers, but it did not. The Court's principal holding was that "special trial judges exercise significant" authority "[i]n the course of carrying out" their day-to-day functions administering trials. 501 U.S. at 882. As the Tenth Circuit concluded, "properly read, *Freytag* did not place 'exceptional stress' on final decision-making power." *Bandimere*, 844 F.3d at 1183.

Freytag's lessons are confirmed by the Supreme Court's recent trilogy of cases deeming military judges Officers. *See Edmond*, 520 U.S. at 662-63; *Ryder v. United States*, 515 U.S. 177, 180-88 (1995); *Weiss v. United States*, 510 U.S. 163, 167-69 (1994). *Edmond*, in particular, concluded that the military court appellate

judges were officers, *even though* they "ha[d] no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." 520 U.S. at 665. As the government has elsewhere explained in a brief joined by the SEC, "*Edmond* makes clear [that] the … inability to render a final decision … is itself indicative of inferior, not principal, officer status." U.S. Br. 32 n.10, *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010) (No. 08-861), 2009 WL 3290435 (emphasis omitted). Inability to render a final decision cannot be determinative of employee status, or the inferior Officer category would be obliterated. Pet. Br. 42-43.

The Commission does not even attempt to reconcile its position with over two centuries of Supreme Court cases deeming a diverse array of functionaries—none of whom had final decision-making authority—to be Officers. Pet. Br. 18-19, 40-41, 45-46. Indeed, the Commission cannot even bring itself to cite or discuss most of these cases, electing instead to denigrate them *en grosse* as poorly reasoned antiques. SEC Br. 41-42. But this Court cannot disregard Supreme Court precedents based on doubts about their continuing vitality, *see Agostini v. Felton*, 521 U.S. 203, 237 (1997)—and any such doubts would be misplaced since the Supreme Court continues to rely on these cases, *see*, *e.g.*, *Edmond*, 520 U.S. at 661; *Buckley*, 424 U.S. at 125-26. In fact, *Buckley*'s definition of "[e]mployees" *derives* from these earlier cases. 424 U.S. at 126 n.162.

The Commission does not dispute that "[m]ost of the SEC ALJs' initial decisions—about 90 percent—become final without any review or revision from an SEC Commissioner." *Bandimere*, 844 F.3d at 1187; *see* Pet. Br. 27. The Commission focuses on its "discretionary" ability to review ALJs' actions (SEC Br. 13-14, 17-18), but that argument is "incomplete" because it ignores what happens when the SEC does *not* conduct review. *Bandimere*, 844 F.3d at 1184 n.36. In such cases, the ALJ's decision by statute is "deemed the action of the Commission." 15 U.S.C. § 78d-1(c). The Commission's assertion that it "'must affirmatively act … in every case'" to "'embrac[e] … the ALJ's initial decision as its own,'" SEC Br. 18 (quoting J.A.186), is both unsupported and incorrect. All the Commission does is enter a "notice that [the] initial decision has become final," *In the Matter of Horizon Wimba, Inc.*, Release No. 75,929, 2015 WL 5439958, at *1 (Sept. 16, 2015), which it can do (and does) "without engaging in any review," *Bandimere*, 844 F.3d at 1184 n.36 (citing 17 C.F.R. § 201.360(d)(2)).

The Commission states that "it is unaware of ever having denied a timely petition for review," but in the very same footnote acknowledges an instance in which "the Commission denied a petition for review." SEC Br. 16 n.1 (citing *In the Matter of Bellows*, Release No. 40,411, 1998 WL 611766 (Sept. 8, 1998)). The Commission *can*—and at least sometimes does—decline review, regardless of who is petitioning.

And under its current regulations, the Commission has discretion to deny any (or every) petition for review.

Moreover, even in the 10% of cases the Commission does review, "the ALJ plays a significant role … in conducting proceedings and developing the record leading to the [Commission's] decision." *Bandimere*, 844 F.3d at 1180 n.25. That is why the Commission in this case remanded to the ALJ for additional findings, *see* J.A.63-65, and why the Commission affirms virtually every decision on review, *see* Pet. Br. 51. The Commission argues that on review it "need not defer to ALJ credibility determinations." SEC Br. 16. That argument reflects neither the law nor the Commission's practice. In reality, the Commission accords "considerable weight and deference" to "[t]he credibility determination" of an ALJ, *In the Matter of Bridge*, Release No. 9,068, 2009 WL 3100582, at *18 n.75 (Sept. 29, 2009), and will defer to that credibility determination "absent *overwhelming* evidence to the contrary," *In the Matter of Clawson*, Release No. 48,143, 2003 WL 21539920, at *2 (July 9, 2003) (emphasis added)—hardly the "*de novo*" standard the Commission misleadingly suggests, SEC Br. 16 (quoting J.A.160 n.117). It is irrelevant that the Commission *could* review these findings *de novo* (*cf. id.*) because it undisputedly does *not*.

The Commission also recognizes (at 17 n.2) that its ALJs have entered immediately "enforceable" default orders without any further Commission action. *In the*

Matter of Alchemy Ventures, Inc., Release No. 70,708, 2013 WL 6173809, at *4 (Oct. 17, 2013). The Commission is thus wrong to state (at 15) that "[i]n no circumstance can an ALJ issue a decision that in any respect commits the Commission to a particular view of the law or facts." Although this practice may not be the Commission's currently preferred method of adjudication, the Commission's concession that its ALJs have the authority to issue, *see* 17 C.F.R. § 201.155—and in fact have issued—such binding default orders leaves no doubt that its ALJs have the *power* to render final decisions.

Most importantly, while trumpeting that "[t]he Commission is free under the securities laws to use its ALJs in any manner it wishes" (SEC Br. 34), the Commission does not dispute that it could direct its ALJs to enter final decisions in any case in which Congress has not otherwise required review by the SEC itself. 15 U.S.C. § 78d-1(a) (authorizing the SEC to "delegate … any of its functions" to ALJs); *see* Chamber Br. 5. Even under the Commission's crabbed view of the Appointments Clause, such significant authority could be delegated *only* to Officers, not employees. *Cf. Buckley*, 424 U.S. at 124 (discussing the Constitution as preventing legislators from "*holding* any Office," regardless of whether the power of that office is exercised (emphasis added) (quoting U.S. Const., art. I, § 6)). Thus, regardless of

what constraints the Commission may (or may not) have placed on its ALJs via regulations and rules of practice, the *power* with which ALJs have been invested means that they are Officers. The SEC has no response to this point.

The Tenth Circuit exhaustively reviewed and rejected identical arguments made by the Commission, explaining in detail why under Supreme Court precedent SEC ALJs are Officers. *Bandimere*, 844 F.3d at 1172-88. The Commission simply ignores *Bandimere*, just as it ignores the great majority of the Supreme Court's decisions. The truth is that—with the exception of *Landry*—there is not a single judicial decision that supports the Commission's position that SEC ALJs are mere employees.

B. OLC Opinions Confirm That ALJs Are Officers

The Department of Justice's Office of Legal Counsel—the body charged with "provid[ing] authoritative legal advice to the President and all the Executive Branch agencies," DOJ, Office of Legal Counsel, http://www.justice.gov/olc (all Internet sites last visited April 9, 2017)—has issued a series of opinions indicating that ALJs, including SEC ALJs, are Officers. The Commission has heretofore ignored these opinions. Now, it misreads them.

The SEC contends (at 39) that a 1990 OLC opinion titled "Authority of Education Department Administrative Law Judges in Conducting Hearings" supports its position, but OLC did not consider or even *mention* the Appointments Clause in that

opinion. Apparently the SEC cites this opinion because, out of context, it uses the word "employee" in reference to ALJs. *See* 14 Op. O.L.C. 1, 1-2 (1990). The fact that the Justice Department lawyers couldn't find any better internal opinions shows how far out on a limb the SEC is in this case.

Indeed, the following year OLC addressed the question whether those very same ALJs were inferior Officers such that construing a statute to grant them authority to issue unreviewable decisions would transform them into "principal, not … 'inferior,' officer[s]." *Secretary of Education Review of Administrative Law Judge Decisions*, 15 Op. O.L.C. 8, 14 (1991). The Commission claims (at 40) that "OLC did not opine on ALJs' status as officers," ignoring that OLC expressly compared the "characteristics" of Education Department ALJs to those of the independent counsel the Supreme Court held to be an inferior Officer in *Morrison v. Olson*, 487 U.S. 654 (1988). *See* 15 Op. O.L.C. at 14. The starting point in OLC's Appointments Clause analysis was that those characteristics made the ALJs inferior Officers and that giving them power to issue unreviewable decisions would make them "principal, not … 'inferior,' officer[s]." *Id.*

Most recently, OLC examined the "relevant constitutional text and the earliest authorities that illuminate that text, as well as Supreme Court authority" like *Buckley* and *Freytag*, and concluded that "*any position* having the two essential characteristics of a federal 'office' is subject to the Appointments Clause"—the position must

be "continuing" and "invested by legal authority with a portion of the sovereign powers of the federal government." *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 73-76 (2007) (emphasis added) (internal quotation marks omitted). SEC ALJs easily fit that description.

Just as with *Buckley* and *Freytag*, the Commission attempts to inject into the principal OLC opinion a requirement it nowhere contains: that SEC ALJs cannot be Officers because they have not been "delegated sovereign authority to act *independently of the Commission*." SEC Br. 38 (emphasis added) (citation omitted). But OLC (like the Supreme Court) specifically rejected that argument, explaining that "[n]either *Buckley* nor early authority supports this restriction" to exclude those who "act only at the direction of" other Officers. 31 Op. O.L.C. at 93. The SEC simply disregards the portions of the opinion that it cannot distort, such as OLC's repeated statements that the "well-established historical formulation" that the Supreme Court consistently applied in *Buckley* and earlier cases "treat[ed] arguably insignificant positions as offices," even those whose occupants were "require[d] … to obey the mandates of a superior." *Id.* at 86-87, 94 (citation omitted); *see also id.* at 95 ("The 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"). OLC's opinion leaves no doubt that SEC ALJs are Officers under the applicable standard.

The Commission also suggests that SEC ALJs lack the "legal power to 'bind the rights of others'" (SEC Br. 39), quoting a phrase OLC used as a shorthand to describe delegated sovereign authority "[a]s a general matter," 31 Op. O.L.C. at 87. The proposition that SEC ALJs presiding over enforcement proceedings cannot bind the rights of others would be risible were it not so dangerous. As discussed above, Congress and the SEC have delegated to ALJs significant authority, including the authority to issue immediately enforceable default orders and initial decisions that become final in all but a handful of cases. Moreover, respondents in SEC enforcement proceedings rightly understand that when SEC ALJs try cases that otherwise would be heard by Article III judges in federal court, the ALJs are exercising delegated sovereign authority. Just ask Ray Lucia.

C. Officer Status Is Consistent With Statutory Text And History

An argument that merited but a single footnote in the decision under review (J.A.161 n.121), and was an afterthought in the panel's decision (J.A.190-91), has now mushroomed into the lengthiest (if not weightiest) part of the Commission's en banc brief: Because Congress chose to confer certain civil service protections on ALJs, the Commission contends, they must not be Officers. *See* SEC Br. 1-2, 19-26, 37-38, 42-43. Wrong again.

1. Neither the "statutory language" nor "legislative history" shows that Congress intended to exempt SEC ALJs from the Appointments Clause. *Bandimere*, 844 F.3d at 1185; Pet. Br. 31-32.

The Commission cites *no* statutory language indicating that its ALJs are employees under the Appointments Clause. On the contrary, Congress expressly required that SEC hearings be held "before the Commission or an *officer or officers* of the Commission." 15 U.S.C. § 77u (emphasis added); *see also* 15 U.S.C. §§ 78v, 80a-40, 80b-12 (same). As with other provisions of the securities laws, Congress knows how to differentiate between "officers" and "employees," *see*, *e.g.*, 15 U.S.C. § 717q ("Appointment of officers and employees"), and "Congress chose the word 'officer' carefully" here, Cuban Br. 11; *see also id.* at 6-14. Indeed, one of the statutory provisions invoked by the SEC (at 13) makes clear that ALJs are *not* employees. *See* 15 U.S.C. § 78d-1(a) (delegation of authority to "an administrative law judge … *or* an employee" (emphasis added)).

The Commission objects (at 37) that there is no "indication that Congress intended" to use the term "officer" in its constitutional sense. But the Supreme Court has rejected that very objection. *United States v. Germaine*, 99 U.S. 508, 510 (1879) (if Congress's use of "officers" had meant "others than officers as defined by the Constitution, words to that effect would be used, as servant, agent, person in the service or employment of the government"). If individuals can be Officers even

when Congress does *not* so designate them, *see Free Enter. Fund v. PCAOB*, 561 U.S. 477, 484 (2010), surely they are Officers when Congress expressly *does*. Certainly, the Supreme Court has never held that an individual designated an "officer" by statute is *not* an Officer under the Constitution.

Congress confirmed that SEC ALJs are Officers when it amended the APA to define an "officer" as "an individual … 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); *see also id.* § 3105 (requiring "[e]ach agency" to appoint its ALJs). The Commission objects that this provision "does not mirror the constitutional requirement[s]" of the Appointments Clause. SEC Br. 38. Not so: Just as the Clause requires that "the Appointment of … inferior Officers" be vested in "the President alone," "the Courts of Law," or "the Heads of Departments," U.S. Const. art. II, § 2, cl. 2, Section 2104 requires that "officers" be "appointed" by "the President," "a court of the United States," or the "head of an Executive agency" or "Secretary of a military department," 5 U.S.C. § 2104(a)(1). Since a multi-member agency acting collectively can be a Head of Department, *Free Enter. Fund*, 561 U.S. at 512-13, Section 2104 is entirely consistent with the Appointments Clause.

Unable to glean any support from statutory text, the Commission patches together snippets of legislative history from the APA. SEC Br. 20-22. Yet it never

addresses the history of the *securities* statutes, which clearly demonstrates that Congress intended that *SEC* hearing "officers" be constitutional Officers. *See* Cuban Br. 3-14. As the government elsewhere concedes, the appropriate focus of the constitutional inquiry here is the SEC's ALJs, not the status of ALJs in other agencies. *Cf.* U.S. Amicus Br. 19 n.4, *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. Mar. 17, 2017). Nor is it pertinent that the SEC also can delegate other (less significant) functions to employees. SEC Br. 38 (citing 15 U.S.C. §§ 78d-1(a), (c)). SEC ALJs can perform only adjudicatory functions, 5 U.S.C. § 3105, and those functions would otherwise be performed exclusively by principal "officers," 15 U.S.C. § 77u.

Moreover, the Commission's principal historical source on the APA repeatedly deems hearing examiners "presiding *officers*" and explains that, although an agency is not "bound by the decision of its *subordinate officer*," those officers' decisions are not "without effect." *Attorney General's Manual on the Administrative Procedure Act* 81-84 (1947) ("*Manual*") (emphases added); *see* Pet. Br. 31-32, 43. Rather, hearing examiners' decisions would "'become a part of the record[,] … [be] of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses,'" and "sharpe[n] … the issues for subsequent proceedings." *Manual* at 84 (citations omitted). ALJs—today's hearing examiners—do far more than "compil[e] the administrative record" (SEC Br. 10);

they take evidence, make rulings, and decide cases. Those functions entail the exercise of significant authority under federal law.

2. The SEC's argument thus boils down to an inference that Congress must have intended to exempt SEC ALJs from the Appointments Clause because it gave them certain civil service protections. *See* SEC Br. 21-23. That inference rests on the manifestly erroneous premise that civil service personnel cannot be Officers. *See*, *e.g.*, SEC Br. 13. In fact, numerous individuals with civil service protections have been found to be constitutional Officers—including the Chief Examiner of the Civil Service Commission, *Authority of Civil Service Commission to Appoint a Chief Examiner*, 37 Op. Att'y Gen. 227, 231 (1933), members of the appeals board of the Department of Health and Human Services, *Cw. of Pennsylvania v. U.S. Dep't of Health & Human Servs.*, 80 F.3d 796, 801-04 (3d Cir. 1996), and the Postmaster General and his deputy, *Silver v. U.S. Postal Serv.*, 951 F.2d 1033, 1036, 1040 (9th Cir. 1991). As the Third Circuit has explained, treating members of the civil service and Officers as mutually exclusive categories "is at odds with the very test for 'officer' status under the Appointments Clause." *Cw. of Penn.*, 80 F.3d at 806.

The Commission relies heavily on *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128 (1953), for the assertion that ALJs are "Civil Service employees." SEC Br. 22-23, 25 (quoting *Ramspeck*, 345 U.S. at 133). But the Commission ignores *Ramspeck*'s conclusion that "Congress intended to make hearing examiners

'a special class of semi-independent subordinate hearing *officers*.'" 345 U.S. at 132 (emphasis added) (citation omitted). Given "the rapid growth of administrative law in the last few decades," *Ramspeck* explained, "the role of these quasi-judicial *officers* [had] bec[o]me increasingly significant." *Id.* at 130 (emphasis added).

The SEC argues that "ALJs and their predecessors have assisted agency heads in their adjudicative functions for many decades" and that this "'settled and established practice'" should be given "'great weight'" in construing the Appointments Clause here. SEC Br. 3 (quoting *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559-60 (2014)). But neither *Ramspeck* nor anything in the historical record so much as hints that ALJs or hearing examiners are not Officers. To the contrary, contemporaneously with *Ramspeck* the Attorney General opined that hearing examiners were "inferior officers" even though their pay, promotion, and termination were controlled by the Civil Service Commission. *Administrative Procedure Act, Promotion of Hearing Examiners*, 41 Op. Att'y Gen. 74, 79-80 (1951). In response to a question whether promotion by the Civil Service Commission violated the Appointments Clause, the Attorney General reasoned not that hearing examiners were exempt from the Clause, as the SEC now asserts, but that they could be properly "appoint[ed]" by the Civil Service Commission. *Id.*; *see also Authority of Civil Service Commission*, 37 Op. Att'y Gen. at 231 (Civil Service Commission is a Head of Department). The historical record thus provides no support to the Commission.

Indeed, until recently the widespread assumption appears to have been that SEC ALJs are Officers and are appointed as such. After all, the statutes require that "[e]ach agency" appoint its ALJs, 5 U.S.C. § 3105, prescribe that only Commissioners or "officers" can adjudicate hearings, 15 U.S.C. § 77u, and specify that "officers" are to be appointed by, *inter alia*, the "head of an Executive agency," 5 U.S.C. § 2104(a)(1). The Commission itself declared to the world that its "[a]dministrative law judges are *independent judicial officers*." SEC, SEC Announces Arrival of New Administrative Law Judge, http://www.sec.gov/news/press-release/2014-208 (Sept. 22, 2014) (emphasis added).

The actual manner in which SEC ALJs are selected and retained came to light only recently, in a case that is still pending before this Court. 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. That case, and others asserting Appointments Clause challenges, arose as the Commission began bringing more and more cases in its administrative tribunal (where it virtually always wins), rather than in federal court (where it loses with some frequency). *See* Jean Eaglesham, *SEC Wins With In-House Judges*, Wall St. J. (May 6, 2015), http://tinyurl.com/o9vsozr. It is now clear—indeed undisputed—that, in fact, the Commission's chosen methodology does not satisfy the Appointments Clause if its ALJs are Officers.

The SEC does not dispute that it could (as the Head of a Department) appoint its own ALJs without amending a single statute. And to this day, the SEC has offered no cogent explanation why it could not (or does not) appoint its own ALJs as the Constitution requires. Thus, the Commission's paean to historical practice rings hollow: If it has been violating the Constitution for many years, then the remedy is not to allow this violation to continue unabated, but to put an end to it. This Court has a duty to require the SEC to adhere to its constitutional obligations, which include appointing its ALJs—who are Officers of the United States—in accordance with the Appointments Clause.

II. *LANDRY* SHOULD BE OVERRULED

In its en banc brief, the Commission devotes just five sentences to whether this Court should overrule *Landry*, 204 F.3d 1125—and *none* defends *Landry* on its own terms. SEC Br. 2, 42. That is telling. The Commission's *sole* authority for exempting its ALJs from the Appointments Clause was this Court's decision in *Landry*. J.A.157-61. The panel said that its analysis "begins, and ends," with *Landry*, which it felt compelled to follow as "circuit precedent." J.A.184. Yet now that the en banc Court has indicated that *Landry*'s future is in doubt, the Commission goes out of its way to avoid discussing, let alone defending, *Landry*.

Apparently as a less-toxic proxy for *Landry*, the Commission cites (at 25-26) *Tucker v. Commissioner*, 676 F.3d 1129 (D.C. Cir. 2012), in which a panel of this

Court determined that appeals employees of the Internal Revenue Service's Office of Appeals are not inferior Officers because their "constrained" discretion meant that their "authority [was] … *insufficient* to rank them as inferior Officers." *Id.* at 1134-35. To be sure, the *Tucker* decision—written by the author of *Landry*—referred elsewhere to final decision-making authority; but that reference was *dictum* in light of the Court's holding. And to the extent overruling *Landry* requires correcting *Tucker*'s *dictum*, so be it. Other than the decision below, no other case turns on *Landry*'s finality requirement.

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, however, neither factor "survives close attention." *Id.* at 1140-43 (concurring in part and concurring in the judgment); *see also PHH Corp. v. CFPB*, 839 F.3d 1, 56 (D.C. Cir. 2016) (Randolph, J., concurring), *reh'g en banc granted*, *order vacated* (Feb. 16, 2017). Indeed, *Freytag* 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; Pet. Br. 38-43. The Commission never cites, let alone addresses, *Freytag*'s reasoning on this point.

The Commission likewise has no response to *Freytag*'s conclusion that the Tax Court's rule prescribing a deferential standard of review was "not relevant to

[the Supreme Court's] grant of certiorari." 501 U.S. at 874 n.3. As Judge Randolph explained—and the Commission does not dispute—the Tax Court "had discretion to pick whatever standard of review it saw fit," and "[i]t would be odd for the constitutional status" of an individual "to depend on [such] an internal rule of procedure." *Landry*, 204 F.3d at 1141-42 (concurring in part and concurring in the judgment); *see also* Pet. Br. 49. Besides, the SEC does not review the ALJ's factual findings de novo, as the FDIC does, *see Landry*, 204 F.3d at 1133 (majority opinion), but accepts an ALJ's credibility findings "absent *overwhelming evidence to the contrary*." *Clawson*, 2003 WL 21539920, at *2 (emphasis added). Because the *Landry* majority opinion is irreconcilable with *Freytag* and undisputedly has given rise to no legitimate reliance interests, *stare decisis* is no barrier to overruling it. Pet. Br. 52-55.

Although the panel felt constrained to follow *Landry* as Circuit precedent (J.A.184), the Tenth Circuit was not so constrained and conducted a thorough examination of the doctrinal and precedential bases for *Landry*, ultimately determining that *Landry* could not be squared with *Freytag*. *Bandimere*, 844 F.3d at 1182-85. As Judge Briscoe emphasized, "[t]he critical difference between the [*Bandimere*] majority and *Landry* and *Lucia* is that the [*Bandimere*] majority recognizes that *Freytag* does *not* make final decision-making authority the *sine qua non* of inferior Officer status." *Id.* at 1189 (concurring opinion). *Bandimere* recognized that *Freytag*'s discussion of final decision-making authority was simply its response to the

government's standing argument, and that "[t]he Court's rejection of the government's standing argument is a far cry from holding that final decision-making authority is the predicate for inferior officer status." *Id.* at 1183 (majority opinion). "[P]roperly read," *Bandimere* concluded, "*Freytag*'s holding undermines" *Landry*'s core holding that "*every* inferior officer *must* possess final decision-making power." *Id.* at 1183-84.

Other than noting that it has petitioned for rehearing in *Bandimere*, SEC Br. 41, the SEC literally ignores the Tenth Circuit's decision. Of course, *Bandimere* no more binds the en banc Court than *Landry* does; the ultimate question is which decision is more persuasive. The Commission's refusal to engage with *Bandimere*, or to defend *Landry*, says a lot about the answer to that question.

*****

Ray Lucia comes to this Court the victim of an unconstitutional adjudication. The ALJ found him liable for securities fraud on a theory "create[d] from whole cloth," J.A.172, and barred him from the investment advisory industry for life—even though the conduct at issue had repeatedly been pre-approved by supervising broker-dealers and, undisputedly, harmed no one. To be sure, the Commission affirmed the ALJ's decision; but this came as no surprise, since it had done the same *in every previous case*. Pet. Br. 51. And the ALJ's decision here destroyed Ray Lucia's career, his spotless reputation, and his business. As this case illustrates, the danger

in giving such significant power to unaccountable officials is even clearer today than it was for the Framers. SEC ALJs are Officers of the United States who must be appointed in conformity with the Appointments Clause in order to ensure that the Commission takes political accountability for them and their decisions.

CONCLUSION

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

Dated: April 24, 2017

Respectfully submitted,

/s/ Mark A. Perry

Mark A. Perry
Counsel of Record
Jason Neal
Kellam M. Conover
Shannon U. Han
Ryan N. Watzel
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MPerry@gibsondunn.com

Caitlin J. Halligan
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, N.Y. 10166
(212) 351-4000

Jonathan C. Dickey
Marc J. Fagel
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105
(415) 393-8200

Counsel for Petitioners