No. 17-130

IN THE
Supreme Court of the United States

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

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

The question presented is "[w]hether administrative law judges of the Securities and Exchange Commission are Officers of the United States within the meaning of the Appointments Clause." Pet. i. The Solicitor General correctly recognizes that "this Court's resolution of the question presented is necessary." U.S. Br. 26. As the government explains, the answer to that question is "extremely important," and the issue has created "pervasive uncertainty"—including an acknowledged circuit split—in the lower courts. *Id.* at 10. Indeed, the United States now agrees with petitioners that SEC ALJs exercise significant authority under federal law and therefore are Officers who must be appointed pursuant to the Appointments Clause. *Id.* at 14-15. Accordingly, the Court should grant review of the question presented in the petition, and appoint an *amicus curiae* to defend the judgment below. *See id.* at 10.

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER SEC ALJS ARE OFFICERS

The United States agrees that certiorari should be granted in this case, and that the D.C. Circuit's conclusion that SEC ALJs are not Officers was erroneous.

A. The Decision Below Is Wrong

The government now agrees with petitioners that SEC ALJs are Officers within the meaning of the Appointments Clause "because they exercise 'significant authority pursuant to the laws of the United States.'" U.S. Br. 10 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam)).

The parties agree that this Court's decision in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991),

"demonstrates" that SEC ALJs are Officers. U.S. Br. 14; *see also* Pet. 14-18. *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.'" *Buckley*, 424 U.S. at 126, 132. SEC ALJs undeniably hold offices established by law. Pet. 13-14. And the government now acknowledges that, under *Freytag*, SEC ALJs exercise "significant authority" because they "are authorized, among other things, to administer oaths, hold hearings, take testimony and admit evidence, issue or quash subpoenas, rule on motions, impose sanctions on contemptuous hearing participants, reject deficient filings, and enter default judgments." U.S. Br. 14-15. "Like the special trial judges at issue [in *Freytag*]," SEC ALJs thus undisputedly have "significant 'duties and discretion.'" *Id.* at 14 (quoting *Freytag*, 501 U.S. at 881). In fact, this Court has consistently held that government officials who preside over adjudicatory proceedings in the role of a trial judge exercise significant authority, and are therefore Officers. Pet. 12-13.

The parties further agree that *Freytag* specifically rejected the lynchpin of the decision below—*i.e.*, that an adjudicator is a mere "employee" if he "lack[ed] authority to enter a final decision." 501 U.S. at 880-81; *see* Pet. 20-22; U.S. Br. 16-17. That position "*ignores* the significance of the duties and discretion that special trial judges possess." U.S. Br. 13 (emphasis added) (quoting *Freytag*, 501 U.S. at 881). Indeed, this Court has held that military judges with "no power to render a final decision … unless permitted to do so by other Executive officers" are Officers. *Edmond* v. *United States*, 520 U.S. 651, 665 (1997). Besides, SEC ALJs can and *do* enter final decisions be-

cause they can enter default judgments, as well as initial decisions that "shall … be deemed the action of the Commission" if further review is not sought, or a request for such review is denied, 15 U.S.C. § 78d-1(c). *See* Pet. 17; U.S. Br. 15.

As the government correctly explains (at 17-18), *Freytag* cannot be distinguished based on the Tax Court's standard of review or its status as an Article I tribunal. Whatever level of deference the Commission affords an ALJ's findings and decisions, the standard of review in *Freytag* "[wa]s not relevant to [the Court's] grant of certiorari," 501 U.S. at 874 n.3, and "played no role in the Court's conclusion that [special trial judges] qualified as 'Officers.'" U.S. Br. 18. And because "*Freytag* did not even mention [the special trial judges'] status as judicial officials," there is no basis for limiting its holding to Article I courts. *Ibid.*

B. This Case Presents The Best Vehicle To Resolve The Circuit Split

1. The United States agrees with petitioners that "[t]he courts of appeals are divided over whether the Commission's ALJs are officers." U.S. Br. 10. The D.C. Circuit held below that, under its previous interpretation of *Freytag*, SEC ALJs are not Officers because their decisions are subject to discretionary Commission review. Pet. App. 11a-18a (discussing *Landry* v. *FDIC*, 204 F.3d 1125, 1133–34 (D.C. Cir. 2000)). In *Bandimere* v. *SEC*, 844 F.3d 1168 (10th Cir. 2016), the Tenth Circuit squarely rejected that rationale and holding. Expressly "disagree[ing]" with the D.C. Circuit's reading of *Freytag*, the Tenth Circuit concluded that *Freytag* "did not make final decision-making power the essence of inferior officer status." *Id.* at 1182, 1184. SEC ALJs are Officers, the court held, because they "carry out 'important functions,'" *id.* at

1188 (quoting *Freytag*, 501 U.S. at 882), and "'exercis[e] significant authority pursuant to the laws of the United States,'" *ibid.* (quoting *Buckley*, 424 U.S. at 126).

While this petition has been pending, the circuit split has only deepened. *See* U.S. Br. 25. In a case involving ALJs of the Federal Deposit Insurance Corporation, the Fifth Circuit has now joined the Tenth Circuit in disagreeing with the D.C. Circuit's interpretation of *Freytag*: "[C]ontrary to the D.C. Circuit's decision," the Fifth Circuit held, "final decision-making authority is not a necessary condition for Officer status." *Burgess* v. *FDIC*, 871 F.3d 297, 301 (5th Cir. 2017); *see id.* at 301-03 (holding that petitioner had made a "strong showing" that FDIC ALJs are Officers despite their "lack of final decision-making authority").

As the government explains (at 22), this division "has generated substantial confusion and disruption" throughout the administrative state. *See also*, *e.g.*, Chamber Br. 11-12; PLF Br. 12-15. The Commission has sought or obtained orders holding in abeyance other appellate challenges to the constitutionality of its ALJs. *See*, *e.g.*, Order, *J.S. Oliver Capital Mgmt.* v. *SEC*, No. 16-72703 (9th Cir. Oct. 25, 2017) (staying appellate proceedings pending disposition of petitions in this case and in *Bandimere*); Order, *Timbervest, LLC* v. *SEC*, No. 15-1416 (D.C. Cir. Aug. 8, 2017) (holding case in abeyance pending disposition of petition in this case); SEC Rule 28(j) Letter, *Bennett* v. *SEC*, No. 16-3827 (8th Cir. Nov. 29, 2017) (requesting abeyance pending disposition of petition in this case). Accordingly, "the Commission's ability to enforce the nation's securities laws has, in significant respects,

been put on hold" until the Court decides *this* case. U.S. Br. 25.

2. The government also agrees with petitioners that "this case, rather than *Bandimere*, presents the Court with the preferable vehicle" for resolving the circuit split. U.S. Br. 24; *see also* Pet. 35 n.*. Unlike *Bandimere*—from which Justice Gorsuch may be recused—this case presents a clean opportunity for the full Court to decide whether SEC ALJs are Officers. *See* Br. for *Amici Curiae* Raymond J. Lucia and Raymond J. Lucia Cos. at 5-7, *SEC* v. *Bandimere*, No. 17-475 (U.S. Oct. 24, 2017). The question presented has been fully ventilated in the extensive proceedings below—including rehearing before the en banc D.C. Circuit—and there are no jurisdictional, preservation, or other problems that could prevent the Court from deciding the Officer question.

C. Recent Developments Do Not Moot This Case

Two significant developments have occurred since the filing of the petition: The government now agrees that SEC ALJs are Officers; and one day after the government filed its brief confessing error, the Commission issued an order purporting to "ratif[y] the agency's prior appointment" of its current ALJs. Order, *In re Pending Administrative Proceedings*, Securities Act Release No. 10,440, at 1 (Nov. 30, 2017) ("Ratification Order"). Neither development moots this case nor diminishes the need for this Court's review.

1. Although the government now agrees that SEC ALJs are Officers, it has afforded petitioners no redress for having subjected them to trial before an unconstitutionally constituted tribunal. *See* U.S. Br. 20-

21. On the contrary, petitioners remain subject to draconian sanctions—including a *lifetime* associational bar—resulting from the tainted proceedings below. *Id.* at 6. The court of appeals sustained those sanctions, which continue to have devastating effects on Ray Lucia. Absent review by this Court, the judgment below will stand uncorrected notwithstanding the Justice Department's confession of error. Review and reversal are warranted to provide petitioners a meaningful remedy for the constitutional deprivation they have suffered.

The government has not yet dismissed the proceedings against petitioners, and therefore there remains a case or controversy between them. In light of the government's change in position regarding whether SEC ALJs are Officers, however, the Court may wish to appoint an *amicus curiae* to defend the judgment below.

2. By its own terms, the Commission's so-called Ratification Order has no applicability to this case; it is also substantively defective.

a. The so-called Ratification Order does not render this case moot. *See Knox* v. *Serv. Emps. Int'l Union*, 567 U.S. 298, 307 (2012) ("voluntary cessation of challenged conduct does not ordinarily render a case moot"). Absent this Court's review, nothing would prevent the Commission from *continuing* to assert that its ALJs are employees. As the Order itself makes clear, unless and until this Court decides the question presented, the Commission will not actually acknowledge that petitioners were tried by an unconstitutional adjudicator or provide an appropriate remedy for that constitutional violation.

The so-called Ratification Order has no effect on this case because by its own terms it applies only to enforcement actions still pending in the administrative process, not to cases that are now pending before an Article III court. *See* Ratification Order 1-2; *see also id.*, Ex. A (listing proceedings remanded to ALJs). Having completed the administrative process, petitioners are entitled to a meaningful remedy for the constitutional deprivation they have suffered. In fact—as petitioners have repeatedly noted without any objection from the Commission or the Department of Justice—the Commission has waived or forfeited any argument in *this* case that "the Appointments Clause violation could be excused under a harmless-error, ratification, *de facto* officer, or any other similar doctrine." Pet. 34; *see also* Pet. App. 9a-10a. No thirteenth-hour ratification can salvage petitioners' tainted adjudication or the ensuing decisions and order.

As the United States appears to concede (at 20-21), petitioners at minimum are "entitled to a hearing before a properly appointed [ALJ]." *Ryder* v. *United States*, 515 U.S. 177, 188 (1995); *see also United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). For example, this Court has vacated the judgment of a panel with a *single* ineligible member, even though the remaining panel members provided "a quorum of judges competent to consider the appeal." *Nguyen* v. *United States*, 539 U.S. 69, 82 (2003). And the Court has held that a litigant tried before one biased judge must receive an entirely new trial before an impartial adjudicator. *Tumey* v. *Ohio*, 273 U.S. 510, 535 (1927). It is therefore clear that the Commission cannot simply wave a wand and reinstate any of the findings or conclusions made by the ALJ in this case. Because the Appointments Clause violation is a

"structural" error, *Freytag*, 501 U.S. at 878-79, the Commission's *only* options will be to dismiss the proceedings or seek a new proceeding before a constitutional tribunal—either a properly appointed ALJ other than Cameron Elliot, or a federal district judge.

b. The so-called Ratification Order has no effect on any other case, either, because SEC ALJs still have not been *appointed* in conformity with the Appointments Clause.

The Order (at 1) instead purports to "ratif[y] the agency's prior appointment" of five identified ALJs. But there undisputedly was no prior agency "appointment" to ratify because, as the government acknowledges (U.S. Br. 19), the Commission "did not play any role in the selection" of those ALJs. Rather, as "employ[ee]s" of the Commission, SEC ALJs had been "hired"—not appointed—by the SEC's Chief ALJ from a list prepared by the Office of Personnel Management, with few exceptions. U.S. Br. 3; *see also*, *e.g.*, Pet. App. 296a-297a (ALJ Elliot selected through this "hiring process"). The Commission conceded below that this method did not comport with the Appointments Clause. Pet. App. 9a. The "ratification" of an unconstitutional procedure is itself a nullity.

This result follows directly from the "principles of agency law" that "presumptively" govern ratification. *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 98 (1994). Ratification operates only to grant retroactive effect to an unauthorized act "as though authority to do the act *had been previously given*." *Cook* v. *Tullis*, 85 U.S. 332, 338 (1874) (emphasis added). Because the Appointments Clause barred the Commission from giving the Chief ALJ authority to "hire" other ALJs (*i.e.*, Officers) in the first place, the Commission has no power to ratify that "hiring" retroactively.

NRA Political Victory Fund, 513 U.S. at 98 ("it is essential that the party ratifying should be able … to do the act ratified … *at the time the ratification was made*" (quoting *Cook*, 85 U.S. at 338)). SEC ALJs must be *appointed* by the Commission itself—and this Order does not do that. Indeed, petitioners are aware of no "evidence of an appointment," such as the signature and delivery of a commission to the Commission's ALJs. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 157 (1803); *see* U.S. Const. art. II, § 3 (requiring "all the officers of the United States" to receive a commission).

II. THE REMOVAL ISSUE IS NOT PROPERLY PRESENTED

After agreeing that the Court should grant review in this case to decide whether SEC ALJs are Officers, the Solicitor General asks this Court to *also* decide whether limitations on the removal of SEC ALJs from office violate the separation of powers. U.S. Br. 18-21. Yet the government does not dispute petitioners' previous explanation that "the constitutionality of ALJ removal procedures … ha[s] never been raised by any party in this case (or in *Bandimere*) and thus th[is is] not [an] argument[] available to the government here." Pet. 34.

It is canonical that this Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Although petitioners have "reserve[d] the right to raise" the removal issue in the unlikely event that this case involves further proceedings before a properly appointed ALJ, Opening Br. for Petitioners at 54 n.6, *Raymond J. Lucia Cos.* v. *SEC*, 868 F.3d 1021 (D.C. Cir. 2017) (en banc) (No. 15-1345), that issue was neither pressed nor passed on in any of the proceedings below—the government even refused

to take a position on the issue despite multiple questions at oral argument. *Hear* Oral Argument at 59:19-1:02:01, *Raymond J. Lucia Cos.* v. *SEC*, 868 F.3d 1021 (D.C. Cir. 2017) (en banc) (No. 15-1345), https://tinyurl.com/yddcpeyh (last visited December 12, 2017). Nor is the removal issue even remotely encompassed by petitioners' question presented. *See Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992) ("While we have on occasion rephrased the question presented by a petitioner, … by and large it is the petitioner himself who controls the scope of the question presented" (citations omitted)).

In fact, no court of appeals has decided whether SEC ALJs' removal protections are unconstitutional. *See*, *e.g.*, *Bandimere*, 844 F.3d at 1188 ("Questions about officer removal … are not issues on appeal and have not been briefed by the parties"). The Solicitor General thus asks this Court to break new ground without the benefit of a decision from the court below or any other court of appeals.

In *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), the Court held that "dual for-cause limitations on the removal" of members of the Public Company Accounting Oversight Board (PCAOB) violate the Constitution's separation of powers. *Id.* at 492. But the Court expressly "d[id] not address" similar removal protections for ALJs because it was "disputed" whether ALJs are necessarily Officers, and "[t]he Government below refused to identify … administrative law judges as 'precedent for the PCAOB.'" *Id.* at 507 n.10 (citation omitted).

Similar prudence would be especially appropriate here. If the Court holds that SEC ALJs are Officers, the Commission's decision and order must be vacated.

If the proceeding is dismissed, or petitioners are afforded a new trial in an Article III forum, the removal issue would never be presented in this case. The government thus seems to ask the Court to provide an advisory opinion on the removal issue. Only if the Commission attempts to try petitioners again before a properly appointed ALJ (assuming, *dubitante*, that such a trial could conform to minimum due process requirements) would the removal issue arise in this case. In that unlikely event, petitioners would raise the removal issue as a constitutional objection or defense to adjudication before an SEC ALJ. Resolving that issue would require, among other things, determining whether the SEC Commissioners *themselves* enjoy for-cause removal protection. *See* U.S. Br. 20.

If the Court nevertheless is inclined to decide the removal issue now, petitioners respectfully request that the Court formulate a specific question on that issue. The Court has previously framed its own questions on constitutional issues. *See*, *e.g.*, *NLRB* v. *Noel Canning*, 133 S. Ct. 2861 (2013). The Solicitor General proposes the unitary question whether the Commission's "use of administrative law judges as hearing officers … violates constitutional limitations on 'Officers of the United States.'" U.S. Br. i. But that reframing is unnecessarily broad. Petitioners propose instead the following additional question: "Whether limitations on the removal of SEC ALJs violate the separation of powers."

CONCLUSION

The petition for a writ of certiorari should be granted limited to the question presented in the petition.

Respectfully submitted.

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