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

BRIEF OF *AMICI CURIAE* STATES OF UTAH, ALABAMA, ARKANSAS, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MISSOURI, NEBRASKA, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA, TEXAS, WISCONSIN, AND WYOMING SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether administrative law judges of the Securities and Exchange Commission are Officers of the United States within the meaning of the Appointments Clause.

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INTEREST OF *AMICI CURIAE*[1]

Amici are the States of Utah, Alabama, Arkansas, Indiana, Kansas, Louisiana, Michigan, Missouri, Nebraska, Oklahoma, Rhode Island, South Carolina, Texas, Wisconsin, and Wyoming. They want to protect the structural safeguards embedded in the Constitution that allow the States and the federal government to "controul each other." The Federalist No. 51, at 351 (James Madison) (J. Cooke ed. 1961). The Appointments Clause ranks among the most significant of those safeguards. *Amici* seek a ruling from this Court that preserves their ability to use the Clause for that purpose.

SUMMARY OF ARGUMENT

In our constitutional drama, the States are not Fredo Corleone, sniveling in a boathouse to a later-born entity and demanding respect. *See* The Godfather: Part II (Paramount Pictures 1974). Rather, "under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

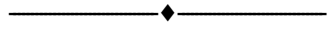
The Framers designed the Constitution to intentionally preserve State sovereignty. They planned on dual sovereigns becoming dueling sovereigns that would check each other's overreach. States' efforts to check federal excesses bear significant weight when

[1] The State of Utah, as *amicus curiae*, may file this brief without the parties' consent. Sup. Ct. R. 37.4.

they hold the federal government to account for disregarding the Constitution's structural safeguards.

The Appointments Clause is a critical structural safeguard. By circumscribing who may appoint principal and inferior federal officers, the Clause facilitates State efforts to hold the President and members of Congress politically accountable for good and bad appointments. The importance of those efforts cannot be overstated in an era when federal appointees can bring the weight of federal authority to bear on untold aspects of a concurrent sovereign's activities.

In resolving this case, the Court should emphasize the federal government's duty to ensure that its inferior officers take their stations in accordance with the Appointments Clause's mandates. Such a ruling will strengthen the States' efforts to discharge their sovereign duty of checking federal overreach for the people's benefit.



ARGUMENT

Like the Tenth Circuit, *Bandimere v. SEC*, 844 F.3d 1168, 1170 (10th Cir. 2016), Petitioners get it right: The Securities and Exchange Commission's administrative law judges are inferior officers. Those ALJs hold offices provided by law and exercise significant federal authority in a host of ways – some with career-ending consequences – when they adjudicate citizens' rights in adversarial proceedings. *See* Pet'rs' Br. 20-26. Those ALJs thus must accede to their offices

consonantly with the Appointments Clause, U.S. Const. art. II, § 2, cl. 2; *see Freytag v. Comm'r*, 501 U.S. 868 (1991); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam). Here, everyone agrees that they did not do so. Pet'rs' Br. 15. That suffices to reverse the Court of Appeals' judgment.

Amici endorse Petitioners' arguments in support of reversal but will not belabor them. Instead, *amici* explain why arguments uniquely theirs to make also support the outcome Petitioners seek.

Those arguments arise from a lesson "every schoolchild learns" – that "our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The Founders' constitutional design makes State sovereignty a bulwark against unlawful federal action. Allowing inferior officers to exercise federal power when they have not lawfully acceded to their offices erodes that unique (and uniquely important) bulwark.

I. The Founders Intended The Sovereign States To Check Federal Overreach.

A. Our Constitution Preserves State Sovereignty.

1. The Founders' ingenuity created "'a legal system unprecedented in form and design, establishing two orders of government.'" *Printz v. United States*, 521 U.S. 898, 920 (1997) (quoting *U.S. Term Limits, Inc.*

v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). The Constitution not only created the federal government but kept the several States intact because "[p]reservation of the States as independent political entities" was "the price of union." *Id.* at 919. In fact, for almost 150 years, this Court's cases have recognized the Constitution's paramount concern for State sovereignty: "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868), *overruled in part on other grounds*, *Morgan v. United States*, 113 U.S. 476, 496 (1885).

By allocating power in a way that "preserves the integrity, dignity, and residual sovereignty of the States," the Constitution "ensure[s] that States function as political entities in their own right." *Bond v. United States*, 564 U.S. 211, 221 (2011). States reap the benefits – and bear the burdens – of "represent[ing] and remain[ing] accountable to [their] own citizens," *Printz*, 521 U.S. at 920, when they exercise the "numerous and indefinite" powers that the Constitution "reserve[s] to" them, The Federalist No. 45, at 313 (James Madison). Those powers operate on subjects closest to the people – their "lives, liberties, and properties," and "the internal order, improvement, and prosperity of the State." *Id.*

The Founders separated sovereignty that way to benefit the people. "The federal structure allows local policies 'more sensitive to the diverse needs of a

heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.' " *Bond*, 564 U.S. at 221 (quoting *Gregory*, 501 U.S. at 458). States can "respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Id.*

2. The Founders who split sovereignty's atom expected the States to check federal overreach. "[A]ction that exceeds the National Government's enumerated powers undermines the sovereign interests of States," *id.* at 225, entities with the institutional motive and ability to push back. Hence our constitutional design yields "a healthy balance of power between the States and the Federal Government" intended to "reduce the risk of tyranny and abuse from either front." *Gregory*, 501 U.S. at 458. As Madison put it, dual sovereignty creates a "double security" for "the rights of the people": "[t]he different governments will controul each other; at the same time that each will be controulled by itself." The Federalist No. 51, at 351.

But that outcome isn't guaranteed simply because the Constitution created separate governments. Achieving federalism's promise of "double security" requires "a proper balance between the States and the Federal Government." *Gregory*, 501 U.S. at 459. Dual sovereigns "will act as mutual restraints only if both are credible." *Id.*

3. State efforts to check federal overreach carry significant credibility when they rely on "the shape of the constitutional scheme." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985). That's because "[a]part from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." *Id.*

Two parts of that structure warrant discussion here. First, States play a unique role (through the electoral college) in electing the President. U.S. Const. art. II, § 1, cl. 2-3. Second, the Founders intended the Senate to protect the States' interests. In that body, "each State received equal representation and each Senator was to be selected by the legislature of his State." *Garcia*, 469 U.S. at 551 (citing U.S. Const. art. I, § 3). To be sure, States no longer directly elect United States Senators, *see* U.S. Const. amend. XVII, but States still have "equal representation in the Senate," a structural feature whose importance "is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State's consent." *Garcia*, 469 U.S. at 551 (citing U.S. Const. art. V.).

The historical record confirms that the Framers thought the Senate well suited to protecting the States. James Madison in "particular reli[ed] on the equal representation of the States in the Senate, which he saw as 'at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an

instrument for preserving that residuary sovereignty.'" *Id.* (quoting The Federalist No. 62, p. 408 (B. Wright ed. 1961)). Madison further reasoned "that 'the residuary sovereignty of the States [is] implied *and secured* by that principle of representation in one branch of the [federal] legislature.'" *Id.* (quoting The Federalist No. 43, p. 315 (B. Wright ed. 1961)).

In short, the Founders placed "procedural safeguards . . . in the structure of the federal system" to help "properly protect" the "State[s'] sovereign interests." *Id.* The Presidency and the Senate embody and superintend those safeguards.

B. The Appointments Clause Is A Structural Safeguard That Serves States' Sovereign Interests.

1. The Appointments Clause is a paradigmatic structural safeguard for checking federal overreach and protecting State sovereignty. It vests the President with power to "nominate, and by and with the Advice and Consent of the Senate," to appoint ambassadors, Justices of this Court, and other "Officers of the United States" whose offices are "established by Law." U.S. Const. art. II, § 2, cl. 2. It creates a different mechanism, however, for appointing "inferior Officers": As Congress "think[s] proper," it "may by Law vest the[ir] Appointment . . . in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.*

The Founders designed the Appointments Clause to "prevent[] the diffusion of the appointment power."

Freytag, 501 U.S. at 878. This safeguard serves that purpose for at least three reasons.

First, one of the Founders' "greatest grievances against executive power" was the "manipulation of official appointments." *Id.* at 883 (internal quotation marks omitted). To them, the appointment power represented both "the most insidious and powerful weapon of eighteenth century despotism," *id.* (internal quotation marks omitted), and a means for "subvert[ing] democratic government," *id.* at 885. The Appointments Clause "addressed these concerns" by carefully delineating who could wield that power. *Id.* at 883.

Second, cabining the appointment power would "ensure that those who wielded it were accountable to political force and the will of the people." *Id.* at 884; *see also Edmond v. United States*, 520 U.S. 651, 663 (1997) (the "Clause [is] designed to preserve political accountability relative to important Government assignments"). "By requiring the joint participation of the President and the Senate" to appoint principal officers, the Clause allows the public to ascribe credit (or blame) for good (or bad) appointments to the responsible political actor(s). *Edmond*, 520 U.S. at 660. So too for the appointment of inferior officers, since their "work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663.

Third, the Framers thought that the Clause gave the Country the best chance at "a higher quality of

appointments." *Id.* at 659. They expected "that the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body." *Id.* In Hamilton's words, "[t]he sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation." The Federalist No. 76, at 510-11.

2. The concerns that motivated the Clause's adoption persist. States share them.

First, the federal government is omnipresent today in ways the Founders could not have contemplated. Like private parties, States feel "the inexorable presence of the administrative state," *Freytag*, 501 U.S. at 885, and can be subject to federal courts' judgments, *see*, *e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-57 (1976) (holding that Congress has power under Section 5 of the Fourteenth Amendment to abrogate State sovereign immunity). States thus share the Founders' interest in ensuring that federal officers do not become "despot[s]" who "subvert[]" their democratic governments when exercising federal power. *Freytag*, 501 U.S. at 883, 885 (internal quotation marks omitted). The Appointments Clause's strictures give States tools to help prevent those outcomes.

States use those tools by deploying their "political force," *id.* at 884, to seek "political accountability relative to important [federal] Government assignments," *Edmond*, 520 U.S. at 663. State officials interact frequently with the State's members of Congress and occasionally with the President or members of his

cabinet. When federal officers are appointed in accordance with the Appointments Clause's requirements, State officials can meaningfully call Executive and Legislative Branch officials to account for their appointees' acts.

Or State officials could use those interactions to suggest persons to be nominated as federal officers, thereby furthering the Clause's third purpose. Given the dual sovereigns' symbiotic relationship, *see Bond*, 564 U.S. at 220-22; 225, States need – and want – the federal government to succeed. Higher-quality nominees (and officers) should produce higher-quality outcomes for the Nation, the States, and the people. But State officials' best chances for proposing quality nominees exist only when it is clear (as the Appointments Clause requires) who makes the appointment. If, for example, a State had an interest in proposing a nominee to be an SEC ALJ, that State would not have known where to turn before this case arose. *See* Pet'rs' Br. 15 (noting that "[f]or years, no one (including government counsel) seemed to know how SEC ALJs were selected" – a secret disclosed only "in response to a discovery order from a federal judge" in this case).

II. Appointments That Do Not Comply With The Clause Undermine State Sovereignty.

Amici acknowledge that not every inferior federal officer can directly affect the States. For example, sovereigns almost certainly will not be respondents in an SEC enforcement action and thus subject to an SEC

ALJ's authority. Since SEC ALJs are the only persons whose status as officers is directly presented, *see* Pet'rs' Br. 42, this Court's judgment here will not immediately implicate *amici*'s workaday activities.

But *amici* care deeply about both *how* the Court answers that question and how the federal government *responds* to that answer. "[A]bout 150 ALJs in 25" other federal agencies also "apparently preside – as SEC ALJs do – over adversarial enforcement proceedings subject to Sections 556 and 557 of the" Administrative Procedure Act. *Id.* Because States can participate as sovereigns in some proceedings before other ALJs – and before other persons who similarly exercise significant federal authority – they have every incentive to ensure that those persons hold their offices lawfully.

Examples from Utah illustrate the point. The federal government administers 63.1 percent of the land within Utah's borders. Carol Hardy Vincent et al., Cong. Research Serv., R42346, *Federal Land Ownership: Overview and Data* 8 (2017), https://fas.org/sgp/crs/misc/R42346.pdf. Most of that land is managed by the Bureau of Land Management (within the Department of Interior) or the U.S. Forest Service (within the Department of Agriculture). *See id.* at 12.

The BLM and Forest Service processes for resolving challenges to their land-management decisions are charitably described as byzantine. Congress eventually had the Congressional Research Service summarize those processes because of their "complexity."

Kristina Alexander, Cong. Research Serv., R40131, *Administrative Appeals in the Bureau of Land Management and the Forest Service* i (2013), http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R40131.pdf.

Consider just the BLM processes. The Department of Interior's Office of Hearing and Appeals (OHA) oversees administrative appeals. *See id.* at 1. "OHA is divided into two principal components: the appeals boards and the hearings division." *Id.* at 2. In public lands disputes, the Interior Board of Land Appeals "is the final step for most challenges of BLM agency actions (as distinguished from those based on land use plans)." *Id.* (citing 43 C.F.R. § 4.1(b)(3)). The decisionmakers on the Board are "Administrative Judges, which are distinct from Administrative Law Judges," though the BLM Director also "is an ex officio member." *Id.*

The hearings division, in contrast, "consists of ALJs, and is used where the law or regulations allow or require an ALJ." *Id.* That includes challenges to grazing decisions or certain types of oil and gas decisions. *See id.* What's more, "BLM officials" – with titles like "Deciding Officials" or "State Directors" – "also have authority to review disputes, typically at the early levels of a challenge." *Id.*

The upshot is that BLM resolves challenges to its land-management decisions through a host of procedures and decisionmakers. Administrative appeals of BLM land-use plans take one path when a State

governor files a "consistency review" (decision by the BLM State Director, appeal to the BLM Director, review in federal court) and another path when anyone else files a "protest" (decision by the BLM Director, review in federal court). *See id.* at 3-5. Any challenge to a BLM grazing decision begins with a "protest" resolved by a "deciding official," whose decision may be appealed to an ALJ, then to the Board, and then to federal court. *See id.* at 6-7. And parties challenge a BLM title or land-patent decision by filing a "contest" that an ALJ resolves; the losing party may appeal to the Board and then seek review in federal court. *See id.* at 9; 43 C.F.R. § 4.450.

Since the federal government controls nearly two-thirds of the land in Utah, the State is (and has been) a party in many BLM proceedings. *See, e.g.*, *Utah v. BLM*, No. 2017-200 (IBLA 2017); *S. Utah Wilderness All. v. BLM*, No. 2017-075 (IBLA 2017); *Wildearth Guardians v. BLM*, No. 2016-279 (IBLA 2016). Those proceedings directly implicate Utah's sovereign interests, and ineluctably raise questions like the one presented here: Are the BLM personnel who administer those proceedings inferior officers, and if so, did they take office consonantly with the Appointments Clause?

Amici do not ask this Court to answer those questions here. Nor do *amici* purport to answer them – for the BLM or for any federal agency whose personnel perform similar tasks. They merely note some pronounced similarities between SEC ALJs, *see* Pet'rs' Br.

20-26, and BLM decisionmakers.[2] The precise implications of those similarities must, of course, await the "case-by-case analysis" that *Freytag* requires. *Bandimere*, 844 F.3d at 1189 (Briscoe, J., concurring).

Yet just because the Court's opinion here will inform those later case-specific decisions about inferior officers – and may even create serious consequences for the federal government in the meantime – is no reason to shy away from Petitioners' requested outcome. The Court has not hesitated to resolve questions of similar magnitude despite its answers' potentially broad ramifications. Whether in prior Appointments Clause challenges, *see, e.g.*, *United States v. Germaine*, 99 U.S. 508, 511 (1878) (applying Appointments Clause to "thousands of clerks in the Departments of the Treasury, Interior and the othe[r]" departments), or in cases alleging other structural violations, *see, e.g.*, *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 676-78 (2010) (holding that the National Labor Relations Board had improperly delegated decision-making authority to a

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[2] *See, e.g.*, 43 C.F.R. § 4.1 (stating that BLM's OHA "is an authorized representative of the Secretary for the purpose of hearing, considering, and deciding matters within the jurisdiction of the Department involving hearings, appeals, and other review functions of the Secretary"); *id.* § 4.1(a) (BLM ALJs "are authorized to conduct hearings in cases arising under statutes and regulations of the Department"); *id.* § 4.1(b)(2) (the Board of Land Appeals "decides finally for the Department appeals to the head of the Department from decisions rendered by Departmental officials"); *id.* § 4.26(a) (BLM ALJs are "authorized to issue subpoenas," both "on [their] own motion, or on written application of a party"); *id.* § 4.438(c) (providing that an ALJ's decision "will be final for the Department unless a notice of appeal is filed").

two-person quorum, which had "decided almost 600 cases"), this Court decides cases as they come – irrespective of the consequences. So too here.

In fact, a pressing need exists for this Court's clear guidance precisely *because* the implications might sweep broadly. If the SEC has erred, other federal agencies might have, too. And if that means unconstitutional federal appointments abound – and directly affect sovereign States – neither the separation of powers nor federalism tolerates proverbially sweeping the debris under the rug. Better to announce clear rules so that the Executive and Legislative Branches can ensure that other rooms in our constitutional structure are properly cleaned.

* * * * *

Adherence to the Appointments Clause's strictures yields benefits for "the entire Republic," *Freytag*, 501 U.S. at 880 – including the States. *Amici* respectfully urge the Court to answer the question presented in a way that allows the entire Republic to assess whether persons exercising significant federal power do so lawfully.

CONCLUSION

The judgment of the Court of Appeals for the D.C. Circuit should be reversed.

Respectfully submitted.

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