ORAL ARGUMENT SCHEDULED FOR MAY 24, 2017

No. 15–1345

United States Court of Appeals for the D.C. Circuit

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

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

BRIEF ON REHEARING *EN BANC* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

On Petition For Review Of An Order Of
The Securities and Exchange Commission

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

A. Parties and Amici. All parties and intervenors appearing before the Securities and Exchange Commission and in this Court appear in the Brief for Petitioners. It is our understanding that three additional amici intend to file briefs in support of Petitioners.

B. Ruling Under Review. An accurate reference to the ruling at issue appears in the Brief for Petitioners.

C. Related Cases. An accurate statement regarding related cases appears in the Brief for Petitioners.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, amicus curiae the Chamber of Commerce of the United States of America hereby submits the following corporate disclosure statement:

The Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief.† The Chamber filed its notice of its intent to participate in this case as *amicus curiae* on March 7, 2017.

Pursuant to Circuit Rule 29(d), the Chamber certifies that a separate brief is necessary to provide the perspective of the businesses that the Chamber represents—including businesses that are subject to the enforcement authority of the Securities and Exchange Commission and whose interests are often adjudicated by the Securities and Exchange Commission's administrative law judges—regarding the importance of ensuring that those who appoint Securities and Exchange Commission administrative law judges are accountable to the public as mandated by the Appointments Clause of Article II of the Constitution.

† No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

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GLOSSARY

ALJ	Administrative Law Judge
FDIC	Federal Deposit Insurance Corporation
SEC or Commission	Securities and Exchange Commission
STJ	Special Trial Judge

STATUTES AND REGULATIONS

Pertinent materials are contained in Petitioners' addendum.

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

INTRODUCTION AND SUMMARY OF ARGUMENT

The SEC's administrative law judges serve an increasingly important role in the enforcement of the securities laws. Statutory changes broadening the class of individuals and entities subject to the Commission's administrative jurisdiction, and expanding the sanctions that may be imposed in administrative enforcement proceedings, have produced dramatic growth in the Commission's use of administrative proceedings rather than civil actions in court.

Thus, SEC ALJs may now preside over administrative proceedings brought by the SEC against *any* business or individual, not just businesses or individuals registered with the SEC. The sanctions imposed in those proceedings may include disgorgement and other monetary penalties, as well as barring individuals from associating with others in the securities industry. In 90 percent of cases, the decisions of the SEC ALJs become final decisions without any review by the SEC. *See Bandimere v. SEC*, 844 F.3d 1168, 1187 (10th Cir. 2016).

The question presented by this case is whether, notwithstanding the significant authority wielded by SEC ALJs, those officials may be appointed without complying with the structural safeguards of the Appointments Clause of Article II of the Constitution.

The Appointments Clause was designed to protect against the manipulation and abuse of "the most insidious and powerful weapon of eighteenth century despotism"—"the power of appointment to offices." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 883 (1991). The Framers of the Constitution sought to protect against abuse of the appointment power by limiting the diffusion of the power and ensuring that "those who wielded it were accountable to political force and the

will of the people." *Id.* at 884. Thus, all officers—*i.e.*, any official "exercising significant authority under the laws of the United States"—must be appointed by the President, or, in the case of inferior officers, by the heads of departments or the courts of law as directed by Congress. *See Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

A straightforward application of Supreme Court precedent leads to the conclusion that SEC ALJs are "inferior officers" who must be appointed in accordance with the Appointments Clause. In *Freytag v. Commissioner of Internal Revenue*, the Supreme Court held that special trial judges of the Tax Court qualify as "officers" based on characteristics and functions essentially indistinguishable from those of SEC ALJs. *See* 501 U.S. at 881-82. For that reason, every other court that has reached the issue has concluded that under *Freytag*, SEC ALJs are officers for purposes of the Appointments Clause.

In departing from that consensus, the panel relied on this Court's decision in *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000). *Landry* held that ALJs of the Federal Deposit Insurance Corporation were not officers subject to the Appointments Clause because they had no authority to enter final decisions. But *Landry*'s holding cannot be

reconciled with the Supreme Court's decisions in *Freytag* and subsequent cases, which expressly hold that quasi-judicial officials qualify as "officers" for purposes of the Appointments Clause, even though they lacked authority to enter final decisions. This Court should accordingly overrule *Landry* and hold that SEC ALJs are officers for purposes of the Appointments Clause.

ARGUMENT

I. Proceedings Overseen By Administrative Law Judges Today Play A Significantly Increased Role In The Commission's Enforcement Activities.

The SEC has in recent years dramatically increased the proportion of enforcement actions brought as administrative proceedings before ALJs, rather than as civil actions in court. That transformation results largely from statutory changes expanding the categories of persons who may be targeted through administrative actions and the remedies available to the Commission in such actions—as well as the Commission's well-documented higher rate of prevailing before its ALJs. This expansion in the use of proceedings over which ALJs preside significantly increases the real-world importance of the issue before the Court in this case.

First, recent statutory changes have expanded the reach of SEC administrative proceedings and the range of available sanctions. The Commission previously could proceed administratively only against persons and entities required by law to register with the Commission. Today, it can proceed administratively against *any* person or entity. *See* 15 U.S.C. §§ 77h-1, 78u-3(a), 80a-9(f), 80b-3(k).

The remedies available in administrative proceedings have expanded from stop-orders and registration revocations and denials to, *inter alia*, monetary and other civil penalties such as fines and disgorgement, *see* 15 U.S.C. §§ 77h-1(e), (g), 78u-2, 78u-3(e), 80a-9(d)-(e), 80b-3(i)-(k); cease and desist orders, *see id.* §§ 77h-1, 78u-3(a), 80a-9(f), 80b-3(k); and collateral bars prohibiting individuals from associating with entities regulated by the SEC, *id.* §§ 78o(b)(6)(A), 78o-4(c)(4), 78q-1(c)(4)(C), 80-b(3)(f). *See generally* Jed S. Rakoff, PLI Secs. Reg. Institute Keynote Address, Is the S.E.C. Becoming a Law Unto Itself? (Nov. 5, 2014), http://media.jrn.com-/documents/secaddress.pdf.

Thus, the SEC can now obtain through administrative proceedings virtually the same relief—including substantial monetary

penalties[1]—against all of individuals and entities that it can sue in court. *See* Rakoff at 5-6; Andrew Ceresney, Remarks to the American Bar Association's Business Law Section Fall Meeting (Nov. 21, 2014) ("Ceresney"), http://www.sec.gov/News/Speech/Detail/Speech/1370543515297; H.R. Rep. No. 114-697, at 2 (2016) ("[t]his shift from litigation in court to administrative proceedings has occurred largely as a result of Section 929P of the [Dodd-Frank Act], which expanded the SEC's authority to obtain civil penalties in administrative proceedings against any person or entity").

Second, the SEC has dramatically increased the proportion of enforcement actions brought in administrative proceedings versus civil actions. Thus,

> [p]ublicly available data indicate that in FY 2014, the SEC's Enforcement Division brought nearly half of its litigated actions as administrative proceedings, an increase of over 35% since 2012. Moreover, it has been reported that the SEC brought 82% of its enforcement actions as administrative proceedings, rather than federal-court cases, in the six months ending in March 2015, representing an increase from less than half of those matters a decade earlier.

[1] In 2016, the SEC obtained over $4 billion in disgorgement and penalties. *See* Press Release, SEC, SEC Announces Enforcement Results for FY 2016 (Oct. 11, 2016), https://www.sec.gov/news/pressrelease/2016-212.html.

H.R. Rep. No. 114-697, at 2; *see also* Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 FORDHAM L. REV. 1143, 1146 (2016) ("Grundfest").

Prior to the Dodd-Frank Act, for example, the SEC had never brought an insider trading case before an ALJ. Now, however, the SEC regularly brings such cases before ALJs. *See* Sarah N. Lynch, U.S. SEC to File Some Insider-Trading Cases in Its In-House Court, REUTERS, June 11, 2014, http://www.reuters.com/article/sec-insidertrading-idUSL2N0OS1AT20140611; Ctr. for Capital Markets Competitiveness, Examining U.S. Securities and Exchange Commission Enforcement: Recommendations on Current Processes and Practices at 14 (July 2015).

Third, the Commission enjoys a higher rate of success in its actions before ALJs. Between October 2010 and March 2015, the SEC won 90% of the cases it brought before its ALJs, as compared with 69% of cases before federal court judges. Jean Eaglesham, *SEC Wins With In-House Judges*, WALL ST. J., May 6, 2015, https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803.

Of course, administrative proceedings before ALJs differ from federal court cases in several ways that meaningfully impact the ability of defendants to present a full defense. For example, defendants have limited ability to obtain pre-hearing discovery, have a short period of time to prepare for a hearing, are not protected by the evidentiary safeguards of the Federal Rules of Evidence, and have no right to a jury trial. *See* Grundfest at 1156-65, 1169-74; *see also* H.R. Rep. No. 114-697, at 3.

In contrast, the SEC may take years to investigate and develop a case, during which time it has essentially unfettered authority to request documents and interview witnesses. *See* Grundfest at 1158. The imbalance between the SEC and defendants in administrative proceedings has raised concerns about the fairness of such proceedings, which further underscores the importance of transparency and accountability in the conduct of the proceedings.

Moreover, the impact of SEC ALJs extends beyond the individual enforcement actions over which the ALJs preside. Agencies, and particularly the SEC, have long used administrative proceedings to establish standards and policies outside of the formal rulemaking

process. *See* David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. REV. 921, 926 (1965); *SEC v. Chenery Corp.*, 332 U.S. 194, 201-03 (1947).

The increased use of administrative proceedings accordingly carries with it a correspondingly greater role on the part of ALJs in agency policymaking. It also transfers responsibility for construing and interpreting the securities laws from federal courts to ALJs because federal courts reviewing administrative decisions defer to ALJs' legal conclusions. *See* Rakoff at 10-12; Grundfest at 1149, 1165-66.

In view of the increasingly central role SEC ALJs have in adjudicating enforcement actions and shaping the policy and law governing individuals and businesses, it is all the more important that the Appointments Clause's significant structural safeguard apply so that the public can easily discern and hold accountable the individual(s) responsible for appointing the ALJs.

II. SEC Administrative Law Judges Are "Officers" Under The Appointments Clause.

A. The Clause's Restrictions Provide Accountability For Appointments Of Officials Who Exercise Significant Executive Authority.

The Constitution's separation of powers, with its attendant checks and balances, is "essential to the preservation of liberty," and also ensures that "[a] dependence on the people" is the "primary control on the government." THE FEDERALIST NO. 51 at 261-262 (James Madison) (Garry Wills ed., 1982); *see also* THE FEDERALIST NO. 70 at 355 (Alexander Hamilton) ("[a] due dependence on the people" is necessary for the "safety of the republic"). And the Appointments Clause is "among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997); *see also Freytag*, 501 U.S. at 880.

First, the Clause "prevents congressional encroachment upon the Executive and Judicial Branches" by "vesting the President with the exclusive power to select principal (noninferior) officers." *Edmond*, 520 U.S. at 659. *Second*, with respect to "inferior Officers," the Clause grants Congress "only limited authority to devolve appointment power on the President, his heads of departments, and the courts of law."

Freytag, 501 U.S. at 884. At the same time, it provides for a check on injudicious appointments by the President by subjecting his appointments of principal officers to Senate approval. *See* U.S. CONST. art. II, § 2, cl. 2; *Weiss v. United States*, 510 U.S. 163, 184-85 (1994); *see also Ryder v. United States*, 515 U.S. 177, 182 (1995) ("The Clause is a bulwark against one branch aggrandizing its power at the expense of another branch . . . .").

By limiting the power of appointment to the President and, in the case of inferior officers, to the Heads of Departments and the courts, the Clause also ensures that those wielding the appointment power are "accountable to political force and the will of the people." *Freytag*, 501 U.S. at 878, 884. The Framers recognized that when the power of appointment is dispersed among multiple people, "[s]candalous appointments to important offices" are made, and it is impossible to "determine by whose influence [the people's] interests have been committed to hands so unqualified, and so manifestly improper." THE FEDERALIST NO. 70 at 359 (Alexander Hamilton). Accordingly, the Constitution "carefully husband[s] the appointment power to limit its diffusion," *Freytag*, 501 U.S. at 883, and thus permits the people to

"determine what part had been performed by the different actors," THE FEDERALIST NO. 77 at 389 (Alexander Hamilton).

Consistent with this history, the Supreme Court has held that the Appointments Clause has "substantive meaning" and that "any appointee exercising significant authority pursuant to the laws of the United States" is an "Officer of the United States" who must be appointed in accordance with the Clause's terms. *Buckley*, 424 U.S. at 126; *see also id.* at 132 ("Unless their selection is elsewhere provided for, *all* Officers of the United States are to be appointed in accordance with the Clause." (emphasis added)).

The class of officials covered by the Clause is "unusually broad," as demonstrated by the wide range of officials the Supreme Court itself has held are "inferior officers,"[2] including:

> (1) A district court clerk, *Ex Parte Hennen*, 38 U.S. 235, 257-58 (1839); (2) "thousands of clerks in the Departments of the Treasury, Interior and the othe[r]" departments, *United States v. Germaine*, 99 U.S. 508, 511 (1878), who are responsible for "the records, books and papers appertaining to the office," *Hennen*, 38 U.S. at 259; (3) a clerk to "the

[2] "Inferior officers" are those officers "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the Senate's advice and consent." *Edmond*, 520 U.S. at 664; *accord Free Enter. Fund v. PCAOB*, 561 U.S. 477, 510 (2010).

> assistant treasurer" stationed "at Boston," *United States v. Hartwell*, 73 U.S. 385, 392 (1868); (4 & 5) an "assistant-surgeon" and a "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); (6) election monitors, *Ex parte Siebold*, 100 U.S. 371, 397-399 (1880); (7) United States attorneys, *Myers v. United States*, 272 U.S. 52, 159 (1926); (8) federal marshals, *Siebold*, 100 U.S. at 397; *Morrison v. Olson*, 487 U.S. 654, 676 (1988); (9) military judges, *Weiss*, 510 U.S. at 170; (10) judges in Article I courts, *Freytag*, 501 U.S. at 878; and (11) the general counsel for the Department of Transportation, *Edmond*, 520 U.S. at 666.

Free Enter. Fund, 561 U.S. at 539-40 (Breyer, J., dissenting) (citations altered).

Although the Supreme Court has not articulated a bright-line test for determining whether an official exercises "significant authority pursuant to the laws of the United States," its decision in *Freytag* provides guidance for making that determination in the context of quasi-judicial officials. *See* 501 U.S. at 881.

Freytag held that special trial judges of the U.S. Tax Court are "inferior officers" based on the "significance of the duties and discretion that [they] possess." *Id.* at 881-82. The Court emphasized that special trial judges "perform more than ministerial tasks"; they "take testimony, conduct trials, rule on the admissibility of evidence, and

have the power to enforce compliance with discovery orders," and exercise significant discretion in carrying out those "important functions." *Id.*[3]

Since *Freytag*, the Court has also held—virtually summarily—that military judges are officers subject to the Appointments Clause. *See Edmond*, 520 U.S. at 662; *Weiss*, 510 U.S. at 169-70.

B. SEC Administrative Law Judges Qualify As "Inferior Officers" Because They Exercise Significant Authority Pursuant to the Laws of the United States.

SEC ALJs clearly qualify as "officers" subject to the Appointments Clause. Indeed, every other court to consider the issue has reached that conclusion.[4] That is not surprising: SEC ALJs exercise significant

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[3] The Court held in the alternative that "[e]ven if the duties of special trial judges" in cases in which they did not have final decision-making authority "were not as significant as [it had] found them to be," the judges' authority to enter final decisions in other cases would suffice to make them "officers." *Id.* at 882.

[4] *See Bandimere v. SEC*, 844 F.3d 1168, 1179 (10th Cir. 2016); *Gray Fin. Grp. v. SEC*, 166 F. Supp. 3d 1335, 1350-51 (N.D. Ga. 2015), *vacated on other grounds* 825 F.3d 1236 (11th Cir. 2016); *Hill v. SEC*, 114 F. Supp. 3d 1297, 1317 (N.D. Ga. 2015), *vacated on other grounds* 825 F.3d 1236 (11th Cir. 2016); *Ironridge Global IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294, 1316 (N.D. Ga. 2015); *Timbervest, LLC v. SEC*, 2105 WL 7597428, at *8-9 (N.D. Ga. Aug. 4, 2015); *Duka v. SEC*, 2015 WL 4940057, at *2 (S.D.N.Y. Aug. 3, 2015), *vacated on other grounds*, No. 15-2732 (2d Cir. June 13, 2016); *cf. Pacemaker Diagnostic Clinic of Am.,*

authority and discretion in administrative proceedings, which have a profound impact on businesses and individuals.

Like the office of special trial judge, the office of SEC ALJ is established by law. The Administrative Procedure Act (APA) creates the office of the administrative law judge, and sets forth the ALJ's duty of presiding over adjudicatory hearings. 5 U.S.C. §§ 556, 557; *see also id.* §§ 3105, 5372 (setting forth means of appointment and salary). The federal securities laws, in turn, authorize the SEC to "delegate . . . any of its functions to . . . an administrative law judge." 15 U.S.C. § 78d-1(a).

Pursuant to that authorization, the SEC has delegated to ALJs responsibility for the "fair and orderly conduct of [administrative] proceedings," 17 C.F.R. § 200.14(a), and thereby empowered the ALJs to "perform more than ministerial tasks," *Freytag*, 501 U.S. at 881. Indeed, an SEC ALJ has "authority to do all things necessary and appropriate

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Inc. v. Instromedix, Inc., 725 F.2d 537, 545 (9th Cir. 1984) (en banc) (recognizing magistrate judges are "officers").

Moreover, several Supreme Court Justices have expressed their opinion that *all* ALJs are officers for purposes of the Appointments Clause. *See Freytag*, 501 U.S. at 910 (Scalia, J., concurring in part and concurring in judgment); *Free Enter. Fund*, 561 U.S. at 542 (Breyer, J., dissenting).

to discharge his or her duties." 17 C.F.R. § 201.111. That includes, but is not limited to:

- administering oaths and affirmations, *id.* §§ 200.14(a)(1), 201.111(a);
- issuing, revoking, quashing, and modifying subpoenas, *id.* §§ 200.14(a)(2), 201.111(b);
- receiving evidence and ruling on the admissibility of evidence and offers of proof, *id.* §§ 200.14(a)(3), 201.111(c);
- regulating the course of a proceeding and the conduct of the parties and their counsel, *id.* §§ 200.14(a)(5), 201.111(d);
- holding prehearing conferences, *id.* §§ 200.14(a)(6), 201.111(e);
- entering default judgments, *id.* § 201.155(a);
- examining witnesses, *id.* § 200.14(a)(4);
- ordering and regulating document production and depositions, *id.* §§ 201.230, 201.233;
- ruling on all procedural and other motions, *id.* §§ 200.14(a)(7), 201.111(h);
- preparing an initial decision containing factual findings and legal conclusions, the reasons or basis thereof, and an appropriate order, sanction, and relief, *id.* §§ 200.14(a)(8), 201.111(i), 201.360; *see also* 5 U.S.C. § 557(c).

See generally 5 U.S.C. § 556(c).

The ALJ's initial decision is "deemed the action of the [SEC]," unless a party or other person entitled to review files a timely petition for review or the SEC on its own initiative exercises its discretionary

right to review. 15 U.S.C. § 78d-1(c); *see also* 17 C.F.R. § 201.360(d); 5 U.S.C. § 557(b). Even in those cases in which a party appeals the ALJ's decision, the SEC retains discretion to decline to review the ALJ's decision, except in a few specified circumstances. *See* 17 C.F.R. § 201.411(b). As a practical matter, 90 percent of ALJ initial decisions become final without review by the SEC. *See Bandimere*, 844 F.3d at 1187.

In sum, the authority and discretion of SEC ALJs are indistinguishable from the duties of the special trial judges that the *Freytag* Court found sufficiently "significan[t]" to render special trial judges "officers" under the Appointments Clause. 501 U.S. at 881-82.

* * *

The Framers recognized that inferior officers exercise government authority that can profoundly influence the lives and interests of the people. They therefore sought to "preserve political accountability relative to important government assignments." *Edmond*, 520 U.S. at 662.

The SEC ALJs at issue here unquestionably hold "important government assignments." The current method of appointing those five

officers through a convoluted process involving numerous unelected officials undermines the Appointments Clause's important structural safeguard—depriving the people of any ability to hold the appointing authority accountable for the consequential actions of SEC ALJs.

To be sure, there may be some inconvenience to the government from filling the SEC ALJ positions in the manner required by the Constitution. But constitutional commands do not give way to convenience and expediency. *See Bowsher v. Synar*, 478 U.S. 714, 736 (1986). In any event, as the experience of other agencies who have amended the process for appointing ALJs has shown, the Commission is unlikely to experience significant disruption. *See, e.g.*, Pub. L. 110-313, § 1, 122 Stat. 3014, 3014 (2008) (amending method of appointing administrative patent and trademark judges to be by Secretary of Commerce); *In re LabMD, Inc.*, No. 9357, 2015 WL 5608167, at *2 (F.T.C. Sept. 14, 2015) (noting reappointment of FTC administrative law judge).

We recognize that there are over 1,500 other ALJs across all federal agencies. *See Free Enter. Fund*, 561 U.S. at 542-43 (Breyer, J., dissenting); *Bandimere*, 844 F.3d at 1199 (McKay, J., dissenting). But

whether those ALJs are also officers for purposes of the Appointments Clause turns on the scope of their functions and discretion. And whether there is a violation of the Appointments Clause turns on how those ALJs are selected.[5]

Certainly the possibility of additional violations of the Constitution does not justify turning a blind eye to the Constitution's requirements. Rather, it provides an additional reason for this Court to reaffirm those requirements to safeguard the liberty and accountability that the Appointment Clause protects.

III. THIS COURT SHOULD OVERRULE *LANDRY V. FDIC.*

Notwithstanding the significant authority SEC ALJs wield in administrative proceedings, and the significant role those proceedings play in the Commission's enforcement of the securities laws, the SEC argues and the panel held that SEC ALJs are not "inferior Officers," relying heavily on *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir 2000).

[5] In addition, the number of ALJs is dwarfed by the "*thousands* of clerks in the Departments of the Treasury, Interior and the othe[r]" departments who the Supreme Court has recognized are officers for purposes of the Appointments Clause. *United States v. Germaine*, 99 U.S. 508, 511 (1878)(emphasis added).

Landry, however, rested on a misreading of the Supreme Court's decision in *Freytag*, and should be overruled.

Landry held that FDIC ALJs were not inferior officers for purposes of the Appointments Clause. *Id.* at 1134. In reaching that conclusion, the Court recognized that, like the special trial judges who were held to be inferior officers in *Freytag*, the FDIC's ALJs had authority to "'exercise significant discretion'" in the course of carrying out "'important functions,'" 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.'" *Id.* at 1133-34 (quoting *Freytag*, 501 U.S. at 881-82).

Nevertheless, the Court held that FDIC ALJs were not inferior officers because they lacked the "power of final decision," which it believed was "critical to the [*Freytag*] Court's decision" that special trial judges are inferior officers. *Id.* at 1134.

That determination, however, is inconsistent with the Supreme Court's decision in *Freytag*, and with the Court's subsequent decisions interpreting the Appointments Clause. *Freytag* expressly *rejected* the government's argument that special trial judges were not officers in

cases where they lacked the authority to enter a final decision. 501 U.S. at 881. That view, the Court held, "ignore[d] the significance of the duties and discretion that special trial judges possess"—namely, statutorily established office, duties, salary, and means of appointment, and performance of the "important functions" of "tak[ing] testimony, conduct[ing] trials, rul[ing] on the admissibility of evidence, and hav[ing] the power to enforce compliance with discovery orders." *Id.* at 881-82. It was on the basis of these "significan[t]" duties and the "significant discretion" special trial judges had in performing those duties that the Court held that special trial judges were officers for purposes of the Appointments Clause. *Id.*

In finding that the power of final decision was critical to the *Freytag* decision, *Landry* mistakenly construed the core holding of *Freytag*. After the *Freytag* Court found that special trial judges were officers based on their role and discretion in regulating the trial process, it went on to set forth a separate and independent basis for finding the judges to be officers. "*Even if* the duties of special trial judges" were not as significant as the Court had just found them to be—and thus not sufficient by themselves to render special trial judges officers—"our

conclusion" that special trial judges are inferior officers "would be unchanged" because special trial judges have the authority to enter final decision in some categories of cases. *Id.* at 882 (emphasis added).

That authority, the Court explained, was sufficient to categorize special trial judges inferior officers in all cases, even if the Court assumed that in some cases the judges had neither final decision-making authority nor other significant duties. *Id.* In other words, *Freytag* stands for the proposition that final decision-making authority in some matters would be sufficient to make an official an "officer" for all purposes, even where his other functions are not "significant." But final decision-making authority in all matters is not necessary for "officer" designation.

Subsequent cases confirm this reading of *Freytag*. In *Weiss v. United States*, decided just a few years after *Freytag*, the Supreme Court held that military judges qualify as officers subject to the requirements of the Appointments Clause. *See* 510 U.S. 163, 170 (1994).[6] Military judges "rule[] on all legal questions, and instruct[]

[6] The precise issue in *Weiss* was whether the Appointments Clause requires military officers to obtain a separate appointment before serving as military judges. The Court noted that the parties agreed

court-martial members regarding the law and procedures to be followed," and, where the accused elects, decide guilt or innocence and impose sentences. *Id.* at 167-68.

However, "no sentence becomes final until approved by the officer who convened the court-martial," and the judges' factual findings, legal rulings, and sentences are subject to *de novo* review by the Courts of Military Review. *Id.* at 167-68; *see also id.* at 193 (Souter, J., concurring); 10 U.S.C. §§ 864, 866, 869.[7] Notwithstanding the military judges' inability to enter final decisions, the Court held that "because of the authority and responsibilities they possess," military judges "act as 'Officers' of the United States." *Weiss*, 510 U.S. at 169.

Similarly, in *Edmond v. United States*, the Supreme Court held that judges on the Coast Guard Court of Criminal Appeals are inferior officers for purposes of the Appointments Clause. 520 U.S. at 666. The Court expressly recognized that those judges "have no power to render a final decision on behalf of the United States unless permitted to do so

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"rightly so" that the Appointments Clause applied to the military judges. 510 U.S. at 170.

[7] The Courts of Military Review were subsequently renamed the Court of Criminal Appeals. *See* National Defense Authorization Act for Fiscal Year 1995, § 924, 108 Stat. 2663, 2831 (1994).

by other Executive Officers." *Id.* at 665. Nevertheless, the Court "[did] not dispute that military appellate judges are charged with exercising significant authority on behalf of the United States," which rendered them officers under the Appointments Clause. *Id.* at 662.

Indeed, the Court recognized that being subject to review is inherent to the definition of an "inferior officer," who is subject to the Appointments Clause: "[W]e think it evident that 'inferior officers' are officers whose 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.

Thus, in both *Weiss* and *Edmond*, the Supreme Court confirmed that the authority to enter final decisions is relevant to distinguishing *inferior* officers from *principal* officers, not to distinguishing inferior officers from mere employees whose appointments are not subject to the strictures of the Appointments Clause. This Court recognized as much in *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*. *See* 684 F.3d 1332, 1338 (D.C. Cir. 2012) (noting that *Edmond* relied on fact that judges at issue "had 'no power to render a final decision on behalf of the United States unless permitted to do so by other Executive

Officers'" to conclude that they were inferior officers). *Landry* stands at odds with these clear precedents and should therefore be overruled.

CONCLUSION

The Court should grant the petition for review and overrule *Landry v. FDIC*, 204 F.3d 1125 (2000).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 4,303 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e)(1). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Century Schoolbook font using Microsoft Word.

Dated: March 10, 2017

/s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Cir. R. 25(a), that on March 10, 2017, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated: March 10, 2017

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