No.

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

PETITION FOR A WRIT OF CERTIORARI

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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.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the proceeding are named in the caption.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner Raymond J. Lucia Companies, Inc. has no parent corporation, and no publicly held company holds 10 percent or more of its stock.

TABLE OF CONTENTS

TABLE OF APPENDICES

Page

TABLE OF APPENDICES *(continued)*

Page

TABLE OF APPENDICES *(continued)*

Page

TABLE OF AUTHORITIES

CASES **Page(s)**

TABLE OF AUTHORITIES *(continued)*

CASES *(continued)* **Page(s)**

TABLE OF AUTHORITIES *(continued)*

CASES *(continued)* **Page(s)**

TABLE OF AUTHORITIES *(continued)*

CONSTITUTIONAL PROVISIONS **Page(s)**

STATUTES

TABLE OF AUTHORITIES *(continued)*

STATUTES *(continued)* **Page(s)**

REGULATIONS

TABLE OF AUTHORITIES *(continued)*

REGULATIONS *(continued)* **Page(s)**

TABLE OF AUTHORITIES *(continued)*

RULES **Page(s)**

OTHER AUTHORITIES

TABLE OF AUTHORITIES *(continued)*

OTHER AUTHORITIES *(continued)* **Page(s)**

TABLE OF AUTHORITIES *(continued)*

OTHER AUTHORITIES *(continued)* **Page(s)**

PETITION FOR A WRIT OF CERTIORARI

Petitioners Raymond J. Lucia and Raymond J. Lucia Companies, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The *per curiam* order of the en banc court of appeals, denying the petition for review by an equally divided court (Pet. App. 1a-2a), is available at 2017 WL 2727019. The panel's opinion (Pet. App. 3a-36a) is reported at 832 F.3d 277. The opinion and order of the Commission (Pet. App. 37a-109a) are available at Exchange Act Release No. 73,857, 2015 WL 5172953; an interim remand order (Pet. App. 238a-243a) is unreported. The relevant initial decision of the administrative law judge (Pet. App. 115a-237a) is available at Initial Decision Release No. 495, 2013 WL 3379719.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2017. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Appointments Clause as well as pertinent statutory and regulatory provisions are reproduced in the Appendix at 247a-294a.

STATEMENT

Administrative law judges of the Securities and Exchange Commission preside over trial-like adversarial hearings, during which they take testimony, rule on the admissibility of evidence, and enforce compliance with their orders. This Court has ruled that non-Article III adjudicators who exercise such discretionary powers are Officers of the United States who must be appointed pursuant to the Appointments Clause. *Freytag* v. *Comm'r*, 501 U.S. 868, 881-82 (1991). In this case, however, a three-judge panel of the D.C. Circuit ruled that SEC ALJs are mere employees who are not subject to the Appointments Clause. Pet. App. 21a. The Tenth Circuit expressly disagreed with that decision, ruling that SEC ALJs are Officers of the United States within the meaning of the Appointments Clause. *Bandimere* v. *SEC*, 844 F.3d 1168, 1170 (10th Cir. 2016). The D.C. Circuit subsequently granted en banc rehearing, but reached a 5-5 deadlock—leaving the panel decision intact and the circuit split intractable.

1. Long before the advent of the modern administrative state, the Framers understood that curbing abuses of executive power requires carefully cabining the prerogative to *appoint* those who wield it. *Edmond* v. *United States*, 520 U.S. 651, 659-60 (1997). In prescribing the exclusive means of appointing any "Office[r] of the United States," U.S. Const., art. II, § 2, cl. 2, the Appointments Clause "preserves … the Constitution's structural integrity" by ensuring that officials invested with significant federal authority remain "accountable to political force and the will of the people." *Freytag*, 501 U.S. at 878, 884; *see also Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam).

Congress has charged the SEC with executing and enforcing the federal securities laws, 15 U.S.C. § 78d(a), including the Investment Advisers Act of 1940, *id.* § 80b-9. Congress authorized the Commission to "delegate … any of its functions" except rulemaking to "administrative law judge[s]." *Id.* § 78d-1(a). When the Commission initiates an enforcement action, it can either sue in federal court or commence an administrative proceeding. *See id.* §§ 78u, 78u-2, 78v. Where the Commission elects to commence an administrative proceeding, an ALJ with delegated authority normally presides over the hearing. *See* 17 C.F.R. § 201.110.

In establishing this statutory scheme, Congress repeatedly referred to SEC ALJs as "officers of the Commission," 15 U.S.C. §§ 77u, 78v, 80a-40, 80b-12; set forth their duties and salary by law, *see* 5 U.S.C. §§ 556-557 (duties), 5372(b) (salary); and prescribed that the "*agency* shall appoint [its] administrative law judges," 5 U.S.C. § 3105 (emphasis added)—a manner of appointment that, if followed, would comport with the Appointments Clause.

The Commission, in turn, has deemed its ALJs "hearing officer[s]" and delegated to those "officer[s] … the authority to do all things necessary and appropriate to discharge" their duties. 17 C.F.R. § 201.111. That authority is extensive and includes the powers to oversee hearings and discovery, rule on motions (including summary disposition), enter default judgments, and impose or modify sanctions. *See generally ibid.* (non-exhaustive list of ALJs' powers); *see also id.* §§ 201.155 (default), .180 (sanctions), .230 (document production), .232-.234 (subpoenas and depositions), .250 (summary disposition), .320-.326 (evidence). SEC ALJs also rule on the admissibility of evidence,

take testimony, and make credibility findings, to which the Commission defers absent overwhelming evidence to the contrary. Pet. App. 19a. The Commission acknowledged in this case that ALJ fact-finding plays a "vital role" in the agency's decision-making process. *Id.* 241a.

At the conclusion of an administrative hearing, SEC ALJs enter an "initial decision," 17 C.F.R. § 201.360(a)(1), that can and almost always does "become final," *id.* § 201.360(d)(2). Although the Commission "retain[s] a discretionary right to review" any "action" by an ALJ, whether *sua sponte* or upon a petition for review, 15 U.S.C. § 78d-1(b), "[i]f the right to exercise such review is declined" or not timely sought, the ALJ's action is "deemed the action of the Commission," *id.* § 78d-1(c). About 90 percent of ALJ decisions are *not* reviewed by the Commission, *see Bandimere*, 844 F.3d at 1180 n.25; in such cases, the Commission "will issue an order that the decision has become final," 17 C.F.R. § 201.360(d)(2).

It is undisputed that, if SEC ALJs are constitutional Officers, then the current procedure for their selection does not comply with the Appointments Clause. Pet. App. 9a-10a. SEC ALJs are not appointed by the Commission as a whole, but rather selected by SEC staff from a pool of candidates identified by the Office of Personnel Management. *Id.* 295a-297a (providing details of how SEC ALJs are selected).

2. Petitioner Raymond J. Lucia, formerly the sole owner of petitioner Raymond J. Lucia Companies, Inc., is an investment professional who—until this proceeding—had an unblemished record spanning nearly forty years. *See* Pet. App. 34a; 119a-120a; 233a. In free seminars for potential clients (at which

no securities were offered or sold), he promoted a retirement strategy colorfully named "Buckets of Money," which advocated a diversified portfolio from which, in retirement, investors would liquidate lower-risk investments first to give riskier investments time to grow. *Id.* 23a; 127a-129a.

Mr. Lucia used a slideshow that compared fictional investors following his strategy with investors following other strategies in hypothetical scenarios. Pet. App. 23a; 130a-132a. Two examples, which the slides described as "backtests," were based partly on historical data, such as stock returns, and partly on assumptions for other variables, such as inflation and real-estate rates of return. Both Mr. Lucia (orally) and the slides (in writing) repeatedly disclosed this use of assumptions, and the slides included dozens of disclaimers that the examples were "hypothetical." *Id.* 24a-29a; 43a n.10; 45a n.14; 76a-77a. Before Mr. Lucia publicly distributed the slideshow, supervising broker-dealers repeatedly approved the slides, and Commission staff had reviewed a similar version—and none had raised any concern that the slides were misleading. *See id.* 84a.

3. In 2012, the Commission charged petitioners with violating the anti-fraud provisions of the Investment Advisers Act of 1940 and SEC rules. Pet. App. 7a-8a. After the Commission elected to proceed administratively rather than in federal court, ALJ Cameron Elliot presided over a trial-like hearing at which witnesses testified and were cross-examined, documents were introduced into evidence, and objections were made and ruled upon. After Judge Elliot issued an initial decision, the Commission remanded for further factual findings, *id.* 239a, because they

were "a matter of considerable importance" to the Commission, *id.* 241a.

On remand, Judge Elliot found that Mr. Lucia's presentations were misleading because they used the word "backtest"—a term with no statutory or regulatory definition—to describe hypotheticals that were not based solely on historical data, but included certain disclosed assumptions. Pet. App. 115a-116a; 196a-197a. Despite finding that the SEC had not proved any investor losses, Judge Elliot barred Mr. Lucia from working as an investment advisor for the rest of his life, revoked his company's registration, and assessed civil penalties. *Id.* 225a-233a. Because of these sanctions, Mr. Lucia is unemployable in his lifelong profession and on the verge of bankruptcy.

4. Petitioners timely sought Commission review, challenging the initial decision on the merits and arguing that Judge Elliot held office in violation of the Appointments Clause. Pet. App. 38a-40a. The Commission granted discretionary review and—by a 3-2 vote—affirmed in relevant part. *Ibid.*; *id.* 110a.

On the merits, the Commission majority sustained Judge Elliot's finding that the presentations were misleading because a "backtest" must use "historical data" whereas petitioners' hypotheticals relied in part on assumptions. Pet. App. 66a-69a. Relying on *Landry* v. *FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), the Commission majority further concluded that SEC ALJs are "not subject to the requirements of the Appointments Clause," Pet. App. 86a, because "it is 'the Commission's issuance of a finality order' that makes [an ALJ's] decision effective and final," *id.* 90a.

In the SEC's only written dissent of 2015, Commissioners Gallagher and Piwowar sharply disagreed

on the merits. *See* Pet. App. 110a-114a. The dissenters explained that the majority had "create[d] from whole cloth specific requirements for advertisements that include the word 'backtest,'" and then applied to petitioners a new rule deeming it misleading "if a backtest fails to use actual historical rates—even if the slideshow presentation specifically discloses the use of assumed rates for certain components." *Id.* 111a. The dissenters also noted that Article III courts should decide the Appointments Clause issue. *Id.* 113a.

5. A three-judge panel of the D.C. Circuit denied a timely petition for review. Pet. App. 4a. In addition to sustaining the Commission's decision on the merits, *id.* 21a-36a, the panel rejected petitioners' Appointments Clause challenge.

The panel stated that, under the D.C. Circuit's 2-1 decision in *Landry*, the constitutional "analysis begins, and ends," with "whether Commission ALJs issue final decisions of the Commission." Pet. App. 13a. Petitioners argued both that *Landry*'s approach was inconsistent with *Freytag*, which rejected the argument that adjudicators "may be deemed employees … because they lack authority to enter a final decision," 501 U.S. at 881, and that applying *Landry* here would be inconsistent with *Edmond*'s holding that certain military appellate judges were Officers even though their decisions were subject to discretionary review. *See* Pet. App. 13a. But the panel summarily responded that "this court has rejected that argument, and *Landry* is the law of the circuit." *Ibid.*

Relying solely on *Landry*, the panel held that SEC ALJs are not Officers because their decisions are subject to discretionary Commission review and, therefore, are not independently final. Pet. App. 13a-18a.

The panel concluded that "the Commission has retained full decision-making powers" in every case because an ALJ's "initial decision becomes final when, and only when, the Commission issues [a] finality order." *Id.* 15a.

Petitioners timely filed a petition for rehearing en banc, arguing that the panel decision could not be reconciled with this Court's Appointments Clause jurisprudence. Petitioners also pointed out that, in opposing certiorari in *Landry*, the government had defended *Landry* as limited to one particular agency, *see* Br. in Opp. 7, *Landry* v. *FDIC*, No. 99-1916 (U.S. Aug. 28, 2000), 2000 WL 34013905 ("*Landry* BIO"), but reneged on that promise in this case by arguing that *Landry* resolved the Appointments Clause question for all ALJs.

While that petition was pending, the Tenth Circuit ruled that SEC ALJs *are* Officers of the United States who must be appointed pursuant to the Appointments Clause. *Bandimere*, 844 F.3d at 1179, 1188. The Tenth Circuit majority expressly disagreed with the D.C. Circuit's reasoning: "*Landry* place[s] undue weight on final decision-making authority." *Id.* at 1182. As Judge Briscoe explained, "[t]he critical difference between the [*Bandimere*] majority and *Landry* and *Lucia* is that the majority recognizes that *Freytag* does *not* make final decision-making authority the *sine qua non* of inferior Officer status." *Id.* at 1189 (concurring opinion). The government filed a petition for rehearing that was "transmitted to all the judges of the court who are in regular active service" and then, after Justice Gorsuch's confirmation, denied by a 9-2 vote. *Bandimere* v. *SEC*, 855 F.3d 1128 (10th Cir. 2017).

In light of these conflicting decisions, the D.C. Circuit granted rehearing en banc to resolve two questions: (1) "Is [Judge Elliot] an inferior officer rather than an employee for the purposes of the Appointments Clause of Article II of the Constitution?"; and (2) "Should the court overrule [*Landry*]?" Pet. App. 245a. Under the D.C. Circuit's rules, a grant of en banc rehearing vacates the panel's judgment but "ordinarily not its opinion." D.C. Cir. R. 35(d).

The ten judges comprising the en banc court heard argument on May 24, 2017. *Hear* Oral Argument, *Raymond J. Lucia Cos., Inc.* v. *SEC*, 2017 WL 2727019 (D.C. Cir. June 26, 2017) (en banc) (No. 15-1345), https://tinyurl.com/yddcpeyh (all Internet sites last visited July 17, 2017). A month later, the court issued a brief *per curiam* order and judgment stating that the petition for review was denied by an equally divided court. Pet. App. 1a-2a (citing D.C. Cir. R. 35(d)).

REASONS FOR GRANTING THE PETITION

The D.C. Circuit—which hears more petitions for review of SEC action than any other court of appeals—granted en banc rehearing to decide whether SEC ALJs are constitutional Officers, and then deadlocked 5-5 on that question, confirming that this Court's review is required. *Cf. Alice Corp. Pty., Ltd.* v. *CLS Bank Int'l*, 134 S. Ct. 2347, 2353-54 (2014) (granting review after en banc court of appeals failed to produce majority opinion resolving recurring issue). Moreover, the en banc court's inability to resolve the Appointments Clause issue leaves in place a square and acknowledged conflict between the panel decision in this case, which held that SEC ALJs are mere employees, and the Tenth Circuit's contrary holding that SEC ALJs are Officers of the United States. *Compare*

Pet. App. 21a *with Bandimere* v. *SEC*, 844 F.3d 1168, 1188 (10th Cir. 2016). Only this Court can resolve this conflict. This case cleanly presents the important and recurring question whether SEC ALJs are Officers who must be appointed pursuant to the Appointments Clause.

I. SEC ALJs Are Officers Of The United States

This Court's precedents make clear that the Appointments Clause's purposefully broad category of "Officers" includes SEC ALJs because they exercise significant discretion in conducting trials, making evidentiary and other rulings that shape the administrative record, and issuing initial decisions that become final in 90 percent of cases.

A.1. This Court has consistently applied a simple, expansive definition of "Officer": Every 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* v. *Valeo*, 424 U.S. 1, 126, 132 (1976) (per curiam) (quoting U.S. Const. art. II, § 2, cl. 2). "Unless their selection is elsewhere provided for" in the Constitution—as with the President—"*all* officers of the United States" who meet these criteria "are to be appointed in accordance with the Clause." *Id.* at 132.

Buckley's broad definition of "Officer" makes perfect sense of the Clause's text. *See*, *e.g.*, 2 Samuel Johnson, *A Dictionary of the English Language*, s.v. "officer" (6th ed. 1785) ("A man employed by the publick"); 2 Noah Webster, *An American Dictionary of the English Language*, s.v. "officer" (1828) (similar). And it is pivotal to the "structural safeguar[d]" the text provides. *Edmond* v. *United States*, 520 U.S. 651, 659

(1997). The Framers viewed "'the power of appointment to offices'" as "'the most insidious and powerful weapon of eighteenth century despotism.'" *Freytag* v. *Comm'r*, 501 U.S. 868, 883 (1991) (citation omitted). They "understood … that by limiting the appointment power" to those who were readily identifiable, "they could ensure that those who wielded it were accountable to political force and the will of the people." *Id.* at 884. The Clause's restrictions thus "preserv[e] … the Constitution's structural integrity by preventing the diffusion of the appointment power." *Id.* at 878.

The Court's modern definition of "Officer" reflects two centuries of decisions holding a wide range of officials to be subject to the Clause—including:

- district-court clerks, *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839);
- a clerk to an assistant treasurer in Boston, *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393-94 (1868);
- engineers and assistant surgeons, *United States* v. *Perkins*, 116 U.S. 483, 484 (1886); *United States* v. *Moore*, 95 U.S. 760, 762 (1878);
- "thousands of clerks in the Departments of the Treasury, Interior and the othe[r]" departments, *United States* v. *Germaine*, 99 U.S. 508, 511 (1879), responsible for "the records, books, and papers appertaining to the office," *Hennen*, 38 U.S. (13 Pet.) at 259;
- judges of election and federal marshals, *Ex parte Siebold*, 100 U.S. 371, 397-99 (1880);
- "commissioners of the circuit courts" who "t[ook] … bail for the appearance of persons

charged with crime," *United States* v. *Allred*, 155 U.S. 591, 594 (1895);

- extradition commissioners, *Rice* v. *Ames*, 180 U.S. 371, 378 (1901);
- district-court commissioners, *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 352-54 (1931); and
- U.S. attorneys, *Myers* v. *United States*, 272 U.S. 52, 159 (1926).

Only individuals with "no general functions, nor any employment which has any duration as to time," whose posts lack "tenure, duration, continuing emolument, or continuous duties," and who "ac[t] only occasionally and temporarily" have been held by this Court to fall outside the Clause. *Auffmordt* v. *Hedden*, 137 U.S. 310, 327 (1890); *see also Buckley*, 424 U.S. at 126 n.162 (employees are "lesser functionaries subordinate to" Officers).

2. This 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. *See generally* Jennifer L. Mascott, *Who Are 'Officers of the United States'?*, 70 Stan. L. Rev. (forthcoming 2017) (draft at https://tinyurl.com/zewj8z2); Kent Barnett, *Resolving the ALJ Quandary*, 66 Vand. L. Rev. 797, 799-803, 810-14 (2013). For example, court commissioners (the predecessors of today's magistrate judges) are constitutional Officers. *Go-Bart*, 282 U.S. at 352-54; *Allred*, 155 U.S. at 594. There is no difference of constitutional magnitude between magistrate judges and administrative law judges.

The critical decision is *Freytag*, in which this Court held that special trial judges of the U.S. Tax

Court are Officers. 501 U.S. at 880-82. Although STJs could make final decisions in some cases, in other cases (including *Freytag* itself) they lacked final decision-making power and could issue only proposed opinions, which the Tax Court was free to accept or reject. *Ibid.* *Freytag* unanimously held that, even in such cases, STJs acted as Officers because they "exercised significant discretion" in performing "important functions"—specifically, "tak[ing] testimony," "conduct[ing] trials," "rul[ing] on the admissibility of evidence," and "enforc[ing] compliance with discovery orders." *Id.* at 881-82; *accord id.* at 901 (Scalia, J., concurring in part and concurring in the judgment).

This Court has held that military judges, too, are Officers based on their significant adjudicatory duties. In *Weiss* v. *United States*, 510 U.S. 163 (1994), the Court explained that military judges are Officers "because of the authority and responsibilities [they] possess," which include ruling on procedural and legal issues and adjudicating offenses under the Uniform Code of Military Justice. *Id.* at 167-69; *see also Ryder* v. *United States*, 515 U.S. 177, 180-88 (1995). This Court's decision in *Edmond* likewise recognized that intermediate appellate military judges are Officers, in part because they "independently 'weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact.'" 520 U.S. at 662 (quoting 10 U.S.C. § 866(c)). That the judges "ha[d] no power to render a final decision" on their own was relevant only to whether they were "inferior officers" or "principal officers." *Id.* at 665-66.

B. Under these principles and precedents, SEC ALJs are "Officers" subject to the Appointments Clause. 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. This Court need go no further to conclude that SEC ALJs are Officers.

Like the special trial judges in *Freytag*, SEC ALJs' "duties, salary, and means of appointment" all "are specified by statute," 501 U.S. at 881; *see* 5 U.S.C. §§ 556-557, 3105, 5372. Congress in fact *referred* to SEC ALJs as "officers" in the securities laws. 15 U.S.C. § 77u ("[a]ll hearings … may be held before the Commission or an *officer* or *officers* of the Commission designated by it" (emphases added)); *see id.* §§ 78v, 80a-40, 80b-12 (same). Federal law accordingly provides that the "*agency*"—here, the Commission—"shall appoint … administrative law judges." 5 U.S.C. § 3105 (emphasis added); *see Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 512-13 (2010) (SEC Commissioners acting as a body constitute a "Head of Department" under the Clause). The SEC has never explained why the Commission itself does not—or could not—appoint its ALJs.

SEC ALJs also "'exercis[e] significant authority pursuant to the laws of the United States,'" *Freytag*, 501 U.S. at 881 (quoting *Buckley*, 424 U.S. at 126), entrusted to them by the federal securities laws and the Commission. That authority includes the power to "conduc[t] hearings in proceedings instituted by the Commission," and "to do all things necessary and appropriate to discharge" that function. 17 C.F.R. § 200.14. Specific duties include:

- amending charging documents, *id.* § 201.200(d)(2);
- entering orders of default, *id.* § 201.155;

- consolidating proceedings, *id.* § 201.201(a);
- "[a]dminister[ing] oaths and affirmations," *id.* §§ 200.14(a)(1), 201.111(a);
- "[i]ssu[ing] subpoenas," *id.* §§ 200.14(a)(2), 201.111(b);
- ordering depositions and acting as the "deposition officer," *id.* §§ 201.233-.234;
- ordering production of evidence and regulating document production, *id.* §§ 201.111(b), .230, .232;
- issuing protective orders, *id.* § 201.322;
- "[r]ul[ing] upon motions," including for summary disposition, *id.* §§ 200.14(a)(7), 201.111(h), .250;
- rejecting filings for procedural noncompliance, *id.* § 201.180(b);
- granting extensions of time and stays, *id.* § 201.161;
- "[h]old[ing] pre-hearing conferences" and "requir[ing]" attendance at such conferences, *id.* §§ 200.14(a)(6), 201.111(e), .221(b);
- ordering prehearing submissions, *id.* § 201.222(a);
- "[r]egulat[ing] the course of [the] hearing," *id.* §§ 200.14(a)(5), 201.111(d);
- receiving "relevant evidence" and ruling upon admissibility, *id.* § 201.111(c);
- "[r]ul[ing] on offers of proof," *id.* §§ 200.14(a)(3), 201.111(c);
- "[e]xamin[ing] witnesses," *id.* § 200.14(a)(4);

- regulating the scope of cross-examination, *id.* § 201.326;
- regulating "the conduct of the parties and their counsel," *id.* § 201.111(d); and
- imposing sanctions for "contemptuous conduct," *id.* § 201.180(a).

These are *adjudicatory* functions that, under *Freytag*, reflect Officer status. *Bandimere*, 844 F.3d at 1187 ("STJs and ALJs closely resemble one another where it counts"). To be sure, ALJs cannot impose fines or imprisonment for contempt (although they can impose other sanctions against contumacious litigants or attorneys), but that is true of most administrative agency officials. *See ICC* v. *Brimson*, 154 U.S. 447, 488-89 (1894). Indeed, the statute that grants the Tax Court contempt power, 26 U.S.C. § 7456(c), does not grant STJs the same power. And this Court has never hinted that contempt power is even relevant to Officer status.

In addition to performing the same functions found significant in *Freytag* (and then some), the SEC ALJ, following a hearing, "prepare[s] an initial decision containing the conclusions as to the factual and legal issues presented." 17 C.F.R. §§ 200.14(a)(8), 201.111(i), .141(b), .360(a). Although parties may petition for review of the ALJ's initial decision by the Commission, or the Commission may review the decision *sua sponte*, *see id.* § 201.410(a), review of an ALJ decision is the exception: In approximately 90 percent of cases, no such further review is conducted. *See Bandimere*, 844 F.3d at 1180 n.25; SEC, ALJ Initial Decisions, https://www.sec.gov/alj/aljdec.shtml. Review often is not sought, and even when requested it is not always granted. *See* 17 C.F.R. § 201.411(b)(2)

(the Commission can "decline to review any [ALJ] decision," except in limited circumstances not pertinent here); *see also*, *e.g.*, *In re Bellows*, Exchange Act Release No. 40,411, 1998 WL 611766 (Sept. 8, 1998) (declining such review). SEC ALJs also have power to issue default orders that are immediately judicially "enforceable" without *any* SEC review. *In re Alchemy Ventures, Inc.*, Exchange Act Release No. 70,708, 2013 WL 6173809, at *4 (Oct. 17, 2013).

If no timely petition for review is filed or if the Commission declines review, the ALJ's initial decision by statute "shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission." 15 U.S.C. § 78d-1(c); *accord* 5 U.S.C. § 557(b) (ALJs' "initial decisions" automatically become final "without further proceedings" absent further review). In such cases, the Commission's regulations provide that it "will issue an order that the [ALJ's] decision has become final." 17 C.F.R. §§ 201.360(a)(1), .360(d)(2). The finality order is non-discretionary and issues as a matter of course after 42 days when no petition for review has been filed. *See id.* §§ 201.360(d)(2), .410(b), .411(c).

On the relatively rare occasions the Commission *does* review an ALJ's initial decision, the Commission does not review the decision anew, but defers to the ALJ's credibility determinations and factual findings. *See In re Clawson*, Exchange Act Release No. 48,143, 2003 WL 21539920, at *2 (July 9, 2003) ("We accept [an SEC ALJ's] credibility finding, absent *overwhelming evidence* to the contrary" (emphasis added)); *In re Bridge*, Securities Act Release No. 9,068, 2009 WL 3100582, at *18 n.75 (Sept. 29, 2009) (similar). As the Commission emphasized in this case, SEC ALJs play a "vital role" in the adjudicative process, as they are

"'in the best position to make findings of fact … and resolve any conflicts in the evidence.'" Pet. App. 241a (citation omitted). Judge Elliot is the only adjudicator in this case who saw and heard the witnesses testify, who reviewed all the evidence, and who shaped the record through evidentiary and other rulings. *See*, *e.g.*, *id.* 193a (finding an Enforcement Division witness credible after noting that evidence concerning a false claim brought by that witness had previously been excluded).

The authority of SEC ALJs mirrors that of the STJs in *Freytag* (as well as the military judges in *Weiss* and *Edmond*). Indeed, the SEC itself represents to the public that its ALJs perform comparable functions to *federal district judges*. SEC, Office of Administrative Law Judges, https://www.sec.gov/alj (last modified Jan. 26, 2017) (ALJs "conduct public hearings … in a manner similar to non-jury trials in the federal district courts"); *see also* SEC, SEC Announces Arrival of New Administrative Law Judge Cameron Elliot, http://www.sec.gov/news/press/2011/2011-96.htm (Apr. 25, 2011). This Court has similarly observed that "the role of the modern … administrative law judge … is 'functionally comparable' to that of a judge." *Butz* v. *Economou*, 438 U.S. 478, 513 (1978). A number of Justices, in fact, have previously indicated that ALJs in general are Officers. *See Free Enter. Fund*, 561 U.S. at 542 (Breyer, J., joined by Stevens, Ginsburg, and Sotomayor, JJ., dissenting); *Freytag*, 501 U.S. at 910 (Scalia, J., joined by O'Connor, Kennedy, and Souter, JJ., concurring in part and concurring in the judgment).

Until recently, the Executive Branch agreed that officials with the authority of ALJs are Officers. The Office of Legal Counsel—responsible for providing

"authoritative legal advice" for the Executive Branch (DOJ, Office of Legal Counsel, http://www.justice.gov/olc)—opined that an "'Office[r] of the United States'" is one who "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*." *Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 95 (2007) (emphasis added). That opinion has never been withdrawn or disavowed by the President or the Attorney General, and it is flatly contrary to the D.C. Circuit's finality requirement and the SEC's litigating position in this case. It makes clear that "[n]either *Buckley* nor early authority supports [a] restriction" of Officer status to exclude those who "'act only at the direction of'" other Officers. *Id.* at 93 (citation omitted).

Under this Court's established (and unbroken) line of Appointments Clause jurisprudence, SEC ALJs are Officers of the United States within the meaning of the Clause.

II. THERE IS A DIRECT AND ACKNOWLEDGED CIRCUIT SPLIT ON THE QUESTION PRESENTED

Two courts of appeals have now applied this body of precedent to reach conflicting decisions on whether SEC ALJs are Officers of the United States who must be appointed pursuant to the Appointments Clause. The D.C. Circuit panel answered that question in the negative, while the Tenth Circuit answered it in the affirmative. The question presented is binary; one of these two decisions *must* be wrong. Indeed, at each step in the analysis the Tenth Circuit squarely "disagree[d]" with the panel decision left in place by the en banc court's order. *Bandimere*, 844 F.3d at 1182. Moreover, the judgment in this case denying the peti-

tion for review is irreconcilable with the Tenth Circuit's judgment granting a petition for review based on the identical constitutional challenge. *Compare* Pet. App. 2a *with Bandimere*, 844 F.3d at 1188. Certiorari is necessary to resolve this dispute between the circuits on an important and recurring constitutional issue.

A. The D.C. Circuit Wrongly Concluded That SEC ALJs Are Mere Employees

The panel decision never addressed the many important, and discretionary, duties exercised by SEC ALJs discussed above. Instead, it held that under *Landry* its "analysis begins, and ends," with whether SEC ALJs can issue unreviewable final decisions of the Commission, and concluded that they cannot. Pet. App. 13a; *see also Bandimere*, 844 F.3d at 1182 ("The D.C. Circuit followed *Landry*" and "considered dispositive" SEC ALJs' supposed "inability to render final decisions"). Confining the Appointments Clause's reach to those who have the power of final decision, however, contravenes this Court's teaching in *Freytag*. At minimum, confining the Clause's reach to those who can issue *unreviewable* final decisions cannot be reconciled with this Court's teaching in *Edmond*.

1. The panel decision uncritically adopted its finality requirement from the D.C. Circuit's divided decision in *Landry*, Pet. App. 13a, which held that inferior Officers must have the "power of final decision," 204 F.3d at 1134. *This* Court's precedents make clear, though, that authority to issue final decisions is a criterion that distinguishes inferior Officers from principal Officers, not a *sine qua non* for the Clause to apply at all.

Freytag expressly rejected the argument that inability to make final decisions takes officials outside the Appointments Clause. 501 U.S. at 880-82. In many cases, including *Freytag* itself, STJs "lack[ed] authority to enter a final decision," and merely "assist[ed]" other officials "in taking the evidence and preparing the proposed findings and opinion." *Ibid*. That did not matter, *Freytag* held, and deeming those judges mere employees on that basis would "ignor[e] the significance of the duties and discretion that [the] judges possess"—namely, the fact that they "perform[ed] more than ministerial tasks," including "tak[ing] testimony," "conduct[ing] trials," and "rul[ing] on the admissibility of evidence." *Ibid.*

To be sure, the *Freytag* Court went on to hold in the alternative that "*[e]ven if* the duties of special trial judges … were not as significant as we … have found them to be, our conclusion would be unchanged" because STJs could issue final decisions in *other* cases. 501 U.S. at 882 (emphasis added). But as Judge Randolph cogently explained, that "conclusion" was "[t]he conclusion" the Court "had reached in the preceding paragraphs"—"namely, that although special trial judges may not render final decisions, they are nevertheless inferior officers of the United States." *Landry*, 204 F.3d at 1142 (concurring opinion); *see Freytag*, 501 U.S. at 881. The power of final decision in *Freytag* is thus "clearly designated … as an alternative holding." *Landry*, 204 F.3d at 1142 (Randolph, J., concurring). While authority to make final decisions may be *sufficient* to trigger the Appointments Clause, the Appointments Clause hardly makes such authority *necessary*—and under this Court's precedent it is not.

The panel in this case summarily rejected petitioners' argument that *Landry*'s contrary reasoning

was "inconsistent with *Freytag*," stating that "*Landry* is the law of the circuit." Pet. App. 13a. But *Landry* was wrongly decided, as Judge Randolph pointed out at the time. *See* 204 F.3d at 1140-43 (concurring opinion). Time and again, this Court has held that adjudicators who lacked final decision-making authority nevertheless were constitutional Officers. *See*, *e.g.*, *Go-Bart*, 282 U.S. at 352, 354 ("All the [Officer's] acts … were preparatory and preliminary to a consideration of the charge by a grand jury and … the final disposition of the case in the district court"); *Allred*, 155 U.S. at 595 (commissioners are "subject to the orders and directions of the court appointing them"); *accord Weiss*, 510 U.S. at 168 ("No sentence imposed [by the Officer] becomes final until it is approved by the officer who convened the court-martial"). Since these officials all are Officers notwithstanding their lack of final decision-making authority, such authority *cannot* be the lynchpin of Officer status as the court below made it.

2. The panel decision not only erroneously confined the Appointments Clause to officials with final decision-making authority, but also implausibly extended that requirement to exempt officials who *can and do* issue final decisions, so long as those decisions are subject to "'discretionary … review.'" Pet. App. 14a-18a. That holding cannot be reconciled with this Court's decision in *Edmond*.

Edmond held that judges on the Coast Guard Court of Criminal Appeals were inferior Officers because their decisions were always subject to further review by principal Officers—namely, the Court of Appeals for the Armed Forces—whether by *sua sponte* order of the Judge Advocate General or where the CAAF exercised its discretion to grant review.

520 U.S. at 664-65; *see* 10 U.S.C. § 867(a). The lack of "power to render a final decision … unless permitted to do so by other Executive officers," *Edmond* held, is the defining *feature* of "'inferior officers,'" distinguishing them from the "'principal officer[s]'" that supervise them. 520 U.S. at 663, 665; *see also Dep't of Transp.* v. *Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1239 (2015) (Alito, J., concurring) ("Inferior officers can do many things, but nothing final should appear in the Federal Register unless a Presidential appointee has at least signed off on it").

As the United States has represented to this Court on at least two occasions, "*Edmond* makes clear [that] … inability to render a *final* decision" is "indicative of inferior … officer status." U.S. Br. 32 n.10, *Free Enter. Fund* v. *PCAOB*, No. 08-861 (U.S. Oct. 13, 2009), 2009 WL 3290435 (emphasis omitted); *see also Landry* BIO 12 n.4 ("In concluding that judges on the Coast Guard Court of Criminal Appeals are 'inferior' rather than 'principal' officers, the Court in *Edmond* observed that those judges 'have no power to render a final decision on behalf of the United States *unless permitted to do so by other Executive officers*'").

The panel nevertheless held that SEC ALJs are employees, not Officers, precisely because their decisions are subject to discretionary review. That holding cannot be squared with *Edmond* or, indeed, any other decision where this Court held that an official who cannot render an unreviewable final decision of the Executive Branch is nevertheless an Officer:

Case	Adjudicator	Officer?	Unreviewable Final Decisions?
Go-Bart, 282 U.S. 344	U.S. Commissioners	**Yes.** 282 U.S. at 352.	**No.** 282 U.S. at 354.
Allred, 155 U.S. 591	U.S. Circuit Commissioners	**Yes.** 155 U.S. at 594-95.	**No.** 155 U.S. at 595.
Weiss, 510 U.S. 163	Military judges	**Yes.** 510 U.S. at 169.	**No.** 510 U.S. at 168.
Ryder, 515 U.S. 177	Judges of the Coast Guard Court of Military Review	**Yes.** 515 U.S. at 180-88.	**No.** *Edmond*, 520 U.S. at 653, 665.
Edmond, 520 U.S. 651	Judges of the Coast Guard Court of Criminal Appeals	**Yes.** 520 U.S. at 662-66.	**No.** 520 U.S. at 665.
Free Enter. Fund, 561 U.S. 477	Public Company Accounting Oversight Board	**Yes.** 561 U.S. at 486.	**No.** 537 F.3d at 673.

Even federal *magistrates*—who wield wide authority and plainly are Officers under *Buckley*—would not be Officers under the D.C. Circuit's test because they cannot (absent consent) render final decisions on the merits. *See* 28 U.S.C. § 636(b)(1)(A).

In short, the D.C. Circuit's finality rule conflates a prerequisite for principal-Officer status with a gateway requirement for the Appointments Clause to apply at all. As *Edmond* explained, the very term "'inferior officer' connotes a relationship with some higher ranking officer"; their "work is directed and supervised" by such "'principal officer[s].'" 520 U.S. at 662-63; *see also NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 947 (2017) (Thomas, J., concurring) ("a principal officer is one who has no superior other than the President"). The Appointments Clause by its terms covers *both* types of Officers, simply allowing (at Congress's option) a different appointment method for the latter. U.S. Const. art. II, § 2, cl. 2. The D.C. Circuit's finality rule, however, effectively confines the Clause to *only* principal Officers, *i.e.*, those with power to make unreviewable final decisions. If the decision below were allowed to stand, it would erase the category of "inferior Officers" from the text of our Constitution.

3. The panel decision noted that Congress "provid[ed] Civil Service protections to ALJs in response to concerns their actions were influenced by a desire to curry favor with agency heads." Pet. App. 21a (citing *Ramspeck* v. *Fed. Trial Exam'rs Conference*, 345 U.S. 128, 132 & n.3, 142 (1953)). The effectiveness of this structure might be questioned given that in roughly 50 decisions before this one, Judge Elliot had not once ruled against the Commission. *See* Sarah N. Lynch, *SEC Judge Who Took on the "Big Four" Known for Bold Moves*, Reuters (Feb. 3, 2014), https://tinyurl.com/hlu76fl. To be sure, the Commission exercised its power of discretionary review and (by a 3-2 margin) affirmed his decision; but that establishes only that Judge Elliot is an inferior rather than a principal Officer. *See Edmond*, 520 U.S. at 665.

In any event, individuals with civil service protections may be Officers. *See*, *e.g.*, *Cw. of Pennsylvania* v. *U.S. Dep't of HHS*, 80 F.3d 796, 801-04, 806 (3d Cir. 1996). Indeed, contemporaneously with *Ramspeck* the Attorney General opined that hearing examiners—the predecessors to ALJs—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).

As *Ramspeck* explained, "Congress intended to make hearing examiners 'a special class of semi-independent subordinate hearing *officers*.'" 345 U.S. at 132 (emphasis added) (citation omitted). When Congress originally enacted the Administrative Procedure Act of 1946, it thus referred to hearing examiners as "officers" *nine* times. *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946). And in enacting the securities laws, Congress referred to ALJs as "officers," prescribing that "[a]ll hearings … may be held before the Commission or an *officer* or *officers* of the Commission." 15 U.S.C. § 77u (emphases added); *see also id.* §§ 78v, 80a-40, 80b-12 (same).

The panel here said that "there is no indication Congress intended these officers to be synonymous with 'Officers of the United States' under the Appointments Clause." Pet. App. 21a. But this Court has squarely rejected this very argument. *Germaine*, 99 U.S. at 510 (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"). The panel's decision runs headlong into this precedent and the rest of this Court's Appointments Clause jurisprudence.

B. The Tenth Circuit Correctly Held That SEC ALJs Are Officers

The Tenth Circuit has held—on materially indistinguishable facts—that "SEC ALJs are inferior officers who must be appointed in conformity with the Appointments Clause." *Bandimere*, 844 F.3d at 1181. The result in *Bandimere* shows that there is a conflict among the circuits that requires this Court's intervention; its reasoning points up the errors made by the panel in this case.

1. *Bandimere*, like this case, concerned an SEC administrative action resulting in a lifetime industry bar and civil penalties. 844 F.3d at 1171. In affirming the ALJ's initial decision on discretionary review, *ibid.*, the Commission again relied on the D.C. Circuit's decision in *Landry* and concluded that SEC ALJs are not "Officers" within the meaning of the Appointments Clause. *In re Bandimere*, Securities Act Release No. 9,972, 2015 WL 6575665, at *19-21 (Oct. 29, 2015).

The Tenth Circuit granted the petition for review and vacated the Commission's decision, holding that SEC ALJs are inferior Officers because they "carry out 'important functions,'" *Bandimere*, 844 F.3d at 1188 (quoting *Freytag*, 501 at 882), and "'exercis[e] significant authority pursuant to the laws of the United States,'" *ibid*. (quoting *Buckley*, 424 U.S. at 126). *Bandimere* recognized that, although this Court "has not stated a specific test for inferior officer status … 'the term's sweep is unusually broad.'" *Id*. at 1174 (quoting *Free Enter. Fund*, 561 U.S. at 539 (Breyer, J., dissenting)). Drawing from its review of the 150-year history of this Court's cases "contain[ing] examples of inferior officers," the Tenth Circuit concluded that "*Freytag* controls the result." *Id*. at 1173-74. The

court gleaned "three characteristics" of inferior Officers from *Freytag*: (1) their position is "'established by Law'"; (2) their "'duties, salary, and means of appointment … are specified by statute'"; and (3) they "'exercise significant discretion' in 'carrying out … important functions.'" *Id.* at 1179 (alterations in original) (quoting *Freytag*, 501 U.S. at 881-82).

As *Bandimere* explained, "[t]hose three characteristics exist" with respect to SEC ALJs. 844 F.3d at 1179. *First*, both the position and the delegated powers of SEC ALJs are established by law. *Ibid.* (citing 5 U.S.C. § 556(b)(3); 17 C.F.R. § 200.14). *Second*, various statutes set forth the duties, salary, and means of appointment of SEC ALJs. *Ibid.* (citing 5 U.S.C. §§ 556-557 (duties); *id.* § 5372(b) (salary); *id.* §§ 1302, 3105 (means of appointment)). *Third*, SEC ALJs "exercise significant discretion in performing 'important functions' commensurate with the STJs' functions described in *Freytag*." *Ibid.* "[B]oth perform similar adjudicative functions," the majority reasoned: "They take testimony, conduct trials, rule on admissibility of evidence, and have the power to enforce compliance with discovery orders." *Id.* at 1181 & n.30 (quoting *Freytag*, 501 U.S. at 881-82).

Bandimere also "spell[ed] out even more of [the] discretionary functions" exercised by SEC ALJs. 844 F.3d at 1181 n.30. For example, SEC ALJs can "shape the administrative record by taking testimony, regulating document production and depositions, ruling on the admissibility of evidence, receiving evidence, ruling on dispositive and procedural motions, issuing subpoenas, and presiding over trial-like hearings." *Id.* at 1179-80 (footnotes omitted). SEC ALJs also "make credibility findings to which the SEC affords 'considerable weight' during agency review,"

"enter default judgments and otherwise steer the outcome of proceedings by holding and requiring attendance at settlement conferences," and "issue initial decisions that declare respondents liable and impose sanctions." *Id*. at 1180-81 (footnotes omitted) (quoting *Bandimere*, 2015 WL 6575665, at *15 n.83). Because SEC ALJs "closely resemble the STJs described in *Freytag*," the Tenth Circuit held that SEC ALJs "are inferior officers who must be appointed as the Constitution commands." *Id.* at 1181.

Judge Briscoe concurred, "fully join[ing]" the majority, and writing separately to explain that an Appointments Clause challenge "requires a position-by-position analysis of the authority Congress by law and a particular executive agency by rule and practice has delegated to its personnel." *Bandimere*, 844 F.3d at 1189 (concurring opinion). "[S]weeping pronouncements" on the constitutional status of other ALJs, Judge Briscoe continued, would be both unnecessary and inappropriate. *Ibid.* This was a pointed response to Judge McKay's dissent, which consisted in large part of such sweeping pronouncements. *See id.* at 1194, 1199-1201 (dissenting opinion).

2. The Tenth Circuit acknowledged that it was "address[ing] the same question," yet reaching the opposite conclusion, as the panel decision in this case. *Bandimere*, 844 F.3d at 1182. The Tenth Circuit expressly rejected both *Landry*'s finality requirement for Officer status *and* the panel's extension of that requirement in this case.

a. Whereas the D.C. Circuit held that under *Landry*, the constitutional analysis "begins, and ends," with whether SEC ALJs "issue final decisions of the Commission," Pet. App. 13a, *Bandimere* expressly rejected the "final authority argument … that

the D.C. Circuit relied on in *Landry* and *Lucia*." 844 F.3d at 1186; *see also id.* at 1182 ("We disagree … that final decision-making power is dispositive to the question at hand"). Beginning and ending the Appointments Clause analysis with an official's final decision-making authority, the Tenth Circuit explained, would "ignor[e] the significance of the duties and discretion that [the official] possess[es]," *id.* at 1175 (quoting *Freytag*, 501 U.S. at 881), and "place undue weight" on a factor that, though perhaps "*relevant* in determining whether a public servant exercises significant authority," is not a "*predicate* for inferior officer status," *id*. at 1182-83 (emphases added). The Tenth Circuit thus refused to repeat the D.C. Circuit's mistakes in "mak[ing] final decision-making authority the *sine qua non* of inferior Officer status," and failing to perform a *complete* Appointments Clause analysis. *Id*. at 1189 (Briscoe, J., concurring).

Bandimere squarely rejected, too, the D.C. Circuit's interpretation of *Freytag*'s holding—established in *Landry* and reaffirmed in this case. "[P]roperly read," the Tenth Circuit concluded, "*Freytag* did not place 'exceptional stress' on final decision-making power." 844 F.3d at 1183. Indeed, properly read, *Freytag* said the opposite—that "STJs are inferior officers even though 'the ultimate decisional authority in cases under section 7443A(b)(4) rests with the Tax Court judges.'" *Id*. at 1182 (citation omitted) (discussing 26 U.S.C. § 7443A(b)(4)). *Bandimere* explained that *Freytag*'s discussion of STJs' final decision-making authority in certain cases "did not modify or supplant its holding that STJs were inferior officers based on the 'significance of [their] duties and discretion.'" *Id.* at 1183 (alteration in original) (quoting *Freytag*, 501 U.S. at 881). Rather, that discussion only "reaffirm[ed]" that "the duties of the STJs are sufficiently

significant to make them inferior officers." *Id.* at 1182. Whereas the D.C. Circuit assumed that "*every* inferior officer *must* possess final decision-making power" under *Freytag*, the Tenth Circuit concluded that "*Freytag*'s holding undermines that contention." *Id.* at 1184.

Cementing its disagreement with the decision below, *Bandimere* added that *this* Court has neither "equated significant authority with final decision-making power in *Buckley*, *Freytag*, *Edmond*, or elsewhere," nor "indicated that each of the officers it has deemed inferior possesses that power." 844 F.3d at 1184. In short, the Tenth Circuit resoundingly rejected the D.C. Circuit's exclusive focus on final decision-making authority as having no footing in this Court's teachings.

b. Recognizing that the issue was "not dispositive to [its] holding because it was not dispositive to *Freytag*'s holding," *Bandimere*, 844 F.3d at 1184 n.36, the Tenth Circuit nonetheless concluded that "SEC ALJs exercise significant authority in part because their initial decisions can *and do* become final without plenary agency review," as indeed "90 percent" do, *id.* at 1180 n.25 (emphasis added). The court explained that "the agency has no duty, based on the regulation's plain language, to review an unchallenged initial decision before entering an order stating the decision is final." *Ibid.* (citing 17 C.F.R. § 201.360(d)(2)). In fact, *Bandimere* noted multiple paths for "an initial decision to become final without plenary agency review." *Id.* at 1184 n.36. In the absence of a petition for review, for example, "the agency may simply enter an order stating an initial decision is final *without engaging in any review*." *Ibid.* (emphasis added) (citing 17 C.F.R. § 201.360(d)(2)).

The Tenth Circuit added that, at any rate, under *Edmond* "[t]he SEC's power to review its ALJs does not transform them into lesser functionaries"; "[r]ather, it shows the ALJs are inferior officers subordinate to the SEC commissioners." *Bandimere*, 844 F.3d at 1188 (citing *Edmond*, 520 U.S. at 663). Judge Briscoe thus observed that, even under the D.C. Circuit's "truncated *Freytag* analysis, [*Bandimere*] correctly holds that the SEC's ALJs are inferior Officers." *Id*. at 1194 (concurring opinion).

* * *

As things stand today, SEC ALJs are Officers in the Tenth Circuit but not in the D.C. Circuit. That is an untenable state of affairs given that Congress has authorized review of SEC final decisions *either* in the D.C. Circuit *or* in the regional circuit encompassing the petitioner's residence or principal place of business. 15 U.S.C. § 78y(a)(1). The SEC itself has acknowledged that the situation is unsustainable, staying all administrative proceedings that are appealable to the Tenth Circuit. Order, *In re Pending Administrative Proceedings*, Securities Act Release No. 10,365 (May 22, 2017). The Commission, courts, and parties to SEC proceedings all need to know sooner rather than later whether or not SEC ALJs are Officers who must be appointed pursuant to the Appointments Clause.

III. THIS CASE IS THE IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED

This case cleanly presents the important and recurring question whether SEC ALJs are Officers of the United States. There are no potential vehicle problems.

The Judiciary has a "strong interest … in maintaining the constitutional plan of separation of powers." *Freytag*, 501 U.S. at 879 (quoting *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 536 (1962)). That interest is especially strong in the context of the Appointments Clause, which is "among the significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659. So important are the "structural" interests implicated by an Appointments Clause challenge that they can "be considered on appeal whether or not they were ruled upon below." *Freytag*, 501 U.S. at 878-79. Because these important structural interests warrant review even where such a challenge has been waived, *see id.* at 879-80, they manifestly warrant review here, where the issue was properly presented in and actually decided by both the agency and the reviewing court.

In part because of the changes wrought by the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, the Commission has dramatically increased both the number and proportion of enforcement actions brought in administrative hearings before its ALJs. In 2014, for example, "[t]he SEC brought more than four out of five of its enforcement actions" before its ALJs, "up from less than half of them a decade earlier." Jean Eaglesham, *SEC Wins With In-House Judges*, Wall. St. J. (May 6, 2015). Moreover, the Commission agrees that SEC ALJs' fact-finding and credibility determinations are "a matter of considerable importance" to the Commission's ability to undertake review. Pet. App. 241a. The constitutionality of proceedings before SEC ALJs thus is important to the functioning of the Commission's decision-making apparatus—as well as to the rights of individuals and entities compelled to defend themselves in administrative hearings.

The question presented is also tightly focused. It is undisputed that the five SEC ALJs are not appointed by the President, the head of a department, or a court of law. Pet. App. 87a. It is also undisputed that the only appropriate remedy for an Appointments Clause violation here is vacatur of the challenged orders. *See Freytag*, 501 U.S. at 879; *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (defect in the appointment of Officer is "an irregularity which would invalidate a resulting order"). The Commission has not argued that the Appointments Clause violation could be excused under a harmless-error, ratification, *de facto* officer, or any other similar doctrine. *See* Pet. App. 9a-10a. And because this case involves a petition for review of agency action, the decision and order under review can be defended only on the grounds articulated by the agency, and the Commission cannot raise any new grounds for the first time in this Court. *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943). For example, the constitutionality of ALJ removal procedures and the status of ALJs in other agencies have never been raised by any party in this case (or in *Bandimere*) and thus these are not arguments available to the government here. *But see Bandimere*, 844 F.3d at 1199-1201 (McKay, J., dissenting) (speculating on these issues without benefit of briefing by any party); *see also Bandimere* v. *SEC*, 855 F.3d 1128, 1130-32 (10th Cir. 2017) (Lucero, J., dissenting from denial of rehearing en banc) (similar).

The constitutionality of SEC ALJs has been raised in a number of pending proceedings. Only two of those—this case and *Bandimere*—have reached appellate decisions on the merits of the Appointments Clause question. The same question has also been raised in at least 13 other cases pending in the courts of appeals and 30 proceedings pending before the

Commission. *See* Pet. App. 300a-304a. These figures will only continue to increase until this Court settles the issue. The question presented by this petition—whether SEC ALJs are Officers of the United States—admits of only one answer. This dispute will grow no more ripe, and the issue no better developed, with time. This Court should grant certiorari now, in this case.*

* * *

The SEC's regime of unaccountable adjudicators has left countless casualties on the field—not least Ray Lucia. After an unblemished career spanning forty years, Mr. Lucia has been rendered unemployable in his profession and on the verge of bankruptcy—even though his free presentations, at which no securities were offered or sold and which concededly caused no investor harm, did not remotely amount to intentional fraud. The ALJ who presided over this case imposed on him "'the securities industry equivalent of capital punishment.'" *Saad* v. *SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013) (citation omitted). The Framers designed the Appointments Clause precisely to prevent such abuses of power by unaccountable officials. This Court needs to decide, now, whether SEC ALJs are Officers of the United States.

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*Although the government could petition for a writ of certiorari in *Bandimere*, this case presents a better vehicle for the resolution of the Appointments Clause issue because (unlike *Bandimere*) this case raises no potential recusal issues. The constitutional issue also was more fully briefed in this case: At the en banc stage, petitioners and the government filed replacement briefs devoted solely to the Appointments Clause issue, and six *amicus* briefs were filed supporting petitioners.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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