No. 17-130

IN THE

Morris Tyler Moot Court of Appeals at Yale

RAYMOND J. LUCIA
AND RAYMOND J. LUCIA COMPANIES, INC.,
Petitioners,
V.
SECURITIES AND EXCHANGE COMMISSION
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Individuals exercising significant authority pursuant to the laws of the United States are inferior officers and must be appointed pursuant to the Appointments Clause of the Constitution. Art. II, § 2, cl. 2. Administrative Law Judges (ALJs) within the Securities and Exchange Commission (SEC) are authorized by statute and regulation to preside over hearings, make procedural, pretrial discovery and evidentiary rulings, order retention or adjustment of sanctions against private parties, and issue final decisions. Do SEC ALJs exercise significant authority such that their appointment is governed by the Appointments Clause of the Constitution?

PARTIES TO THE PROCEEDING

Petitioners are Raymond J. Lucia and Raymond J. Lucia Companies, Inc.

Respondent is the Securities and Exchange Commission.

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The order of the court of appeals, sitting en banc, by an equally divided court (J.A. 77) is reported at 868 F.3d 1021. The opinion of the court of appeals (J.A. 1-31) is reported at 832 F.3d 277. The Commission's unreported order and opinion (JA 32-74) is available at 2015 WL 5172953. The unreported initial decision of the administrative law judge (ALJ) is available at 2013 WL 6384274.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 26, 2017. The petition for a writ of certiorari was filed and granted. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Appointments Clause of the Constitution, U.S. Const., art. II, § 2, cl. 2. states:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The remaining significant statutory provision, 15 U.S.C. § 78d-1, is available in the Appendix.

STATEMENT OF FACTS

A. The Role of Administrative Law Judges at the Securities and Exchange Commission

During 2014 and 2015, Administrative Law Judges (ALJs) at the Securities and Exchange Commission (SEC) decided nearly 400 cases, less than ten percent of which were ever reviewed by the Commission itself. *Bandimere v. Sec. & Exch. Comm'n*, 844 F.3d 1168, 1187, 1187 n.41 (10th Cir. 2016) (citing SEC, ALJ Initial Decisions, https://www.sec.gov/alj/aljdec.shtml). The SEC enforces a broad range of laws regulating almost every aspect of the U.S. economy, including the conduct of stock exchanges, public company

reporting of information to stockholders and potential investors, insider trading, and the Foreign Corrupt Practices Act. SEC, About – What We Do, www.sec.gov/article/whatwedo.html.

In deciding these cases, ALJs administer oaths and affirmations, issue subpoenas, regulate the course of the hearing and the conduct of parties and counsel, and rule on all motions, including dispositive motions. 5 U.S.C. § 556(c). The SEC, by regulation, further empowers ALJs to determine the scope and form of evidence admitted, 17 C.F.R. § 201.326, enter default judgments, 17 C.F.R. § 201.155, and punish contemptuous conduct, 17 C.F.R. § 201.180(a). ALJs also have the power issue orders "setting aside, limiting or suspending any temporary sanction" previously imposed by the SEC. 17 C.F.R. § 200.30-9(b); 17 C.F.R. § 201.531. These decisions "shall be effective 14 days after service" to the affected party. *Id*.

After presiding over the taking of evidence, ALJs issue an initial decision, complete with findings of fact and conclusions of law. 15 U.S.C. § 78d-1; 17 C.F.R. § 200.30-9(a); 17 C.F.R. § 201.360(b). The parties may petition the full Commission for review within a time period set by the ALJ in the initial decision. *Id*. If no party petitions and the Commission does not review on its own discretion, then "the action of any such . . . administrative law judge . . . shall, for all purposes . . . be deemed the action of the Commission." 15 U.S.C. § 78d-1(c). By regulation, the SEC inserted an interim step, requiring a "finality order." 17 C.F.R. § 201.360(d)(2). While finality orders are sometimes issued by the Commission itself, they are often issued by the General Counsel's office "pursuant to delegated authority." *E.g.*, *AARX Inc.*, Finality Order, SEC Release No. 74,185, 2015 WL 411834, at *1 (Feb. 2, 2015). These orders recite that the deadline for a petition for review has passed and that the ALJ's decision has thus become final. *Id.*

Even when the Commission does review an ALJ's decision, the Commission "affords their credibility findings 'considerable weight and deference' and accepts the findings 'absent

substantial evidence to the contrary.'" *Bandimere v. Sec. & Exch. Comm'n*, 844 F.3d 1168, 1180 n.23 (10th Cir. 2016) (citing *Thomas C. Bridge*, SEC Release No. 9,068, 2009 WL 3100582, at *18 n.75 (Sept. 29, 2009); and *Steven Altman*, SEC Release No. 63,306, 2010 WL 5092725, at *10 (Nov. 10, 2010)). Commission review is also limited in scope. The Commission may only make a decision on the basis of the record, 17 C.F.R. § 201.411, whose contents are shaped exclusively by the ALJ, 17 C.F.R. §§ 201.326, 201.350.

To ensure the impartiality of adjudications, ALJs receive "career appointments," 5 C.F.R. § 930.204, and are removable only "for good cause" after a hearing before the Merit Systems Protection Board, 5 U.S.C. § 7521, which is comprised of other ALJs. The position of ALJ is created by the Administrative Procedure Act (APA), 5 U.S.C. § 556(b)(3), and ALJs' pay is set by statute, 5 U.S.C. § 5372. ALJs are not appointed by the President, a Head of Department, or the Courts of Law. Instead, ALJs are hired and fired by other midlevel bureaucrats, who are themselves tenure protected. 5 U.S.C. § 1302; 5 C.F.R. § 930.201.

B. Procedural History of Mr. Lucia's Case

On September 5, 2012, the SEC instituted an enforcement action against Raymond J. Lucia, Sr. and his company, Raymond J. Lucia Companies (collectively, "Petitioners"). J.A. 6. The matter was assigned to an ALJ. Over the course of the following ten months, Petitioners and the SEC enforcement team exchanged discovery, filed briefs, and ultimately conducted a hearing under the supervision of the ALJ. *Raymond J. Lucia Companies, Inc.*, SEC Release No. 495, 2013 WL 3379719 (Dec. 6, 2013) (initial decision). During the hearing, the ALJ took testimony, admitted evidence and heard argument on various legal issues. *Id.* The ALJ found violations on only one of the four counts. J.A. 6. Petitioners moved for the ALJ to correct manifest errors of fact, which was granted. *Id.* The Commission reviewed the decision on its own and, rather than

issuing a decision itself, remanded to the ALJ for further fact-finding on the three charges where violations were not found. *Id.* at 6-7. The ALJ issued a new decision and the parties cross-petitioned for review. J.A. 7. The Commission granted the review and found violations on all four alleged counts, but "impose[d] the same sanctions as the ALJ." J.A. 34. The Commission rejected Petitioners claim that the hearing was constitutionally defective because the presiding ALJ was not appointed in accordance with the Appointments Clause of the Constitution. *Id.* Mr. Lucia and his company petitioned the Court of Appeals for the D.C. Circuit for review, which was denied in an opinion rejecting Petitioners' constitutional argument. The D.C. Circuit, sitting en banc, denied the petition for review by an equally divided court. J.A. 77.

SUMMARY OF THE ARGUMENT

The Appointments Clause ensures those who wield significant government power are accountable to the public. Under a straightforward application of this Court's precedents, ALJs must be inferior officers, subject to constitutional appointment. On several occasions this Court has suggested ALJs must be inferior officers and has held every similar position that has come before the Court to be an inferior officer. The original meaning, purpose, and historical practice of the Appointments Clause also support this conclusion.

First, SEC ALJs must be officers because they exercise significant authority pursuant to the laws of the United States. The position of ALJ is created by statute and further defined by regulation. Thus their authority arises not from contract, but from the sovereign delegation of power by Congress and the President. The power they wield is the power of the state.

Second, this authority is significant and so requires political oversight and accountability. SEC ALJs possess all of the powers of a Tax Court STJ, an inferior officer, and then some. Their power to issue subpoenas, rule on evidentiary issues, and generally conduct hearings is

unchecked by the Commission, which refuses to review these issues on an interlocutory basis. The SEC has further enhanced these powers by regulation, giving ALJs the power to adjust and reduce sanctions and punish contempt. Moreover, Commission review of a final decision is rare and deferential. This authority to manage and decide SEC enforcement actions is further augmented by the scope and economic significance of the SEC's jurisdiction.

Third, Congress created an office of SEC ALJ by statute while housing appointment and removal in a separate set of tenure protected bureaucrats. The plain text of the statute creates an office, to which the SEC may delegate any of its functions, save rulemaking, for final decision. The SEC cannot cure this constitutional defect by requiring a finality order because the statute does not permit such a requirement. Further, separation of powers principles forbid an agency interpretation from curing a constitutionally impermissible delegation of power by Congress. This is especially true in Appointments Clause cases because the Clause prohibits the branches both from aggrandizing or abandoning their own power. Moreover, the SEC's finality order is just a rubber stamp, which should not shift the political spotlight away from the ALJs.

Fourth, this Court should continue to reject a finality requirement for inferior officers because finality more appropriately marks the line between inferior and principal officers. Whatever ambiguity on this issue existed in *Freytag*, it was clarified six years later in *Edmond*, when this Court unequivocally rejected a finality requirement for inferior officers. The purpose of the Appointments Clause suggests finality is more appropriately a factor in separating principal from inferior officers because finality indicates supervision and inferior officers must be supervised. Thus, even if SEC ALJs may not enter final orders, that would merely render them inferior, rather than principal officers.

Finally, the Framers understood "officers" to include any person performing a duty for the public. This broad original meaning explains the need for such stringent safeguards. The flexibility afforded in appointing inferior officers further suggests that the Framers did not take a restricted view of the term. Moreover, historical practice, dating from the days of Chief Justice Marshall, has included district court clerks, federal marshals and clerks of the departments among the ranks of officers. The far-reaching understanding of the term "officers" combined with the sweeping powers of SEC ALJs require them to be constitutionally appointed in order to ensure the political accountability provided for by the Appointments Clause.

ARGUMENT

The Appointments Clause protects the American public from the abuses of an incompetent or unaccountable government. U.S. Const., art. II, § 2, cl. 2. Principal officers must be appointed by the President, subject to the "Advice and Consent" of the Senate. *Id.* Thus, the Clause "separates the Government's power but also provides for a degree of intermingling, all to ensure accountability and preclude the exercise of arbitrary power." *Weiss v. United States*, 510 U.S. 164, 186 (1994) (Souter, J., concurring). Congress may dispense with the checks and balances in appointing inferior officers, but "that authority is limited to assigning the appointing power to the highly accountable President or the heads of federal departments, or, where appropriate, to the courts of law." *Id.* Neither of the political branches may seize or abandon the power to appoint.

I. SEC ADMINISTRATIVE LAW JUDGES ARE INFERIOR OFFICERS.

"There can be little doubt that the role of the . . . administrative law judge within this framework is 'functionally comparable' to that of a judge." *Butz v. Economou*, 438 U.S. 478, 513 (1978). Indeed, if one walked into an ALJs' courtroom, he or she would observe a proceeding

that "walks, talks, and squawks very much like a lawsuit." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 757 (2002) (internal citations omitted). A medley of competing and overlapping tests for officers exist. *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 466, 539 (2010) (Breyer, J., dissenting) (collecting four different tests for inferior officers). Yet, this Court has twice suggested that surely ALJs must count.

Concurring on behalf of three other Justices in *Freytag*, Justice Scalia noted that while administrative law judges adjudicate cases, "[t]hey are all executive *officers*." *Freytag v. Comm'r*, 501 U.S. 868, 910 (1991) (Scalia, J., concurring). Nearly two decades later, Justice Breyer made the same point writing on behalf of a different caucus. After listing out all of the ALJs, including SEC ALJs, Justice Breyer wrote: "Each of these ALJs is an inferior officer." *Free Enterprise Fund*, 561 U.S. at 586 (Breyer, J., dissenting). It is no surprise, then, that in each case presenting non-Article III judges of various types with duties resembling those of an ALJ, this Court has held them to be officers, not employees. *See Edmond v. United States*, 520 U.S. 651 (1997) (holding judges of the Coast Guard Court of Criminal Appeals to be inferior officers); *Freytag*, 501 U.S. at 870 (holding Tax Court Special Trial Judges to be inferior officers); *see also Weiss*, 510 U.S. at 167 (1994) (noting that military judges who preside over courts-martial, but do not enter the final sentence are inferior officers). A straightforward application of these precedents requires ALJs to be constitutionally appointed.

The Appointments Clause is an issue of separation of powers. *Freytag*, 501 U.S. at 883. A separation-of-powers inquiry involving a vague and undefined term would typically begin with original meaning and historical practice. *See, e.g.*, *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014). When those methods fail to provide clarity, the Court turns to a functional, context-specific inquiry, often eschewing per se

rules. *Free Enterprise Fund*, 561 U.S. at 520. However, when this Court provides directly analogous precedent that comports with that original meaning and historical precedent, efficiency counsels starting there.

A. SEC ALJs Are Inferior Officers Because They Exercise Significant Authority Pursuant to the Laws of the United States.

An officer is "any appointee exercising significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam); *see also Edmond*, 520 U.S. at 662; *Freytag*, 501 U.S. at 881. To be an officer is not to be without supervision. Indeed, the Constitution provides for "inferior officers," Art. II, § 2, cl. 2, who have "a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior." *Edmond*, 520 U.S. at 662 (1997). SEC ALJs exercise authority pursuant to the Laws of the United States because their offices and powers are created by statute and augmented by regulation. *See Freytag*, 501 U.S. at 881. Moreover, the authority they exercise—hearing and deciding cases worth many millions of dollars—is significant. Thus, they are inferior officers.

1. ALJs Exercise Authority Pursuant to the Laws of the United States Because the Position Is Created by Statute.

ALJs occupy an office "established by law" and therefore exercise authority "pursuant to the laws of the United States." *Freytag*, 501 U.S. at 881. In *Freytag*, the Court held Tax Court Special Trial Judges (STJ) exercised authority pursuant to the laws of the United States because the office is "'established by Law' and the duties, salary, and means of appointment for that office are specified by statute." *Id*.; *see also United States v. Mouat*, 124 U.S. 303, 307-08 (1888); *United States v. Germaine*, 99 U.S. 508, 510 (1879). Like the STJs in *Freytag*, Congress created the office of administrative law judge by statute. 5 U.S.C. § 3105 (creating ALJs); 15 U.S.C. § 78d-1 (authorizing the SEC to delegate to ALJs). Congress also dictated the duties,

salary, and means of appointment and removal for ALJs. 5 U.S.C. § 5372(b)(1)(A) ("There shall be three levels of basic pay for administrative law judges . . . and each such judge shall be paid at one of those levels, in accordance with the provisions of this section."); 5 U.S.C. § 556(c) (listing the duties and powers of ALJs when presiding over hearings); 5 U.S.C. § 7521 (prohibiting adverse actions against ALJs, including removal and reduction in pay, except "for good cause"). Therefore, like the STJs in *Freytag*, the authority, however large, exercised by any ALJ is "pursuant to the laws of the United States." *Freytag*, 501 U.S. at 881; *see also Buckley*, 424 U.S. at 126.

2. SEC ALJs Exercise Significant Authority Because They Have Broad Discretion in Conducting Hearings and Deciding Cases.

SEC ALJs must be officers because they possess all of the same statutorily granted powers as the Tax Court STJs held to be inferior officers in *Freytag*. The *Freytag* Court rested its holding that the STJs exercised significant authority on the fact that they "conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." *Id.* at 882. Congress empowered SEC ALJs to perform each of these functions. 5 U.S.C. § 556(b) (permitting ALJs preside over the taking of evidence); *id.* at § 556(c) (permitting ALJs to issue subpoenas, order depositions, and rule on offers of proof). They may also administer oaths and affirmations and require parties to appear at settlement conferences. *Id.* Straightforwardly applying this Court's decision in *Freytag* requires SEC ALJs be appointed under the Appointments Clause.

The SEC's own rules and regulations further expand the scope of SEC ALJs' authority beyond that of the STJs in *Freytag*. Congress empowered the SEC to augment ALJs' powers by delegating "any of [the SEC's] functions," except rulemaking to its ALJs. 15 U.S.C. § 78d-1(a). The SEC has taken advantage of this option. SEC ALJs are responsible for "conduct[ing]

hearings" and for the "fair and orderly conduct" of those proceedings. 17 C.F.R. § 200.14. In a particularly sweeping delegation, SEC ALJs "have the authority to do *all things necessary* and appropriate to discharge [their] duties." 17 C.F.R. § 201.111 (emphasis added). This includes the ability to adjust or remove sanctions against parties, issue subpoenas, and punish contempt. 17 C.F.R. § 201.531 (adjust sanctions); 5 U.S.C. 556(c)(2) (subpoenas); 17 C.F.R. § 201.180(a) (contempt). Because this Court has already deemed STJs to exercise significant authority under the laws of the United States, ALJs that wield even greater power, like those at the SEC, must also exercise significant authority. Therefore, they must be inferior officers so that their authority is accountable to the President, Congress, and, by the ballot box, the public.

The power of ALJs to conduct hearings is functionally unchecked by the Commission. As in *Freytag*, SEC ALJs exercise complete control over the proceedings. *Freytag*, 501 U.S. at 881. Interlocutory review of any issue is "disfavored" and available only in "extraordinary circumstances." 17 C.F.R. § 201.400. Moreover, the SEC "will not grant" petitions about "the hearing's scope or the admission of evidence." *McDuff*, SEC Release No. 78,066, 2016 WL 3254513, at *5 (Jun. 14, 2016); *see also City of Anaheim*, SEC Release No. 42,140, 1999 WL 1034489, at *1 (Nov. 16, 1999). Further, the Commission "will not grant" petitions for interlocutory review of "fact-bound, discretionary procedural rulings" or "pre-trial discovery orders." *McDuff*, 2016 WL 3254413, at *5; *see also Nat. Blue Res.*, Exchange Act Release No. 74215, 2015 WL 470453, at *3 (Feb. 5, 2015). This consistent course of adjudication significantly limits the ability of the SEC to depart from its practice of refusing review. *See I.N.S. v. Yang*, 519 U.S. 26, 32 (1996) (finding that "unfettered" agency discretion may be limited "by rule or by settled course of adjudication"). Given the power of ALJs to unilaterally dictate the

terms on which high stakes civil enforcement actions proceed, they must be held politically accountable.

SEC ALJs wield this authority with broad discretion and are supervised primarily for error by the Commission. Indeed, nearly 90 percent of ALJ opinions take effect without any substantive review by the Commission. *Bandimere v. Sec. & Exchange Comm.*, 844 F.3d 1168, 1187 n.41 (10th Cir. 2016) (citing SEC, ALJ Initial Decisions, https://www.sec.gov/slj/aljdec.shtml).[1] Even when the Commission does review, the ALJ's findings shape every aspect of that inquiry. First, the Commission may only revise a decision based on "the record," 17 C.F.R. § 201.411, the scope of which is entirely determined by the pre-trial and evidentiary rulings of the ALJ, 17 C.F.R. §§ 201.326, 201.350. The Commission "will not" review these rulings on an interlocutory basis. *See, e.g.*, *McDuff*, 2016 WL 3254413, at *5. Second, the ALJ's initial decision is, itself, part of the record. 17 C.F.R. § 201.411(a). Finally, the Commission "affords [ALJs'] credibility findings 'considerable weight and deference' and accepts the findings 'absent substantial evidence to the contrary.'" *Bandimere*, 844 F.3d at 1180 n.23 (quoting *Thomas C. Bridge*, SEC Release No. 9,068, 2009 WL 3100582, at *18 n.75 (Sept. 29, 2009); and *Steven Altman*, SEC Release No. 63,306, 2010 WL 5092725, at *10 (Nov. 10, 2010)). Even if the agency has, by regulation, the authority to review *de novo*, it has limited its discretion to do so by following a consistent course of adjudication. *Yang*, 519 U.S. at 32. ALJs' unchecked ability to generate findings afforded deference further suggests they are inferior officers.

[1] Petitioners have standing to challenge the constitutionality of ALJs even though Petitioners' case was reviewed by the full Commission. *Buckley v. Valeo*, 424 U.S. 1, 115 (1976) (holding petitioners had standing "to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights"); *see also Freytag*, 501 U.S. at 883.

The need for ALJ oversight is particularly acute where, like SEC ALJs, their decisions impact all sectors of the economy. In considering the scope of a Clause "designed to preserve political accountability relative to important Government assignments," the jurisdictional sweep of the individual's authority must be considered. *Edmond v. United States*, 520 U.S. 651, 662-63 (1997); *see also Morrison v. Olson*, 487 U.S. 654, 672 (1998) (considering the scope of jurisdiction in deciding whether the independent counsel was a principal or inferior officer). The scope ALJ adjudications far surpasses that in *Morrison*, in which the independent counsel—an inferior officer—could investigate only a limited number of people suspected of a specific set of crimes. *Id.* ALJs adjudicate cases involving at least six major federal statutes that regulate broad swaths of the economy, J.A. 3, including the Securities Exchange Act of 1934, Sarbanes-Oxley and Dodd-Frank. SEC, About – What We Do, www.sec.gov/article/whatwedo.html. The power to make such economically significant decisions cannot be wielded by those answerable only to other unnamed bureaucrats.

3. Congress Gave SEC ALJs Nearly Unlimited Power, Including to Issue Final Decisions.

Congress gave ALJs nearly unlimited power, including the power to issue final decisions. When an ALJ issues a decision, the parties may petition for review within a certain time period. 15 U.S.C. § 78d-1. If this date passes without action by the parties, or if the Commission declines review, Congress provides that the ALJ's "action" *"shall*, for *all* purposes, including appeal or review thereof be deemed the action of the Commission." 15 U.S.C. § 78d-1(c) (emphasis added). In this same statute, Congress permitted the Commission to delegate "any of [its] functions," except rulemaking to its ALJs. 15 U.S.C. § 78d-1(a).

The statute creates an office, without providing for constitutional appointment. By permitting the SEC to house "any of [its] functions," save rulemaking, in ALJs, Congress gave

ALJs authority limited only by the scope of the SEC's power. "Read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008). Moreover, the statutory term "shall" "normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34-35 (1998); *see Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016). The result is straightforward. Unless the Commission exercises discretionary review, an ALJ's decision must be last word on any issue the SEC has assigned to the ALJ. To "ensure accountability and preclude the exercise of arbitrary power," that person must be an officer. *Weiss v. United States*, 510 U.S. 163, 187 (1994) (Souter, J., concurring) (internal quotations omitted). Yet Congress has unconstitutionally allocated the appointment power for ALJs with the Office of Personnel Management.

The SEC's *pro forma* finality order requirement cannot cure this constitutional defect. By regulation, the SEC has inserted a ministerial interim step before the ALJ "becomes final." 17 C.F.R. § 201.360(d)(2). First, this is inconsistent with the plain text of the statute. If the term "shall" creates "an obligation impervious to judicial discretion," surely agencies too are prohibited from defying that obligation. *Lexecon*, 523 U.S. at 34-35; *see also Kingdomware Technologies*, 136 S. Ct. at 1977 ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."). Though the SEC need not delegate all of its functions to ALJs, the SEC cannot abridge the ALJs statutorily mandated authority to issue final decisions when it does. An unlawful regulation cannot rescue an unconstitutional law.

Second, and more importantly, an agency cannot, by its own interpretation, cure the constitutional defect in Congress's original delegation. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472-73 (2001). In *Whitman*, the Court held that an unlawful delegation of

legislative power could not be saved by an agency's reasonable narrowing construction of a statute and that to permit such would be "internally contradictory." *Id.* If no possible agency construction can remedy Congress's giving away of its *own* constitutional powers, that principle must extend to congressional interference with another branch's powers. This is especially true here, where Congress, by providing for-cause removal protections for SEC Commissioners, has already limited the President's ability to regulate the internal workings of the agency. Moreover, the Appointments Clause "forbids both aggrandizement and abdication" of power by the branches. *Weiss*, 510 U.S. 163, 189 (1994) (Souter, J., concurring). It "preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag*, 501 U.S. at 879. Thus, even if the SEC's nominal limitation on finality indicated the consent of the Executive Branch, the defect is not cured. Congress and the President may not collude to insulate centers of governmental power from public accountability.

Even if requiring a finality order were allowed by statute and could cure this constitutional defect, the SEC's rubber stamp should not be deemed to do so. Constitutional inquiries, particularly in separation of powers, turn on "the substance of what is required," not on "mere matters of form." *Crowell v. Benson*, 285 U.S. 22, 53 (1932). Finality orders do not entail the kind of substantive review that would shift the locus of political accountability from the ALJ to the Commission. Indeed, finality orders are often issued by the Office of the General Counsel, without any substantive review or involvement of the Commission. *See, e.g.*, *AARX Inc.*, Finality Order, SEC Release No. 74,185, 2015 WL 411834 (Feb. 2, 2015). The purpose of the Appointments Clause is to ensure that those who wield significant power are checked by the public. This Court should not allow a façade to wall off ALJs from public scrutiny.

In the case being reviewed, the D.C. Circuit improperly afforded deference to the SEC's interpretation that finality orders require meaningful Commission review of ALJ decisionmaking. *Raymond J. Lucia Cos. v. Sec. & Exchange Comm'n.*, 832 F.3d 277, 287 (D.C. Cir. 2016). Deference to agency interpretations of their own rules are "undoubtedly inappropriate" where the (1) "the agency's interpretation conflicts with a prior interpretation," or (2) "when it appears that the interpretation is nothing more than a convenient litigating position." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (internal quotations omitted). Both are true here. This interpretation is a marked departure from the SEC's consistent practice of having the General Counsel's Office, not the Commission itself enter these orders. *See, e.g.*, *AARX Inc.*, Finality Order, SEC Release No. 74,185, 2015 WL 411834 (Feb. 2, 2015). This new interpretation seems crafted solely to save the SEC from the unconstitutionality of their ALJs. This Court should not allow the SEC to bootstrap its way into a heightened level of deference for the purposes of avoiding a serious constitutional question.

4. This Court Should Continue to Reject a Finality Test for Inferior Officers

Even if ALJ decisions are not final, this Court has explicitly held that the authority to issue final decisions is not a necessary condition for inferior officers. The circuit split giving rise to this Court's review centers on the *Lucia* and *Bandimere* courts' conflicting accounts of the role of finality in *Freytag*. To be sure, Petitioner contends the Tenth Circuit's reading of *Freytag* is correct, see *infra*, but that is beside the point. This Court clarified the role of finality six years later in *Edmond*. *Edmond v. United States*, 520 U.S. 651 (1997); *see also Weiss*, 510 U.S. at 168-69 (agreeing with the parties' consensus that military judges whose sentences are not final until approved by another officer to be inferior officers). In *Edmond*, the Court considered whether judges of the Coast Guard Court of Criminal Appeals were principal or inferior officers. These

judges reviewed court-martial proceedings resulting in serious criminal penalties to ensure they were "correct in law and fact," without deferring to the trial court's factual findings. *Id.* at 651.

In *Edmond*, the Court of Criminal Appeals was administratively overseen by the Judge Advocate General (JAG) for the Coast Guard, who sets rules of procedures and policies governing review. He could also remove or reassign the judges. The decisions of the Court of Criminal Appeals were reviewed by the Court of Appeals for the Armed Forces every time the JAG orders such review. *Id.* at 665. In holding the judges of the Court of Criminal Appeals to be *inferior*, rather than *principal* officers, the Court relied on the fact that the judges "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id.*; *see also Weiss*, 510 U.S. 168-69 (noting that military judges who cannot issue final orders "act as 'Officers' of the United States" because of "the authority and responsibility they possess."); *Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (holding issuance of "advisory opinions" to "represent the performance of a significant governmental duty exercised pursuant to a public law."). Thus, power to issue final decisions demarks the line between principal and inferior officers, not between officers and employees.

The Court also rejected a finality requirement in *Freytag*, despite the D.C. Circuit's reading to the contrary. In *Freytag*, STJs could be assigned to a case under three different subsections. *Freytag*, 501 U.S. at 872. Under subsections (b)(1)-(3), the STJ had the authority to enter a final judgement. *Id.* However, under subsection (b)(4) the STJ prepared findings of fact and law for review by a judge of the Tax Court. *Id*. The Court contrasted powers of STJs with special masters, who also could not enter final orders. The Court cited the STJ's statutory origins and the ability to "take testimony, conduct trials, rule on the admissibility of evidence and . . . enforce compliance with discovery orders" as proof they were officers. *Id*. at 881-82.

The Court rejected the Commissioner's argument that the STJs were employees for the purposes of subsection (b)(4) because they lacked authority to enter a final decision. *Id.* ("This argument ignores the significance of the duties and discretion that [STJs] possess."). The powers STJs exercised under (b)(4) made them officers. "*Even if* the duties of special trial judges under subsection (b)(4) were not as significant as *we* and two other courts *have found them* to be, our conclusion would be *unchanged*." *Id.* at 882 (emphasis added). This holding in the alternative clearly indicates that the Court already held the powers of an STJ to constitute significant authority, even if Special Tax Judge lacked the statutory authority to issue a final order. Moreover, one of the "two other courts" the *Freytag* Court approvingly cited was the Second Circuit's decision regarding STJs, which explicitly rejected a finality requirement. *Freytag*, 501 U.S. at 881-82; *see Samuels, Kramer & Co. v. Comm'r of Internal Revenue*, 930 F.2d 975, 985–86 (2d Cir. 1991) (finding STJs powers "to be inconsistent with the classifications of 'lesser functionary' or mere employee" even without the power to make final decisions) Therefore, the authority to issue final orders is not a necessary condition for officer status under *Freytag*. Even if ALJs cannot issue final decision, they must be inferior officers because of the significant authority exercised in their remaining powers.

The Court should continue to reject a finality test for two reasons. First, adopting a finality test conflates inferior officers and principal officers. If inferior officers must simultaneously be supervised by a higher ranking officer such that they are not *principal* officers and be able to issue final decisions, the number of inferior officers would become vanishingly small. This would prevent many who wield significant power on behalf of the state from being politically accountable and may have the unintended effect of adding to the ranks of principal officers, whose appointment is more burdensome. Second, this Court has rejected "bright-line

rules" in separation of powers cases. *Free Enterprise Fund*, 561 U.S. at 519-20. This "functional approach permits Congress and the President the flexibility needed to adapt to statutory law and changing circumstances." *Id.* Whether an individual is an officer should remain a functional inquiry, with the need for political accountability as the motivating force.

B. The Original Meaning, Purpose, and Historical Practice of the Appointments Clause Require the SEC ALJs Be Inferior Officers.

The original meaning of "officer" is properly understood broadly, and thus must include ALJs. At the time of the Founding, the term "officer" was anyone whom the King tasked with "any duty concerning the publick." Giles Jacob, *A New Law Dictionary*, tit. Office (9th ed. 1772); 2 T. Cunningham, *A New and Complete Law Dictionary*, tit. Office (2d ed. 1771). This understanding appears to have crossed the Atlantic. In one early Circuit Court case, Justice Marshall defines an office to be "'a public charge or employment' and he who performs the duties of the office, is an officer." *United States v. Maurice*, 2 Brock 96 (D. Va. 1823). In Marshall's view, all officers were also employees, but there must exist a set of employees who were not officers because their employment was merely provided for by a short term contract. *Id.* Again, a capacious understanding of "officer" emerges.

Concern over officers run amok dates back to the Declaration of Independence, in which the Founders decried King George's "swarms of officers" that were "harass[ing]" the people. Declaration of Independence ¶ 12 (U.S. 1776). "[T]he power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism." *Freytag*, 501 U.S. at 883 (internal quotations omitted). However, rather than constitutionally limit the existence of officers, and thus the powers delegable by the President or Congress, the Founders sought "to promote a judicious choice of men for filling the offices" through the Appointments Clause. *The Federalist* No. 76, at 509-10 (Alexander Hamilton). The separation of powers and

checks and balances enshrined in the Appointments Clause therefore suggest that the term "officer" in the Constitution reflects this broad historical meaning.

The alternate appointment mechanism for inferior officers also points to broad meaning of the term officer. Congress's ability to vest the appointments power solely in the President, Heads of Departments, or Courts of Law suggests the Framers foresaw the need for a large number of inferior officers would render congressional confirmation impracticable. *Weiss*, 510 U.S. 186-87 (Souter, J., concurring) ("A degree of flexibility was thought appropriate in providing for the appointment of officers who, by definition, would have only inferior governmental authority.") (citing 2 M. Farrand, Records of the Federal Convention of 1787, p. 627 (rev. ed. 1937) (J. Madison)). This would be neither necessary nor appropriate if the Framers understood officers to be only those in the highest echelons of government.

History is littered with inferior officers less powerful than SEC ALJs. Since Chief Justice Marshall's decision in *Maurice*, this Court has held district court clerks, *In re Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839), federal marshals, *Ex Parte Siebold*, 100 U.S. 371, 397-98 (1879), a postmaster first class, *Myers v. United States*, 272 U.S. 52 (1926) and "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), among others, to be inferior officers of the United States. Moreover, history does not suggest these cases were particularly close calls. In holding a district court clerk to be an inferior officer, the Court found it to be so obvious that it "cannot be questioned." *In re Hennen*, 38 U.S. (13 Pet.) at 258. In finding a postmaster first class to be an inferior officer, the Court in *Myers* summarized the simple rule of the Appointments Clause: "[The President] cannot appoint any inferior officer, *however humble*, without legislative authorization." *Myers*, 272 U.S.

at 193. The power exercised by ALJs – to conduct trials, subpoena documents and witnesses, and issue decisions – is far from humble and must be constrained by the political process.

The need for political accountability for SEC ALJs is particularly acute. They exercise broad powers, checked only by a Commission that is, itself, insulated from political influence via for-cause removal. *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 495-96 (2010). If the President can neither remove the agency head, nor appoint inferior officers, such agencies may come to be "regarded as beyond his control—a 'headless Fourth Branch.'" *Freytag*, 501 U.S. at 922 (Scalia, J., concurring). The Securities and Exchange Commission as an agency is vitally important and wields the power to regulate nearly every aspect of the economy, including by punitive fines registering in the hundreds of millions. The ALJs responsible for conducting hearings and making final, official legal findings in nearly ninety percent of these cases should not be hired and fired by a set of bureaucrats, themselves removable only for cause. This prevents meaningful accountability for ALJs' actions and, through multiple layers of tenure-protection, interferes with the Presidents constitutional responsibility to "take care the laws be faithfully executed." U.S. Const., art. II, § 3, cl. 5. SEC ALJs must be constitutionally appointed.

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

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APPENDIX

Title 15, Section 78d-1: Delegation of Functions by the Commission

(a) Authorization; functions delegable; eligible persons; application of other laws
In addition to its existing authority, the Securities and Exchange Commission shall have the authority to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter. Nothing in this section shall be deemed to supersede the provisions of section 556(b) of Title 5, or to authorize the delegation of the function of rulemaking as defined in subchapter II of chapter 5 of Title 5, with reference to general rules as distinguished from rules of particular applicability, or of the making of any rule pursuant to section 78s(c) of this title.

(b) Right of review; procedure
With respect to the delegation of any of its functions, as provided in subsection (a) of this section, the Commission shall retain a discretionary right to review the action of any such division of the Commission, individual Commissioner, administrative law judge, employee, or employee board, upon its own initiative or upon petition of a party to or intervenor in such action, within such time and in such manner as the Commission by rule shall prescribe. The vote of one member of the Commission shall be sufficient to bring any such action before the Commission for review. A person or party shall be entitled to review by the Commission if he or it is adversely affected by action at a delegated level which (1) denies any request for action pursuant to section 77h(a) or section 77h(c) of this title or the first sentence of section 78*l*(d) of this title; (2) suspends trading in a security pursuant to section 78*l*(k) of this title; or (3) is pursuant to any provision of this chapter in a case of adjudication, as defined in section 551 of Title 5, not required by this chapter to be determined on the record after notice and opportunity for hearing (except to the extent there is involved a matter described in section 554(a)(1) through (6) of such Title 5).

(c) Finality of delegated action
If the right to exercise such review is declined, or if no such review is sought within the time stated in the rules promulgated by the Commission, then the action of any such division of the Commission, individual Commissioner, administrative law judge, employee, or employee board, shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission.