No. 17-130

IN THE

Supreme Court of the United States

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

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF PROFESSOR JENNIFER L. MASCOTT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Jennifer Mascott is an Assistant Professor of Law at the Antonin Scalia Law School of the George Mason University. The *amicus* has an interest in preservation of the U.S. Constitution's Appointments Clause restraints on the exercise of government power. The academic scholarship of *amicus* explores the original public meaning of Article II of the Constitution and the interrelationship between Article II's textual constraints and democratic accountability. In particular, this brief draws substantially from *amicus*'s article, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443 (2018), regarding the original meaning of the Appointments Clause and early federal appointment practices. This brief discusses that evidence as it relates to the question whether the Appointments Clause applies to administrative law judges and the broader question of which categories of federal officials are "Officers of the United States."

CONSTITUTIONAL PROVISION INVOLVED

Article II, Section 2, Clause 2 of the Constitution provides in relevant part: "[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

1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or her counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

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."

SUMMARY OF ARGUMENT

When interpreting the phrase "Officers of the United States" in the Appointments Clause, this Court has emphasized the importance of the historical meaning of the constitutional text. *See Buckley v. Valeo*, 424 U.S. 1, 127-29 (1976) (per curiam). Substantial evidence suggests that the original public meaning of "Officers of the United States" included every federal civil official with ongoing responsibility to carry out a statutory duty. *See generally* Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443 (2018) (hereinafter *Officers*). Under this "statutory duty" standard, administrative law judges (ALJs) within the Securities and Exchange Commission (SEC) are "Officers of the United States." SEC ALJs carry out tasks that Congress has assigned to the SEC. *See* 15 U.S.C. § 78d-1(a); 17 C.F.R. §§ 200.14, 200.30-9. Therefore, the SEC's ALJs are "officers" under the "statutory duty" test.

This standard differs from the suggestion in some cases that Congress can determine Article II "officer" status by choosing whether to tie responsibility for a specific statutory task to one particular official. *See, e.g.*, *Landry v. FDIC*, 204 F.3d 1125, 1133 (D.C. Cir. 2000). Rather, the original meaning of "officer" encompassed every official who happened to carry out a statutory

task—whether Congress had explicitly assigned it to them or not. *See Officers*, *supra*, at 507-08, 513-15. It is the exercise of the governmental power that makes an official an "officer"—not Congress's classification of the position.

The "statutory duty" standard is consistent with the outcome of most of this Court's Appointments Clause cases as well as with numerous pronouncements this Court has made about the meaning of the Clause. *See, e.g.*, *Buckley*, 424 U.S. 1; *Freytag v. Commissioner*, 501 U.S. 868 (1991). Along with the Court's widely cited discussion of "significant authority" in *Buckley*, the Court in that case also explained that from its first inclusion in constitutional drafts, the phrase "Officers of the United States" has "embrace[d] all appointed officials exercising responsibility under the public laws of the Nation." 424 U.S. at 131. Several nineteenth century decisions accordingly tied the concept of duty to status as an Article II "officer." *See, e.g.*, *Auffmordt v. Hedden*, 137 U.S. 310, 326-29 (1890); *United States v. Germaine*, 99 U.S. 508, 511-12 (1878); *United States v. Hartwell*, 73 U.S. 385, 393 (1867).

Evidence from the text of the Constitution, its drafting history, and Founding-era uses of the phrase "Officers of the United States" suggests it was not a new term of art established in the Constitution to set aside an especially important class of officers. Rather, the modifier "of the United States" indicated that the Appointments Clause encompassed federal, rather than state, officers. Indeed, contextual analysis of thousands of Founding-era uses of "officer(s)" and "office(s)" in dictionaries, the drafting and ratification debates, the Federalist Papers and Anti-Federalist essays, the *Journals of the*

Continental Congress, and a database of early newspaper records suggests that an eighteenth century officer was anyone with ongoing responsibility for carrying out a governmental task.

The Court should not permit purported practical concerns over proper implementation of Appointments Clause requirements to dissuade it from adhering to the original meaning of the Constitution. As the Court explained in response to appointment-related partiality concerns in *Buckley*, "fears, however, rational, do not by themselves warrant a distortion of the Framers' work." 424 U.S. at 134.

ARGUMENT

I. This Court's decisions confirm that whether SEC ALJs are "Officers of the United States" must be evaluated in accordance with the phrase's original public meaning.

The Court has held that, when evaluating which government officials are "Officers of the United States" subject to the Appointments Clause, the phrase must be interpreted in accordance with the historical meaning of its terms. *See Buckley*, 424 U.S. at 128-31, 138-39 (emphasizing the "express language" of the Clause). Appointments Clause requirements are "well-established constitutional restrictions stemming from the separation of powers," *id.* at 132, and are "critical to preserving liberty," *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). An inquiry into the scope of those requirements thus "of necessity touches upon the fundamental principles of the Government established by the Framers of the Constitution." *Buckley*, 424 U.S. at 120.

To maintain the key "structural protection" of separated powers, the Framers provided each branch with "'the necessary constitutional means, and personal motives, to resist encroachments'" by the other branches. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 501 (2010) (quoting The Federalist No. 51, at 268 (J. Madison) (George W. Carey & James McClellan eds., 2001)). One important tool the Executive retained to counter legislative encroachment was "'the power of appointing, overseeing, and controlling those who execute the laws.'" *Free Enterprise Fund*, 561 U.S. at 501 (quoting 1 *Annals of Cong.* 463 (1789) (J. Madison)).

Due to the essential limitations that the Appointments Clause imposes, this Court's leading modern opinion on the scope of its requirements repeatedly returned to the Clause's text and emphasized the "importance of its language." *Buckley*, 424 U.S. at 124-25. In particular, when considering whether Federal Election Commissioners are "Officers of the United States," this Court relied on its "reading of the language of the Appointments Clause" as well as interpretive information gleaned from the drafting history of the Clause, the Federalist Papers, and Constitutional Convention debate records. *Id.* at 128-31. Because the Article II phrase "Officers of the United States" is a "term intended to have substantive meaning," the Court pointedly declined "to read the Appointments Clause contrary to its plain language." *See id.* at 125-27.

Substantial historical evidence derived from thousands of eighteenth century references to the terms "officer," "office," and "officers of the United States" suggests that the original meaning of the Appointments Clause encompassed every federal civil official with "ongoing

responsibility to perform a statutory duty." *Officers*, *supra*, at 454. The SEC ALJs clearly qualify as Article II officers under this standard. *See* Jennifer L. Mascott, *Constitutionally Conforming Agency Adjudication*, 2 Loy. U. Chi. J. Reg. Compliance 22, 27 (2017) (published online). The SEC has statutory authority to delegate Commission functions to its ALJs and has done so via regulation. 15 U.S.C. § 78d-1(a); 17 C.F.R. §§ 200.14, 200.30-9. Therefore, the SEC's ALJs are "Officers of the United States" under the original meaning of the Appointments Clause.

Although this "statutory duty" standard differs substantially from Appointments Clause interpretations in lower courts such as the D.C. Circuit, it is consistent with the outcome of most of this Court's cases interpreting the phrase "Officers of the United States." *See Officers*, *supra*, at 463-65 & n.99. Further, this Court previously has articulated a standard for Article II "officer" status that embraces the concept of duty. *See Auffmordt*, 137 U.S. at 326-27 (concluding that an appraiser was not an "officer" because his position lacked "tenure, duration, continuing emolument, or continuous duties, and he act[ed] only occasionally and temporarily"); *Germaine*, 99 U.S. at 511-12 (same, regarding a surgeon with "duties" that were "occasional and intermittent"); *Hartwell*, 73 U.S. at 393 ("An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties."). *Cf. Free Enterprise Fund*, 561 U.S. at 506 & n.9 (citing *Germaine* in discussing the meaning of "Officers of the United States").[2]

2. In *Free Enterprise Fund*, the Court suggests that *Germaine*'s characterization of "nine-tenths of the persons

A determination that the Appointments Clause embraces a "statutory duty" standard also would be consistent with this Court's recent decisions in *Buckley* and *Freytag*. To be sure, lower courts such as the D.C. Circuit have interpreted *Buckley* and *Freytag* as imposing a multi-factor set of minimal threshold requirements for Article II "officer" status. *See, e.g.*, *Landry*, 204 F.3d at 1133-34 (suggesting, for example, that "'significant discretion'" is "rather a magic phrase under the *Buckley* test"); *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 284-85 (D.C. Cir. 2016). But the D.C. Circuit has overread, and wrongly fossilized, this Court's Appointments Clause decisions.

In both *Buckley* and *Freytag*, the Court evaluated positions that it fairly easily concluded were above the minimal officer-versus-employee threshold. *See Buckley*, 424 U.S. at 137-38 (stating that "[t]he Commission's enforcement power … is authority that cannot possibly be regarded as merely in aid of the legislative function of the Congress"—work that the Court had said a non-Article II officer could perform); *Freytag*, 501 U.S. at 881-82 (noting that the two courts to consider the question had found the special trial judges to be officers and briefly explaining the Court's agreement with this conclusion). Consequently, this Court did not need to, and did not, articulate a detailed bright-line standard for moving from employee to officer

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rendering service to the government" as non-officers may help to justify the non-officer treatment of many modern civil servants. *See* 561 U.S. 506 & n.9 (internal quotation omitted). But this *Free Enterprise Fund* discussion misconstrues *Germaine*, which was not a case about permanent government employees but rather surgeons hired for services—similar to government contractors. *See* 99 U.S. at 509, 511-12.

status as a rule of decision for every future case. Rather, the Court noted in more general terms the significance in the level of authority held by the specific officials under review in those cases.

In the most commonly cited portion of *Buckley*, the Court stated that the "fair import" of the phrase "Officers of the United States" is that it encompasses "any appointee exercising significant authority pursuant to the laws of the United States." 424 U.S. at 126. But the Court also explained that from the earliest constitutional drafts, the phrase "Officers of the United States" had "embrace[d] all appointed officials exercising responsibility under the public laws of the Nation"—a definition bearing striking resemblance to the Founding-era meaning of "officer" as one with "ongoing responsibility for a statutory duty." *Compare Buckley*, 424 U.S. at 131, *with Officers*, *supra*, at 506-07. Further, *Buckley* left "significant authority" sufficiently undefined that it may be construed as consistent with the Founding-era statutory duty standard. *Cf. Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 86 (2007) ("The Court's reference in *Buckley* (and subsequent cases) to the exercise of 'significant authority' does vary somewhat from the well-established historical formulation, but nothing in the Court's opinion suggests any intention to break with the longstanding understanding of a public office or fashion a new term of art."). In exercising power over private parties, the federal government inherently wields so much authority that anyone carrying out a governmental duty arguably exercises some measure of "significant authority." *See Officers*, *supra*, at 464 & n.106.

In evaluating the "officer" status of the Federal Election Commissioners before it, *Buckley* highlighted that the Commissioners carried out particularly "significant governmental dut[ies]" like rulemaking. 424 U.S. at 140-41. But the Court did not specify that the Commissioners' duties *necessarily* had to meet that level of significance for "officer" status—just that the duties in fact were so significant that "Officers of the United States" must perform them. *See id.* Toward the conclusion of the opinion, the Court observed that governmental tasks "of an investigative and informative nature" may be performed without an Article II appointment. *See id.* at 137. But the Court suggested these governmental tasks were suitable for non-Article II officers because they involved serving as an aid to Congress, not as an executive officer of the United States. *See Free Enterprise Fund*, 561 U.S. at 500 n.5 (explaining that this portion of the *Buckley* opinion "describ[ed] legislative positions that are not really offices at all (at least not under Article II)"); s*ee also Buckley*, 424 U.S. at 137-38 (describing the non-officer tasks as "falling in the same general category as those powers which Congress might delegate to one of its own committees").

Then in *Freytag*, when considering whether the Tax Court's special trial judges are "Officers of the United States," the Court began by observing that the only two courts to previously address the issue held that the officials were Article II "officers." *See* 501 U.S. at 881. The Court then briefly conducted its own analysis of the special trial judges' Article II status. *See id.* at 881-82. The Court noted that the officials' duties and salary were provided for by statute, in part to distinguish them from non-officers hired for services "on a temporary, episodic

basis." *Id.* at 881. The Court took note that the special trial judges had significant duties and discretion and recounted their "more than ministerial tasks" like taking testimony, conducting trials, and enforcing compliance with discovery orders. *See id.* at 881-82; *see also id.* at 882 (explaining that one alternative basis for the special trial judges' "officer" status was their authority to reach final decisions in a certain class of cases). But the Court did not explicitly state that these tasks are a mandatory prerequisite for qualifying as an Article II "officer." *See id.* Rather, the Court primarily seems to have been describing the responsibilities that the officials before it happened to have and explaining that such tasks must be carried out by "officers." In other words, *Freytag* can be read as establishing sufficient, but not necessary, conditions for "officer" status.

Whether the Court agrees, or instead interprets its precedent to have established mandatory minimum factors for Article II officer status, the specific question whether ALJs are "Officers of the United States" is one of first impression. *See Free Enterprise Fund*, 561 U.S. at 507 n.10 (noting the dispute). In addressing that question and the potential reach of the Clause to this class of agency adjudicators, the original meaning of the Clause should at a minimum inform the Court's analysis. *See, e.g.*, *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560-61 (2014) (considering evidence from the Constitutional Convention records and early dictionaries relevant to analysis of the Recess Appointments Clause). Moreover, the Court may want to consider whether articulating a clearer standard than "significant authority" would better serve the lower courts and Congress, which in establishing new offices "by Law" must evaluate which positions

are subject to Article II. Adoption of the historical standard of "officer" as one responsible for an ongoing statutory duty would provide much needed clarity, ensure consistency with the Constitution's text, and further the democratic accountability and transparency purposes of Appointments Clause mandates.

II. Substantial evidence proves that the original public meaning of "Officers of the United States" encompassed any federal civil official with ongoing responsibility to perform a statutory duty.

The Appointments Clause requires that all "Officers of the United States" be appointed by the President with Senate advice and consent, the President alone, "Heads of Departments," or "Courts of Law." U.S. Const. art. II, § 2, cl. 2. By involving a limited set of actors in officer selection, Article II helps to ensure that the public knows the identity of the official responsible for the appointment. *See* Hanah Matchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. Pa. J. Const. L. 745, 766 (2008); *Freytag*, 501 U.S. at 883 ("The 'manipulation of official appointments' had long been one of the American revolutionary generation's greatest grievances against executive power …. Those who framed our Constitution addressed these concerns by carefully husbanding the appointment power to limit its diffusion.").

Concerns about transparency, accountability, and excellence in government service existed from the time of the Founding. *See Free Enterprise Fund*, 561 U.S. at 497-98 ("Without a clear and effective chain of command, the public cannot 'determine on whom the

blame or the punishment of a pernicious measure … ought really to fall.'" (quoting The Federalist No. 70, at 366 (A. Hamilton))). The Framers selected the mechanism of the Appointments Clause to safeguard these core values—believing that transparency in the appointment process would hold the democratically elected executive and his department heads accountable for selecting well-qualified officers. *See, e.g.*, *Freytag*, 501 U.S. at 884 ("The Framers understood … that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people."); The Federalist No. 76, at 392-93 (A. Hamilton) (concluding that singular responsibility in appointments "will naturally beget a livelier sense of duty, and a more exact regard to reputation"). Proper interpretation of the scope of the phrase "Officers of the United States" is a fundamental component of correctly, and completely, implementing the Appointments Clause's democratic accountability protections.

Substantial eighteenth century evidence indicates that the original public meaning of the phrase was broad, encompassing every federal civil official "with ongoing responsibility for a federal statutory duty." *Officers*, *supra*, at 465. An official's governmental duty did not have to rise to any minimal level of significance for the official to come within Appointments Clause requirements. *See id.* at 454. Nor did the term "officer" relate to an official's power to exercise discretion or engage in final decision-making—in contrast to modern lower-court opinions making such factors mandatory elements of Article II officer status. *See, e.g.*, *Tucker v. C.I.R.*, 676 F.3d 1129, 1133-35 (D.C. Cir. 2012). Officials with duties as nondiscretionary as recordkeeping were considered "officers." *See Officers*, *supra*, at 450.

Moreover, in contrast to the modern classification of federal officials as either employees or officers, *see Buckley*, 424 U.S. at 126 n.162, the Founders more likely would have thought of people below the level of officer as "attendants" or "servants." *See, e.g.*, The Federal Farmer, Anti-Federalist No. 41-43 (Part II): The Quantity of Power the Union Must Possess is One Thing; The Mode of Exercising the Powers Given is Quite a Different Consideration (1788) (hereinafter Federal Farmer XVIII), in *The Anti-Federalist Papers*, at 156, 162 (Bill Bailey ed., n.d.), https:/perma.cc/XM7Q-XV4B (describing the categories of people who would work in the nation's capital under the new federal government as the government's "own members, officers, and servants"); *see also Officers*, *supra*, at 503. The *Oxford English Dictionary*'s first recorded use of the term "employee" is dated 1814—more than 25 years after the ratification of the Constitution. *See Oxford Eng. Dictionary*, https://perma.cc/F9ZK-XUPF (archived Nov. 13, 2017).

A recent article by *amicus* in the *Stanford Law Review* uses two distinctive tools to uncover the original public meaning of the phrase "Officers of the United States": (i) corpus linguistics-style analysis of Founding-era documents and (ii) examination of appointment practices during the First Congress. Corpus linguistics interpretive analysis involves the adaptation of empirically based big-data techniques to statutory and constitutional interpretation. *See, e.g.*, Stephen C. Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning*, 13 Colum. Sci. & Tech. L. Rev. 156, 190 (2011); *People v. Harris*, 885 N.W.2d 832, 838-39 (Mich. 2016) (using corpus linguistics techniques in statutory interpretation); *see also Officers*, *supra*, at

466-70, 494-96 (explaining the article's methodology). One key insight from the field is that examination of every use of a term in a wide variety of documents can yield a more complete, impartial understanding of a word than resorting to cherry-picked Founding-era statements and definitions. *See generally* James C. Phillips et al., *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical,* 126 Yale L.J.F. 21 (2016).

To uncover the original public meaning of the term "officer," the *Stanford Law Review* study first implemented more traditional interpretive techniques like examining the constitutional text, consulting Founding-era ordinary-language and legal dictionary entries on "officers," and analyzing the constitutional drafting history. *See Officers*, *supra*, at 470-74, 484-90. Then, incorporating insights from corpus linguistics, the study examined the context of every use of the terms "office(s)" and "officer(s)" in Nathan Bailey's eighteenth century ordinary-language dictionary, Max Farrand's records of the constitutional drafting debates, the Federalist Papers, and the Borden collection of Anti-Federalist essays. *See id.* at 490-94, 498-503. The study also examined the context of every use of the full phrase "Officers of the United States" in Jonathan Elliot's records of the state ratification debates, the *Journals of the Continental Congress*, and a database of early American newspaper records. *See id.* at 475-79, 494-98.

This analysis suggested first that "Officers of the United States" was not a term of art setting aside a particularly important class of officers. *See id.* at 469. Rather, the modifier "of the United States" just denotes

that the Clause applies to federal, and not state, officers. As a result, determination of the meaning of the standalone term "officer" is directly relevant to identifying the class of federal officials who constitute "Officers of the United States." Evidence of the eighteenth century meaning of "officer" suggests that it encompassed every official "with ongoing responsibility to perform a statutory duty." *See id.* at 454. Early federal officials carrying out statutory duties were considered "officers" even where the statute creating the duty did not specify which officer had to perform it. *See id* at 507-08, 512-15 (explaining that clerks who kept customs-related records required by statute were "officers," in contrast to non-"officer" messengers who engaged only in non-statutory tasks like "'packing despatches'" and "'preserving the newspapers'").

A. The Constitutional Text

Even though the Constitution includes no definition of "Officers of the United States," the President's authority to nominate judges, certain diplomatic officers, and "*all other* Officers of the United States" suggests the phrase encompasses a larger group than just the diplomats and judges—further confirmed by the Clause's subsequent reference to a class of "inferior Officers." *See* U.S. Const. art II, § 2, cl. 2; *Officers*, *supra*, at 470. The reference to "all other" indicates, too, that the Appointments Clause provides the exclusive mechanism for appointing "Officers of the United States" whose appointments are not specifically provided for in other constitutional provisions. *See* U.S. Const. art. II, § 2, cl. 2 (providing that the President "shall nominate … all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law").

The Constitution's other references to "Officers of the United States" merely describe consequences that derive from officer status—such as the possibility for impeachment and the requirement of a commissioning. U.S. Const. art. II, §§ 3, 4; *Officers*, *supra*, at 470. The Constitution uses some formulation of the terms "officer(s)" and "office(s)" thirty additional times. *See Officers*, *supra*, at 470 n.139 (excluding a reference to "Post Offices"). Most of these references do not explicitly indicate what level of authority constitutional officers hold. *See id.* The one potential exception is the Necessary and Proper Clause's authorization for Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. This clause could be read as permitting the exercise of federal power to reside *only* in the federal government itself or its departments or officers—not a lower-level non-officer class. *See Officers*, *supra*, at 470-71 n.139.

B. "Officers of the United States" is not a term of art.

Not only does the constitutional text itself arguably suggest that a broad group of officials exercising federal power is included with the meaning of "officers," the text—in conjunction with significant external Founding-era evidence—indicates that "Officers of the United States" was not a new term of art setting aside an especially important class of government officials. *See Officers*, *supra*, at 471-83. Rather, like its use in at least three other constitutional provisions, the modifier "of the United

States" seems just to have indicated that the referenced officers are federal, rather than state, officials.

As an initial observation, the first reference to executive "officer[s]" in Article II uses the standalone word "officer," not "officer of the United States." *See* U.S. Const. art. II, § 2, cl. 1 (authorizing the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments …"). If the phrase "Officers of the United States" created a new special class, presumably Article II's initial reference to officers in that class would include the complete term of art.

The Appointments Clause drafting history further suggests that the modifying phrase "of the United States" just connotes a broad class of federal officers spanning multiple branches of the government, versus purely executive officers or state-level officials. The earliest drafts of the Constitution suggested that the President had authority to appoint only executive officers; at that stage in the drafting process the legislature retained authority to appoint non-executive officers like judges. *Compare* 1 *The Records of the Federal Convention of 1787*, at 21-22, 62-63 (Max Farrand ed., 1911) (hereinafter *Farrand's Records*), *with* 2 *Farrand's Records*, *supra*, at 43-44; *see Officers*, *supra*, at 472-74. The President acquired the authority to appoint non-executive "Judges of the supreme Court" and ambassadors at the same near-final stage of the drafting process that the Appointments Clause first referenced the full phrase "Officers of the United States." *See* 2 *Farrand's Records*, *supra*, at 493-96; *Officers*, *supra*, at 472-73 & nn.151-154.

Several other constitutional uses of the phrase "of the United States" similarly provide a descriptive reference to the federal level of government versus the state level. *Officers*, *supra*, at 471, 473-74 & nn.141, 156. For example, Article II, Section 2, Clause 1 establishes the President as "Commander in Chief of the Army and Navy *of the United States*, and of the Militia *of the several States*." U.S. Const. art. II, § 2, cl.1 (emphasis added). The Oaths Clause requires "executive and judicial Officers, both *of the United States* and *of the several States*, [to] be bound by Oath or Affirmation, to support this Constitution." *Id.* art. VI, cl. 3 (emphasis added). And Article IV, Section 3, Clause 2 instructs that "nothing in this Constitution shall be so construed as to Prejudice any Claims *of the United States*, or *of any particular State*." *Id.* art. IV, § 3, cl. 2 (emphasis added). Each of these Clauses' references to "of the United States" juxtaposed with a parallel reference to state-level government underscores the phrase's use as a modifier setting aside a federal-level category.

The earliest uses of the full phrase "Officers of the United States" confirm this analysis. Examination of every use of the phrase in the *Journals of the Continental Congress* and a database of early newspaper records showed the phrase arising as early as 1778 in descriptions of continental military officers. *See Officers*, *supra*, at 475-79. Many of these uses of the phrase do not provide contextual clarification of its meaning, but two indicate that the phrase is referencing all continental, *i.e.*, national- versus state-level, officers. For example, a 1782 War Office Report suggested that the government should not pay a military officer "as an officer of the United States" during the time he served instead as a state military captain. *See* War Office, Report (1782), *in* 23 *Journals of the*

Continental Congress 1774-1789, at 626 (Gaillard Hunt ed., 1914). And the Minutes from a February 1778 session of the Continental Congress described continental-level civil and military officers as "officer[s] of the United States." Minutes of Feb. 9, 1778, *in* 10 *Journals of the Continental Congress*, *supra*, at 138-40 (Worthington Chauncey Ford ed., 1908); *see also generally Officers*, *supra*, at 475-79 (providing more in-depth explanation of evidence from the *Journals of the Continental Congress* and Series I of the Readex Early American Newspapers database containing 340,000 newspaper issues from 1690 to 1876).

In addition, on a number of occasions the Founders used a variety of distinct phrases to describe Article II officers—suggesting that the descriptor "Officers of the United States" was not considered a precise term of art. *See Officers*, *supra*, at 474. For example, Alexander Hamilton in Federalist No. 77 discussed removal and appointment procedures for "officers of the government," the Anti-Federalist essayist writing as "The Federal Farmer" described Article II officers as "officers of the union," and Representative Roger Sherman used the phrases "officers of the United States" and "officers of the Federal Government" interchangeably during a 1790 congressional debate on militia legislation. *See* The Federalist No. 77, at 396; The Federal Farmer, Anti-Federalist No. 76-77: An Anti-Federalist View of the Appointing Power Under the Constitution (1788), *in The Anti-Federalist Papers*, *supra*, at 293, 294 (Bill Bailey ed., n.d.), https://perma.cc/XM7Q-XV4B; 14 *Documentary History of the First Federal Congress of the United States of America, 4 March 1789-3 March 1791*, at 120-21 (William Charles diGiacomantonio et al. eds., 1995).

Also, examination of every use of the phrase "officers of the United States" in the drafting and ratification debates, the Federalist Papers, and the Borden collection of Anti-Federalist essays revealed no direct definition of the precise scope of the phrase. *See Officers*, *supra*, at 468 & n.131, 474-75. *But see id.* at 475 & n.164 (noting one contradictory use of the phrase during the first congressional debates). This may be because the term "officer" had a "common and known acceptation" at the time. *See* 4 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* 454-55 (Jonathan Elliot ed., Washington, Jonathan Elliot 2d ed. 1836) (hereinafter *Elliot's Debates*) (recording an 1806 congressional debate statement); *see also* 8 *Annals of Cong.* 2294, 2306 (1799) (recording Rep. Harper's reference to the "universally received signification of the term 'office'").

C. Founding-era dictionaries and commentaries

Because the phrase "Officers of the United States" is not a term of art for especially important officials, it makes sense to turn to the late eighteenth century meaning of the standalone term "officer" to determine the scope of federal officials under the Appointments Clause.

The majority of the ten Founding-era dictionaries that *amicus* surveyed defined a civil "officer" to be a "man employed by the public(k)" and described an "office" as a "public employment" or a "public charge." *See, e.g.*, 2 Samuel Johnson, *A Dictionary of the English Language* (London, J.F. & C. Rivington 6th ed. 1785) ("Officer": "1. A man employed by the publick"; "2. A commander in the army;" "3. One who has the power

of apprehending criminals, or man accountable to the law"); *see also Officers*, *supra*, at 486-88 (cataloguing the dictionary definitions). The only one of the ten Founding-era dictionaries with a materially different definition explained that the word "officer" "in general signifies any person that has a peculiar post or business appointed him." *See* Thomas Dyche & William Pardon, *A New General English Dictionary* (London, Toplis & Bunney 18th ed. 1781); *Officers*, *supra*, at 486 & n.226. Chief Justice Marshall recounted a similar definition several decades later in an 1823 circuit court opinion, explaining: "An office is defined to be 'a public charge or employment,' and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States." *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747); *see also* Noah Webster, *An American Dictionary of the English Language* (New York, S. Converse 1828) ("officer": a "person commissioned or authorized to perform any public duty").

The ordinary-language dictionary definitions and Chief Justice Marshall's explanation are consistent with eighteenth century legal dictionary definitions of "officer," which similarly incorporate the concept of a public charge or duty. *See Officers*, *supra*, at 488-90. For example, Matthew Bacon states that "the Word Officium principally implies a Duty, and ... the Charge of such Duty." 3 Matthew Bacon, *A New Abridgment of the Law* *718-19 (London, C. Bathurst 4th ed. 1778). He then observes that officer status is not dependent on the significance or level of importance of one's duty: An officer "is not the less a Public Officer, where his Authority is confined to narrow Limits; because it is the Duty of his Office, and the Nature of that Duty,

which makes him a Public Officer, and not the Extent of his Authority." *Id.* at *719. Further underscoring that one's eighteenth century status as an "officer" was unrelated to discretion or final decisionmaking, Bacon also describes a class of "Ministerial Offices." *See id.* This group included positions like the "Office of Register of Policies of Assurance," which "required only the Skill of Writing after a Copy," and recordkeepers like chirographers who kept records of court-imposed fines. *See id.* at *734; Dyche & Pardon, *supra* (defining "Chirographer").

The bestselling eighteenth century dictionary by Nathan Bailey used the words "officer(s)" and "office(s)" more than 500 times to define other terms. *See Officers*, *supra*, at 485 (discussing the "officer" and "office" references); Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 Geo. Wash. L. Rev. 358, 361, 367-81 (2014) (discussing Bailey's dictionary). Treating Bailey's dictionary as a self-contained corpus, *amicus* examined the context of each of those references. *See Officers*, *supra*, at 485. The dictionary characterized as "officers" numerous assistants, recordkeepers, and other public officials engaged in menial tasks. *See id.* at 490; *see generally* N. Bailey, *An Universal Etymological English Dictionary* (London, J. Murray 25th ed. 1783).

For example, "Messengers [of the Exchequer]" were "officers belonging to that Court, who attend the Lord Treasurer, and carry his letters and orders." Bailey, *supra*, (*Messengers*). A sword-bearer was "an officer who carries the sword of state before a magistrate." *See id.* (*Sword*). Satellites were "Life-Guards, or Officers attending upon a Prince." *Id.* (*Satellites*). A "Swabber" was

"an inferior officer on board a ship of war, whose office it is to take care that the ship be kept clean." *Id.* (*Swabber*). A "sewer" was "an officer who comes in before the meat for a King or Nobleman, and places it upon the table." *Id.* (*Sewer*). A "Gauger" was "an officer employed in gaging," or measuring the contents of a vessel. *Id.* (*Gager/Gauger*; *Gage/Gauge*). A Chafe-Wax was "an Officer belonging to the Lord Chancellor, who fits the wax for [the] sealing of writs." *Id.* (*Chafe*). An "Assay-Master" was "an officer of the Mint, who weighs the bullion, and takes care that it be according to the national standard." *Id.* (*Assay*). And a butler was "an officer that provides the king's wines." *Id.* (*Botiler/Butler*). *See also Officers*, *supra*, at 490-94 (detailing a lengthier list).

The dictionary's characterization of these officials as "officers" would have influenced the late eighteenth century American understanding of the term even though the new constitutional system embraced few of these specific positions. *See Officers*, *supra*, at 492. *But see* Act of Aug. 4, 1790, ch. 5, § 6, 1 Stat. 145, 154 (1790) (repealed 1799) (providing for gaugers); Act of Apr. 2, 1792, ch. 16, § 1, 1 Stat. 246, 246 (1792) (providing for an Assayer). The Framers intentionally rejected the British approach for creating offices and appointing officers, but no evidence suggests the Constitution imported an altered meaning of the word "officer" itself. *See Officers*, *supra*, at 493-94. One complaint underlying the colonists' war for independence was that the King had "erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people." *The Declaration of Independence* para. 12 (U.S. 1776). Under British practice the King had power to both create and fill public offices. *See* The Federalist No. 69, at 360-61 (A. Hamilton); *Officers*, *supra*, at 492-

93 (further describing British practice). The Framers rejected this potential for abuse, cleanly separating the power to create offices from the power to appoint officers to fill them. *See* Mascott, *Constitutionally Conforming Agency Adjudication*, *supra*, at 28; Volokh, *supra*, at 769. The Court should not acquiesce in resisting this safeguard by ratifying the lower courts' expansive creation of a non-officer "employee" class free from separation-of-powers limits that preserve accountable and transparent governance.

D. Contextual uses of "Officer" and "Officers of the United States" in Founding-era sources debating the Constitution

The Federalist Papers, the Borden collection of Anti-Federalist essays, and the drafting debates contain hundreds of references to the terms "officer(s)" and "office(s)." *See Officers*, *supra*, at 468 n.131. Examining their context, as well as every reference to "Officers of the United States" in the ratification debates, strongly suggests that "officer" had a very broad scope in the late eighteenth century. *See Officers*, *supra*, at 494-504 (detailing this analysis and explaining any potential counter-examples). The Framers and ratifiers believed that thousands of officials would qualify as "officers." In fact, their statements do not appear to account for any class of ongoing non-officer positions other than a class of "servants" and "attendants." *See Officers*, *supra*, at 450, 503; *see also, e.g.*, Federal Farmer XVIII, *supra*, *in The Anti-Federalist Papers*, *supra*, at 162 (referring to the parties who would work in the capital city as the federal government's "own members, officers, and servants").

Following are several illustrative examples. During the North Carolina ratification debate, Mr. Maclaine described "inferior officers of the United States" as "petty officers" who maintained "trifling" duties. 4 *Elliot's Debates*, *supra*, at 43-44; *see also Officers*, *supra*, at 496-97. Mr. Taylor observed that if the Constitution were adopted, "we shall have a large number of officers in North Carolina under the appointment of Congress" because, for example, there would be "a great number of tax-gatherers." *See* 4 *Elliot's Debates*, *supra*, at 36. During the drafting debates, Gouverneur Morris observed that the executive would have the duty to appoint "ministeral officers of the administration of public affairs." 2 *Farrand's Records*, *supra*, at 52. Later in the drafting process, James Wilson observed that the appointing power would encompass even "tide-waiter[s]," a position that Samuel Johnson's dictionary described as an "officer who watches the landing of goods at the customhouse." *See* Johnson, *supra* (*Tidewaiter*).

The Anti-Federalist essayist known as the "Federal Farmer" expressed concern that federal taxation powers would lead to "many thousand officers solely created by, and dependent upon the union." The Federal Farmer, Anti-Federalist No. 41-43 (Part I): The Quantity of Power the Union Must Possess Is One Thing; The Mode of Exercising the Powers Given is Quite a Different Consideration (1788), *in The Anti-Federalist Papers*, *supra*, at 148, 149. James Madison disagreed and believed the federal government would have relatively few officers. *See Officers*, *supra*, at 501-02 (discussing these various positions). But this is because Madison believed that the federal government's "few and defined" powers would require it to have only one officer for every "thirty or forty, or even more, officers" in

the states, which had "numerous and indefinite" powers. The Federalist No. 45, at 241. In particular, Madison concluded that state officers would exceed federal officers "beyond all proportion, both in number and influence," *see id.* at 240, because he believed that state officers would collect taxes on behalf of the federal government if it ever imposed a federal internal revenue tax, *see id.* at 241.

Madison clearly believed, however, that the term "officer" itself had a broad scope, embracing many officials. *See Officers*, *supra*, at 502. In describing state and local officers, he referred to "the justices of peace, officers of militia, ministerial officers of justice, with all the county, corporation, and town officers … having particular acquaintance with every class and circle of people." *See* The Federalist No. 45, at 240. Tellingly, despite the strong disagreements between Federalists and Anti-Federalists over whether the Constitution permitted too strong a concentration of centralized power, writers on both sides shared the same understanding of the broad meaning of the term "officer."

This understanding of "officer" also extended back to the time of the Continental Congress. *See generally Officers*, *supra*, at 537-45. For example, a 1778 resolution regarding military hospitals characterized "apothecaries, mates, stewards, [and] matrons" as "officers." *See* Minutes of Feb. 6, 1778, *in* 10 *Journals of the Continental Congress*, *supra*, at 127, 130 (Worthington Chauncey Ford ed., 1908). These individuals had nondiscretionary duties far below the level that contemporary courts have considered mandatory for "officer" status. A 1775 Continental Congress committee report indicated that the role of mates and apothecaries was to "visit and attend

the sick." *See* Minutes of July 27, 1775, *in* 2 *Journals of the Continental Congress*, *supra*, at 210. The 1775 report also characterized clerks and storekeepers as "officers," observing that storekeepers were "[t]o receive and deliver the bedding and other necessaries by order of the [hospital] director" and clerks were "[t]o keep accounts for the director and store keepers." *See id.* at 210-11 (discussing "the choice of officers"). *But see Officers*, *supra*, at 539-40, 542 & nn.589, 599 (explaining that the actual appointment methods used to fill a number of these positions appeared to be in some tension with the description of them as "office[s]").

Several Continental Congress-Era handwritten lists of "officers" on file at the National Archives also suggest that officials with relatively insignificant responsibilities were considered officers at that time. *See Officers*, *supra*, at 540-41. A 1783 document titled "A List of the Officers" listed positions as low-level as clerk and clerk/interpreter. *See* A List of the Officers in the Department of Foreign Affairs and Their Appointments (1783), *microformed on* Microcopy No. 247, Roll 22 (Nat'l Archives & Records Serv.). A 1775-76 document titled "Officers appointed" listed an engineer, a storekeeper, and a surgeon along with colonels, majors, and brigadier generals. *See* Officers Appointed (n.d.), *microformed on* Microcopy No. 247, Roll 195, Item No. 178 (Nat'l Archives & Records Serv.). The reference to just "officers" in the titles of these two records appears deliberate as several other archives records instead used the label "officers & c." when listing lower-level non-officers like messengers. *See Officers*, *supra*, at 540-41; *see also id.* at 513-15 (explaining that Founding-era messengers and office-keepers likely were not considered "officers" because their responsibilities did not include any governmental tasks imposed by law).

E. Early appointment practices

Early appointment practices during the First Congress confirm the understanding of Article II "officers" as officials responsible for an ongoing statutory duty. The only categories of civil executive officials in ongoing positions cleanly excluded from Article II appointment practices were "(i) positions more like those of 'servants' or 'attendants' and (ii) 'deputies' acting as agents in place of an officer, where the officer was subject to personal legal liability for the deputy's actions."[3] *Officers*, *supra*, at 450.

Clerks maintaining legislatively required records were appointed by department heads in conformity with Article II. *See, e.g.*, Act of Sept. 11, 1789, § 2, 1 Stat. 67, 68 (authorizing the heads of the three executive departments to appoint clerks); *see also Officers*, *supra*, at 508, 511-15. Officials as varied as internal revenue inspectors and supervisors, lighthouse keepers and superintendents, ship masters and first, second, and third mates on revenue cutters (although not "mariners" and "boys"), customs collectors, naval officers, and surveyors also were selected in compliance with the Appointments Clause. *See Officers*, *supra*, at 507-37 (further discussing the First Congress's appointment practices). *But see id.* (noting possible counter-examples like certain officials in

3. These deputy marshals, collectors, surveyors, and naval officers constituted a relatively small category who carried out the duties of their primary officer as his representative. Consequently, they were not considered officers in their own right. *See id.* at 509, 515-20. Other early-level positions bearing the moniker "deputy" were appointed in compliance with Article II where they did not have the same agent-principal liability relationship with a higher-level officer. *See id.* at 520-22 (discussing, among other positions, deputy apothecary generals charged with safekeeping medical equipment and deputy postmasters).

the Territories, *id.* at 528 n.508, and the National Bank, *id.* at 531). Contrary to the suggestion of some modern judicial opinions that Congress can determine "officer" status based on whether it chooses to directly tie statutory duties to a particular official, *see, e.g.*, *Landry*, 204 F.3d at 1133, the original meaning of "officer" encompassed every official who happened to carry out a statutory task—whether Congress had explicitly assigned it to them or not. For example, clerks who kept statutory records were considered "officers" even where statutes just generally required executive recordkeeping without assigning clerks to the job. *See Officers*, *supra*, at 507-08, 513-15. Analogously, today if Congress were to authorize an agency to promulgate rules, every official participating in that task would be an "officer" under the statutory duty standard.

In contrast, messengers and office-keepers did not carry out legislative tasks authorized or required by Congress, so they were not "officers" and Congress consequently did not need to establish their positions "by Law." *See* U.S. Const. art. II, § 2 (requiring that Congress establish the appointments for officers "by Law"). Individuals in these positions served more as assistants and carried out nonstatutorily required tasks like "arranging and preserving the newspapers, and the printed copies of the laws and documents of Congress," as well as "putting up and packing despatches and other papers for transmission by mail." *See* Louis McLane, The Following Arrangement of the Gentlemen Employed, the Distribution of Their Duties, and Rules for Their Performance, Are Directed to be Observed in the Department of State, from and After the 30th June, 1833 (1833), *microformed on* M800, Roll 1, Vol. 1A (Nat'l Archives & Records Serv.).

In apparent contrast to the clerk/messenger dividing line, one set of positions that at least initially did not conform with the statutory-duty "officer" construct is lower-level customs officials like weighers, measurers, gaugers, and inspectors. *See Officers*, *supra*, at 523-27. Numerous Founding-era writings described them as "officers," but they were not selected in compliance with the Appointments Clause in 1789. They were instead subject to hiring by customs collectors who did not head a department. *Compare, e.g.*, Letter from Nathaniel Smith to George Washington (July 10, 1789), *in* 3 The Papers of George Washington 176 (Dorothy Twohig ed., 1989) (requesting to be considered for the "office" of gauger), and Notes on the Collection Bill (HR-11) (n.d.), *in* 16 *Documentary History of the First Federal Congress, 4 March 1789-3 March 1791*, at 1052 (Charlene Bangs Bickford et al. eds., 2004) (describing an inspector as an "officer" in notes on draft legislation), *with* Act of July 31, 1789, ch. 5, § 5, 1 Stat. 29, 36-37 (repealed 1790) (authorizing appointment by collectors); *see also Officers*, *supra*, at 523-27. But Congress addressed this situation in 1799, requiring the "approbation" of the Secretary of the Treasury for the appointment of these customs officials. *See* Act of Mar. 2, 1799, ch. 22, § 21, 1 Stat. 627, 642 (amended 1811). And, an Attorney General opinion issued in 1843 concluded that customs inspectors are Article II officers, observing that any statute permitting customs collectors to appoint inspectors would be "null and void under the constitution." *See* Appointment & Removal of Inspectors of Customs, 4 Op. Att'y Gen. 162, 164-65 (1843).

Measurers, gaugers, and weighers carried out the statutory duties of measuring imported goods for the purposes of calculating customs duties. *See* Tariff Act of 1789, ch. 2, § 1, 1 Stat. 24, 24-26 (repealed 1790); Act of Aug.

4, 1790, § 53, 1 Stat. 145, 172 (repealed 1799). Inspectors carried out the statutory duties of preventing ships from unloading goods without a permit and searching ships suspected of smuggling. *See* Act of Aug. 4, 1790, §§ 30-31, 1 Stat. at 164-65; *Officers*, *supra*, at 524 & n.178. Perhaps Congress did not initially provide for these positions by statute because their payment-for-service compensation structures mimicked aspects of non-officer government contracting positions, a category involving irregular government work existing at the time of the Founding just like today. *See* Act of Aug. 4, 1790, § 53, 1 Stat. at 172 (providing for payment in accordance with the amount of goods measured); *Officers*, *supra*, at 534-37. *But see* Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government* 1-48 (2013) (explaining that fees for services were a routine compensation mechanism for many governmental officials in the eighteenth century).

III. The Court should not distort the meaning of the Appointments Clause based on alleged practical implementation concerns.

In its decision here, the D.C. Circuit suggested that keeping ALJs from the reach of the Appointments Clause is a necessary protection to maintain independence in agency adjudicative proceedings. *See Lucia*, 832 F.3d at 288-89 (discussing "independence" through "tenure and compensation" and declining to "cast aside a carefully devised scheme" by concluding that ALJs are "officers"). But when considering the Appointments Clause in *Buckley*, this Court clearly instructed that practical fears such as the potential partiality of government decisionmakers "do not by themselves warrant a distortion of the Framers' work." *See* 424 U.S. at 134 (refusing to

reject constitutional appointment requirements based on the fear that presidential appointment would unduly influence federal election commissioners who administer presidential campaign rules).

In any event, the politically appointed SEC Commissioners have the last word on whether an ALJ's initial decision stands as the agency's final determination, or whether the Commissioners will instead review the decision. *See* 15 U.S.C. § 78d-1(b). *But see id.* (giving a party a right to Commission review in certain circumstances). When choosing to review, the SEC may consider the matter de novo. *See Lucia*, 832 F.3d at 286. Further, the SEC Commissioners have statutory authority to adjudicate matters in the first instance if they so choose. *See* 15 U.S.C. § 78d-1(a).

To be sure, an ALJ's initial determination, as a practical matter, often is the last word from the agency in adjudication. *See* 15 U.S.C. § 78d-1(c) (providing for ALJ decisions to be deemed "the action of the Commission" if there is no review). And when presiding over cases, ALJs have the power to take final action with respect to many matters that impact private rights like issuing subpoenas and ruling on offers of proof. *See* 17 C.F.R. § 200.14(a). But at the end of the day, whether ALJs meet a theoretical non-Article III standard of independence is immaterial in the sense that the politically appointed *Commissioners* have the final say over adjudication. If this Court believes that democratically accountable, constitutional appointment of adjudicative officials raises independence concerns, the Court should revisit the proper scope of matters that can be resolved by non-Article III adjudication in the first place. *See Stern v. Marshall*, 564 U.S. 462, 482-83 (2011); *see also* Mascott, *Constitutionally Conforming Agency Adjudication*, *supra*, at 42-51. The Court should not

compound any potential concerns over agency adjudicators lacking impartiality and improperly exercising judicial power with the additional error of insulating executive branch adjudicators from the Appointments Clause.

The Framers instituted the Appointments Clause as the mechanism to ensure excellence in government service and democratic accountability in the exercise of government power. *See Freytag*, 501 U.S. at 883-84. Permitting agency staff to hire ALJs enables department heads to distance themselves from public responsibility for adjudicative decisions issued from their agency. *Cf. Free Enterprise Fund*, 561 U.S. at 497-98 (tying public accountability to "a clear and effective chain of command"). Commissioners and department heads have the *power* to issue adjudicative decisions in line with their priorities. They should also bear the public *responsibility*—and, if necessary, the blame—for decisions issued by adjudicators appointed under their headship.

If this Court concludes consistent with Article II's original meaning that ALJs are "officers," aspects of the competitive-based selection of ALJs may remain permissible, at least in some form. *See Officers*, *supra*, at 550-56 (explaining potential constitutional concerns with aspects of the competitive service system as currently structured). Article II assigns Congress the power of establishing offices "by Law." U.S. Const. art. II, § 2, cl. 2. Since the Founding, that power to create offices has been interpreted to carry with it the authority to stipulate at least some credentials that must be held by the inferior officers filling those posts. *See, e.g.*, Volokh, *supra*, at 747; *Officers*, *supra*, at 551; *see also* Edward S. Corwin, *The President: Office and Powers, 1787-1948; History and Analysis of Practice and Opinion* 88-89 (3d ed. 1948).

These issues are multi-faceted and should be further briefed and vetted in an appropriate case. Here, a finding that the SEC's ALJs are "Officers of the United States" under the historical "statutory duty" standard—and thus, department head appointment is required—would answer the appointments-related aspect of the specific question presented to the Court.

CONCLUSION

For the reasons stated, this Court should reverse the D.C. Circuit's judgment.

Respectfully submitted,

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