No. 17-130

IN THE

Supreme Court of the United States

RAYMOND J. LUCIA, *et al.*,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

BRIEF FOR CORNELL SECURITIES LAW CLINIC AS *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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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*

The Cornell Securities Law Clinic (the "Clinic") is approved to operate as a law school clinic by the New York State Appellate Division, Third Department, and is a curricular offering of Cornell Law School. Cornell Law School is part of Cornell University, which is a private and statutory not-for-profit educational corporation registered in the State of New York. The Clinic offers second- and third-year law students an opportunity, among other things, to provide supervised representation to small investors, primarily in upstate New York.[1] The Clinic has a strong interest in protecting the rights of investors.

The present case involves, among other things, determining whether the decisions of the administrative law judges ("ALJs") of the Securities and Exchange Commission ("SEC" or the "Commission") were unconstitutionally rendered and defining who is an Officer under the Appointments Clause. The issues raised in this case are directly relevant to the Clinic's mission and work.

CONSTITUTIONAL PROVISION AT ISSUE

Article II, Section 2, Clause 2 of the U.S. Constitution provides:

> [The president] shall have Power, by and with the Advice and Consent of the Senate, to make

1. No counsel for any party authored this brief in whole or in part, and no person, other than the Clinic, made a monetary contribution intended to fund the preparation or submission of this brief. All parties lodged a blanket consent with the Clerk.

> Treaties, provide two thirds of the Senators present concur; and he 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.

SUMMARY OF THE ARGUMENT

The Court should affirm the decision of the U.S. Court of Appeals for the District of Columbia Circuit.[2]

I. SEC ALJs are not Officers for the purposes of the Appointments Clause because they do not have final decision-making power in any circumstance. Contrary to Petitioners' assertions, this Court's precedent shows that final decision-making authority is a necessary aspect of every Officer of the United States. This Court has previously found individuals to be Officers when they

2. The amicus curiae respectfully adopts, in relevant part, the facts as set forth in the decision below, *Raymond J. Lucia Co. v. SEC*, 832 F.3d 277, 281–83 (D.C. Cir. 2016). Citations to "Pet. Br." refer to Petitioners' brief filed in this case. As the Respondent SEC filed a brief in support of Petitioners, we include citations to the SEC Brief, but only refer to the SEC's arguments when they differ from Petitioners' arguments. We cite to the SEC's brief as "SEC Br."

act with final decision-making power in at least some circumstances. SEC ALJs, however, do not issue a final decision in *any* circumstance. Every action an SEC ALJs takes is subject to review by the Commission. Thus, SEC ALJs merely assist the Commission in exercising its enforcement power and are therefore not Officers under the Appointments Clause.

II. The legislative history and the statutory scheme of the Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq.*, support the finding that SEC ALJs are not Officers of the United States.

A. The APA is where Congress devised the office of the Administrative Law Judges for all agencies. Petitioners point out that Congress referred to hearing examiners, the predecessors to ALJs, as officers numerous times throughout the APA. Petitioners fail to mention, however, that Congress did not refer to examiners as officers a single time in § 11 of the APA. This is significant because § 11 specifically deals with the appointment and removal of "Examiners"—i.e., ALJs. This shows that in devising the office of the ALJ, Congress did not intend the ALJs to be Officers of the United States.

B. Moreover, had Congress intended for SEC ALJs to be Officers of the United States, it would have included express language to that effect—either by including that phrase or by mentioning, or otherwise clearly implicating, the Appointments Clause. This Court has recognized that where Congress knows how to attach particular meaning to a statutory scheme, its failure to do so is reasonably construed as purposeful. Congress knows how to create an office that would be appointed pursuant to the Appointments Clause. It did not do so here.

C. Finally, to the extent the term "officers" in the APA is ambiguous—i.e., there are two possible interpretations: Officer of the United States or employee—that ambiguity should be resolved to avoid constitutional questions.

III. The Court should reject Petitioners' position and hold that SEC ALJs are not Officers of United States to avoid two serious legal ramifications.

A. First, Petitioners' position would render a portion of the Appointments Clause superfluous. The Appointments Clause applies to any office that is "established by Law." SEC ALJs, however, are not directly established by any statute. Rather, Congress passed a statute *authorizing* but not mandating the Commission to appoint ALJs. A separate rule of the Commission creates the office of the SEC ALJ. Thus, Petitioners interpret "established by Law" as covering any office that is authorized by any legal authority, be it a statute, rule, etc. Yet this interpretation would mean that the provision "established by Law" has no limiting effect, because every government employee holds an office that is created by a statute, rule, executive action, or other legal authority. To give effect to the established by Law provision, the Court should limit its application only to offices directly created by statute.

B. Second, Petitioners' definition for who is an Officer of the United States is so overbroad it would produce an absurd result, for example, of applying constitutional requirements to members of Self-Regulatory Organizations (SROs). As explained below, Petitioners' definition consists of two prongs: first, that the office is established by some legal authority; and second, that the officials holding that office exercise significant government

authority. FINRA disciplinary hearing officers, for example, would satisfy the first prong despite the fact that their office is not directly created by statute. FINRA disciplinary hearing officers also would satisfy the second prong because they, like ALJs, conduct hearings, rule on admissibility of evidence, and issue initial decisions. Thus, under Petitioners' definition, FINRA disciplinary hearing officers would be subject to the Appointments Clause. This conclusion, however, is contrary to law and public policy. This Court previously recognized that SROs are non-government entities and do not become a part of the government absent Congressional control over the SRO board.

IV. If this Court nonetheless determines that SEC ALJs are Officers of the United States, then remand for a new hearing is the appropriate remedy. Although Petitioners argue for dismissal, there is no legal grounds for this remedy. Even if Petitioners received unconstitutional process, the outcome may have been valid.

ARGUMENT

The D.C. Circuit correctly concluded that SEC ALJs are not Officers of the United States because they do not have the authority to enter a final decision on any matter. *See Lucia*, 832 F.3d at 283–89. This holding is consistent with this Court's precedent and Congressional intent. Petitioners' position, on the other hand, that: (i) "established by Law" should cover offices created by agency rules, rather than be limited to those expressly created by statute; and, (ii) the exercise of "significant authority" should not require final decision-making authority, is untenable. *See* Pet. Br. at 20–26; SEC Br. at 14

(focusing on significant authority prong alone). Petitioners' position renders the "established by Law" provision of the Appointments clause superfluous and potentially applies to FINRA hearing officers. Accordingly, the Court should affirm the decision below.

I. SEC ALJS ARE NOT OFFICERS UNDER THE APPOINTMENTS CLAUSE BECAUSE THEY DO NOT HAVE FINAL DECISION-MAKING AUTHORITY.

Petitioners assert that SEC ALJ's are "established by Law" and "exercise authority . . . deemed sufficiently significant" to conclude that SEC ALJs are Officers under the Appointments Clause. *See* Pet. Br. at 20; SEC Br. at 25–32. According to Petitioners, "SEC ALJs unquestionably exercise significant authority pursuant to the laws of the United States," because they: "amend[] charging documents"; "enter[] orders of default"; "consolidat[e] proceedings"; "[a]dminister oaths and affirmations"; "[i]ssue subpoenas"; issue an initial decision; and otherwise regulate the course of the administrative proceeding. Pet. Br. at 21–22; SEC Br. at 20. Petitioners then assert that under this Court's holdings in *Buckley v. Valeo*, 424 U.S. 1 (1976), *Freytag v. Commissioner*, 501 U.S. 868 (1991), and *Edmond v. United States*, 520 U.S. 651 (1997) any individual who possesses an office established by Law and exercises significant government authority is an Officer for the purposes of the Appointments Clause. Pet. Br. at 16–20; SEC Br. at 23–24. Petitioners thus conclude that SEC ALJs are Officers of the United States. Pet. Br. at 26.

Petitioners misread this Court's precedent. In determining whether a federal employee was an Officer,

this Court has always focused on final decision-making authority. Thus, while it is true that the Commission has granted ALJs with authority over powers such as taking testimony and ruling on the admissibility of evidence, SEC ALJs do not have final decision-making authority, and therefore do not exercise "significant authority." *See* 15 U.S.C. § 78d-1 (2012). Hence, this Court should affirm the decision below and endorse the D.C. Circuit's analysis of whether ALJs are Officers under the Appointments Clause.

The Appointments Clause requires that only duly appointed "Officers of the United States" exercise such powers that represent "the performance of significant governmental duty exercised pursuant to public law." *Buckley*, 424 U.S. at 140–41. In *Buckley*, the Court considered whether the appointment of the Federal Election Commission ("FEC") was unconstitutional. In analyzing the extent of the FEC's powers, the Court focused on whether the FEC merely aided Congress in fact-finding, in which case it was constitutional, *see id.* at 137, or whether it exercised independent, executive power, *see id.* at 138. The Court explained that "investigative and informative powers" do not constitute significant authority, while "interpretive and rulemaking powers, such as the power to issue regulations or make determinations without supervision," do constitute significant authority. *Id.* at 137–142. The FEC, however, was charged with fact-finding, rulemaking, and enforcement functions. *Id.* The Court emphasized that the FEC performed these functions "free from day-to-day supervision." *Id.* at 140–41. Because the FEC exercised authority independent of Congress, the Court could not conclude that they merely assisted Congress. *Id.* at 141. Accordingly, the FEC commissioners were deemed Officers of the United States. *Id.*

Similarly, the special trial judges in *Freytag* exercised significant authority because of the important duties they were assigned and because they had final decision-making authority. *See* 501 U.S. at 882. In *Freytag*, the special trial judges of the Tax Court were authorized to take testimony, conduct trials, rule on the admissibility of evidence, and enforce compliance with discovery orders. *Id.* at 881–82. In holding that the special trial judges were Officers, the Court focused on the fact that the judges had authority to issue final decisions in at least some cases. *Id.* at 882. That is, under §§ 744A(b)(1), (2), and (3) of the Tax Reform Act of 1969, the Chief Judge had authority to allow special trial judges to render final decisions of the Tax Court. *Id.* Much like the FEC in *Buckley*, the Tax Court judges exercised independent authority "free from day-to-day supervision" in at least some instances. *Compare Buckley*, 424 U.S. at 137–42, *with Freytag*, 501 U.S. at 881–82. For this reason, this Court correctly concluded that the Tax Court judges were Officers because they did not exist merely to assist another office; they were final decision-makers.

Finally, *Edmond* involved intermediate appellate military judges. 520 U.S. at 662. These judges were authorized to "independently 'weight the evidence, judge the credibility of witnesses, and determine controverted questions of fact.'" *Id.* (quoting 10 U.S.C. § 866(c)). As Petitioners correctly observe, however, the judges "could enter 'a final decision on behalf of the United States' when 'permitted to do so by other Executive Officers.'" Pet. Br. at 19 (quoting *Edmond*, 520 U.S. at 665). Thus, even the judges in *Edmond* had final decision-making power.

In contrast, SEC ALJs are not Officers under the Appointments Clause because, while they do have

significant powers overseeing administrative hearings, they do not have final decision-making authority. Similar to the judges in *Freytag* and *Edmond*, the SEC ALJs exercise authority over several matters during administrative hearings—such as entering orders of default, issuing subpoenas, taking testimony, and ruling of the admissibility of evidence. *See* Pet. Br. at 21–23; SEC Br. at 16. Unlike the special trial judges, however, no action of the SEC ALJ is independently final until the Commission issues the "finality order." *Lucia*, 832 F.3d at 286. Under 15 U.S.C. § 78d-1(b), "the Commission shall retain a discretionary right to review the action of any . . . administrative law judge . . . upon its own initiative or upon petition of a party." Therefore, this case is unlike *Freytag* or *Edmond* because the ALJs exist to assist the Commission in its decision-making; the ALJs are not independent actors and the Commission retains a right to review all decisions by SEC ALJs. 15 U.S.C. § 78d-1(b). *Compare with Edmond*, 520 U.S. at 665, *Freytag*, 501 U.S. at 882, *and Buckley*, 424 U.S. at 137–42.

In this particular case, the Commission did not blindly accept the ALJ's determination but chose to review the decision of the ALJ because the findings of the case were "a matter of considerable importance" to the Commission. *See* Pet. Br. at 24. This shows that the Commission is the one wielding significant government power to enforce the securities laws, not the ALJ. The ALJ merely assists the Commission. Thus, while it is true that SEC ALJs have considerable authority in taking testimony and ruling on the admissibility of evidence, the fact that they never have final decision-making authority is clearly distinguishable from the judges in *Edmond* and *Freytag.* Accordingly, SEC ALJs do not exercise "significant authority," and

therefore should not be considered Officers under the Appointments Clause.

For this reason, the Court should reject Petitioners' position and adopt the D.C. Circuit's well-reasoned approach to determining when a government official truly wields significant government authority. According to the D.C. Circuit, in order to qualify as such, ALJs must perform important functions that exercise significant discretion and have final decision-making authority. *Landry v. Fed. Deposit Ins. Corp.*, 204 F.3d 1125, 1133–34 (D.C. Cir. 2000).

In *Landry*, the D.C. Circuit acknowledged the similarities between the special trial judges of *Freytag* and ALJs. *Id.* at 1133–1134. Nonetheless, the D.C. Circuit concluded that ALJ's authority was not as broad as the special trial judges' authority because the ALJs can never render final decisions. *Id.* at 1134. ALJs can only file a "recommended decision, recommended findings of fact, recommended conclusions of law, and a proposed order." *Id.* at 1133. The D.C. Circuit remarked that if recommendatory powers of the special trial judges in *Freytag* were sufficient to hold the judges as Officers, then this Court would not have focused on the judges' final decision-making power. *Id.*

Then in *Tucker v. Commissioner*, 676 F.3d 1129 (D.C. Cir. 2012), the D.C. Circuit identified three "main criteria" for determining when an office is vested with "significant authority": (1) power over "significant" or important matters; (2) "discretion"; and (3) final decision-making authority. *Id.* at 1133. First, "significant important matters" is a fact-intensive analysis that requires the

court to determine whether the matters are important or meaningful in nature. *Id.* Second, an office is vested with discretion when the tasks of its holder are more than ministerial. *See Freytag*, 501 U.S. at 881. An office will lack discretion where the office-holder has no choice but to act in a certain way. *See Tucker*, 676 F.3d at 1134. Third, an office holder has final decision-making authority when the office holder can enter a decision on behalf of an agency that is final in at least some circumstances. *Tucker*, 676 F.3d at 1133–134.

The D.C. Circuit's test is a logical interpretation and application of the decision in *Freytag*. Applying its test to the facts of this case, SEC ALJs are not Officers of the United States because they lack final decision-making power. Accordingly, this Court should uphold the decision below.

II. CONGRESS DID NOT INTEND TO ESTABLISH ADMINISTRATIVE LAW JUDGES AS OFFICERS OF THE UNITED STATES.

In arguing that Congress intended for SEC ALJs to be Officers of the United States subject to the Appointments Clause, Petitioners assert that the APA "specifically recognize[d] ALJs—or, as they were known then, 'hearing examiners'—as 'officers'" because "[t]he APA, as enacted, [] referred to hearing examiners as 'subordinate officers' or 'officers' *nine* times." Pet. Br. at 36. In doing so however, Petitioners neglect to mention that under § 11 of the APA, which is titled "Examiners" and deals specifically with their appointment and removal, hearing examiners are exclusively referred to as just that—there is no reference to, or mention of, "officers"

whatsoever. Moreover, Petitioners gloss over the fact that while Congress could have included express language clearly indicating that references to "officers" within other provisions of the APA are in fact references to Officers of the United States subject to the Appointments Clause, it did not do so.

Petitioners also argue that, because SEC ALJs "ultimately exercise *executive* power" and are not wholly independent tribunals, they must necessarily be executive Officers. Pet. Br. at 35. This argument not only disregards the statutory safeguards Congress included under § 11 of the APA in order to provide hearing examiners with some degree of adjudicatory independence (and by extension, insulation from political control), but also incorrectly circumvents the emphasis *Freytag* placed on the degree of governmental authority exercised rather than the mere exercise of it. *See Freytag*, 501 U.S. at 881–82.

Finally, under a longstanding principle of statutory construction, where there are competing interpretations of ambiguous statutory language, this Court should resolve that ambiguity in a manner that avoids constitutional issues if such a construction is reasonable and not plainly contrary to congressional intent. *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 628–29 (1993) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

A. Congress Did Not Refer to ALJs as Officers a Single Time in § 11 of the APA, Which Provided for the Appointment of Examiners to Preside Over Administrative Proceedings.

Petitioners emphasize that the text of "[t]he APA, as enacted, [] referred to hearing examiners as 'subordinate officers' or 'officers' *nine* times." Pet. Br. at 36. They argue that the sole reasonable interpretation of these references is to read the APA as having established hearing examiners (the predecessors to ALJs) as Officers of the United States. *Id.* In doing so, Petitioners rely on this Court's holding in *United States v. Germaine*, 99 U.S. 508 (1879), for the proposition that "the Appointments Clause is triggered when Congress denominates an official an 'officer.'" Pet. Br. at 35. The *Germaine* Court held that if Congress, through statutory language, meant to refer to something other than "officers as defined by the Constitution, words to that effect would be used, as servant, agent, person in the service or employment of the government." *Germaine*, 99 U.S. at 510.

Petitioners neglect to mention, however, that while it is true that the text of the APA includes a few references to "officers" within some of its provisions, there is no mention of, or reference to, the term within § 11—which is titled "Examiners" and deals specifically with their appointment and removal. Administrative Procedure Act, Pub. L. No. 79-404, § 11, 60 Stat. 237, 244 (1946) (codified at 5 U.S.C. §§ 551–59 (2012)). Section 11, being the section of the APA directly concerned with the placement of hearing examiners within the administrative system, would appear to be the most insightful as to whether Congress intended to establish them as Officers of the United

States rather than agency employees. Moreover, neither the House nor the Senate, in the reports issued by their respective Committees on the Judiciary recommending that the APA be passed, provide any indication that hearing examiners should be considered Officers of the United States subject to the Appointments Clause. *See generally* H.R. Rep. No. 79-1980 (1946); *id.* at 26–31, 34–37, 46 (for the explanatory sections most relevant to hearing examiners); *see generally* S. Rep. No. 79-752 (1945); *id.* at 16–18, 20–23, 46 (for the explanatory sections most relevant to hearing examiners). In fact, there is no mention of, or reference to, the Appointments Clause at all. H.R. Rep. No. 79-1980; S. Rep. No. 79-752. These omissions are particularly significant because each committee dedicated a substantial portion of their respective reports to providing a detailed explanation for each of the APA's statutory provisions. H.R. Rep. No. 79-1980; S. Rep. No. 79-752.

Congress's silence, in omitting any mention of, or reference to, "officers" from the statutory language of § 11, strongly evidences its intent to establish hearing examiners as agency employees rather than executive Officers. While it is true that, as Petitioners point out, Congress included generic references to "officers" when discussing hearing examiners within other provisions of the APA, § 11 stands out as being the critical missing piece to Petitioner's constitutional puzzle. Applying this Court's holding in *Germaine*, Congress did in fact use words other than "officer" within § 11 to describe agency officials presiding over adversarial agency adjudications—and so it must not have intended for these examiners to be considered Officers of the United States subject to the Appointments Clause. Additionally, the absence of

any express indication that hearing examiners should be considered Officers of the United States subject to the Appointments Clause from the extensive, explanatory portions of both the House and Senate judicial committee reports provides further evidence of Congress's intent to establish them as agency employees, not as Officers of the United States.

B. If Congress Wanted to Establish Examiners as Officers of the United States, It Would Have Included Express Language to that Effect.

Petitioners also fail to provide any argument for why Congress decided not to include, anywhere in the APA, any express language clearly indicating that references to "officers" outside of § 11 are in fact references to Officers of the United States subject to the Appointments Clause. This Court has recognized that where Congress knows how to attach particular meaning to a statutory scheme, its failure to do so is reasonably construed as purposeful. *See Cnt. Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176–77 (1994) (where the Court rejected respondents' argument that the "[i]nclusion of those who act 'indirectly' suggests a legislative purpose fully consistent with the prohibition of aiding and abetting" because if "Congress intended to impose aiding and abetting liability, . . . it would have used the words 'aid' and 'abet' in the statutory text.").

Here, the APA, like the statute at issue in *Central Bank of Denver*, includes ordinary language that could be afforded extraordinary effect. *Id.* However, applying the reasoning of *Central Bank of Denver* leads to the opposite conclusion because Congress knows how to refer

to "Officers of the United States" unambiguously and in such capacity as to invoke the Appointments Clause, but did not do so anywhere within the APA. For example, in *Germaine*—Petitioners' principal case for interpreting general references to "officers" within the APA as actually referring to "Officers of the United States"—the defendant was indicted under a statute in which Congress did exactly that. 99 U.S. at 509 (where defendant was indicted under § 12 of the so-called Crimes Act of 1825, 4 Stat. 118, which reads, "'Every *officer of the United States* who is guilty of extortion under color of his office shall be punished by a fine of not more than $500, or by imprisonment not more than one year, according to the aggravation of his offence.'" (emphasis added)).

Considering the lengthy legislative history of the APA, along with the substantial attention it received from both the Executive and the general public, it seems unlikely that Congress would tiptoe around such a critical issue—particularly when it has had no difficulty clearly and unambiguously identifying Officers of the United States subject to the Appointments Clause when it so desires. *See id.*; *see generally* President's Comm. on Admin. Mgmt., *Administrative Management in the Government of the United States* (1937). In other words, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 468 (2001).

C. Given a Reasonable Option, Any Statutory Ambiguity Within the APA Should be Resolved in a Manner That Avoids Constitutional Issues.

Collectively, the lack of any reference to "officers" within § 11 of the APA, along with the lack of any express language clearly indicating that Congress intended references to officers in other provisions of the APA to refer to Officers of the United States subject to the Appointments Clause, arguably create ambiguity as to the true nature of agency "examiners." It is a longstanding principle of statutory construction that, "in a case of statutory ambiguity, 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" *Concrete Pipe & Prod.*, 508 U.S. at 628–29 (quoting *Edward J. DeBartolo Corp.*, 485 U.S. at 575). Stated differently, "[w]hen the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

Petitioners assert that the APA can only be reasonably construed as having established hearing examiners as Officers of the United States. However, they neglect to advance any argument for why a contrary interpretation would be unreasonable. Petitioners provide no explanation for Congress's omission of the term "officer" from § 11 of the APA—which is specifically dedicated to the detailed discussion of the appointment process for hearing examiners. Petitioners also fail to provide an explanation

for Congress's total omission of any express language clearly indicating that Congress intended references to officers within other provisions of the APA to refer to Officers of the United States subject to the Appointments Clause. Finally, Petitioners neglect to address why Congress would purposefully create an office that it views as being subject to the Appointments Clause, and in the same breath, provide for a process of appointment that facially violates it.

This Court should therefore reject Petitioners' proposed statutory construction in favor of construing the APA as having established hearing examiners as agency employees—thereby avoiding constitutional issues.

III. PETITIONERS' POSITION RENDERS THE "ESTABLISHED BY LAW" PROVISION OF THE APPOINTMENTS CLAUSE SUPERFLUOUS AND WOULD PRODUCE AN ABSURD RESULT.

Petitioners assert that the fact "that SEC ALJs hold offices [E]stablished by [L]aw" and "that they exercise authority . . . deemed sufficiently 'significant'" is sufficient for this Court "to conclude that SEC ALJs are Officers." Pet. Br. at 20; SEC Br. at 16. This definition is too broad and the potential ramifications of Petitioners' position weigh heavily in favor of affirming the decision below. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 749 (1975) ("Thus we conclude that what may be called considerations of policy, which we are free to weigh in deciding this case, are by no means entirely on one side of the scale. Taken together with the precedential support for the Birnbaum rule over a period of more than 20 years, and the consistency of that rule with what we can glean

from the intent of Congress, they lead us to conclude that it is a sound rule and should be followed.").

A. "Established by Law" Should Be Limited to Offices Directly Created by Congress.

Petitioners assert that the office of the SEC ALJs is "established by Law" because it is created by the Administrative Procedure Act. *Id.* at 21 (first citing *Freytag*, 501 U.S. at 881; and then citing *Bandimere v. SEC*, 844 F.3d 1168, 1179 (10th Cir. 2016)). The APA, however, only *permits* "[e]ach agency" to "appoint as many [ALJs] as are necessary for proceedings." 5 U.S.C. § 3105 (2012). The SEC Commission could have decided not to employ this authority. The office of the SEC ALJ only came into existence when the Commission promulgated a rule creating the office. *See* 17 C.F.R. § 200.14 (2017) ("Under the Administrative Procedure Act (5 U.S.C. §§ 551–559) and the federal securities laws, the Office of Administrative Law Judges conducts hearings in proceedings instituted by the Commission."). Thus, insofar as Petitioners assert that the office of the ALJ is "established by Law," Petitioners interpret the term broadly to include any legal authority. *See also* Stephen G. Bradbury, *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, *passim* (2007).

This broad construction of "established by Law" proposed by Petitioners would render this text of the Constitution superfluous. After all, any individual lawfully acting on behalf of the government is acting pursuant to some legal authority. *Cf. Tucker v. Comm'r*, 135 T.C. 114, 157–58 (2010) ("[A]ny 'Office' that actually exists in the

Federal Government is arguably 'established by Law.'"). For example, FBI investigators are "officials" whose appointment is authorized by statute. *See* 28 U.S.C. § 533 (2012). The Appointments Clause, however, pertains to "all other Officers of the United States . . . which shall be established by Law." U.S. Const. art. II, § 2, cl. 2. Plainly, then, the text of the Constitution suggests that some federal Officers to be established by "Law" and some officers to act not pursuant to any "Law." If law is to be understood to include rules, regulations and other legal authority, then all federal offices are established by law. Thus, the "established by Law" clause would become mere surplusage, which is an impermissible interpretation of the Constitution. *Tucker*, 135 T.C. at 157; *cf. Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (holding that statutes should not be read to render any portion of the text superfluous).

A more sound approach is to limit the application of the Appointments Clause to offices directly created by Congress. In fact, this Court found individuals to be Officers of the United States primarily in cases where the office they held was created directly by statute rather than by regulation or executive action. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 484–85 (2010) (the Public Company Accounting Oversight Board created under the Sarbanes-Oxley Act); *Freytag*, 501 U.S. at 870 (the Tax Court created under 26 U.S.C. § 7441, which provided that "[t]here is hereby established . . . the United States Tax Court."); *Morrison v. Olson*, 487 U.S. 654, 660–61 (1988) (the "independent counsel" created under the Ethics in Government Act in instances where high-ranking government officials are investigated); *Buckley*, 424 U.S. at 7 (the Federal Election Commission established under the Federal Election Campaign Act); *Humphrey's*

Ex'r v. United States, 295 U.S. 602, 619–20 (1935) (the Federal Trade Commission created by the Federal Trade Commission Act). Accordingly, the Court should interpret the "established by Law" requirement to only apply to offices created directly by Congress. This interpretation gives adequate effect to the text of the Constitution.

B. Petitioners' Overly Broad Definition of Officers Would Produce an Absurd Result.

Second, Petitioners' definition for Officers of the United States is overbroad and would produce an absurd result because it would apply constitutional requirements to SROs. *See Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 454 (1989) ("Where the literal reading of a statutory term would compel 'an odd result,' . . . we must search for other evidence of congressional intent to lend the term its proper scope."). Under Petitioners' definition, any office holder is an Officer of the United States so long as that office exists pursuant to any legal authority, *see supra* subpart I.C.*i*., and must perform significant functions, *see* Pet. Br. at 20–23; SEC Br. at 16. According to Petitioners, the SEC ALJs perform significant functions because they can amend charging documents, enter default judgments, consolidate proceedings, issue subpoenas, order depositions, regulate the hearing, rule on admissibility, and take other necessary steps towards an initial decision. Pet. Br. at 21–23. All parties agree that any action by the ALJ is subject to review by the Commission. 15 U.S.C. § 78d-1(b). Thus, any action of the ALJ remains initial until affirmed by higher authority.

Petitioners' position is overbroad because factfinders within FINRA may satisfy both prongs

of Petitioners' definition. *See* Joseph McLaughlin, *Is FINRA Constitutional?*, 12 Engage, Sept. 2011, at 111, 111–14; Robert Botkin, Note, *FINRA and the Developing Appointments Clause Doctrine*, 17 Wake Forest J. Bus. & Intell. Prop. L. 627, 630–43 (2017).

FINRA satisfies the first prong of Petitioners' definition because its operation is authorized by law. "FINRA is not part of the government"; it is "a not-for-profit organization authorized by Congress to protect America's investors." *About FINRA*, Fin. Indus. Regulatory Auth. (2018).[3] It is authorized under 18 U.S.C. § 78*o*-3 to promote just and equitable principles of trade" by "appropriately discplin[ing] their members for violations of any provision of the Exchange Act, the rules or regulations promulgated thereunder, or their own rules." *Fiero v. Fin. Indus. Regulatory Auth., Inc.*, 660 F.3d 569, 574 (2d Cir. 2011) (quoting 15 U.S.C. § 78*o*-3(b)(7)). FINRA is thus authorized by statute, and its disciplinary actions are likewise authorized by statute. Accordingly, under Petitioners' definition, FINRA and its hearing officers would be "established by Law."

FINRA also satisfies the second prong of Petitioners' definition. It is widely recognized that FINRA plays a key role in regulating the securities industry. It "perform[s] much of the day-to-day oversight of the securities markets and Broker-Dealers under their jurisdiction. [FINRA is] primarily responsible for establishing standards under which members conduct business; monitoring how that business is conduct; and bringing disciplinary actions against members for violating applicable federal statutes,

3. https://www.finra.org/about.

SEC rules, and [FINRA] rules." U.S. Gov't Accountability Off., GAO-15-376, *Securities Regulation: SEC Can Further Enhance Its Oversight Program of FINRA* 1 (2015). With regards to disciplinary proceedings, FINRA disciplinary hearing officers function similarly to ALJs. FINRA hearing officers can compel production of evidence or direct witnesses to give a statement. *See Guide to the Disciplinary Hearings Process*, Fin. Indus. Regulatory Auth..[4] At the hearing, FINRA hearing officers direct the proceeding, determine the admissibility of evidence, compile the record, and issue an initial decision. *Id.* Much like a defendant in an SEC proceeding can appeal to the district court, a defendant before FINRA retains the right to appeal to the National Adjudicatory Council and, thereafter, to the SEC. *Id.*; *see also* 15 U.S.C. § 78s(e)(1) (2012). Accordingly, FINRA hearing officers perform the same functions Petitioners allege are substantial enough to be deemed an Officer of the United States. As FINRA hearing officers satisfy both prongs of Petitioners' definition, they would need to be appointed pursuant to the Appointments Clause if Petitioners' argument were adopted by this Court.

There is no serious question, however, that FINRA disciplinary hearing officers need not be appointed pursuant to the Appointments Clause. FINRA hearing officers are attorneys employed by FINRA. *See Answers to Frequently Asked Questions for Respondents in FINRA Disciplinary Proceedings*, Fin. Indus. Regulatory Auth.[5]

4. http://www.finra.org/industry/guide-disciplinary-hearing-process#proceedings

5. http://www.finra.org/industry/faq-disciplinary-proceedings

They are not appointed by the President, the courts, or by a head of any department. In fact, FINRA disciplinary officers could not be so appointed because "FINRA is not part of the government." *About FINRA*, *supra*. FINRA is headed by a board of governors who are elected by securities dealers. *See FINRA Manual* art. vii, §§ 4(a), 13 (2011).[6] Accordingly, if the Court accepts Petitioners' position, FINRA hearing officers would exist in violation of the Appointments Clause even though that plainly is not so under established law.

This absurd potential effect on FINRA disciplinary hearing officers shows that Petitioners' position is overbroad. For one, the effect undermines this Court's precedent. FINRA, after all, is an SRO and not a federal agency. *See, e.g.*, *PCAOB*, 561 U.S. at 484–85 (2010) (contrasting SROs like the New York Stock Exchange with federal agencies); *North v. Smarsh, Inc.*, 160 F. Supp. 3d 63, 78 (D.D.C. 2015). This Court held that for such non-government entities to be recognized as a "part of the Government for purposes of the [Constitution]," Congress must retain control over the SRO's executive board. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995); *see also Horvath v. Westport Library Ass'n*, 362 F.3d 147, 153 (2d Cir. 2004). Congress did not retain such control over FINRA's board of governors—they are elected by their members. *See FINRA Manual*, *supra*, at art. vii, §§ 4(a), 13. Thus, Petitioners' position would undermine *Lebron*, by subjecting some non-government entities to the requirements of the Constitution, even when

6. http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=4628&record _id=6028&filtered_tag=

Congress does not retain control over the organizations' boards. Notably, this would not affect only FINRA, but potentially other SROs as well. *See, e.g.*, 7 U.S.C. § 12a(3)(J) (2012) (SROs in the commodity exchange market).

Second, the Petitioners' definition seriously affects FINRA's ability to perform its SRO functions. FINRA oversees over "3,900 brokerage firms, more than 160,000 branch offices and nearly 635,000 registered representatives." Botkin, *supra*, at 637. In 2017 alone, FINRA resolved 3,735 cases. *See Dispute Resolution Statistics*, Fin. Indus. Regulatory Auth. (Feb. 24, 2018).[7] This is more than five times as many cases as the SEC adjudicated during the same time period. SEC, Div. of Enfm't, *Annual Report: A Look Back at Fiscal Year* 2017 at 6 (2017).[8] As a result of Petitioners position, FINRA hearing officers would need to be appointed pursuant to the Appointments Clause—hindering, or eliminating completely, the ability of FINRA to perform its self-regulatory functions.

* * *

Petitioners' position is thus overbroad in two important ways: it threatens to render the "established by Law" provision of the Appointments Clause superfluous; and, it threatens to disrupt the regulatory functions of SROs. To avoid the ramifications discussed above, the Court should affirm the decision below. *See Blue Chip Stamps*, 421 U.S. at 749.

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7. http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics

8. https://www.sec.gov/files/enforcement-annual-report-2017.pdf

IV. EVEN IF SEC ALJS ARE OFFICERS, REMAND, RATHER THAN DISMISSAL, IS THE APPROPRIATE REMEDY.

If this Court determines that SEC ALJs are Officers under the Appointments Clause, then remand to a duly appointed panel is the correct remedy, as Petitioners assert. *See* Pet. Br. at 43–49. Where Petitioners err is in claiming that dismissal is warranted. *See id.* at 49–58. There are no legal grounds to dismiss the action against Petitioners. In cases involving improperly appointed adjudicators, this Court has held that remand to a duly appointed adjudicator was the remedy, not dismissal. *See Ryder v. United States*, 515 U.S. 177, 188 (1995) ("Petitioner is entitled to a hearing before a properly appointed panel of that court."). After all, the judgment of a tribunal improperly appointed is not, in itself, invalid. *See Ex parte Ward*, 173 U.S. 452, 456 (1899) ("The result of the authorities is that the title of a person acting with color of authority, even if he be not a good officer in point of law, cannot be collaterally attacked. . . ."). In general, the judgment will stand regardless under the de facto officer doctrine. *Id.* While Petitioners argue they suffered a constitutional wrong, *see Ryder*, 515 U.S. at 182, the alleged defect was in the process rather than in the disposition of the merits—a duly appointed tribunal may have come to the same conclusion as the ALJs. Accordingly, Petitioner may be entitled to correct process, but not to the dismissal of the complaint.

Petitioners do not cite any law to the contrary. In fact, their entire argument for dismissal is based on the fact that a new ALJ may once again find against them, *see* Pet. Br. at 49–50, and that the long years defending against

the Commission has left him destitute, *see id.* at 57–58 ("Lucia fought the good fight."). While that may certainly be true, remand is the remedy this Court has used in similar situations. *See, e.g.*, *Elchuk v. United States*, 310 F.2d 717, 717 (5th Cir. 1962) (affirming earlier decision after remand from the Supreme Court); *Goldbaum v. United States*, 222 F.2d 360, 361 (9th Cir. 1955) (same).

CONCLUSION

For the aforementioned reasons, the decision of the U.S. Court of Appeals for the District of Columbia Circuit should be affirmed.

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Respectfully submitted,

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