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 FOR NATIONAL BLACK LUNG ASSOCIATION AS *AMICUS CURIAE* SUPPORTING AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*[1]

This brief is presented on behalf of the National Black Lung Association. The National Black Lung Association is an organization of coal miners and friends and families of miners who advocate for education, treatment standards, and policy protections for miners who have suffered permanent disability or death as a result of exposure to coal dust.

This court granted certiorari on the question of whether administrative law judges (ALJs) of the Securities and Exchange Commission (SEC) are "officers of United States" within the meaning of the Appointments Clause. *Lucia v. SEC*, 868 F.3d 1021 (D.C. Cir. 2017), *cert. granted*, 2018 WL 386565 (U.S. Jan. 12, 2018) (No. 17-130). Resolution of the question presented is important to the National Black Lung Association because of the integral role that ALJs play in the adjudication of claims under the Black Lung Benefits Act, 30 U.S.C. §§ 901-44.

SUMMARY OF ARGUMENT

If the Court finds a constitutional violation in this case, the Court's remedial determination could

[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief. *Amicus curiae* files this brief with the written consent of all parties, copies of which are on file in the Clerk's Office.

dramatically affect coal miners disabled by black lung and their widows. ALJs within the Department of Labor are the primary adjudicators in the black lung benefits system. At a time when black lung disease is resurgent, the Department of Labor's Office of Administrative Law Judges is severely backlogged with claimants waiting years for routine decisions. If the Court were to hold that past decisions by ALJs are void, this could require hundreds of remands back to the agency's Office of Administrative Law Judges, hobbling efforts to address the backlog and leaving vulnerable miners and their families who depend on such benefits.

With the question pending before this Court of the constitutionality of the appointments of ALJs, in December 2017, Secretary of Labor Alexander Acosta ratified the Department of Labor's prior appointments of its ALJs. The letters of ratification were "intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution."[2]

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[2] *See* U.S. Dep't of Labor, OALJ, *Home Page*, https://www.oalj.dol.gov/ (last visited Mar. 29, 2018) ("[T]he Secretary of Labor, R. Alexander Acosta, in his capacity as head of the Department of Labor, ratified the appointment of Chief Judge Stephen R. Henley on December 15, 2017 and of all other Department of Labor ALJs on December 21, 2017. The ratifications were effective immediately.").

The Court should ensure that its holding in this case does not affect existing ALJ decisions in black lung benefits claims.

ARGUMENT

I. Rates of black lung disease, an incurable condition that affects coal miners, are on the rise.

The Federal Coal Mine Health and Safety Act (Coal Act) of 1969 established, among other protections for coal miners, a federal compensation program for those miners disabled or killed by black lung disease, and their surviving dependents. 30 U.S.C. § 901(a).

Black lung disease is a term used to identify collectively a number of breathing diseases caused by overexposure to coal mine dust. Black lung disease is incurable and progresses long after exposure to coal dust ends. Treatment serves solely to alleviate symptoms and prevent complications that may arise. The disease is known to lead to lung impairment, disability, and premature death.[3]

While black lung disease sounds to many like an archaic condition with little relevance in the 21st Century, rates of black lung disease are on the rise, most

[3] U.S. Dep't of Labor, Office of Inspector General, Office of Audit, 05-17-003-01-060, *Effect of OALJ Staffing Levels on the Black Lung Case Backlog* 2 (2017), *available at* https://www.oig.dol.gov/public/reports/oa/2017/05-17-003-01-060.pdf [hereinafter *2017 OIG Report*].

acutely in the Central Appalachian coalfields.[4] Rates of severe black lung disease among career Appalachian coal miners are actually higher now than just after the Coal Act's passage in 1969 when data started being kept.[5]

II. Coal miners and widows applying for black lung benefits typically endure years-long delays due to a backlog before ALJs.

Delays in the federal black lung benefits program are one of the most prominent problems facing coal miners with black lung and their widows.[6]

The federal black lung benefits program is administered by the U.S. Department of Labor. A miner or widow seeking benefits begins the years-long process by submitting a claim to the Department of Labor's Office of Workers' Compensation Programs (OWCP). The most recent publicly available data shows that OWCP takes an average of 235 days to issue a decision.[7]

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[4] Carrie Arnold, *A Scourge Returns: Black Lung in Appalachia*, 124 ENVTL. HEALTH PERSPS. A13 (2016), *available at* http://ehp.niehs.nih.gov/wp-content/uploads/124/1/ehp.124-A13.alt.pdf.

[5] *See* David J. Blackley et al., *Resurgence of Progressive Massive Fibrosis in Coal Miners – Eastern Kentucky, 2016*, 65 MORBIDITY & MORTALITY WKLY. REP. 1385, 1387 (2016), *available at* https://www.cdc.gov/mmwr/volumes/65/wr/pdfs/mm6549a1.pdf.

[6] Evan Barret Smith, *Black Lung in the 21st Century: Disease, Law, & Policy*, 120 W. VA. L. REV. (forthcoming April 2018), *available at* https://ssrn.com/abstract=3152733.

[7] U.S. Dep't of Labor, Office of Inspector General, Office of Audit, 05-15-001-50-598, *Procedural Changes Could Reduce the*

Once OWCP issues its decision, either the claimant or the coal company that would be responsible for benefits may request a formal hearing before an ALJ from the Department of Labor's Office of Administrative Law Judges (OALJ). The ALJ conducts a *de novo* review of the evidence.[8] In 2017, from a sample of 41 black lung cases audited by the Office of the Inspector General, OALJ took an average of 640 days to issue a decision. In one instance, a case remained pending with the OALJ for more than four and a half years.[9]

Parties may appeal an ALJ decision to the Department of Labor's Benefits Review Board. On average, claims remain pending before the Board for 328 days.[10] Either party may appeal decisions from the Board directly to the U.S. Court of Appeals, and then to the U.S. Supreme Court (although the Court has not granted certiorari in a black lung benefits case since 1994).[11] If a court, the Board, or an ALJ identifies an error,

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Time Required to Adjudicate Federal Black Lung Benefits Claims 5 (2015), *available at* https://www.oig.dol.gov/public/reports/oa/2015/05-15-001-50-598.pdf (FY2014 data) [hereinafter *2015 OIG Report*].

[8] U.S. Gov't Accountability Office, GAO-10-7, *Black Lung Benefits Program: Administrative and Structural Changes Could Improve Miners' Ability to Pursue Claims* 7-8 (2009), *available at* https://www.gao.gov/assets/300/297807.pdf [hereinafter *GAO Report*].

[9] *2017 OIG Report* at 3.

[10] *2015 OIG Report* at 5.

[11] *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

the claim may be remanded. This results in additional years of litigation.

Between 2001 and 2008, in 24% of cases where miners eventually received benefits from their employers, those miners were forced to wait three to six years before benefits were awarded. In 4% of cases, miners were forced to wait six years or more for an award of benefits.[12] Part of the delay in benefits awards stems from the frequency of appeals. In Fiscal Year (FY) 2008, in cases where the OWCP ruled in favor of a miner or widow, coal operators appealed to the OALJ 80% of the time. Additionally, between FY 2004 and FY 2008, approximately 43% of all claims decided by OALJ were appealed to the Board, and about 10% of Board decisions were appealed to the federal appellate courts.[13]

Contributing to the excessive delays that claimants endure, under the Black Lung Benefits Act's broad "modification" procedure, coal operators may reopen final awards. *See* 33 U.S.C. § 922 *incorporated by reference into* 30 U.S.C. § 932(a); 20 C.F.R. § 725.310*; see also Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 294-98 (1995) (holding that § 922 modification is not limited to "particular kinds of factual errors or to cases involving new evidence or changed circumstances" but rather can be used whenever there is a

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[12] These numbers fail to account for claims made by widows, denied claims, and all awards from the Black Lung Disability Trust Fund.

[13] *GAO Report* at 14-15.

change in the conditions "that entitled the employee to benefits in the first place"). These proceedings may be initiated "any time prior to one year after the date of the last payment of compensation." 33 U.S.C. § 922. Modification proceedings start the process over at OWCP and pile years onto the already lengthy process. For example, in *Wolf Creek Collieries v. Sammons*, 142 F. App'x 854, 855-56 (6th Cir. 2005), the Sixth Circuit noted that even though Mrs. Sammons's case had already been in litigation for 29 years, the coal company was "certainly free to continue this Thirty Years War" using its § 922 modification right.

Coal miners and their survivors must endure years of litigation to get the modest black lung benefits to which they are entitled. The backlog before the Department of Labor's Office of Administrative Law Judges is the largest source of this delay.

III. If ALJs are found to be "officers of the United States," retroactive application of this decision will worsen the existing backlog of black lung cases.

A decision that opens the door for vacating or modifying past ALJ decisions due to the Appointments Clause will further burden an already overburdened system. Since 2009, the combination of a burgeoning caseload and dwindling staffing capacity has strained OALJ's ability to hear black lung benefits claims in a

timely way.[14] As a result, between 2009 and 2013 alone, OALJ's overall case backlog increased by 134%.

The consequence has been that ALJs received far more black lung claims than they are able to decide. In 2013, ALJs issued only 813 decisions despite the filing of 1,104 new black lung benefits claims and an additional 2,851 pending[15] cases at the ALJ level. By 2014, the number of pending cases increased to 3,142.[16] Black lung claimants were forced to wait an average of 429 days for their cases just to be assigned to an ALJ, and an additional 90 to 120 days for their cases to be heard.[17] On average, ALJs took 693 days, or nearly two years, to decide a black lung case.[18]

The backlog of black lung benefits claims before ALJs endures to this day despite increased funding from Congress[19] and an agency plan to reduce the backlog.[20]

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[14] *2015 OIG Report* at 5.

[15] A pending case is defined as a case that remains undecided more than one year after its filing.

[16] *Id.* at 4.

[17] *Id.* at 37.

[18] *Id.* at 12.

[19] Dep't of Labor, Fiscal Year 2019 Congressional Budget Justification, Departmental Management (2018), 5-6, *available at* https://www.dol.gov/sites/default/files/budget/2019/CBJ-2019-V3-02.pdf [hereinafter *FY 2019 Budget*].

[20] *2017 OIG Report* at 9.

The most recent information from the Department of Labor projects that this backlog will, in fact, increase from 2,552 cases in FY 2017 to 2,724 black lung cases in FY 2018, before declining to 2,654 cases at the end of FY 2019. OALJ expects that, by 2019, it will still take an average of 20 months for ALJs to issue decisions in black lung cases.[21]

A decision here that applies retroactively could open the door to vacating and modifying past ALJ decisions in black lung cases. This, in turn, would exacerbate a backlog that already has serious human consequences. Many coal miners die before their black lung benefits claim is finally decided. The Federal Administrative Law Judges Conference agrees, arguing that "this decision will impact the more than 1930 current ALJs who are estimated to have well over one million pending cases. A lengthy or complicated process to review or rehear those cases could result in significant delays and increased backlogs."[22]

The most vulnerable black lung cases are those on direct appeal, where benefits were awarded prior to the Secretary of Labor's ratification of the ALJs' appointments. The most recent data shows that the Benefits Review Board has 441 pending black lung cases[23] and approximately 30 are before the U.S. Courts of Appeals. Even if only those nonfinal cases were affected, this

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[21] *FY 2019 Budget* at 54, 58.

[22] Brief Amicus Curiae of Federal Administrative Law Judges Conference in Support of Neither Party 12.

[23] *FY 2019 Budget* at 56.

would increase the OALJ backlog by 18% (from 2,724 to 3,195) – erasing any potential progress on the backlog and further delaying decisions for deserving coal miners and their survivors.

And while the awards on direct appeal are the most likely to be affected, because coal operators have the right to request modification under 33 U.S.C. § 922 of any award within a year that the last benefits were paid, *all* black lung beneficiaries who were awarded by ALJs prior to December 2017 become vulnerable.

The human toll of increased delays and case backlogs would be significant. In the words of Senator Bob Casey, "Justice delayed, as we often have said, is justice denied. In this case for coal miners suffering from the debilitating effects of black lung disease. Our nation's hard-working miners and their families deserve much better than that."[24]

IV. If a technical violation of the Appointments Clause exists, the Court should not apply its decision retroactively because doing so would cause injustice and hardship to individuals who have relied on ALJ decisions.

Even if a technical violation occurred in the appointment of ALJs, the Court should only apply its

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[24] *Coal Miners' Struggle for Justice: How Unethical Legal and Medical Practices Stack the Deck Against Black Lung Claimants: Hearing Before the Subcomm. on Employ't and Workplace Safety of the Senate Comm. on Health, Educ., Labor & Pensions*, 113th Cong. 5 (2014) (Prepared Statement of Senator Casey).

decision prospectively because a retroactive application severely harms individuals who have relied on ALJ decisions and would impose substantial inequitable results in individual cases.

Constitutional remedies are generally limited to the minimal remedy necessary to cure the constitutional defect. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508-09 (2010). In past Appointments Clause cases, the Supreme Court has refused to invalidate prior acts by improperly appointed officers. *See Buckley v. Valeo*, 424 U.S. 1, 142 (1976). Whether a decision should apply prospectively in civil cases has traditionally been governed by the nonretroactivity test articulated in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-97 (1971). *See, e.g.*, *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 178 (1990). According to that test, the Court may apply a decision nonretroactively when the issue is of first impression and where the holding might be unfair or cause harm to individual parties if applied retroactively. *See Chevron Oil*, 404 U.S. at 106-07.[25]

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[25] The complete nonretroactivity test articulated by the Supreme Court in *Chevron Oil*:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law. . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed

A. Historically, the Court has rejected retroactive application of its decisions when doing so would impair important government programs.

Considering the massive use of and reliance on ALJs across the federal government – including programs such as the black lung benefits program, Social Security, and immigration in which many individuals' livelihoods and safety depend – the interests in protecting both the functioning of government programs and the reliance interests of individuals are substantial. In the context of the black lung benefits program, a retroactive application of the law would severely impair the program because it would further burden already overburdened Department of Labor ALJ dockets. This harm to the program would substantially delay and interrupt access to benefits for thousands of former coal miners and their widows whose claims and livelihood rely on ALJ decisions. Rather, the Court should consider a prospective application of its holding as it has done in the past.

When the Supreme Court ruled in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982), that the Bankruptcy Act intruded

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by retroactive application, for "(w)here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07 (internal citations omitted).

upon Article III powers, the Court did not invalidate all decisions by bankruptcy judges who acted beyond their jurisdiction. Rather, the Court said that its decision would only apply prospectively because retroactive application in a case of first impression was not necessary to the holding and "would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts." *Id.*

B. If the Court finds a constitutional violation, the Court should apply its decision nonretroactively or appropriately limit retroactive application to protect those who otherwise would be harmed.

Furthermore, even if a technical violation of the Appointments Clause in appointing Department of Labor ALJs occurred, the error was not prejudicial to any party. In December 2017, the Secretary of Labor ratified all Department ALJs. *See* U.S. Dep't of Labor, OALJ, *Home Page*, https://www.oalj.dol.gov/ (last visited Mar. 29, 2018) ("[T]he Secretary of Labor, R. Alexander Acosta, in his capacity as head of the Department of Labor, ratified the appointment of Chief Judge Stephen R. Henley on December 15, 2017 and of all other Department of Labor ALJs on December 21, 2017. The ratifications were effective immediately."). Congress clearly gave the Secretary of Labor authority to appoint ALJs for black lung claims. *See* 30 U.S.C. § 932a; *see also* 5 U.S.C. § 3105. Accordingly, any Appointments

Clause violations have been cured for Department of Labor ALJs.

Therefore, if the Court finds an Appointments Clause violation, retroactive application of that holding would be an empty formality within the Department of Labor, burdening all parties involved. The same ALJs who might have been improperly appointed have now been ratified. There is no reason to believe that voiding the old decisions and remanding for new ones would lead to different outcomes.

Instead of applying its decision purely retroactively, the Court should minimize harm to those receiving black lung benefits and others relying on ALJ decisions in one of two ways. First, the Court may hold that its decision regarding the appointment of ALJs will only be applied nonretroactively as in *Northern Pipeline*. Doing this would preserve the functioning of the black lung benefits program, among others, and in turn protect already vulnerable individuals from further harm.

Alternatively, retroactive application should be limited to cases where the Appointments Clause was properly raised and preserved – a very rare occurrence in the black lung context. In *Freytag v. Commissioner*, 501 U.S. 868, 878-80 (1991), the Court stated that the case was "one of those rare cases in which we exercise our discretion to hear petitioners' challenge" even though the petitioner waived it below. But it is notable that the Court ruled *against* the petitioner in *Freytag*. Justice Scalia's concurring opinion in *Freytag* on the importance of raising and preserving even Appointments

Clause challenges is instructive and was joined by three other justices. To find that such challenges cannot be waived has "no support in principle or in precedent or in policy." 501 U.S. at 895 (Scalia, J., concurring). Waiver of unraised issues is "not a mere technicality," it is "essential to the orderly administration of justice." *Id.* at 894-95 (quoting 9 C. Wright & A. Miller, Federal Practice and Procedure § 2472, p. 455 (1971)) (internal quotations omitted). For example, if the Court finds Appointments Clause challenges unwaivable, Department of Labor ALJs' prior decisions would be open to challenge, meaning that time spent on previous decisions will have been "expended uselessly." *Id.* at 900. The Court should make clear that where the losing party failed to properly and timely object, the challenge to an ALJ's appointment cannot succeed.

In addition, this case is about a Securities and Exchange Commission ALJ in the enforcement context. As the Court stated in *Free Enterprise Fund*, "many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions." 561 U.S. at 507 n.10. Department of Labor ALJs perform purely adjudicative functions. For enforcement, a party must go to an actual officer: a U.S. District Judge. *See* 33 U.S.C. §§ 918, 921(d) (requiring a party to sue in U.S. District court to enforce an award of benefits); 20 C.F.R. § 725.351(c) (providing the "[p]owers of adjudication officer" and explaining that if a party disobeys an ALJ, the ALJ can only "certify the facts to the Federal district court having jurisdiction in the place in which he or she is sitting").

Even if the Court holds that the ALJ in this case was a constitutional officer, this does not mean that the Department of Labor's ALJs are "officers" when adjudicating black lung benefits claims. The Court should make clear that its decision should not affect past decisions from ALJs in other contexts such as the black lung benefits program.

CONCLUSION

The National Black Lung Association asks the Court to be mindful that if an Appointments Clause violation is found here that the Court's expression of its holding could affect coal miners and their families. The Court should seek to limit the impact of its decision on the black lung benefits program given (1) the increase in coal miners suffering from black lung, (2) the long delays and backlog before the U.S. Department of Labor's Office of Administrative Law Judges, and (3) the fact that Secretary Acosta has already ratified the appointment of all of the agency's ALJs. A holding otherwise would needlessly exacerbate the suffering caused by black lung. The Court should simply affirm the judgment below, but at minimum, the Court should limit

its holding to avoid disrupting the countless lives that depend on prior ALJ decisions.

Respectfully submitted,

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