No. 20-1203

IN THE

Supreme Court of the United States

MOOSE JOOCE, ET AL.,

Petitioners,

v.

FOOD & DRUG ADMINISTRATION, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF OF THE CATO INSTITUTE AND REASON FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The question presented in the petition, which references the relevant precedent and describes the circuit split, can be more simply restated as:

Does a perfunctory ratification cure a rulemaking promulgated by an improper government official?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

Reason Foundation is a nonpartisan and nonprofit organization, founded in 1978 to promote liberty by developing, applying, and communicating libertarian principles and policies. Reason advances its mission by publishing *Reason* magazine, as well as website commentary, and by issuing research reports. Reason also communicates through books, articles, and appearances at conferences and on broadcast media.

Amici have a strong interest in enforcing our constitutional separation of powers and ensuring the democratic accountability of executive officers—both issues that this case squarely presents.

INTRODUCTION AND SUMMARY OF ARGUMENT

Lower courts have lately been hearing a variety of challenges to agency action based on alleged defects in authority. Some of these cases reflect the

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

consequences of recent decisions by this Court. *See, e.g.*, *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 679 (6th Cir. 2018) (addressing a defect in constitutional authority to an agency adjudication in the wake of *Lucia v. SEC*, 138 S. Ct. 2044 (2018)). Others involve claims that an administration has abused its authority to name "acting" directors without undertaking constitutional procedures for appointments. *See, e.g.*, *SW Gen. Inc. v. NLRB*, 796 F.3d 67, 72–78 (D.C. Cir. 2015) (finding that the agency's acting general counsel violated the Federal Vacancies Reform Act). Finally, there are controversies like this one, which involve a small number of agencies with an entrenched practice of having career civil servants sign off on law-like rules, in violation of the Constitution's requirement that principal officers bear responsibility for such policies. *See* Angela C. Erickson & Thomas Berry, Pacific Legal Foundation, *But Who Rules the Rulemakers? A Study of Illegally Issued Regulations at HHS* 3 (2019) (finding that 98% of the FDA's final rules were issued by career employees who did not have the constitutional authority to do so); *see also Alfa Int'l Seafood v. Ross,* No. 17-31, 2017 U.S. Dist. Lexis 96329 (D.D.C. June 22, 2017) (involving an Appointments Clause challenge to a fishing regulation promulgated by career civil servant).

These disputes all implicate the same important federal question: how do courts retroactively redress unauthorized agency action? The answer in practice depends on the administrative process at issue.

When these challenges are brought against agency adjudications, this Court has provided clear instructions. In *Lucia*, the Court held that "the

appropriate remedy for an adjudication tainted with an appointments violation is a new hearing before a properly appointed official." 138 S. Ct. at 2055. The new judge, moreover, could not be the same as the one who presided over the original enforcement action. *Id.*

Yet administrative adjudications represent only a small subset of all regulatory activity. For the rest, courts are turning to the ratification doctrine, a one-size-fits-all affirmative defense that allows agencies to cure its unauthorized action with little more than a signature. The doctrine, which originated the D.C. Circuit, requires courts to uphold good-faith affirmations by properly appointed officers of prior decisions by unauthorized officials. *See Intercollegiate Broad. Sys. v. Copyright Royalty Bd. & Librarian of Cong.*, 796 F.3d 111, 117–21 (D.C. Cir. 2015); *FEC v. Legi-Tech*, 75 F.3d 704, 708–09 (D.C. Cir. 1996). Because agencies are presumed to make detached and considered judgments, an agency's ratification retains its curative powers even if, on its face, it appears to be a "nothing more than a rubberstamp." *Id*. at 708. At least two other circuits have adopted the D.C. Circuit's ratification doctrine to cure agency actions that suffer defects in constitutional authority. *See CFPB v. Gordon*, 819 F.3d 1179, 1190–92 (9th Cir. 2016); *Advanced Disposal Servs. East, Inc. v. NLRB*, 820 F.3d 592, 602–06 (3d Cir. 2016).

The problem is that the ratification doctrine paints with too broad a brush. Courts are failing to differentiate administrative action that's suitable for ratification from action that's not. Exercises of prosecutorial discretion are ratified just as easily as legislative rules. Yet unlike prosecutorial discretion, legislative rules—like the FDA's vaping regulation

here—are beholden to procedural requirements that ensure public participation and reasoned policymaking. *See* 5 U.S.C. §§ 553, 706 (establishing notice-and-comment rulemaking procedures and reasonableness review of agency action).

By treating all agency actions the same, ratification runs afoul of this Court's guidance in *Lucia* that a "new hearing" was the proper remedy for an adjudication tainted by an Appointments Clause violation. 138 S. Ct. at 2055 Of course, the *Lucia* petitioner had a right to an administrative hearing as an initial matter. The obvious implication is that the aggrieved party is due a semblance of the procedural rights to which he or she originally had been entitled.

Under *Lucia*, agencies may employ ratification to cure constitutional defects to agency action—but only to action that is unburdened by rigorous procedural requirements, such as an exercise of prosecutorial discretion or the issuance of a nonbinding guidance memorandum. But *Lucia* does not permit agencies to retroactively rubberstamp agency action that flows from processes that convey the force and effect of law, including agency adjudications and legislative rules. For adjudications, *Lucia* calls for a "new hearing." For legislative rules like the one at issue here, *Lucia* calls for the agency to hear out the aggrieved parties, by supplementing the record with their comments.

Courts have turned to the ratification doctrine in part out of fear for the administrative fallout that would ensue if they disrupted rules that are already on the books. Such concerns are unwarranted. Agencies often reopen their records in response to adverse court decisions. Any equitable remedy could

be tailored to aggrieved parties who had participated in the original rulemaking. There is no reason to believe that an adverse decision for the government here would lead to greater administrative burden.

In sum, the Court should grant the petition because the decision below conflicts with *Lucia* on the important federal question of how to remedy a constitutional defect in authority.

ARGUMENT

I. THE RATIFICATION DEFENSE CONFLICTS WITH THIS COURT'S HOLDING IN *LUCIA*

The district court below held there was "no reason—other than the existence of APA procedures—for differentiating between ratifications of rules and ratifications of enforcement decisions or agency adjudications." *Moose Jooce v. FDA*, No. 18-203, 2020 U.S. Dist. Lexis 23322, at *15 (D.D.C. Feb. 11, 2020). But this understanding, affirmed by the D.C. Circuit, conflicts with this Court's reasoning in *Lucia*, which makes clear that "the existence of APA procedures" affects the viability of ratification.

To appreciate *Lucia*'s effect on the instant case, bear in mind that the Administrative Procedure Act creates rigorous procedures for two types of agency action: trial-like adjudications and legislative rules. *Compare* 5 U.S.C. § 553 (establishing procedures for notice-and-comment rulemakings) *with* 5 U.S.C. §§ 554, 556, 557 (establishing procedures for formal adjudications). Only a small minority of agency action falls into these two categories; most agency policy is

implemented through informal means that are subject to minimal APA requirements.

Lucia addressed a constitutional defect in a formal adjudication. As a remedy, the Court required the agency to undertake a "new hearing" with a properly appointed administrative law judge, one who had not heard the matter when it first came through the agency. *Lucia*, 138 S. Ct. at 2055. Plainly, the *Lucia* Court was influenced by the "the existence of APA procedures." In requiring a "new hearing," the Court modeled its equitable remedy on the petitioner's existing procedural rights under the APA. Following *Lucia*, lower courts have routinely given new hearings in front of different administrative law judge for constitutionally defective administrative adjudications. *See, e.g., Jones Bros.*, 898 F.3d 669; *Associated Mortg. Bankers, Inc. v. Carson*, 2019 U.S. Dist. Lexis 1603 (D.D.C. Jan. 4, 2019); *Cirko ex rel. Cirko v. Comm'r of Soc. Sec.*, 948 F.3d 148 (3d Cir. 2020); *Ramsey v. Comm'r of Soc. Sec.*, 973 F.3d 537 (6th Cir. 2020); *Morris & Dickson, Co. v. Whitaker*, 360 F. Supp. 3d 434 (W.D. La. 2018).

Lucia, therefore, instructs lower courts to tailor remedies such that they account for the differences among administrative processes. The ratification doctrine, by contrast, "reject[s] the notion that the type of agency proceeding mattered." *Moose Jooce*, 2020 U.S. Lexis 23322, at *15. Put differently, it makes no sense for the Court to require a "new hearing" for adjudications tainted by a defect in authority, but then for lower courts to deny any meaningful process in "curing" defects to legislative rulemaking—the only other type of agency action subject to robust APA safeguards.

To be sure, the ratification doctrine is appropriate in many cases. Where, for example, a defect in authority affects an exercise of prosecutorial discretion, a rubberstamp ratification presents little concern, because these kinds of agency actions are neither bound by procedural safeguards nor even subject to judicial review. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (establishing a presumption against judicial review of an agency's discretion in the enforcement of its regulations). Simply put, if the original action required little more than a signature to effectuate, then the ratification requires no more, either. Lower courts often employ ratification in this unobjectionable context. *CFPB v. Seila Law LLC*, 984 F.3d 715, 718 (9th Cir. 2020) (remedying a defective civil investigative demand), *vacated and remanded*, 140 S. Ct. 2183 (2020); *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 370–72 (D.C. Cir. 2017) (curing a defective enforcement notice); *Advanced Disposal Servs. East, Inc*, 820 F.3d at 602–06 (redressing a defective enforcement notice).

A barebones ratification will thus comport with *Lucia* for most agency action, because most agency action is informal and escapes rigorous procedural guarantees under the APA. For a minority of agency actions, however—trial-like adjudications and legislative rules—*Lucia* demands that lower courts heed "the existence of APA procedures" in remedying an Appointments Clause violation. *Moose Jooce*, 2020 U.S. Lexis 23322, at *15.

There is a second way in which the D.C. Circuit's ratification defense conflicts with *Lucia*'s remedial reasoning. *Lucia* explained that this Court's Appointments Clause remedies are designed not only

to advance the Constitution's "structural purposes," but also "to create incentive[s] to raise Appointments Clause challenges." *Lucia*, 138 S. Ct. at 2055 n.5 (quoting *Ryder v. United States*, 515 U.S. 177, 183 (1995)). Ratification achieves the opposite—rather than "incentivize," it *nullifies* Appointments Clause challenges. Because the defense "cures" any potential authority defect, ratification resolves the underlying claim on the merits, "regardless of whether the previous officer was or was not validly appointed." *Guedes v. BATFE*, 920 F.3d 1, 13 (D.C. Cir. 2019) (cleaned up); *see also Intercollegiate Broad.*, 796 F.3d at 119 n.3 (ratification defeats Appointments Clause challenge). The upshot is that ratification undermines the prophylactic purpose of Appointments Clause jurisprudence, as this Court set forth in *Lucia*.

The perverse result is the continued violation of a key structural component to the separation of powers. Since the petitioners filed against the FDA, the FDA has continued to flout the constitutional restraints of the Appointments Clause. FDA employees continue to issue rules today. *See, e.g.*, 85 Fed. Reg. 14,565 (Mar. 13, 2020); 85 Fed. Reg. 7215 (Feb. 7, 2020). And because the FDA knows it can always ratify improperly promulgated rules, it has little motivation to establish proper appointments in the first instance because it can amend them any time scot free. *See* Kent Barnett, *The Consumer Financial Protection Bureau's Appointment with Trouble*, 60 Am. U. L. Rev. 1459, 1484 (2011).

II. RESOLVING THIS IMPORTANT QUESTION WILL NOT BURDEN THE GOVERNMENT

At least in part, lower courts have permitted rubberstamp ratifications out of concern for the potential repercussions of disrupting rules that are already on the books. *See, e.g.*, *Alfa Int'l Seafood*, 2017 U.S. Dist. Lexis 96329, at *9 (justifying ratification because "the disruptive effect of vacatur would be substantial"). Such fears do not withstand scrutiny.

As an initial matter, agencies have a history of overstating the administrative burden of correcting administrative action that suffers from a defect in constitutional authority. After *Lucia*, for example, the Social Security Administration warned the Third Circuit that "an adverse ruling would open the floodgates" to thousands of cases brought by "every disappointed claimant [seeking] a do-over before a new ALJ simply by raising a *Lucia* claim in district court." *Cirko*, 948 F.3d at 159. On investigating this claim, the court there concluded that "the purported flood is actually a trickle." *Id.*

More importantly, any remedy would be rooted in the judiciary's equity power, so this Court could employ prudential doctrines that mitigate any undue administrative consequences. *Lucia* is illustrative. In crafting an equitable remedy there, the Court neither invoked the APA's procedural requirements nor demanded that the agency start a new proceeding from scratch. In implementing *Lucia*'s flexible mandate for a "new hearing," agencies typically assign the case to a different administrative law judge, who then takes limited briefing based on the

existing record. *See, e.g.*, *In re Harry C. Calcutt III*, Decision and Order to Remove and Prohibit from Further Participation and Assessment of Civil Money Penalties, FDIC-12-568e, 4–5 (Dec. 15, 2020) (Decision and Order to Remove and Prohibit from Further Participation and Assessment of Civil Money Penalties) (explaining the agency's post-*Lucia* procedure). *Lucia* basically requires the agency to again hear out the aggrieved party, nothing more.

It's easy to imagine how *Lucia*'s remedial prescriptions would translate to this case, and that the resultant administrative burden would be minimal. For example, relief could be limited to parties who participated in the notice-and-comment process for the original rule. At least one of the plaintiffs submitted a comment to the FDA, arguing that the proposed rule did not consider the positive benefits of vaping. *Moose Jooce*, 2020 U.S. Lexis 23322, at *5. This comment focused on the same issue—evidence regarding the public health benefits of vaping—about which the petitioners now seek to inform the agency as a remedy for the agency's (ongoing) violation of the Appointments Clause.

Finally, there is nothing remarkable about a regulatory agency supplementing the record for a legislative rule. Agencies routinely reopen administrative records on remand without vacatur from federal courts.

In sum, lower courts have turned to the ratification doctrine at least partly out of undue concern for administrative disruption. These concerns are unfounded because any equitable remedy would be limited to supplementing the record with

comments from aggrieved parties who preserved their claims by participating in the original rulemaking.

CONCLUSION

One-sentence ratifications cannot cure Appointments Clause defects in agency rulemaking. Permitting them incentivizes agencies to flout the rulemaking process, while disincentivizing litigants challenging the agency action. This Court should grant the petition and ultimately reverse the court below.

Respectfully submitted,

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