

03/03/21

No. 20-1230

In the
Supreme Court of the United States

Reginald L. Sydnor,
Petitioner,

v.

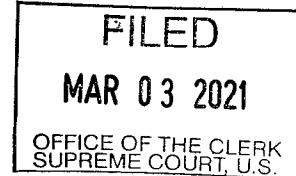
Mark A. Robbins, Vice Chairman, et al.
Respondents.

On Petition for Writ of Mandamus to
the United States Court of Appeals
for the Third Circuit

ORIGINAL

PETITION FOR WRIT OF MANDAMUS

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QUESTION(S) PRESENTED

In June, 2018, petitioner sued the United States Merit Systems Board (board), board members in district court for the Eastern District of Pennsylvania, pursuant to Mandamus Act, Administrative Procedures Act (APA), and the United States Constitution. Petitioner requested the district court to mandate the board members to vacate two unconstitutional, null and void board final decisions rendered by a non-constitutionally appointed board employee. These same unconstitutional, null and void final board decisions adjudicated petitioner unsuitable, removed and debarred petitioner from his constitutionally appointed and employed federal administrative law judge (ALJ) position. Despite petitioners' timely motion, interlocutory appeal and petition for review to the board to vacate the unconstitutional board adjudication and decisions and to afford petitioner an appropriate due process ALJ board appeal before a constitutionally appointed board ALJ, the board to this date has repeatedly refused petitioner his ALJ constitutional and statutory due process relief.

At all times, the board members were put on notice and are aware that the board is continuously violating petitioner's statutory and constitutional due process rights, pursuant to 5 U.S.C 7521, 5 U.S.C. 551 et seq (Administrative Procedures Act) (APA)), and 5 U.S.C. 7515 E, and Article II, 2, cl. 2 of the United States Constitution. All leading to what this Court has deemed a board constitutional appointment violation. Petitioner's repeated and timely requests to the board and the appeals courts for an ALJ due process board hearing before a constitutionally appointed board ALJ entitles petitioner to that relief, pursuant to this Court's ruling in *Lucia v. Security Exchange Commission*, 585 U.S. ____

(2018), 138 S. Ct. 2044. Ignoring this Court’s controlling law and the pertinent facts regarding petitioner’s right to timely request the district court to mandate his appropriate due process relief, on motion from the board members, the district court dismissed petitioner’s request for relief and a Third Circuit Court of Appeals panel affirmed the dismissal. Petitioner’s request for an *en banc* hearing on his mandamus request for his appropriate ALJ due process relief was denied.

Petitioner returns to this Court and again ask this Court to intervene by requesting the Court to enforce its own mandate set forth in its *Lucia* decision, *id* and afford petitioner that same fundamental and appropriate constitutional due process relief the board has deprived petitioner for over two decades. The questions presented to this Court are as follows:

1. Does petitioner’s repeated timely requests for his appropriate ALJ due process hearing before a constitutionally appointed board ALJ, although all were ignored by the board and dismissed throughout the appeal courts, entitle petitioner to a timely request for that same appropriate due process relief, pursuant to this Court’s ruling in *Lucia*.
2. Does petitioner’s prior unsuccessful appeal of an unconstitutional, null and void board final decision now bar petitioner’s entitlement to his appropriate constitutional due process relief, denied by that same unconstitutional board decision.
3. Can the district court rely upon the ruling of an unconstitutional, null and void board decision to deny petitioner his appropriate constitutional due process relief, denied by that same board decision.
4. Does the lower courts’ dismissal of petitioner’s mandamus request for his appropriate constitutional due process relief, denied by the board’s constitutional

appointment violation, in fact, sanctions the board's constitutional appointment violation against petitioner.

PARTIES TO THE PROCEEDING

Petitioner (mandamus plaintiff in the district court), is a life-long constitutionally appointed and employed federal Administrative Law Judge (ALJ), determined unsuitable, removed and debarred from his federal employment by an unconstitutional, null and void Merit Systems Protection Board (board) final decision. A board decision which *per se* violated the Appointment Clause of Article II of the United States Constitution and the Congressional statutory due process procedures set forth in 5 U.S.C. 7521, 5 U.S.C. 551, et seq (the APA), and 5 U.S.C. 7512 E.

Respondents in this Court are the United States District Court for the Eastern District of Pennsylvania and the Third Circuit Court of Appeals. Both lower courts are charged with the duties and responsibilities to uphold and enforce the federal statutory laws and the United States Constitution. Respondents are also the Board Members of the United States Merit Systems Protection Board, charged with the direct duty and responsibility to ensure the board's compliance with the Appointment Clause of Article II of the United States Constitution and to enforce the statutory due process provisions of 5 U.S.C. 7521, the APA, and 5 U.S.C. 7512 E (defendants in the district court and real parties of interest in the court of appeals).

STATEMENT OF RELATED CASES

None

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Petitioner, Reginald L. Sydnor, respectfully petitions for a writ of mandamus to the United States District Court for the Eastern District of Pennsylvania. In the alternative, the petitioner respectfully request that the Court treat this petition as a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, or as a common law writ of certiorari to review the district court's decision to dismiss petitioner's mandamus request for his appropriate constitutional due process relief from the United States Merit Systems Protection Board.

OPINIONS BELOW

On June 22, 2018, petitioner filed a district court mandamus and APA action against the board members of the Merit Systems Protection Board (board) seeking his denied appropriate and entitled Administrative Law Judge (ALJ) constitutional due process relief. The action was based upon the board members' continual violation of petitioner's due process rights pursuant to 5 U.S.C. 7521, 5 U.S.C. 551, et seq (APA), 5 U.S.C. 7515 E, and revisited by the board members' refusal to honor its own mandate for petitioner's appropriate ALJ due process relief, as set forth by the board members themselves in *McDougall v. Social Security Administration*, 2010 M.S.P.B. 163 (August 13, 2010), (App. E, 15a-16a, 18a-19a, *infra*). Without answering petitioner's action, the board members filed a motion to dismiss petitioner's mandamus request for his appropriate due process relief based upon a six year federal statute of limitations and petitioner being barred from his appropriate constitutional due process relief because petitioner had already unsuccessfully

appealed its now unconstitutional, null and void board decisions, which denied petitioner his entitled ALJ appropriate constitutional due process relief being requested. On June 26, 2019, the district court issued an Order granting the board members' motion and dismissed petitioner's request for his appropriate constitutional due process relief, quoting the board members' motion rationale in a footnote. Petitioner timely motioned the district court for reconsideration and to grant petitioner's request for his appropriate constitutional due process relief, based upon this Court's June 22, 2018 ruling in *Lucia v Security Exchange Commission*, 585 U.S. ___ (2018), 138 S. Ct. 2044, 201 L. Ed. 2d 464 (App. F, 31a-32a, *infra*), which established the controlling law for petitioner's timely request for his appropriate constitutional due process relief. Likewise, pursuant to this Court's *Lucia* ruling, since the board's violation of the federal ALJ due process statutes amounted to a board constitutional appointment violation, the appealed final board decisions, which denied petitioner his constitutional due process relief, now become unconstitutional, null and void. A position the board members had already taken in its *McDougall* decision. App. E, 18a-19a, *infra*.

On December 3, 2019, the district court issued another Order, which denied petitioner's reconsideration and again dismissed petitioner's request for appropriate constitutional due process relief. Again, the district court attached a footnote which disregarded this Court's ruling on the board's unconstitutional appointment violation. Instead, the district court cited the ruling of the unconstitutional, null and void board decision as a reason to disqualify petitioner from any timely request for appropriate

constitutional due process relief, set forth by this Court's controlling ruling in *Lucia*.

Petitioner timely appealed the district court's dismissal of petitioner's mandamus request for relief to the Third Circuit Court of Appeals. On September 24, 2020, a third circuit panel member issued a non-precedent, unpublished judgment and opinion affirming the district court's orders. Petitioner timely petitioned for an *en banc* hearing on the matter and requested the appellate court to issue the appropriate constitutional relief mandated by this Court. Petitioner's *en banc* petition was denied on December 4, 2020 and the judgment and opinion was entered on December 14, 2020.

JURISDICTION

The common law writ of mandamus against a lower court is codified at 28 U.S.C. 1651 (a). "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the principles of law". As such, the jurisdiction of this Court is invoked under 28 U.S.C. 1651. In the alternative, the jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). The judgment of the court of appeals was entered on December 14, 2020.

RELEVANT PROVISIONS INVOLVED

(see appendix)

STATEMENT

Petitioner serves a lifelong appointment and was employed by the Social Security Administration (SSA) as an Administrative Law Judge (ALJ) in the SSA's Voorhees, New Jersey hearing office in early 1997. (Federal ALJ ID No. 2117). Prior to petitioner's appointment, petitioner had 19 years of productive and unblemished federal service in both military and civilian federal service. Petitioner's background had been thoroughly screened, verified, approved and rated by the Office of Personnel Management's Office of Administrative Law Judge (OPM OALJ) as suitable and highly qualified for federal ALJ appointment. The OPM OALJ investigated petitioner's personal, educational, military and professional background. An inquiry was made into petitioner's criminal record and state bar disciplinary conduct with no reported incidents. As has always been the case to this date.

Notwithstanding, in the fall of 1997, based upon an unverified false allegation that petitioner was involved in criminal misconduct in prior federal service, an overly zealous OPM Suitability Branch (OPM SB) investigator coached the SSA to unofficially and indefinitely remove petitioner from his constitutionally appointed and employed SSA ALJ position. The OPM SB investigator subsequently investigated the matter and concluded no criminal misconduct. However, in an apparent effort to cover for petitioner's already unjustified ALJ removal, the investigator alleged petitioner falsified his ALJ application. The same ALJ

application the OPM OALJ had already thoroughly screened, verified, approved and rated. The OPM SB investigator determined petitioner was unsuitable and therefore must be removed and debarred from federal service. An unchallenged and out of order OPM SB conclusion which denied petitioner a due process opportunity to an OPM suitability hearing and decision before an OPM Suitability Panel. Petitioner appealed the out of order and anomalous actions by the OPM SB and the SSA to the Merit Systems Protection Board (board) as an illegal ALJ discipline violating 5 U.S.C. 7521 and the APA and discriminatory, since this type procedural action had never been taken against any other ALJ. Compare the established ALJ procedure afforded by the SSA, OPM (former Civil Service Commission) and the board in *In re Spielman*, 1 M.S.P.R. 53, 1979 M.S.P.B. Lexis 115, 1 M.S.P.B. 50 (M.S.P.B. June 12, 1979).

Not in conformity with the established board assignment of an ALJ board appeal to a constitutionally appointed board ALJ, for appropriate ALJ board appeal review and adjudication, petitioner's ALJ board appeal was unexplainably rerouted to a board administrative judge (BAJ). A BAJ being nothing more than a title given to a non-constitutionally appointed board attorney hired by in house staff. All in violation of 5 U.S.C 7521, corresponding board regulations, the APA and 5 U.S.C. 7515 E and a board action ultimately defined by this Court as an agency constitutional appointment violation. Petitioner immediately motioned and petitioned the board members to reassign petitioner's ALJ board appeal to a constitutionally appointed board ALJ for appropriate board review and adjudication. Both petitioner's motion and petition were administratively blocked by

the board clerk and the BAJ. App. H, 66a-67a, 68a-70a, *infra*.

The non-appointed BAJ proceeded to conduct an *ad hoc* non-adversary hearing, not in conformity with any established ALJ due process procedures set forth by the APA, 5 U.S.C. 7521, board regulations 5 C.F.R. 1201.137, .140(a), and .142 and traditional board ALJ caselaw. No deciding official from the OPM SB or the SSA appeared to give any sworn testimony or to be cross examined on the record, as to any merit to support an OPM SB unsuitability conclusion or the resulting removal and debarment of petitioner. The proceeding barred petitioner from any opportunity to challenge or defend the OPM SB unsuitability conclusion or the justification for any ALJ removal or debarment disciplinary action. The BAJ immediately dismissed petitioner's ALJ board appeal of the SSA's unofficial indefinite suspension/removal as lacking board jurisdiction (PH-0752-98-0213-I-1), dismissed petitioner's discrimination claim and proceeded to ordered petitioner unsuitable, debarred from federal service and for the SSA to officially remove petitioner from his ALJ position (PH-0731-98-0188-I-1). Petitioner again timely petitioned the board members to review and to vacate the illegal BAJ adjudication and decisions and to reassign petitioner's ALJ board appeals to a constitutionally appointed board ALJ for appropriate board resolution. The board members refused review. App. H, 62a-63a, *infra*.

Petitioner timely appealed the BAJ's final board decisions as not in accordance with the board's administrative and statutory due process procedures for board ALJ appeals and discriminatory in a subsequent district court action, pursuant to 5 U.S.C. 7703 (b) (2); App. H, 64a, *infra*. That action, and

appellate review were unsuccessful and dismissed by those lower courts without a trial de nova and based upon summary motions, citing the now unconstitutional, null and void BAJ final board decisions as the sole deciding legal authority. This Court denied petitioner's writ of certiorari on the matter. *Sydnor v. LaChance*, No. JFM -99-228, sup op at 2 (D. Md. Oct. 26, 1999), aff'd, 210 F. 3d 362 (4th Cir. 2000 (Table)), Cert. denied 531 U.S. 1014 (2000). See Writ of Certiorari, App. H, 46a-70a, *infra*. Again, petitioner was denied the fundamental due process opportunity to challenge or defend the merit of any disciplinary action or the illegal and alleged discriminatory administrative proceedings leading to the disciplinary actions. Instead, all was decided by the now unconstitutional, null and void BAJ final board decisions. Existing to this date, not one OPM SB or SSA deciding official has ever appeared to give sworn testimony or to be cross examined on any administrative or court record as to the merit for petitioner's continual ALJ disciplinary actions decided by the BAJ.

In 2010, the board members themselves made clear in *McDougall v. SSA*, citation omitted, App. E, 15a-19a, *infra*, that a non- appointed BAJ could not adjudicate a board ALJ appeal matter and mandated that any such adjudication violated the APA, 5 U.S.C.7521 and 5 U.S.C 7515 E and must be vacated and reassigned to a constitutionally appointed board ALJ for appropriate adjudication. Based upon the board members own mandate, petitioner again timely motioned the board to vacate PH-0752-98-0213-I-1 and PH-0731-98-0188-I-1 and to assign petitioner's ALJ board appeals to a board ALJ. Without a response from the board, petitioner specifically wrote and sent a

detailed letter to the board chair person and again made the request. Via the board clerk, the board members refused to honor its *McDougall* mandate regarding petitioner's request, with a ridiculous response. See App. G, 36a-45a and App. E, 15a-16a, *infra*.

On June 21, 2018, this Court made clear *Lucia v. SEC*, citation omitted, App. F, 31a-32a, *infra*, that it was an agency constitutional appointment violation for an agency to allow a non-constitutional appointed agency employee to perform an agency adjudication mandated to be performed by a constitutional appointed agency ALJ. This Court mandated that any such agency violation is unconstitutional, null and void and must be vacated and then reassigned to a constitutionally appointed agency ALJ for appropriate disposition. This Court made clear that any such grievant who timely objected to the due process denial to the agency and in the courts is entitled to that appropriate constitutional due process relief. *Lucia*, App. F, 31a-32a, *infra*.

On June 22, 2018, petitioner had no choice but to file the current action with the district court in the form of a Mandamus and APA complaint requesting the district court to mandate the board members to enforce their own mandate and ultimately the mandate of this Court to vacate PH-0752-98-0213-I-1 and PH-0731-98-0188-I-1 and to assign petitioner's ALJ board appeals to a constitutionally appointed board ALJ for appropriate ALJ due process disposition. The district court and the third circuit panelist ignored the controlling law set forth by this Court and the vital case facts to determine petitioner's entitlement to appropriate constitutional due process relief. Instead, the lower courts dismissed petitioner's claim for that relief, based upon the board

member's motion. The lower courts disregarded the fact that it was the board members own appropriate ALJ due process relief that prompted petitioner to file this current action. The board members admitted in their *McDougall* decision that the board violated 5 U.S.C 7521, the APA and 5 U.S.C.7515 E by allowing a BAJ to adjudicate a board ALJ appeal. The board members then mandated that any such board adjudication had to be vacated as null and void and the board ALJ appeal had to be reassigned to a board ALJ for appropriate board ALJ appeal adjudication. *McDougall*. App. E, 15a-16a, 17a-19a, *infra*. The fact that the lower courts allowed the board members to exclude petitioner from its own mandate renewed and extended the board's constitutional appointment violation against petitioner. The courts permitting the renewal and extension of the board's appointment violation becomes more so when the courts disregarded the controlling law and mandate of this Court to dismiss petitioner's timely request for his appropriate relief and then allow the unconstitutional, null and void board decisions to remain in effect, as the justification. In essence, the lower courts have exempted the board members from any constitutional appointment violation responsibility, only as it applies to petitioner. All in violation of petitioner's constitutional rights to due process and equal protection under law, as set forth in the 5th Amendment of the United States Constitution.

REASONS FOR GRANTING THE PETITION

A writ of mandamus becomes necessary when there are “exceptional circumstances amounting to a judicial ‘usurpation of power’” *Cheney v. United States Dist. Court*, 542 U.S. 367, at 380 (2004). Petitioner must establish (1) the “right to issuance of the writ is ‘clear and indisputable,’” (2) the Petitioner has “no other adequate means to attain the relief sought, and (3) “the writ is appropriate under the circumstances.” Id at 380-381 (citation omitted). Those are the exact circumstances of this case which clearly demonstrate a repeated total disregard for the due process and equal protection clauses of the United States Constitution directly by the respondent board members of the Merit Systems Protection Board. The board member’s total disregard for petitioner’s constitutional due process and equal protection rights have been endorsed by the lower courts’ refusal to mandate the board’s compliance with the statutory due process intent of Congress and now that of the United States Constitution, as ruled by this Court. Instead, at the request of the board members, the lower courts routinely dismiss petitioner’s repeated and timely requests for his entitled and appropriate due process relief.

Petitioner therefore has no other choice but to once again ask this Court to intervene and to end the profoundly misguided cycle of the lower courts endorsing the board denying petitioner the same statutory and constitutional due process rights that the board readily affords other ALJs. Petitioner has established a “clear and indisputable” right to relief. *Cheney*, at 542 U.S. at 381 (citation omitted).

The factors for a mandamus are readily satisfied because petitioner has “no other adequate means” to

"attain the relief" petitioner is entitled and seeks to prevent the repeated denial of petitioner's constitutional right to due process, *Id.* at 380-381 (citation omitted). A mandamus is especially appropriate here because it is the only way "to prevent the lower court(s) from interfering" with the discharge of the board's constitutional and statutory duty and responsibility to afford petitioner the same appropriate ALJ constitutional due process and equal protection, it readily affords other ALJs. *id.* at 382.

In the alternative, the Court could grant review of petitioner's case in one of two other ways. Either the Court could treat this petition as a petition for a writ of certiorari, pursuant to 28 U.S.C. 1254 (1) seeking review of the Third Circuit's December 4, 2020 Judgment affirming the district court's dismissal. App. A, 1a-6a, *infra*. The Court could then grant certiorari on any or all of the questions presented and review the court of appeals decision to affirm the district court's dismissal of petitioner's mandamus action. Cf. *Cheney*, 542 U.S. at 391. Otherwise, the Court could construe this petition as a petition for a common law writ of certiorari, pursuant to 28 U.S.C. 1651 and seek review of the district court's Orders dismissing petitioner's mandamus request for appropriate due process relief. App. B and C, at 7a-10a and 11a-12a, *infra*. The Court could then grant certiorari on any or all of the questions presented and review the district court's orders directly.

Whatever course this Court takes, petitioner's repeated and timely requests for his constitutional due process relief and his equal protection under the law should not again be left dangling, without this Court's intervention.

A. Petitioner has a clear and indisputable legal and factual right to mandated appropriate constitutional due process relief, which was misguidedly ignored and routinely dismissed by the lower courts

It is clear and indisputable that petitioner was constitutionally appointed as a lifelong ALJ and employed in that position with the SSA's Voorhees, New Jersey hearing office. An ALJ is a constitutionally appointed federal officer upon which Congress has specifically set forth the statutory due process procedures, in 5 U.S.C. 7521, 5 U.S.C. 551, et seq (APA) and 5 U.S.C 7512 E, for an agency to remove an ALJ from his appointed and employed ALJ position. It is well established that the board has original jurisdiction to adjudicate adverse actions against ALJs under 5 U.S.C. 7521. *Social Security Administration v Long*, 113 M.S.P.R. 190, par. 12 (2010); *Tunik v. Merit Systems Protection Board*, 407 F.3d 1326, 1332-33 (Fed. Cir. 2005). An agency can only take action against an ALJ "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U.S.C. 7521 (a); *Long*, 113 M.S.P.R. 190, par 12. An ALJ is entitled to have his board appeal adjudicated under the APA, 5 U.S.C. 551, et seq. See *Social Security Administration v. Dantoni*, 77 M.S.P.R. 516, 521, aff'd, 173 F.3d 435 (Fed. Cir. 1998) (Table); *Social Security Administration v. Goodman*, 28 M.S.P.R. 120, 124 (1985). The provision for adverse action appeals under Chapter 75, Subchapter II, see 5 U.S.C. 7511-7514, do not apply to adverse actions taken against ALJs, see 5 U.S.C. 7512(E).

Under the APA, the taking of evidence and any hearing in an action against a ALJ must be presided over by the full board, one or more board members, or an ALJ. See 5 U.S.C. 556(b). The board's regulations specifically designate that "[a]n administrative law judge will hear an action brought by an employing agency under this subpart against a respondent administrative law judge." 5 C.F.R 1201.140(a)(1); see also *Dantoni*, 77 M.S.P.R. at 521. The assigned ALJ prepares the initial decision, pursuant to 5 U.S.C. 557, that ultimately can be reviewed by the board via a petition for review. 5 C.F.R. 1201.140(a)(2). The same procedure applies when an ALJ brings an action affirmatively alleging constructive removal by an agency. 5 C.F.R 1201.142. *McDougall*, App. E, 15a-19a, *infra*. The respondent board members are well aware of the congressional statutory intent, coupled with its own explicit regulations, for the appropriate due process procedures to adjudicate an ALJ board appeal. However, by an apparent designed error, the board assigned petitioner's ALJ board appeals to a BAJ for adjudication. The error becomes even more so - designed, when despite petitioner's timely requests for his board appeals to be reassigned to a board constitutionally appointed ALJ, those requests were administratively blocked and ignored by the board. See App. G, 36a-45a; and App. H, 62a-63a, 66a-70a, *infra*.

On June 21, 2018, this Court made clear in its *Lucia* ruling that it was an agency constitutional appointment violation of Article II, 2, cl 2 of the United States Constitution for an agency (board) to allow a non- constitutional appointed employee (BAJ) to adjudicate and decide an agency matter (board ALJ appeals) mandated to be adjudicated by a constitutionally appointed agency (board) ALJ. Any

said adjudication (final board decisions PH-0752-98-0231-I-1 and PH-0731-98-0188-I-1) are unconstitutional, null and void. The matter must be reassigned to a constitutionally appointed (board) ALJ for appropriate constitutional due process relief. This Court ruled that any previous grievant who timely objected to the violation was entitled to that appropriate constitutional due process relief. *Lucia*, App. F, 22a-24a, 31a-32a, *infra*.

The board members were well aware of their appointment violation when they reopened the BAJ adjudication on their own motion, pursuant to 5 C.F.R. 1201.118, reviewed and decided the *McDougall* ALJ board appeal in 2010. In fact, the board members mandated and granted the very same *Lucia* appropriate constitutional due process relief to ALJ *McDougall*. *McDougall*, App. E, 15a-16a, 18a-19a, *infra*. However, unlike ALJ *McDougall*, the board members again refused petitioner's timely request for the same appropriate constitutional due process relief from his unconstitutional null and void final board decisions PH-0752-98-0231-I-1 and PH-0731-98-0188-I-1, petitioner had been requesting all along. App. G, 36a-45a, at 42a-43a, *infra*. The board members' action once again renewed and extended the board's constitutional appointment violation, only as it would be specifically applied to petitioner. Petitioner has established a clear and indisputable right to relief. *Cheney*, 542 U.S. at 381.

1. The lower courts' dismissal of petitioner's mandamus request for relief, as untimely, is not in accordance with the controlling law set forth by this Court's *Lucia* ruling for timely relief as established by the case facts

Although factually disregarded by the lower courts in error, petitioner's mandamus complaint to the district court specified a long uncontested history of petitioner's legal entitlement and timely requests for an ALJ due process board appeal hearing before a constitutionally appointed board ALJ. Namely, petitioner's immediate challenge to his ALJ constitutional due process denial when the board committed its initial constitution appointment violation by unexplainably assigning petitioner's ALJ board appeals to a non- constitutionally appointed BAJ for adjudication and resolution. Petitioner timely motioned and interlocutory appealed to the board members for his ALJ board appeals to be reassigned and adjudicated by a constitutionally appointed board ALJ. However, as already noted, petitioner's motion and appeal were administratively blocked by the board clerk and the BAJ. (again see App. H, 66a-70a, *infra*.)

The BAJ dismissed petitioner's ALJ board appeal of his unjustified SSA indefinite suspension/removal as not within board jurisdiction (PH-0752-98-0213-I-1). The BAJ then dismissed petitioner's discrimination claim and adjudicated petitioner unsuitable for federal employment and ordered petitioner removed and debarred from his constitutionally appointed and employed ALJ position (PH-0731-98-0188-I-1). All in clear violation of 5 U.S.C. 7521, corresponding board regulations, the APA, 5 U.S.C. 7515 (E) and a litany of established board ALJ

caselaw. Petitioner timely petitioned the board members to review and vacate the illegal BAJ's board decisions and to reassign petitioner's ALJ board appeals to a board ALJ for appropriate ALJ due process adjudication. The board members again committed a board appointment violation by its refusal to reopen, review and grant petitioner's specific request for his ALJ appropriate due process relief, as it readily did for ALJ McDougall. See again App. H, 62a-63a, *infra*.

Petitioner timely appealed the denial of his appropriate ALJ due process and the merit of the BAJ's final board decisions PH-0752-98-0213-I-1 and PH-0731-98-0188-I-1 to the district court, as a mixed discrimination and procedural due process denial case, pursuant to 5 U.S.C. 7703 (b) (2) and the board's final decision appeal instructions. App. H, 65a, *infra*. This time a timely challenge and request for petitioner's constitutional due process relief was made in federal court. *Sydnor v. Lachance*, No. JFM-99-228, slip op. at 2 (D. Md. Oct 26, 1999). Like the board, the district court ignored petitioner's request to be given his appropriate administrative board ALJ due process relief. Without a trial de nova, the district court granted a motion for summary judgment, based upon and adopting the findings of the BAJ's final board decision PH-0731-98-0188-I-1 and PH-0752-98-0213-I-1. The Fourth Circuit of Appeals affirmed. 210 F. 3d. 362 (4th Cir. 2000) (Table). Petitioner timely appealed to this Court for a writ of certiorari on the denial of petitioner's repeated request for an appropriate ALJ board appeal hearing before constitutionally appointed board ALJ, *inter alias*. App. H, 46a 70a, *infra*. This Court denied petitioner's writ of certiorari. 531 U.S. 1014 (2000).

In 2010, the board members issued their *McDougall* ALJ board decision making it clear that an ALJ board appeal is mandated to be heard by a constitutionally appointed board ALJ. The board members also made clear and mandated that any ALJ board appeal adjudicated and decided by a BAJ violated 5 U.S.C 7521, 5 U.S. C. 551, et seq (APA) and 5 U.S.C. 7515 (E) and must be vacated as null and void for lack of authority and jurisdiction. The board members also mandated that a new board hearing had to be held before a constitutionally appointed board ALJ. See *McDougall generally*, App. E, *infra*. Based upon the board members own decision and mandate, petitioner timely petitioned and motioned the board for the same mandated ALJ due process relief, the board members readily afforded ALJ McDougall. This is the same ALJ due process relief the petitioner had been requesting all along. Without any response from the board, on April 10, 2015, petitioner specifically sent a detailed letter directly to the chair board member and again timely requested the board members to vacate PH-0752-98-0213 I 1 and PH-0731-98-0188-I-1 and to grant petitioner an ALJ due process hearing before a board ALJ. On behalf of the chair board member, the board clerk responded that there was no board regulation which permitted the board to reconsider final board decisions PH-0752-98-0213-I-1 and PH-0731-98-0188-I-1. Again, see App G, 42a-43a, *infra*. A contradictory board response not in accordance with the action the board members undertook to review the *McDougall* ALJ board appeal and to render its decision and mandate. Again see App. E, 15a-16a, *infra*. Said response clearly demonstrates the board's intent to again renew and extend its constitutional appointment

violation against petitioner and to exclude petitioner from any mandated remedy.

On June 21, 2018, this Court ruled in its *Lucia* ruling that an agency commits a constitutional appointment violation to allow a non-constitutional appointed employee to adjudicate an agency matter, which is mandated to be adjudicated by a constitutionally appointed agency ALJ. Long before this Court's ruling in *Lucia*, the board members, by their own ruling, made clear that an ALJ board appeal is mandated to be adjudicated and decided by a constitutionally appointed board ALJ. Furthermore, that any such adjudication and decision by a non-constitutional appointed BAJ is null and void and must be vacated, with a new adjudication and decision by a board ALJ. *McDougall*, App. E, *infra*. It is clear that petitioner's ALJ board appeals PH-0752-98-0213-I-1 and PH-0731-98-0188-I-1 were adjudicated and decided by a non-constitutional appointed BAJ. It is also clear that the board, despite petitioner's repeated timely demands for his appropriate board ALJ due process adjudication, has repeatedly refused to afford petitioner that appropriate ALJ due process relief.

This Court in its *Lucia* ruling has deemed the board's repeated denial of petitioner's appropriate constitutional ALJ due process relief from final board decisions PH-0752-98-0213-I-1 and PH-0731-98-0188-I-1 as a board constitutional appointment violation. This Court has also made clear in its *Lucia* ruling that a grievant of the board's constitutional appointment violation, who timely makes claim for his denied appropriate constitutional due process relief, is entitled to a new and appropriate board ALJ adjudication and decision, as a matter of law. App. F, *infra*. Petitioner's timely requests and claim for his board ALJ due

process hearing has been the case over and over again here, warranting petitioner's mandamus request to the district court for his appropriate constitutional due process relief.

For over two decades, petitioner has made timely claims for his appropriate ALJ due process relief, not only to the board, but in the unsuccessful court appeals of the board's unconstitutional, null and void board decisions to the district court, the fourth circuit, and even in a writ for certiorari to this Court. All petitioner's timely claims for his appropriate ALJ constitutional due process relief were denied. Here again, petitioner timely requests a mandamus for the same appropriate due process relief from the district court, third circuit, and now again from this Court. Appropriate due process which the board members themselves mandate petitioner is entitled. More so, appropriate constitutional due process relief which this Court mandated petitioner is entitled, in accordance with the controlling law for making a timely claim, as clearly established by the facts set forth *supra*. All which the district court and the third circuit panelist misguidedly ignored in dismissing petitioner's mandamus request.

2. The lower courts errored to rule petitioner's unsuccessful appeals of a board decision, ruled unconstitutional, null and void by this Court, can still be used to deny petitioner's appropriate constitutional due process relief, denied by that same board decision

The board members successfully motioned and misguided the district court to dismiss petitioner's mandamus claim for his appropriate ALJ constitutional due process relief because petitioner had already unsuccessfully appealed those board decisions. Those same board decisions to this date, have continued to rule petitioner unsuitable, removed and debarred petitioner from his lifelong constitutionally appointed and employed SSA ALJ position. It did not matter to the board members, and was ignored by the district court and the third circuit panelist that these are the same unsuccessfully appealed board decisions which the board members themselves subsequently ruled as in violation of 5 U.S.C. 7521, the APA, and 5 U.S.C 7515 (E), and mandated by the board members to be without board authority and jurisdiction and to be vacated as null and void. It did not matter to the board members, district court, or the third circuit panelist that these are the same unsuccessfully appealed board decisions the board members themselves mandated to be unequivocally reassigned to a constitutionally appointed board ALJ for appropriate ALJ board resolution. It did not matter to the board members, district court or the third circuit panelist that this Court had deemed board decisions, such as PH-0752-98-0213-I-1 and PH-0731-98-0188-I-1 as a board constitutional appointment violation and mandated that

such be vacated as unconstitutional, null and void. As such, a mandated remedy would be a new appropriate constitutional hearing before a constitutionally appointed ALJ. *Lucia*, App. F, 31a-32a, *infra*.

The board members, district court and the third circuit panelist, in their motions, orders and opinion, make a point to lambast petitioner for his repeated, unsuccessful, but timely requests for his constitutionally entitled ALJ due process remedy. Nonetheless, petitioner's repeated timely requests for that entitled ALJ constitutional due process relief, in fact, establishes petitioners right to remedy from the board's unconstitutional appointment violations, based upon *Lucia*. The district court and third circuit are in error to grant the board members' motion to dismiss petitioner's mandamus request based upon any unsuccessful appeal of an unconstitutional, null, void and now vacated board decision, resulting from a board constitutional appointment violation. There can be no res judicata or collateral estoppel bar stemming from the litigation of an unconstitutional, null and void board decision that must be vacated and otherwise does not exist.

3. The district court erred to rely upon an unconstitutional, null and void board decision ruling to disqualify and dismiss petitioner's mandamus request for his appropriate constitutional due process relief, as set forth by this Court

The district court in its order, makes the same error the prior district court made to rely upon the faulty procedure and the merit of an unconstitutional, null and void board decision to deny petitioner his

entitled and appropriate constitutional and statutory ALJ due process relief. Based upon this Court's controlling ruling in *Lucia*, final board decisions PH-0731-98-0188-I-1 and PH-0752-98-0213-I-1 are both null and void and must be vacated because they were derived from a board constitutional appointment violation, making them unconstitutional. Also, the board members' own mandate set forth in their *McDougall* decision, make final board decisions PH-0731-98-0188-I-1 and PH-0752-98-0213-I-1 null, void and must be vacated because they were derived from a BAJ without board jurisdiction and authority. Either way, it would be error for the district court to have dismissed petitioner's mandamus action based upon any reliance on factual findings or legal conclusions derived from final board decisions PH-0731-98-0188-I-1 or PH-0752-98-0213-I-1.

Generally, in both civil and criminal cases, unconstitutional laws and rules are void *ab initio*, or from inception, as if they never existed. See *Montgomery v. Louisiana*, U.S., 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). Seemingly the same would apply to an unconstitutional board decision, without jurisdiction or authority. As such, and as specifically mandated by this Court in *Lucia* and the board members themselves in *McDougall*, the entire unconstitutional, null, and void board proceeding in PH-0752-98-0213-I-1 and PH-0731-98-0188-I-1, to include any legal and factual conclusions, are null and void and must be vacated as a matter of law.

In the district court's December 3, 2019 order, the district court cites petitioner as being determined unsuitable and uses this unconstitutional, null and void board legal and factual conclusion, set forth in PH-0731-98-0188-I-1, to exclude petitioner from any ALJ due

process procedural protection. The district court then proceeds to exclude petitioner from the *Lucia* timely coverage based upon that legal and factual conclusion, solely and ultimately determined by the unconstitutional, null and void board decision. It is legal and factual error for the district court to have dismiss petitioner's mandamus action based upon any information from a board decision lacking jurisdiction or authority and derived from a board constitutional appointment violation.

Likewise, it would also be legal and factual error for the district court to have relied upon any other prior court decision which in fact relied upon that same unconstitutional, null and void board decision to dismiss petitioner's prior court actions on his appeal of that unconstitutional, null and void board decision. This especially becomes error, when none of those prior court actions afforded petitioner a *de nova* hearing on the merit of any matter appealed from that flawed board decision. Instead, those prior courts relied solely upon what had already been decided by that unconstitutional, null and void board decision to summarily dismiss petitioner's appeals.

B. Petitioner has no other adequate means to attain his appropriate constitutional due process relief, improperly denied by the board and misguidedly dismissed by the lower courts, based upon that improper denial

Petitioner has "no other adequate means" to "attain the relief". *Cheney*, *supra* at 380-381. Appropriate constitutional and statutory due process relief becomes unavailable when the respondent lower courts look the other direction from the board's

unconstitutional actions. Notedly, when the lower courts refuse to comment on the board members repeated wrongful actions to deny petitioner the same constitutional and statutory due process relief, the board members readily afford other ALJs, unlike petitioner. See *In re Spielman*, 1 M.S.P.R 53, 1979 M.S.P.B. Lexis 115, 1 M.S.P.B. 50 (M.S.P.B. 1979), *Dantoni*, *supra* and *McDougall*, *infra*. This becomes apparent when the respondent lower courts berate petitioner in their orders and opinion for repeatedly requesting his denied appropriate constitutional and statutory due process relief, petitioner is entitled to as a matter of law. Likewise, the respondent lower courts fail to acknowledge or even mention the fact that the respondent board members admit to violating 5 U.S.C 7521, the APA, 5 U.S.C. 7515 E, by allowing a BAJ to adjudicate petitioner's board ALJ appeal. *id.* As this board violation applies to petitioner, this is a board constitution appointment violation, pursuant to this Court's ruling in *Lucia*. All which renders final board decisions PH-0752-98-0213-I-1 and PH-0731-98-0188-I-1 unconstitutional, null and void.

For over two decades, petitioner has timely and repeatedly requested the board, district and circuit courts and even this Court for petitioner's right to a fundamental ALJ board appeal hearing before a board ALJ. An appropriate due process remedy petitioner is clearly and undisputedly entitled, pursuant to 5 U.S.C. 7521, APA, and 5 U.S.C.

7515 (E). Repeatedly, the board has unexplainably ignored and the appeal courts have skirted the issue and routinely dismissed petitioner's requests for his due process relief, in reliance upon an unconstitutional, null and void board decisions. App. G; and H, *infra*. The very same scenario was the case when petitioner

was forced to board appeal and to litigate side issues radiating directly from the unconstitutional, null and void board decisions. Again, the petitioner specifically attacked the validity of the unconstitutional, null and void board decisions directly causing the issues being appealed and litigated, all resulting from the board's denial of petitioner's ALJ due process relief. Again, the board and those lower courts ignored and skirted petitioner's claim for his constitutional and statutory due process relief and relied upon the unconstitutional, null and void board decisions to dismiss petitioner's claims. See *Sydnor v. OPM*, WL 2029300 (E.D. Pa. July 11, 2007), aff'd, 356 F. App'x 175 (3d Cir. 2009); *Sydnor v. M.S.P.B.* (ALJ Board Appeal No. CB-7521-10-0003-T-1), 466 F. App'x 907 (Fed. Cir. 2012).

In June, 2018, petitioner again timely requested the district court in this current action, to mandate the board members to comply with their own mandate and the APA to vacate board decisions PH-0752-98-0213-I-1 and PH-0731-98-0188-I-1 and to afford petitioner his entitled ALJ board appeal hearing before a board ALJ. A request which the board members have repeatedly denied petitioner and now again. App. G, *infra*. With knowledge of this Court's controlling ruling in *Lucia*, and the facts supporting petitioner's timely claim for his appropriate constitutional due process relief, the board members, district and circuit courts again either ignored, defied or circumvented the constitution, federal statutes and the ruling of this Court. The respondent board members and the lower courts again relied upon the unconstitutional, null and void board decisions to deny and dismiss petitioner's appropriate constitutional claim for due process relief. App. A - D, *infra*. Once more, the board and the lower courts have

resorted to the vicious cycle of using the board's wrongdoing to justify the board's wrongdoing.

Petitioner has no other option but to again return to this Court and to seek this Court's intervention, this time in the form of a writ of mandamus for the board members and the lower courts to comply with the United States Constitution, federal due process statutes and the ruling of this Court in *Lucia*. Petitioner has "no other adequate means to attain" his appropriate constitutional due process relief. *Cheney, supra*, at 381 (citation omitted), citing *Kerr v. United States Dist. Court, Northern Dist. of Cal.* 426 U.S. 394, 403 (1976).

C. Mandamus relief is appropriate under the circumstances of this contradicted case

As previously established, there is a history in this case of petitioner's appeal to the lower courts and the lower court's refusal to mandate the board to comply with its duties and responsibilities set forth in 5 U.S.C. 7521, APA and 5 U.S.C. 7515 (E) by allowing petitioner's ALJ board appeals PH-0752-98-0213-I-1 and PH-0731-98-0188-I-1 to remain as wrongful board final decisions. Even after this Court's ruling in *Lucia*, establishing ALJ board appeals PH-0752-98-0213-I-1 and PH-0731-98-0188-I-1 as unconstitutional, null and void, the lower courts still repeatedly defend the board's wrongful actions toward petitioner by either ignoring the established controlling law or to ridiculously trying to justify the board's action. To this date, not one of the lower courts have ever nor will ever determine the continuous board actions toward petitioner violate Article II, 2, cl. 2, and the 5th Amendment of the United States Constitution, 5 U.S.C.

7521, the APA, 5 U.S.C 7512 (E) , 5 C.F.R. 1201.140 and a litany of established board caselaw. Instead, these courts would rather lambaste and attempt to humiliate petitioner for his repeated timely requests for his denied constitutional and statutory due process relief, to which he is entitled and will always be entitled.

The lower courts have allowed the board to carved out its own exception for the petitioner from the board's own statutory mandate, as well as an exception from this Court's constitutional appointment mandate, to continue its denial of petitioner's appropriate due process remedy. In essence, the lower courts have licensed the board to continue to violate its statutory ALJ due process duties and responsibilities, as well as the 5th Amendment and now the appointment clause of the United States Constitution, as applied to petitioner. As this case now stands once more before this Court, it becomes clear that a mandamus writ for petitioner's appropriate constitutional due process relief to both respondent board members and the lower courts is "appropriate under the circumstances of this case." *Cheney, supra* at 380.

A mandamus is traditionally used "to confine (in this case, a board's ALJ appeal) to a lawful exercise of its prescribed jurisdiction. Granting a mandamus to enforce the board's ALJ appeal due process to comply with Article II, 2, cl. 2 of the United States Constitution, 5 U.S.C. 7521, the APA, and 5 U.S.C. 7512 E would do just that. *Cheney, ibid*, citing *Roche v. Evaporated Milk Assoc.*, 319 U.S. 21, 26 (1943). A mandamus is particularly appropriate here where you have the lower courts perpetuating the board's violation of the United States Constitution and federal due process statutes by not interceding to mandate the board's compliance. *ibid*. The board's actions

constitute "exceptional circumstances" amounting to a judicial "usurpation of power" *Will v. United States*, 389 U.S. 90, 95 (1967) and a "clear abuse of discretion" *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 376, 383 (1953), either which "will justify the invocation of this extraordinary remedy". *Will*, 389 U.S. at 95.

CONCLUSION

For the foregoing reasons, the court should issue a writ of mandamus directing the district court and the board to afford petitioner his appropriate constitutional due process relief, as set forth in this Court's *Lucia* ruling. Alternatively, the Court should construe this petition as either (1) a petition for a writ of certiorari seeking review of the court of appeals' December 14, 2020 decision to affirm the district court's dismissal or (2) a petition for a common law writ of certiorari seeking review of the district court's orders dismissing petitioner's mandamus for appropriate constitutional due process relief, and grant certiorari on the questions presented.

Respectfully Submitted,
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