No. 22-838

In the Supreme Court of the United States

INTEGRITY ADVANCE, LLC AND
JAMES R. CARNES,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF

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INTRODUCTION

Instead of recognizing the constitutional taint and confusion that persists in administrative hearings post-*Lucia*, the government blindly plows ahead with arguments for an amorphous de novo "solution." Br. in Opp. 9. As Integrity Advance has shown, Pet. 19–25, this "solution" only results in rubberstamping tainted decisions, thus depriving litigants of the remedy outlined in *Lucia*'s clear and simple terms: a "new hearing." The Constitution demands more than superficial remedies, but that is all Integrity, Carnes, and many others have received under the interpretation of *Lucia* the government urges here.

The government invites this Court to sidestep the *Lucia* "new hearing" issue by making three misleading and erroneous claims. First, it remarkably claims there is *no confusion* in the lower courts and agencies over *Lucia*'s remedy. Next, it claims a new "hearing" must be interpreted in the narrowest sense, requiring *only* written submissions and paper record review. Finally, it claims Appointments Clause violations are not structural errors requiring *actual* new proceedings. The government is simply wrong—once, twice, three times.

Once the government's flawed arguments are revealed, the government offers no reason why the Court should not grant this case to provide guidance on *Lucia*'s remedy. Lower courts are desperately seeking the Court's instruction. See, *e.g.*, *Calcutt v. FDIC*, 37 F.4th 293, 320 (6th Cir. 2022) ("*Lucia* does not specify what features a 'new hearing' must contain . . . . Other decisions addressing the remedies for

Appointments Clause violations are similarly vague."). And no one can legitimately dispute the agencies are all over the map in their approaches. Only the Court can provide authoritative guidance on this unresolved issue.

The government similarly seeks to minimize Integrity's separation of powers challenge to the Consumer Financial Protection Bureau's ("CFPB") funding scheme. The government both downplays the fundamental severity of this constitutional violation, and denies this Court's authority to consider new arguments in support of preserved claims.

The Court should grant the petition.[1]

ARGUMENT

I. This Court should grant this case to clarify *Lucia*'s new hearing remedy.

A. The lower courts and agencies are badly fractured over how to remedy Appointments Clause violations.

The government ignores both an active circuit split and a morass of agency decisions in its attempt to

[1] Petitioners recognize the Court's grant of certiorari in *CFPB v. Community Financial Services Association of America*, No. 22-448 (Feb. 27, 2023) may affect this petition. We respectfully suggest the Court might take two possible approaches, although there may be others. One is to grant Question 1 in this case and direct a briefing schedule that permits the Court to resolve this case contemporaneously with *Community Financial Services*. Another option is to hold this case pending resolution of *Community Financial Services* and then decide whether to grant Question 1, or to resolve this case on the basis of Question 2.

dissuade this Court from granting certiorari. Br. in Opp. 14–16. It mischaracterizes the extent of confusion below, and either misunderstands this Court's power of review or misrepresents the constitutional violation at issue. All three weigh in favor of granting the petition.

The government notes the Tenth Circuit joined two other circuits in deciding paper record "de novo review" satisfies *Lucia*. Br. in Opp. 14–15. But the government ignores that other circuits have reached the opposite conclusion: the Fourth Circuit recently held the proper remedy for an Appointments Clause violation is "a *new and plenary hearing* before a different and properly appointed ALJ." *Brooks v. Kijakazi*, 60 F.4th 735, 743–44 (4th Cir. 2023) (emphasis added). Litigants in the Fourth Circuit will now receive a completely new hearing, while litigants in the Sixth, Tenth, and Federal Circuits may only receive mere paper review, or more, depending on the agency and ALJ. These decisions—all interpreting *Lucia*—stand diametrically opposed.

Further, the Ninth Circuit appears to agree with the Fourth Circuit. It recently described *Lucia* as promulgating a "remed[y] with bite," and mandating "a *different*, validly appointed ALJ to rehear and adjudicate [the] case de novo." *Cody v. Kijakazi*, 48 F.4th 956, 963 (9th Cir. 2022) (emphasis in original). The Ninth Circuit's use of "de novo" cannot be squared with the Tenth Circuit's "de novo on a paper record" approach in this case. The Ninth Circuit disavowed, among other things, the ALJ's reliance on evidence from the tainted proceedings. *Id.* at 961–62.

The court also emphasized there should be an opportunity to present new evidence when the ALJ "reached the same conclusion" as the tainted decision. *Id.* at 962–63. The Ninth Circuit ultimately concluded that *Lucia* required "ordering a review *untouched* by" the tainted ALJ. *Id.* at 962 (emphasis added).[2]

The circuits are split on Question 1 in the petition. The Fourth and Ninth Circuits abide by *Lucia*'s directive; the Sixth, Tenth, and Federal Circuits grant agencies leeway to rubberstamp tainted decisions through paper review. And while the government acknowledges *Calcutt*'s outcome, Br. in Opp. 15, it specifically ignores the Sixth Circuit's call for help: "*Lucia* does not specify what features a 'new hearing' must contain . . . Other decisions . . . are similarly vague." 37 F.4th at 320. Only this Court can grant the necessary guidance to clarify *Lucia*'s new hearing remedy and resolve the circuit split.

The confusion in the courts, however, pales compared to the chaos in the agencies. As Integrity has shown, Pet. 11–18, agencies' interpretations of *Lucia* vary drastically. Some ALJs follow the Solicitor General's own advice and offer parties a chance to cure tainted proceedings. Pet. 11–13. Other ALJs take the opposite approach and give parties no more than paper review, as here. Pet. 13–16. Yet a third category

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[2] District courts are already following these precedents to divergent ends. For example, the U.S. District Court for the District of Colorado read *Cody* and *Lucia* as requiring "a new plenary hearing," *Rajo v. Kijakazi*, No. 19-CV-03010-NRN, 2023 WL 2596452, at *3, *5 (D. Colo. Mar. 22, 2023), instead of following the Tenth Circuit's ruling in this case.

of ALJs grant themselves discretion to address the constitutional violation as they see fit. Pet. 16–18. The government makes no effort to explain these discrepancies; in fact, it does not even *acknowledge* their existence. See Br. in Opp. 16 ("[E]ven if there were disagreement among *ALJs or agencies* about how best to implement Lucia's new hearing instruction . . .") (emphasis in original).

The government mistakenly suggests only a circuit split could warrant review. Br. in Opp. 16. While that standard is met here for the reasons discussed above, the government's argument also undermines this Court's power of review. This Court's discretion is broad enough to encompass cases, like this one, that hinge on important questions of federal law, regardless of the precise state of conflict below. Here, the question at issue involves nothing less than the constitutional remedy guaranteed to litigants—which only this Court can define.

And the lower court and agency decisions interpreting *Lucia*'s remedy are anything but uniform. Agencies are flowering with new theories on how to correct the violation, and several circuits have answered with directly contradictory precedents. Litigants nationwide are receiving wildly different remedies. Though *Lucia* was straightforward in directing there be a "new hearing," the Court needs to provide even more clear instructions for the lower courts and agencies to follow.

B. *Lucia*'s new hearing remedy cannot be satisfied by paper record review in adversarial proceedings.

Paper review of the tainted record in an administrative enforcement action cannot satisfy *Lucia*. The government offers out-of-context suggestions to the contrary, none of which refute that a "hearing" in an adversarial proceeding requires more than submission of written materials alone. The government obfuscates this fact by claiming *Lucia* and *Ryder* "focus only on the need for a new adjudicator with a constitutional appointment who can consider the matter afresh." Br. in Opp. 10 (citing *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018); *Ryder v. United States*, 515 U.S. 177, 188 (1995)) (internal quotations omitted).[3] But if this view were correct—and perfunctory paper record review was sufficient—it would render *Lucia*'s "new hearing" language a total afterthought. That cannot be true.

The government's reliance on *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1975), is misplaced. First, *Florida East Coast* is a statutory construction case, where the Court interpreted Congress's use of the term "hearing" in the Interstate Commerce Act. *Id.* at 238. It is unclear what weight (if

[3] This reading is particularly confusing in light of *Lucia*'s holding to the contrary. 138 S. Ct. at 2055 n.5 ("[W]e do not hold that a new officer is required for every Appointments Clause violation."). Notably, the Court did not craft a similar exception to the new hearing requirement.

any) statutory construction precedent carries in a constitutional remedy case.[4]

Nevertheless, the government claims *Florida East Coast* does not "require an agency either to hear oral testimony, to permit cross-examination, or to hear oral argument." Br. in Opp. 10 (cleaned up). This vastly overstates the case's holding. *Florida East Coast* recognized "the term 'hearing' in its legal context undoubtedly has a host of meanings." 410 U.S. at 239. The meaning varies "depending on whether it is used in the context of a rulemaking-type proceeding or a proceeding devoted to the adjudication of particular facts." *Id.* As there is a "recognized distinction" between an administrative rulemaking proceeding and an administrative adversarial proceeding, *id.* at 245, a rulemaking "hearing" can be satisfied without oral testimony. But the proceedings here clearly fall in the adversarial category; therefore, they require an *actual* oral hearing, not just a paper review. *Id.* at 244–45.

Judge Friendly's article comes to the same conclusion. Again, the government presents a contextless quote to claim a hearing "need not include 'oral presentation,' but rather can consist of presentation of argument 'in written form.'" Br. in Opp. 10–11 (citing Henry J. Friendly, *"Some Kind of*

[4] It is clear precedent "applies with special force to questions of statutory construction." Bryan A. Garner et al., *The Law of Judicial Precedent* 333 (2016). But *Lucia*'s remedy is constitutional and judicially-derived, thus differentiating it from *Florida East Coast*. "[M]aterial differences," like this, can render precedent "wholly inapplicable" to the case at hand. *Id.* at 97.

Hearing", 123 U. Pa. L. Rev. 1267, 1281 (1975)). The full sentence reads much differently:

> Determination whether or not an oral hearing is required *should depend* on the susceptibility of the particular subject matter to written presentation, on the ability of the complainant to understand the case against him and to present his arguments effectively in written form, and on the administrative costs.

Friendly, 123 U. Pa. L. Rev. at 1281 (emphasis added).

Judge Friendly's example of a hearing satisfied by written submission is "direct testimony by expert witnesses" in scientific administrative proceedings, which are generally "not the subject of controversy" and where "the value of observing demeanor is minimal." *Id.* at 1281 n.79. Uncontroversial expert testimony is a far cry from the proceedings here, which closely resembled a criminal trial—turning on credibility determinations and resulting in over $40 million in personal liability. Pet. 6–7.

As this Court has recognized, "where credibility and veracity are at issue . . . written submissions are a *wholly unsatisfactory* basis for decision." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (emphasis added). Ignoring *Goldberg*'s directive, the government endorses ALJ Kirby's erroneous belief that she could make credibility determinations based on cold record review. Br. in Opp. 13. But this misguided belief resulted in "near-automatic" acceptance of the tainted ALJ's credibility determinations. *Lucia*, 138 S. Ct. at

2055. To correct the violation, ALJ Kirby was required to hear oral testimony and make new credibility determinations. She did not, and the taint remained.

Factfinders like ALJ Kirby abdicate their responsibility by making credibility determinations based on paper review only. Pet. 22–25. Credibility determinations are clearly controversial here, where the government claims ALJ Kirby actually *credited* Carnes' testimony. Br. in Opp. 13–14. Integrity disagrees: the paper record shows Carnes' frequent confusion about the CFPB's questions,[5] the tainted ALJ regularly interjected and asked independent questions that shaped Carnes' testimony,[6] and ALJ Kirby not only ruled against Integrity and Carnes, but recommended financial liability *three times* that recommended by the tainted ALJ.[7] Paper review of a tainted record cannot satisfy *Lucia* in a case like this.

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[5] See, *e.g.*, CFPB Doc. 172, at 228 (Sept. 9, 2016) ("Explain – I don't understand that – what you are saying. I may have flipped through a loan agreement, your concept of review I'm not sure what it means.").

[6] See, *e.g.*, CFPB Doc. 172, at 218–220 (Sept. 9, 2016) (tainted ALJ questioning Carnes about his knowledge of Integrity's loan agreements).

[7] ALJ Kirby arguably engaged in retaliation by nearly tripling the recommended financial liability following her limited paper review. Pet. 6. Even the Director recognized this when she adopted the financial liability recommended by the original, tainted ALJ. The government laughably attempts to re-frame this action by ALJ Kirby as evidence that she did not "simply rubberstamp" the tainted decision. Br. in Opp. 12.

C. Appointments Clause violations are structural errors, which require both automatic reversal and new proceedings.

Courts recognize Appointments Clause violations "seem most fit to the doctrine of structural error." Pet. 21 (quoting *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000) (brackets omitted)); see also *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 123 (D.C. Cir. 2015) ("[A]n Appointments Clause violation is a structural error."). The government ignores this reality despite the Court ordering a structural remedy in *Lucia*: both automatic reversal *and* a new hearing. 138 S. Ct. at 2055–56. Again, the government stubbornly insists the Court's directive of a "new hearing" does not really mean an actual new proceeding. Such doublespeak is not true.[8]

Structural errors require both automatic reversal *and* new proceedings. And new proceedings cannot be mere paper review of the tainted record, but actual new proceedings that start afresh. See, *e.g.*, *McCoy v. Louisiana*, 138 S. Ct. 1500, 1512 (2018); *Presley v. Georgia*, 558 U.S. 209, 216 (2010); *Sullivan v. Louisiana*, 508 U.S. 275, 281–82 (1993); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927). When "the error [is] structural," as here, "a new [proceeding] is the required corrective." *McCoy*, 138 S. Ct. at 1512.

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[8] George Orwell, 1984, at 53 (1949) ("In the end, the Party would announce that two and two made five, and you would have to believe it.").

The government relies on *Waller v. Georgia*, 467 U.S. 39 (1984) to suggest otherwise; however, *Waller* is merely a limited exception to the general rule. There, the trial judge prohibited the public from viewing a pretrial suppression hearing, a structural error. *Id.* at 41–43. Because the error only occurred in the suppression hearing, the Court ordered a new suppression hearing, not an entirely new trial. *Id.* at 49–50. A new trial was only warranted if the judge came to a different conclusion during the new suppression hearing. *Id.* at 50. *Waller* carves out a very narrow exception: an entirely new proceeding is not required *only* when the structural error did not infect the entire proceedings.

Here, the original ALJ's proceeding was tainted start to finish. An entirely new proceeding is required to remedy the Appointments Clause violation.[9]

II. This Court can and should consider the unconstitutional funding arguments raised in this case.

Integrity asks this Court to review the separation of powers violation in the CFPB's funding scheme. In

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[9] As Integrity recognized, parties can agree some tainted evidence does not need to be regenerated, particularly if the evidence is uncontroversial. Pet. 28 n.5. The government misrepresents this as inconsistency. Integrity simply suggests a scalpel-like approach to *Lucia*'s remedy, allowing for flexibility where the parties can agree. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2210–11 (2020) (remedying structural constitutional defects requires "a scalpel rather than a bulldozer."). In contrast, the government's bulldozer approach calls for one uniformly blunt method, condemning litigants to the same decision as the tainted one.

response, the government sidesteps Integrity's arguments, dismissing them as "incorrect for the reasons given in the government's petition" filed in *CFPB v. Community Financial Services Association of America*, No. 22-448 (Feb. 27, 2023). Br. in Opp. 16.

The government similarly avoids Integrity's issue preservation arguments, offering circuit-level precedent and one general recitation from *United States v. Williams*, 504 U.S. 36 (1992), of the Court's "traditional rule" for review. Br. in Opp. 17. It ignores that the *Williams* Court actually *granted* certiorari, despite the petitioner not raising the particular question in the matter below, finding it "a permissible exercise of our discretion to undertake review of an important issue." 504 U.S. at 44. It also ignores Integrity's citations of post-*Williams* cases affirming this Court's broad authority. See *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Davis v. United States*, 512 U.S. 452, 464 (1994) (Scalia, J., concurring) ("[T]he refusal to consider arguments not raised is a sound prudential practice, rather than a statutory or constitutional mandate, and there are times when prudence dictates the contrary.").

Integrity has claimed the CFPB's structure violates the separation of powers from the start. See CFPB Doc. 34, at 3–4 (Jan. 26, 2016). This Court may consider "any argument in support" of a "federal claim [once] properly presented." *Lebron*, 513 U.S. at 379, and should do so here.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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