No. 17-130

IN THE

Supreme Court of the United States

RAYMOND J. LUCIA, *et al.*,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

BRIEF FOR WING F. CHAU AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

In the wake of the financial crisis that began in 2007, the U.S. Securities and Exchange Commission (the "Commission" or SEC) investigated finance professionals and firms that participated in various ways in the creation and marketing of securities such as Collateralized Debt Obligations (CDOs) whose demise was blamed for precipitating the crisis. *Amicus curiae* Wing F. Chau is a principal of Harding Advisory, LLC, a collateral manager who analyzed and helped select collateral securities for a number of CDOs (and managed those CDOs) until they experienced events of default when the crisis hit. In October 2013, the SEC charged Mr. Chau and Harding Advisory (collectively, "Harding") with fraud in connection with the assembly of collateral for and marketing of one CDO and also in connection with purchasing certain bonds of a non-Harding CDO for two other CDOs that Harding managed. These charges were brought administratively, and the hearing was assigned to SEC Administrative Law Judge (ALJ) Cameron Elliot, the same ALJ who presided over the Petitioners' case. Harding is one of the petitioners to the U.S. Court of Appeals for the District of Columbia Circuit whose petition is being held in abeyance pending the resolution of this case. Brief for Petitioners at 48-49, *Lucia v. SEC*, No. 17-130 (Feb. 21, 2018) ("Pet'rs Br.").

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1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or his counsel made a monetary contribution intended to fund the preparation or submission of this brief. Both Petitioners and Respondent have consented to the filing of this brief.

Despite the fact that, as demonstrated in this brief, Congress intended SEC administrative hearings to be conducted by officers of the United States because of the power they wield and to assure fairness, competence, and political accountability, numerous crucial decisions that drove the outcome of Harding's case were made by ALJ Elliot (who was not properly appointed) or by other SEC employees who acted on behalf of the Commission and exercised its power also without proper appointment. In other words, not a single properly-appointed officer can be held accountable for these decisions; neither the Commission, nor any individual Commissioner, and not ALJ Elliot. As a result, the Commission can disclaim political accountability by pretending that an "independent" ALJ made the relevant decisions and ALJ Elliot can disclaim responsibility by relying on SEC processes and procedures. The Commission should not be allowed to treat constitutional and congressional prescriptions about delegation of authority and diffusion of political responsibility so lightly.

Treating constitutional edicts as suggestions not commands, both the Commission and ALJ Elliot cloaked ALJ Elliot in the trappings of an officer without appointing him as one. The SEC described ALJ Elliot's functions as those of an officer:

> Administrative law judges are independent judicial officers who rule on allegations of securities law violations in public administrative proceedings instituted by the Commission. They conduct public hearings, in a manner similar to non-jury trials in federal district courts, issue

> initial decisions, and have authority to impose a broad range of sanctions.

Press Release, SEC Announces Arrival of New Administrative Law Judge Cameron Elliot, U.S. Sec. & Exch. Comm'n (Apr. 25, 2011), https://www.sec.gov/news/press/2011/2011-96.htm. To command respect and exude authority, ALJ Elliot signed subpoenas as "an officer designated by the Securities and Exchange Commission," allowed himself to be called "Your Honor," and had litigants stand up when he entered the courtroom or when they addressed him.[2] *See* Subpoena *Ad Testificandum*, *In re Harding Advisory LLC*, Admin. Proc. File No. 3-15574 (Mar. 14, 2014), attached as Exhibit, at 1a.

It is no accident, therefore, that the case against Harding was brought administratively; with no one responsible, no one needed to take responsibility for any unfairness, and the proceeding was rife with unfairness. The starkest example of this is the management of the hearing schedule. The issues in Harding's case were highly complex and involved a very large volume of material. (The Division of Enforcement's initial production alone was the equivalent of the entire printed contents of the Library of Congress.) Because of the complexity and the volume of materials, Harding asked ALJ Elliot for an additional six months to prepare for the hearing. (At the time, SEC Rules of Practice required the issuance of the initial decision of the ALJ within 300 days of service of the order instituting proceedings.) *See* Supplemental

2. His representation that he was "an officer of the Commission" is, of course, a misrepresentation. He is an employee who performed officer functions without proper appointment.

Briefing in Support of Respondents' Appeal Regarding Their Due Process Claims at 4-5, *In re Harding Advisory, LLC*, Admin. Proc. File No. 3-15574 (June 9, 2015).[3]

In response to Harding's motion to extend the 300-day deadline by six months, ALJ Elliot claimed that he sympathized but that his hands were tied by the Commission, and then denied the request. *See* Order Denying Respondent's Motion for Adjournment at 1-2, *In re Harding Advisory, LLC*, Admin. Proc. File No. 3-15574, 2014 WL 10937716, at *1-2 (Jan. 24, 2014). When Harding filed an interlocutory appeal of this denial to the Commission, the Commission itself did not rule. Rather, the SEC's Office of General Counsel ruled on the appeal **by delegated authority**; none of the Commissioners was involved in that decision. *See* Order Denying Petition for Interlocutory Review and Emergency Motion to Stay the Hearing and Prehearing Deadlines at 14, *In re Harding Advisory, LLC*, Admin. Proc. File No. 3-15574, 2014 WL 988532, at *8 (Mar. 14, 2014). In other words, not a single properly-appointed officer of the United States ruled on something as significant as whether the arbitrary deadline imposed by the Commission Rules of Practice deprived Harding of the ability to prepare adequately. Ironically, despite denying Harding six additional months to prepare—and finding that "one day" there may be "an administrative proceeding where the difficulties of preparing for hearing [sic] within the time specified . . . are found to warrant some extraordinary relief . . . but this is not that proceeding," *see id.* at 2—after the hearing, ALJ Elliot asked the Commission for four additional

3. The SEC docket for *In re Harding Advisory, LLC,* Admin. Proc. File No. 3-15574, can be located at: https://www.sec.gov/litigation/apdocuments/ap-3-15574.xml.

months to file his initial decision, citing the volume of the record and the complexity of the issues. The Commission granted his request. *See* Order Granting Extension, *In re Harding Advisory, LLC*, Admin. Proc. File No. 3-15574, 2014 WL 4160053 (Aug. 21, 2014) (noting, among other things, that ALJ Elliot "held seventeen days of hearing [sic] in this matter, which involved nearly 5,000 pages of transcript, nearly 1,400 exhibits, and more than 500 pages of post-hearing briefs," and finding that it was in the public interest to extend the deadline).

Another indication of the SEC and ALJ Elliot taking officer status lightly is ALJ Elliot's apparent view that if the Commission alleged liability, it was his job to find liability. As the Petitioners note, ALJ Elliot invariably found for the Commission in his first three years as an ALJ—50 out of 50 cases. *See* Pet'rs Br. at 6; Jean Eaglesham, *Fairness of SEC Judges Is in Spotlight*, Wall St. J. (Nov. 22, 2015), https://www.wsj.com/articles/fairness-of-sec-judges-is-in-spotlight-1448236970 (stating that as of November 22, 2015, ALJ Elliot "has found the defendants liable in every contested case he has heard" and that "[h]e dismissed a case for the first time in August").[4]

4. It appears that in the one referenced instance of ALJ Elliot ruling for the respondent, he also found liability but refused to impose sanctions based on the respondent's personal circumstances. *See In re Judy K. Wolf*, Admin. Proc. File No. 3-16195, 2015 WL 4639230, *19-23 (Aug. 5, 2015). Since November 22, 2015, ALJ Elliot has issued 59 initial decisions, and all but two of these decisions have been adverse for the respondents. However, neither outcome in those cases alters ALJ Elliot's record. *See In re GCA Acquisition Corp.*, Admin. Proc. File No. 3-17868, 2017 WL 2000697, at *1 (May 12, 2017) ("After investigating the matter, the Division filed a brief and a declaration expressing the belief that the proceeding against

Indeed, in Harding's case, ALJ Elliot was so determined to find liability that he adopted an uncharged negligence theory when it became clear that there was no evidence to support the Commission's allegation of willfulness, stating: "in order to find an intent to defraud, I would have to disbelieve every single lay witness who testified on the subject." Initial Decision at 66, *In re Harding Advisory, LLC*, Admin. Proc. File No. 3-15574, 2015 WL 137642, at *63 (Jan. 12, 2015). Despite ALJ Elliot's effort to do the Commission's bidding, even the Commission recognized that the uncharged negligence theory was defective and reversed. Opinion of the Commission at 6-7, *In re Harding Advisory, LLC*, Admin. Proc. File No. 3-15574, 2017 WL 66592, at *5 (Jan. 6, 2017). ALJ Elliot's second finding of liability (with respect to the purchase of two non-Harding bonds for two Harding-managed CDOs—each of these bonds represented approximately 1.6% of the collateral of each of those Harding-managed CDOs) is similar. Here, ALJ Elliot found that Harding bought the two bonds despite having a negative opinion of them. Not a single witness testified that Harding disliked the bonds. Mr. Chau denied disliking the bonds. But ALJ Elliot did not find Mr. Chau credible and the Commission later upheld ALJ Elliot's finding of liability, in large part, by deferring to ALJ Elliot's credibility findings. *See id.* at 15-17, 2017 WL 66592, at *12-13. It is worth pointing out, however, that ALJ Elliot's credibility findings on issues of asset selection may have been infected by his failure to understand the instruments at issue; despite contrary

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International Metals should be dismissed."); *In re Gary L. McDuff*, Admin. Proc. File No. 3-15764, 2016 WL 7324412, at *2, 17-18, 20 (Dec. 16, 2016) (ALJ Elliot dismissed claims after the Commission reversed his prior finding of liability on the pleadings in a case involving a *pro se* defendant serving 300 months in prison).

testimony and disclosures in the relevant deal documents, he did not understand that the securities Harding selected for its CDOs were investment grade. Initial Decision at 4, *In re Harding Advisory, LLC*, 2015 WL 137642, at *4.

Mr. Chau submits this brief to demonstrate that Congress understood that the power wielded by SEC ALJs is immense and the consequences of their actions are grave, and thus that the constitutional requirements for officers and their appointment are meaningful. The SEC's shifting claims that ALJs are akin to U.S. district court judges conducting trials, but that they are mere employees, and most recently, that their initial defective appointments can be "ratified," make a mockery of the Constitution's deliberate choice to require clear and specific appointment of those wielding the executive power of the United States. Assuming proper appointment as officers of the Commission, SEC ALJ's conduct would be directly imputed to the Commission; the Commission could not then hide behind the pretense that ALJs are independent actors doing something other than wielding the Commission's power.

SUMMARY OF ARGUMENT

As both the Petitioners and the government persuasively argue, the *Lucia* panel misapplied this Court's long-standing, uninterrupted precedent for determining whether a government official's duties render him or her a constitutional officer who must be appointed in conformity with the Appointments Clause. *See* Pet'rs Br. at 26-33; Brief for Respondent Supporting Petitioners at 33-38, *Lucia v. SEC*, No. 17-130 (Feb. 21, 2018) ("Resp't Br."). Separately, the panel also incorrectly dismissed

clear congressional intent (expressed in plain statutory language as well as legislative history) that SEC ALJs must be properly-appointed constitutional officers. *See Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 289 (D.C. Cir. 2016), *aff'd en banc by an equally divided court*, 868 F.3d 1021 (D.C. Cir. 2017). This *amicus* brief focuses on the second of those defects. The relevant statutes and their legislative histories demonstrate beyond doubt that Congress intended that Commission hearings be held by "Officers of the United States" only. As discussed below, Congress understood that it was delegating significant executive power to SEC ALJs and wanted that power to be wielded by people of rank and responsibility as insurance against abuses of power, and so that the public would view administrative proceedings as meaningful, competent, and fair. The panel's decision thwarts clearly expressed congressional language, understanding, and intent.

The *Lucia* panel's error in this respect can be traced directly to the SEC's argument below, which the panel adopted verbatim. The federal securities laws command that hearings "be held before the Commission or *an officer or officers of the Commission designated by it*," *see, e.g.*, 15 U.S.C. § 77u (emphasis added), yet the SEC consistently argued (until the government here conceded error below) that "there is no indication Congress intended these officers to be synonymous with 'Officers of the United States,'" *Raymond J. Lucia Cos.*, 832 F.3d at 289; *see also* Opinion of the Commission, *In re Raymond J. Lucia Cos.*, Admin. Proc. File No. 3-15006, 2015 WL 5172953, at *23 n.122 (Sept. 3, 2015). Congress's deliberate use of the words "officer or officers" is, of course, the best possible indication of that very intent, because the word "officer" is imbued with constitutional meaning. The relevant

legislative history is another good indication. Yet, the panel said nothing about the statutory interpretation points raised by the *amici*, nor did it address the legislative history demonstrating that Congress meant and understood that the terms "constitutional officers" and "officers" were synonyms. *See* Brief of Mark Cuban as *Amicus Curiae* in Support of Petitioners, *Raymond J. Lucia Cos.*, 832 F.3d 277 (Feb. 8, 2016) (No. 15-1345).

The panel's sole reference to congressional intent was its observation that it found no evidence of congressional intent "that the ALJ who presides at an enforcement proceedings [sic] be delegated the sovereign power of the Commission to make the final decision." *See Raymond J. Lucia Cos.*, 832 F.3d at 287 (emphasis added). This observation is incorrect because, as the government concedes, the statutory scheme does permit SEC ALJs to issue final decisions. Resp't Br. at 34. This observation is also beside the point, for it confuses *what* may be delegated with *to whom*. In any event, it is clear from the legislative history that Congress's intent was not dependent on delegation of power to issue final decisions; Congress required that hearings be held by constitutional officers because of the seriousness of the subject matter as well as the powers attendant to conducting them (and even gathering evidence in advance of them).

As the Director of the SEC's Division of Enforcement conceded in briefing the Commission on the same issue in one of the 13 matters that will be impacted by the Court's decision, *see* Pet'rs Br. at 48: "The Constitution assigns to Congress the authority to determine, in the first instance, whether a position it creates is that of an officer or of an employee, and '[t]hat constitutional assignment to Congress

counsels judicial deference.'" Division of Enforcement's Memorandum of Law in Response to the Commission's May 27, 2015 Order Requesting Supplemental Briefing, *In re Timbervest, LLC*, Admin. Proc. File No. 3-15519 (July 1, 2015) (first quoting U.S. Const. art. II , § 2, cl. 2, then quoting *In re Sealed Case*, 838 F.2d 476, 532 (D.C. Cir.) (Ginsburg, J., dissenting), *rev'd sub nom. Morrison v. Olson*, 487 U.S. 654 (1988)), https://www.sec.gov/litigation/apdocuments/3-15519-event-148.pdf.

When the securities laws and the APA are read together, both the statutes and the legislative histories unmistakably show that Congress intended that SEC ALJs had to be officers of the United States. This congressional determination is fully rational and merits acceptance, as evidenced by the fact that the Petitioners, the government, and most of the court of appeals judges who have analyzed the issue agree that SEC ALJs wield the power of constitutional officers.[5]

ARGUMENT

I. THE SECURITIES LAWS REQUIRE THAT OFFICERS HOLD SEC HEARINGS.

Congress chose the following language to authorize SEC hearings:

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5. *See Raymond J. Lucia Cos.*, 868 F.3d 1021 (*en banc* decision resulting in an equally divided court: 5-5); *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016) (panel decision resulting in two of three judges on the panel holding that SEC ALJs are constitutional officers).

> All hearings shall be public and may be held before the Commission or ***an officer or officers of the Commission designated by it*** . . . .

Securities Act of 1933, 15 U.S.C. § 77u (emphasis added).[6]

Plain language of legislation must be given its plain meaning. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) ("[W]e begin by analyzing the statutory language, 'assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose.' We must enforce plain and unambiguous statutory language according to its terms." (citations omitted)); *United States v. Germaine*, 99 U.S. 508, 510 (1878) (finding that when Congress uses the phrase "officers of the United States," it means constitutional officers and stating that an intent to describe someone other than a constitutional officer is denoted by words such as "servant, agent, person in the service or employment of the government"). Unless contrary intent is apparent, in other words, one must assume that Congress meant "officers" in the constitutional sense when it used the word "officers" for at least four reasons. First, the word "officer" is imbued with significant meaning in our constitutional framework—Article II, Section 2 of the Constitution itself refers to the "principal Officer in each of the executive Departments," "Officers of the United States," and "inferior Officers." U.S. Const. art. II, § 2; *see*

6. *See also* Securities Exchange Act of 1934, 15 U.S.C. § 78v ("Hearings . . . may be held before the Commission, any member or members thereof, or any officer or officers of the Commission designated by it . . . ."); Investment Advisers Act of 1940, 15 U.S.C. § 80b-12 (same); Investment Company Act of 1940, 15 U.S.C. § 80a-40 (same).

Buckley v. Valeo, 424 U.S. 1, 125-26 (1976). Second, this Court has expressly interpreted the phrase "officer of the United States" in legislation as meaning a constitutional officer, *see Germaine*, 99 U.S. at 510, and Congress's choice of that language should be deemed to incorporate the Court's interpretation, *see Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 589-90 (2010) ("[W]hen 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'" (citations omitted)). Third, the grouping of the Commission itself with its officers in this provision implies a parity of stature—*i.e.*, Congress's reference to "officers" is a reference to constitutional officers because they are equally empowered to "exercis[e] significant authority pursuant to the laws of the United States." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 486 (2010) (quoting *Buckley*, 424 U.S. at 125-26). Finally, the word "designated" indicates that the Commission cannot empower someone who is not already an officer to serve in officer capacity for the purpose of holding a hearing; only someone who is already an officer—properly appointed and sworn in—may be *designated* to hold such a hearing.

II. LEGISLATIVE HISTORY OF THE SECURITIES LAWS CONFIRMS THAT CONGRESS USED THE WORD "OFFICER" TO MEAN CONSTITUTIONAL OFFICER.

The relevant legislative history confirms that Congress meant SEC hearings to be administered by constitutional officers.

A. The Legislative History of the Securities Act.

Empowering administrative agencies with significant adjudicatory powers was a significant undertaking in 1933. Indeed, at that time, the administrative state expanded rapidly, both through the creation of new agencies and the growth of established agencies. *See* Attorney Gen.'s Comm. on Admin. Procedures, U.S. Dep't of Justice, Final Report of Attorney General's Committee on Administrative Procedure 7-11 (1941) ("Attorney General's Committee Report"). In the 1930s alone, Congress created and authorized 17 federal agencies, including the SEC. *Id.* at 10. Congress, therefore, grappled not only with the particulars of what subject areas each federal agency would regulate and what shape those regulations should take, but also with the question of who should wield the newly-expanded powers of the executive branch. Put differently, Congress was intensely focused on which individuals within each agency should exercise certain powers and functions, and, therefore, Congress chose its words carefully.

With this as backdrop, congressional debate in connection with the House bill that eventually became the Securities Act of 1933 reflects deep concerns about vesting any non-judicial officer with the power to hold hearings, administer oaths and affirmations, compel attendance, and recommend severe sanctions. Indeed, initially there was even dissension as to whether the Commission itself and any of its members—all principal officers—should wield this power.

The initial House of Representatives' draft of the Securities Act of 1933 would have authorized the

Commission (then the Federal Trade Commission) to revoke a company's registration if, among other things, it found that the company was in "unsound condition." *See, e.g.*, H.R. 4314, 73d Cong. § 6 (1933). Certain members of Congress expressed concern that the power to take away someone's business because it was "unsound" was both unprecedented and immense. *See, e.g.*, *Federal Securities Act: Hearing Before the H. Comm. on Interstate & Foreign Commerce*, 73d Cong. 44-45 (1933) (Representative Clarence Lea described this power as "a rather radically different field" than the one of controlling publicity or disclosures).

To address these concerns, drafters initially proposed vesting such powers only in *principal* officers of the United States. For example, an early draft bill, H.R. 4314, placed officers empowered to act for the Commission on the same footing as Commission members who were principal officers. Specifically, the relevant draft language would have provided, in relevant part:

> SEC. 6. That the Commission may revoke the registration of any security by entering an order to that effect, if upon examination . . . . In making such examination ***the Commission or other officer or officers designated by it*** shall have access to and may compel the production of all the books and papers of such issuers. . . . ***The issuer or other person or entity applying for registration shall on application to the Commission within thirty days from the entry of such order be entitled to a public hearing*** . . . .

H.R. 4314, 73d Cong. § 6 (1933) (emphasis added). Initial drafts of this legislation always contemplated that members of the Commission would be principal officers.[7] Therefore, the use of the word "other" to modify the words "officer or officers" suggests parity; reflecting congressional intent that investigations and hearings be conducted either by principal officers who are Commissioners or other principal officers designated by the Commission for that purpose.

Congress was concerned about vesting this amount of control and power *even* with the Commission or any other principal officer. In one illuminating exchange, Chairman Sam Rayburn, of the House of Representatives Committee on Interstate and Foreign Commerce, questioned Mr. Ollie Butler from the Department of Commerce, who participated in drafting the bill. Noting that "we have passed a lot of laws since we met here on the 5th of March, but I do not think we have given anybody that much power yet," Chairman Rayburn asked Mr. Butler: "If you were going to pass upon whether or not a man's business was based upon sound principles, you would want quite a corps of the ablest economists in the land to sit around you, would you not?" *Federal Securities Act: Hearing Before the H. Comm. on Interstate & Foreign Commerce*, 73d Cong. 135 (1933). After Mr. Butler conceded that "[i]t would be necessary to give an intelligent opinion on such a subject," Chairman Rayburn pressed his point, stating:

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7. Congress initially imbued the Federal Trade Commission with the authority to carry out the Securities Act of 1933. That Commission is "composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate." 15 U.S.C. § 41.

> Do you believe that ***an administrative officer of the Government*** ought to be given that much power, as a general principle—to pass upon whether or not a man's business is based on sound principles? It is mighty easy when you go to write a statute, if you want to delegate absolute authority; you can write that in a very short statute; but the question that this committee has got to determine is whether or not they want to give ***anybody*** that kind of authority. Is it your opinion, as a lawyer and as an economist, that the Federal Trade Commission, or a bureau in the Federal Trade Commission, or ***somebody at the head of a bureau in the Federal Trade Commission***, should be given the power to pass upon whether or not a man's business is based upon sound principles?

Id. (emphasis added).

When Mr. Butler conceded that the powers at issue were indeed very broad, Chairman Rayburn again asked whether such powers should be conveyed even to principal officers because, as he observed, those principal officers were only as good as Commission personnel:

> And yet we are committing them into the hands of a commission, of men appointed by the President, and, of course, confirmed by the Senate. But you know, as long as you have been around Washington—you will not have to stay here long to find out—that any law, the administration of which you commit to a

> board or commission, is just about as good in its administration, or as bad, ***as the personnel of the commission***. Therefore, if this commission could always be composed of men who were wise and men who were good, that would be one thing; but it is quite a hazard, is it not, realizing the personnel in the past of some of these commissions?

Id. at 135-36 (emphasis added); *see also Federal Securities Act: Hearings Before the S. Comm. on Banking & Currency*, 73d Cong. 103-04 (1933) ("That is quite a lot of power to give to an official, to determine that in his opinion a given enterprise is not based upon sound principles.").

Similarly, a related draft provision authorizing investigations and giving powers to compel production of evidence and take sworn testimony provided:

> For the purpose of all investigations . . . , ***the Commission and officer or officers designated by it*** are empowered to subpena [sic] witnesses, examine them under oath, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry.

H.R. 4314, 73d Cong. § 15(b) (1933) (emphasis added).[8] Given the revocation-for-being-unsound debate context, the only reasonable interpretation of this language is that it too referred to constitutional officers.

8. *Compare* 15 U.S.C. § 77s(c) (similar).

A later draft bill, H.R. 5480, narrowed draft Section 6 and removed the power to revoke registration of securities based on an unsound condition of an issuer. *See* H.R. 5480, 73d Cong. § 6 (1933). It allowed the Commission to enter a stop order suspending a registration statement if it appeared that the statement included any material false statements or omissions. *Id.* § 8(d). Additionally, it slightly modified the language regarding who was authorized to conduct stop order examinations by replacing the words "other officer" with the words "any officer." *Compare* H.R. 4314, 73d Cong. § 6 (1933), *with* H.R. 5480, 73d Cong. § 8(e) (1933) ("In making such examination the Commission or ***any*** officer or officers designated by it shall . . . ." (emphasis added)).

This modification shows two things: First, by replacing the word "other" with the word "any," the new draft provision empowered both inferior and principal officers. One can infer that once the drafters narrowed the grounds on which the Commission could revoke a registration, they were comfortable permitting inferior officers to hold examinations and exercise attendant powers. Second, this is a deliberate, considered change because it obviously changes the meaning of the provision. H.R. 5480 was passed on May 5, 1933. *See* 77 Cong. Rec. 2910-55 (1933).

The original Senate draft bill, S. 875, largely tracked the original House bill, H.R. 4314; it too included a clause that would have allowed revocation of a registration of an "unsound" business. *See* S. 875, 73d Cong. § 6(e) (1933). However, the Senate requested a Conference with the House. *See* H.R. 5480, 77 Cong. Rec. 2978-84, 2986-3000 (1933). The differences between the two chambers' bills

were reconciled in a Conference Report, and the final public law had three key parts:

(1) It retained the language in H.R. 5480 regarding the powers of "***the Commission or any officer or officers designated by it***" to examine witnesses under oath and require the production of documents in connection with a stop order examination. *See id.* at 3894 (emphasis added).

(2) It modified the language of H.R. 5480 regarding investigations, so that "***any member of the Commission or any officer or officers designated by it*** are empowered to administer oaths and affirmations, subpena [sic] witnesses, take evidence, and require the production" of documents for purposes of investigations. *See id.* at 3896 (emphasis added).[9]

(3) It added a section entitled "Hearings by Commission," directing that: "All hearings shall be public and may be held before ***the Commission or an officer or officers of the Commission designated by it*** . . . ." *See* 77 Cong. Rec. 3896-97 (1933) (emphasis added).

The Conference Report was subsequently agreed to by both the House and Senate. *Id.* at 3903, 4009 (1933).

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9. Note that "the Commission or officers" was replaced with "any member of the Commission or any officer or officers," indicating that Congress was focused on this provision. *Compare* H.R. 5480, 73d Cong. § 19(b) (1933), *with* 77 Cong. Rec. 3896 (1933).

In sum, Congress chose the word "officer" carefully and calibrated its grant of authority to executive officers based on the scope of delegated powers.

B. The Legislative History of the Securities Exchange Act.

The following year, Congress passed a companion act, the Securities Exchange Act of 1934. This act, of course, established the SEC. In it, Congress imbued the Commission and the officers it designated with certain executive functions, such as subpoenaing witnesses, administering oaths, and compelling the production of documents.

Notably, the initial version of the Senate bill included much of the same language and structure as the Securities Act on the relevant issues. That draft started by outlining the "Special Powers of the Commission" in Section 18:

> For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this Act, ***any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena [sic] witnesses, compel their attendance, take evidence, and require the production of*** any books . . . .

S. 2693, 73d Cong. § 18(e) (1934) (emphasis added). As with the Securities Act, this was a grant of executive power to the Commission members and any *officers* designated by the Commission (and no one else).

Further edits to the relevant language suggest continued meticulous attention to detail, especially to the scope and nature of delegated powers. First, both the House and Senate edited the language so that it would cover not just investigations, but also "all inquiries." *See, e.g.*, H.R. 8575, 73d Cong. § 6(c) (1934); S. 3234, 73d Cong. § 6(c) (1934). Second, following the Conference Report (in which the Senate and the House versions were reconciled), this provision was further edited so that, in the enacted version of the law, these powers and privileges could be exercised by the Commission, any member of the Commission, or any officer of the Commission in relation to any investigation "or any other proceeding under this title." Securities Exchange Act of 1934, Pub. L. No. 73-291, § 21(b), 48 Stat. 881, 900; *see* 15 U.S.C. § 78u(b).

The attention to the wording of the provision authorizing hearings in the Exchange Act also indicates that Congress intended hearings to be held by constitutional officers. The draft provided:

> All hearings shall be public and may be held before the Commission, ***any member or members thereof*** or an officer or officers of the Commission designated by it, and appropriate records thereof shall be kept.

S. 2693, 73d Cong. § 21 (1934) (emphasis added). Note that the highlighted language was an addition to the language in the Securities Act's analogous provision, making it even more explicit that not all hearing officers needed to be principal officers, *i.e.*, Commission members or their peers. Apparently, having resolved (with the Securities Act's passage) that inferior officers could also

hold hearings, Congress added the highlighted language to reflect that. This change also emphasizes that, when conducting hearings, designated hearing officers wield equivalent powers as and enjoy parity of stature with individual Commission members, all of whom are principal officers. Congress's careful choice of who could wield the hearing-related powers it was delegating would be upended were one to read "employee" where Congress said "officer."[10]

Finally, Congress understood that the choice of the words "employee" or "officer" in the Exchange Act carried legal implications. For example, the use of the word "appoint" in Section 4, which establishes the Commission and authorizes it to employ staff, indicates that Congress

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10. Yet another reason to conclude that Congress meant that hearings be held by officers of the United States is the use of the word "officer" in the Exchange Act provision for cases of contumacy or refusal to comply with Commission subpoenas. Under that provision, too, the federal courts would only be able to order a person to appear before the Commission, one of its members, or any officer of the Commission. *See* 15 U.S.C. § 78u(c). However, this provision of the Exchange Act is slightly different than a similar provision of the Securities Act and different in a manner that confirms Congress's intent that hearings be held before constitutional officers. In the Exchange Act, the words "or member or officer designated by the Commission" replace the words "one of its examiners designated by it" in the Securities Act. *Compare* 15 U.S.C. § 78u(c) (Exchange Act), *with id.* § 77v(b) (Securities Act). Two things follow from this change: one, the choice of the word "officer" was deliberate; and two, because these are two references to the same individuals, Congress used the word "examiners" in the Securities Act as a descriptive term for all officers who were designated to conduct hearings or investigations, including, of course, Commission members.

was sensitive to the significance of the term "officer."[11] Specifically, initial House and Senate drafts did not authorize the Commission to "appoint" officers or anyone else. *See, e.g.*, H.R. 7924, 73d Cong. § 3 (1934); S. 2642, 73d Cong. § 4(e) (1934) (initial Senate draft: "The Commission is further authorized, in accordance with the civil service laws, to employ . . . such officers and employees . . . as may be necessary . . . ."). The addition of the word "appoint" in the enacted law signified that Congress understood that the Commission needed authority to appoint certain of its employees to "officer" positions.[12] There is no other reason to change "employ" to "appoint."

In sum, as this legislative history establishes, Congress painstakingly considered the administrative scheme it was creating and to whom it would convey certain executive authority, making a constitutional determination that only officers wield executive power.

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11. Section 4(b) of the final enacted law reads, in relevant part: "The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and other experts as may be necessary . . . and the Commission may . . . appoint such other officers and employees as are necessary . . . ." *See* Securities Exchange Act of 1934, Pub. L. No. 73-291, § 4(b), 48 Stat. 881, 885.

12. The current provision is: "The Commission shall appoint and compensate officers, attorneys, economists, examiners, and other employees in accordance with section 4802 of title 5." 15 U.S.C. § 78d(b)(1).

III. CONGRESS INTENDED SEC ALJS TO BE PROPERLY APPOINTED CONSTITUTIONAL OFFICERS UNDER THE APA.

The relevant language and legislative history of the APA also display clear congressional intent to have SEC hearings held by, at minimum, inferior officers of the United States. Indeed, following lengthy discussions and analysis, the APA left the appointment of hearing officers to the heads of departments that selected them precisely because Congress recognized that, as inferior officers, these hearing examiners had to be appointed in a manner consistent with the Appointments Clause.

A. The APA Also Places ALJs on the Same Footing with Principal Officers.

In parallel with the placement of hearing officers on par with the Commission members in the securities laws, the APA also places ALJs on par with heads of departments, *i.e.*, principal officers: "There shall preside at the taking of evidence—(1) the agency; (2) one or more members of the body which comprises the agency; or (3) one or more administrative law judges appointed under section 3105 of this title." *See* 5 U.S.C. § 556(b). As the discussion below shows, this was no accident; this language reflects Congress's policy choices and careful analysis.

B. Empowerment of ALJs Was a Reaction to Earlier Functioning of Administrative Agencies.

The APA stemmed from a review of administrative agencies following the expansion of the administrative state after the Great Depression. *See generally* Attorney General's Committee Report; *see also* S. Comm. on the Judiciary, 79th Cong. Admin. Procedure (Comm. Print 1945), S. Doc. No. 79-248, at 11-42 (1944-46); Attorney Gen.'s Comm. on Admin. Procedure, U.S. Dep't of Justice, U.S. Sec. & Exch. Comm. (Monograph 26) 189 (1940) (describing hearing practices at the SEC and criticizing the SEC for the impression, whether real or perceived, that it withheld real power from its hearing examiners).[13] The APA was meant to elevate all hearing officers (including, specifically, SEC hearing examiners) in order to address some of the concerns raised about the early years of the administrative state. The Attorney General's Committee Report outlined certain procedural and substantive defects in the then-current administrative functions, including in formal adjudications, and provided a proposed draft of the APA. *See generally* Attorney General's Committee Report at 7-25, 191-203. The concerns raised in the Report animated the passage of the APA and informed much of its language.

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13. In 1978, Congress amended the United States Code to change the title of "hearing examiners" to "Administrative Law Judges" and to increase the number of such positions at the GS-16 level. Act of Mar. 27, 1978, Pub. L. No. 95-251, 92 Stat. 183, 183-84.

The Committee recommended that:

- Agency heads delegate much of the investigatory and prosecutorial functions to capable officers and the initial adjudicative functions to other independent officers. *See id.* at 46, 55-60.

- The status of all hearing officers be elevated to allow them to command public confidence and exercise "functions of responsibility and interest." *Id.* at 43-44, 46.

- The hearing officers' initial decisions be given real weight, *i.e.*, the initial decision would become final absent clear error. *Id.* at 50-51 ("In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court.").

- Congress empower the hearing officers to exercise certain executive or sovereign functions, such as "preside at hearings, issue subpoenas, administer oaths, rule upon motions, carry out other duties incident to the proper conduct of hearings, and make findings of fact, conclusions of law, and orders for the disposition of matters coming before them." *Id.* at 50.

- To attract and appoint "men of ability and prestige," the agency should have an important role in selecting and appointing the hearing officers, but also an independent body should be in charge of investigating and approving that person's qualifications:

> [T]he hearing commissioner is in a very real sense acting for the head of the agency. He is hearing cases because the heads cannot as a practical matter themselves sit. . . . The entire usefulness of the agency may be destroyed if the hearing officers are incompetent or if the public loses confidence in their fairness. . . [But] before anyone should ***undertake these highly responsible duties of a hearing commissioner*** his judicial qualifications and capacity should be investigated and approved by a body independent of the agency.

Id. at 46-47 (emphasis added).

These recommendations, according to the Committee, were necessary to assure that administrative proceedings were a fair method of dispute resolution. As the Committee stated:

> The Committee believes that its recommendations in the preceding chapter for the conduct of hearings by able, independent, ***and responsible*** hearing commissioners will do much to assure these fundamentals of a fair hearing.

Id. at 68 (emphasis added).

C. Congress Intended ALJs to Be "Presiding Officers," Appointed in Accordance with the Appointments Clause.

Acting on the above-described prescriptions, Congress passed the APA, which, as detailed below: (1) made the

hearing examiners "presiding officers"; (2) granted them certain executive powers; (3) mandated that the decisions of subordinate officers be given weight and force; and (4) made certain that the appointment of ALJs are made in conformity with the Appointments Clause.

1. Congress referred to hearing examiners as "presiding officers."

Congress referred to hearing examiners as "presiding officers" in the original legislation:

> SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—
>
> (a) ***PRESIDING OFFICERS.***—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act . . . . The ***functions of all presiding officers and of officers participating in decisions*** in conformity with section 8 shall be conducted in an impartial manner.

Administrative Procedure Act of 1946, Pub. L. No. 79-404, § 7(a), 60 Stat. 237, 241-42 (emphasis added). Parallel to the Exchange Act, this provision covered three categories of persons: the Commission acting together, individual Commissioners, and other persons appointed to hold hearings. The words "the functions of all presiding officers" referred to all three of these categories. The sole sensible reading of this language is that the grouping of examiners with principal officers in this section indicates that examiners should have officer status.

The very next provision of the APA as originally adopted supports this reading. It states:

> (b) ***Hearing powers.—Officers presiding at hearings shall have authority***, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas [sic], . . . and (9) take any other action authorized by agency rule consistent with this Act.

Id. § 7(b), 60 Stat. 237, 242 (emphasis added). When acting as hearing examiners, the agency, any of its individual members, or any other presiding officer appointed under the APA could wield equivalent executive power under this provision, suggesting status parity.

2. The statutory definitions of "officer" and "employee" confirm that Congress intended SEC ALJs to be "inferior officers."

In 1965, in connection with the adoption of the revised Title 5, Congress restated "in comprehensive form, without substantive change, the statutes in effect before July 1, 1965, that relate to Government employees, the organization and powers of Federal agencies generally, and administrative procedure . . . ." H.R. Rep. No. 89-901, at 1 (1965). Congress made language changes to streamline and standardize terms across various interrelated statutory provisions without changing their meaning. *Id.* at 2-3.

Among other things, Congress defined the terms "officer" and "employee" in new Sections 2104 and 2105,

respectively. *See generally id.* at 8, 10, 12-13. Applying these definitions, Congress amended the hearing-authorizing provisions of the APA thus:

> The words "employee" and "employees" are substituted [in Section 556(b)] for "officer" and "officers" ***in view of the definition of "employee" in section 2105***. The sentence "A presiding or participating employee may at any time disqualify himself[,]" is substituted for the words "Any such officer may at any time withdraw if he deems himself disqualified."

Id. at 13 (emphasis added).

Similar changes and qualifying comments were made in Section 557. *Id.* By noting that the substitution of "employee" for "officer" was made in view of the expansive definition of "employee," Congress indicated that it understood that "officer" and "employee" were not interchangeable terms and that, therefore, as originally drafted, officer did not mean employee. *See id.* An analysis of these definitions shows that SEC ALJs are officers under the APA.

"Officer" is defined thus:

> **(a)** For the purpose of this title, "officer", except as otherwise provided by this section or when specifically modified, means a justice or judge of the United States and ***an individual who is—***
>
> **(1)** ***required by law to be appointed*** in the civil service ***by*** one of the following acting in an official capacity—

(A) the President;
(B) a court of the United States;
(C) ***the head of an Executive agency***; or
(D) the Secretary of a military department;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an authority named by paragraph (1) of this section, or the Judicial Conference of the United States, while engaged in the performance of the duties of his office.

5 U.S.C. § 2104 (emphasis added).

"Employee" is defined thus:

(a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, ***means an officer*** and an individual who is—

(1) appointed in the civil service by one of the following acting in an official capacity—

(A) the President;
(B) a Member or Members of Congress, or the Congress;
(C) a member of a uniformed service;
(D) an individual who is an employee under this section;
(E) the head of a Government controlled corporation; or

> **(F)** an adjutant general designated by the Secretary concerned under section 709(c) of title 32;
>
> **(2)** engaged in the performance of a Federal function under authority of law or an Executive act; and
>
> **(3)** subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

5 U.S.C. § 2105 (emphasis added). In other words, the "employee" definition automatically includes all officers (both principal and inferior) as well as certain non-officers falling within subsections (a)(1), (a)(2), and (a)(3).

Indeed, the only reason that SEC ALJs meet the statutory definition of "employee" in Section 2105 is that they meet the statutory definition of "officer" in Section 2104. SEC ALJs are not covered by subsections (a)(1) and (a)(3) of Section 2105 because they must be designated by the Commission under the securities laws (as discussed above) and, under the APA, they must be appointed by the "agency." *See* 5 U.S.C. § 3105 ("Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title."). In other words, SEC ALJs do not meet Section 2105's tests for non-officer employees. But, SEC ALJs are "officers" under Section 2104 because they (1) must be appointed by the Commission; (2) perform their duties under authority of law; and (3) are subject to supervision by the head of

an executive agency—the Commission.[14] Accordingly, because they are officers under Section 2104, they also are "employees" under the preambular language of Section 2105(a).

D. Congress Explicitly Made Certain that ALJs' Appointments Complied with the Appointments Clause.

To dispel any lingering doubt about congressional intent in using the word "officer" to mean "inferior officer" of the United States when referring to ALJs in the APA, Congress directly addressed whether hearing officers had to be appointed in conformity with the Appointments Clause. Its answer was yes. This was an explicit recognition by Congress that hearing officers are meant to be inferior officers.

The Attorney General's Committee Report recommended that hearing officers be appointed by an independent government body. Attorney General's Committee Report at 47-49. To accomplish this, the Committee recommended the formation of an "Office of Administrative Justice," whose Director would be appointed by the Judicial Conference and who would, in turn, appoint hearing examiners. S. Comm. on the Judiciary, 79th Cong. Admin. Procedure (Comm. Print 1945), S. Doc. No. 79-248, at 41-42 (1944-46).

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14. The SEC is an Executive agency. *See* 5 U.S.C. § 101-105; *see also Free Enter. Fund*, 561 U.S. at 512-13 (the Commission acting together is the head of an agency.).

This proposal was rejected because it ran afoul of the Appointments Clause. As explained by the Senate Judiciary Committee:

> The legal difficulty with the suggestion, however, is that the ***Constitution provides for the placing of powers of appointment*** "in the courts of law" whereas the Judicial Conference is a committee and not a court and hence may ***not be within the constitutional authorization for appointing powers***.

Id. at 42 (emphasis added).

The same concerns were voiced in the House hearings. The then-President of the American Bar Association (ABA) testified that the Judicial-Conference-Appointment proposal may present constitutional appointment power problems. *Id.* at 50. The Chairman of the Special Committee on Administrative Law for the ABA concurred:

> The third proposal has been made recently, and that is that either the selection or the approval of the examiner be vested in some official appointed by the Judicial Conference. . . . However, ***that presents a very serious constitutional question as to whether you could have the Judicial Conference make the appointment of an executive official when the Constitution vests the power of appointment only in the President, the head of a department[, or] a court.*** The Judicial Conference is not a court.

Id. at 82 (emphasis added).

To address this issue, Congress made certain the proposed bill complied with the Appointments Clause. The next suggestion taken up (and ultimately adopted) by the Senate Judiciary Committee was that the "examiners be appointed '*by* each agency' rather than [just] 'for each agency.'" *Id.* at 42 (emphasis in original). In those instances where agency heads are heads of departments, such as the SEC, this change ensured proper Article II appointments. *See Free Enter. Fund*, 561 U.S. at 511 (SEC constitutes a department).

E. Congress Was Conferring Significant Executive Powers in the APA.

Were Congress not conferring significant executive powers on ALJs, it would not have bothered with the Appointments Clause. The following comment from the Senate Judiciary Committee is illuminating:

> It has been suggested that this bill should grant the subpena [sic] power to all hearing officers, ***whether or not the agency has been granted such power***. It may seem logical that hearing officers should have compulsory process powers, but it has been felt that the grant of such powers is of such a nature and so important as to be better left to Congress in connection with specific legislation rather than dealt with by a general statute.

S. Comm. on the Judiciary, 79th Cong., Admin. Procedure (Comm. Print 1945), S. Doc. No. 79-248, at 29-30 (1944-46) (emphasis added). There would be no reason to consider giving ALJs *independent* subpoena powers if Congress

meant them to be mere employees whose job was limited to serving as aides to the Commission. Note that the decision not to vest ALJs with independent subpoena power did not rest on their status as mere employees or aides. Rather, Congress saw the delegation of subpoena power to be significant enough to require a specific statutory grant. *A fortiori*, exercise of subpoena powers by SEC ALJs is exercise of significant executive power.

To be sure, the original APA text distinguished between supervising officers and subordinate officers, but that distinction is most naturally read as tracking the Constitution's distinction between principal and inferior officers, because every inferior officer, by definition, is subordinate to, and is subject to supervision by, a principal officer. In referring to subordinate examiners, therefore, Congress repeatedly used the word "officer." *See* Administrative Procedure Act of 1946, Pub. L. No. 79-404, § 8, 60 Stat. 237, 242-43.

In short, Congress empowered ALJs carefully and in full recognition of the importance of officer status to their functions. As the Senate Judiciary Committee explained, the APA was "designed to assure that the presiding officer will perform a real function rather than serve merely as a notary or policeman." S. Rep. No. 79-752, S. Doc. No. 79-248, at 207, 269. Similarly, the Chairman of the Senate Judiciary Committee, Pat McCarran, wrote that the APA "is intended as a guide to him who seeks fair play and equal rights under law, as well as to those invested with executive authority." S. Comm. on the Judiciary, 79th Cong., Admin. Procedure (Comm. Print 1945), S. Doc. No. 79-248, at III (1944-46).

CONCLUSION

Both the relevant statutory language and legislative history show that Congress intended SEC ALJs to be inferior officers in the constitutional sense. Congress deliberately delegated significant executive powers to them. Recognizing the significance of the powers ALJs wield, Congress also made sure that their appointments comport with the Appointments Clause. The panel decision was incorrect, therefore, in dismissing statutory language and ignoring legislative history confirming congressional intent that SEC ALJs be properly appointed officers. SEC ALJs must be appointed in accordance with constitutional and congressional mandates.

Respectfully submitted,

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February 28, 2018

EXHIBIT

EXHIBIT — SUBPOENA AD TESTIFICANDUM OF THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION, DATED MARCH 14, 2014

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15574

In the Matter of

HARDING ADVISORY LLC and

WING F. CHAU,

Respondents.

SUBPOENA AD TESTIFICANDUM

To: Michael Edman

[redacted]

YOU ARE HEREBY REQUIRED to appear before the Honorable Cameron Elliot, Administrative Law Judge of the Securities and Exchange Commission, at Room 238 of the Javits Federal Building, 26 Federal Plaza, New York, NY, on the 31st day of March 2014, or at any date thereafter, at 9:30 a.m., to provide testimony in the Matter of Harding Advisory LLC and Wing F. Chau, AP File No. 3-15574, a public administrative proceeding pursuant to the Section 8A of the Securities Act of 1933, Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940.

IN TESTIMONY WHEREOF, the undersigned, an officer designated by the Securities and Exchange Commission, has hereunto set his hand at Washington, D.C.

Date: 3-14-2014

Signed: [signature]

Honorable Cameron Elliot
Administrative Law Judge