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 District of Columbia Circuit

BRIEF FOR COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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QUESTION PRESENTED

Whether administrative law judges of the Securities and Exchange Commission are Officers of the United States within the meaning of the Appointments Clause.

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INTEREST OF *AMICUS CURIAE*

By order dated January 18, 2018, this Court invited Anton Metlitsky to brief and argue this case as *amicus curiae* in support of the judgment below. The court below held that administrative law judges of the Securities and Exchange Commission are not "Officers of the United States" under the Appointments Clause of the United States Constitution.[1]

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

Relevant constitutional, statutory, and regulatory provisions are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

The Appointments Clause regulates the means of appointment of "Officers of the United States." U.S. Const. art. II, § 2, cl. 2. "Principal" officers must be appointed by the President "by and with the Advice and Consent of the Senate." *Id.* Congress may also provide for "inferior Officers" to be appointed in that manner, but alternatively may "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.*

The Appointments Clause is primarily "designed to preserve political accountability relative to important Government assignments." *Edmond v.*

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and his firm made a monetary contribution to this brief's preparation or submission.

United States, 520 U.S. 651, 663 (1997). In light of that purpose, the "Officers of the United States" who must be appointed in the manner required by the Clause include only those persons who both hold a continuing government position "established by [federal] Law," U.S. Const. art. II, § 2, cl. 2, and who have the authority, in their own name, to "bind[] the government or third parties for the benefit of the public," *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 77 (2007) ("2007 OLC Op."). In this way, federal appointees authorized to "exercise the power of the United States" by binding the government or private parties are "accountable to the President"—either directly or through a senior official who is himself a presidential appointee—and the President is in turn "accountable to the people." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1238 (2015) (Alito, J., concurring).

By contrast, "a person whose acts have no authority and power of a public act or law absent the subsequent sanction of an officer or the legislature"—for example, a person exercising "advisory" or "investigative" functions—is not an "Officer of the United States" but an employee. 2007 OLC Op. 95, 98 (quotations omitted). The overwhelming majority of those working in the Executive Branch are mere employees—i.e., "lesser functionaries subordinate to officers of the United States," *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976)—who need not be appointed under the Appointments Clause. In 1879, this Court estimated that 90% of all federal workers were "undoubtedly" employees, not officers. *United States v.*

Germaine, 99 U.S. 508, 509 (1879). By 2010, "[t]he applicable proportion" of non-officer employees had "of course increased dramatically." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 506 n.9 (2010).

The question presented in this case is whether administrative law judges ("ALJs") employed by the Securities and Exchange Commission ("SEC" or "Commission") are inferior "Officers of the United States," such that they must be appointed in conformity with the Appointments Clause. Pet. i. The background relevant to answering the question presented is as follows:

A. Administrative Law Judges And The Administrative Procedure Act

1. The "rapid growth of administrative law" beginning in the early Twentieth Century increased the number of agency hearings to the point that "the agency heads … [could] rarely preside over hearings in which evidence is required." *Ramspeck v. Fed. Trial Exam'rs Conf.*, 345 U.S. 128, 130 (1953). "The agencies met this problem … by designating hearing or trial examiners to preside over hearings for the reception of evidence." *Id.* at 130-31; *see also* Paul Verkuil et al., *The Federal Administrative Judiciary*, Admin. Conf. of the United States, Recommendations and Reports, Vol. II, 1992 ACUS 770, 799 (1992) ("hearing examiners presided at adjudications before enactment of the [Administrative Procedure Act ('APA')], and the term 'examiner' was used at least as early as 1906"). Those examiners "made a report to the agency setting forth proposed findings of fact and recommended action," with the "final de-

cision" left to the agency heads. *Ramspeck*, 345 U.S. at 131.

Before Congress enacted the APA, employing agencies themselves determined hearing examiners' compensation and promotion under the Classification Act of 1923, placing the examiners in a "dependent status" to those agencies. *Id.* at 130. This resulted in "[m]any complaints … against the actions of the hearing examiners, it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations." *Id.* at 131.

2. Congress in the APA sought to address concerns about the independence of hearing examiners—known today as ALJs[2]—and considered "the securing of fair and competent hearing personnel … the heart of formal administrative adjudication." *Butz v. Economou*, 438 U.S. 478, 514 (1978) (quotation omitted). The APA thus "contains a number of provisions designed to guarantee the independence of [ALJs]." *Id.*

In particular, Congress "intended to make hearing examiners a special class of semi-independent subordinate hearing officers by vesting control of their compensation, promotion and tenure in the Civil Service Commission to a much greater extent than in the case of other federal employees." *Ramspeck*, 345 U.S. at 132 (quotation omitted).

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[2] Hearing examiners were first referred to as "administrative law judges" by regulation in 1972, 37 Fed. Reg. 16,787 (Aug. 19, 1972), and then by statute in 1978, Pub. L. No. 95-251, 92 Stat. 183 (1978).

Thus, "[e]ach agency" may "appoint" ALJs, 5 U.S.C. § 3105, but the Office of Personnel Management ("OPM")—formerly the Civil Service Commission—determines who is qualified to hold that position, *id.* § 5372. Agencies have no authority to alter an ALJ's salary, *id.*, and no "action" (including removal) can be taken by the agency against the ALJ except "for good cause established and determined by the Merit Systems Protection Board," *id.* § 7521(a).

3. Although the APA granted ALJs *structural* independence from their employing agencies, it did not grant them any independent policymaking or decisional authority, instead ensuring that ALJs remain "subordinate" to their agencies. *Ramspeck*, 345 U.S. at 132; *see also* 5 U.S.C. § 557(c) (referring to ALJs as "subordinate employees"). Thus, as a general matter, the APA authorizes ALJs to "preside at the taking of evidence" in formal adjudications, 5 U.S.C. § 556(b)—which includes the power, for example, to "issue subpoenas," "receive relevant evidence," and "regulate the course of the hearing," *id.* § 556(c)—and to issue "initial decision[s]," *id.* § 557(b). But the Act also ensures that on "appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision" itself. *Id.*

Thus, the agency has final and plenary authority over ALJ decisions not only as to questions of law but also as to questions of fact. *See FCC v. Allentown Broad. Co.*, 349 U.S. 358, 364-65 (1955). The APA, in other words, ensures that evidence is taken and facts are determined "in the first instance by an official not subject to agency coercion," but that "the

agency retains full power over policy, a power it can exercise when it performs its reviewing function." 1992 ACUS at 803; *see also Attorney General's Manual on the Administrative Procedure Act* 83 (1947) (agency "is in no way bound by the decision" of ALJ and "retains complete freedom of decision—as though it had heard the evidence itself").

4. Congress has defined the terms "officer" and "employee" as used in Title 5 of the U.S. Code. The statutory definition of "officer" includes only individuals who must be appointed in the manner provided by the Appointments Clause, 5 U.S.C. § 2104, while the definition of "employee" includes officers and those appointed by, among others, "an individual who is an employee under this section," *id.* § 2105(a)(1)(D). Title 5 refers to ALJs as "employees." *See*, *e.g.*, *id.* § 556(c) ("employees presiding at hearings"); *id.* § 557(b) ("presiding employee").

B. Securities And Exchange Commission ALJs

The question presented in this case turns on the powers of the ALJs employed by the SEC. Pet. i.[3] The duties and authority of SEC ALJs are set forth in SEC regulations promulgated under authority Congress has granted the SEC.

1. The SEC is a five-member independent agency whose members the President appoints by and

[3] As petitioners note, there are nearly 2,000 ALJs across the federal government, many of whom appear to exercise functions different from those of SEC ALJs. Pet. Br. 41-42. Whether ALJs other than SEC ALJs are "Officers of the United States" is not at issue here.

with the advice and consent of the Senate. *See* 15 U.S.C. § 78d(a). Among other functions, the Commission is empowered to enforce federal securities laws and regulations. *See*, *e.g.*, *id.* § 78d. One mechanism for SEC enforcement is an administrative action within the Commission. 17 C.F.R. § 202.5(b).

The Commission itself is authorized by 5 U.S.C. § 3105 to appoint ALJs to preside over such hearings. Since 1962, however, Congress has authorized the Commission to delegate "any of its functions" other than rulemaking to "a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board." 15 U.S.C. § 78d-1(a); *see* Pub. L. No. 87-592, 76 Stat. 394, 394-95 (1962). The Commission under this authority had (until recently) delegated the power to hire ALJs to SEC staff, who typically chose from a list of qualified candidates provided by OPM.[4] Pet. App. 295a-297a.[5]

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[4] Cameron Elliot, the ALJ who presided below, was an ALJ at the Social Security Administration before the SEC, and he may have been hired by the SEC under a process somewhat different from that described above. Notice at 2, *In re Timbervest LLC*, No. 3-15519 (SEC June 23, 2015) (filed by SEC Enforcement Division), https://perma.cc/5RMX-R6V4. It is undisputed, however, that ALJ Elliot was "hired without the involvement of individual Commissioners." *Id.*

[5] On November 30, 2017, the Commission "ratified" the appointment of its current ALJs, including the ALJ who presided over petitioners' hearing, and ordered a reopening of the record in all cases then still pending before the SEC. *See* SEC, Order (Nov. 30, 2017), https://www.sec.gov/litigation/opinions/2017/33-10440.pdf. The Commission took no action, however,

2. a. The SEC has delegated certain authorities to its ALJs under the statute just described, which authorizes the Commission to delegate "any of its [non-rulemaking] functions" to (among others) ALJs. 15 U.S.C. § 78d-1(a). Subsection (b) of that statute provides that the "Commission shall retain a discretionary right to review the [delegated] action ... upon its own initiative or upon petition," and lists circumstances in which Commission review is mandatory. *Id.* § 78d-1(b). Subsection (c) provides that if plenary discretionary review of delegated functions is not sought or undertaken, "then the action of any" delegee (including an ALJ) listed in subsection (a) "shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission." *Id.* § 78d-1(c).

ALJs' authority is thus limited by the scope of delegation from the Commission. By regulation, "[a]ll proceedings shall be presided over by the Commission or, if the Commission so orders, by a hearing officer." 17 C.F.R. § 201.110. The "hearing officer" may be, among others, an ALJ. *Id.* § 201.101(a)(5). ALJs are responsible for "conduct[ing] hearings" and for ensuring "the fair and orderly conduct of the proceedings." *Id.* § 200.14(a). And the Commission grants ALJs "the authority to do all things necessary and appropriate to discharge [their] duties," including administering oaths, receiving evidence, ruling on motions, issuing subpoenas,

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with respect to cases (like this one) in which a petition for judicial review had already been filed. *See* Resp. Br. 3 n.2.

and issuing an initial decision on whether the securities laws have been violated. *Id.* § 201.111.

b. The Commission, however, has not delegated ALJs authority to bind the government or private parties. Rather, as the SEC explained in the proceedings below, the Commission retains "plenary authority over the course of ... administrative proceedings and the rulings of [its] law judges—before and after the issuance of the initial decision and irrespective of whether any party has sought relief." Pet. App. 91a (quotation omitted).

For instance, although ALJs may issue subpoenas, *see* 17 C.F.R. §§ 200.14(a)(2), 201.111, they cannot enforce them—only a federal district court can enforce an SEC subpoena, including by contempt, and only at the request of the Commission itself. 15 U.S.C. § 78u(c). The only authority the ALJ has to punish "[c]ontemptuous conduct" is to exclude the offender from the hearing room or preclude her from representing a party in the proceeding—actions that are subject to immediate *de novo* review by the Commission. 17 C.F.R. § 201.180(a)(1), (2).

ALJs also lack authority to issue a decision on the merits that binds the Commission or private parties. Rather, the ALJ prepares an "initial decision," which "include[s] findings and conclusions, and the reasons or basis therefor, as to all the material issues of fact, law or discretion presented on the record and the appropriate order, sanction, relief, or denial thereof." *Id.* § 201.360(b). The Commission "may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part," any initial decision. *Id.* § 201.411(a). The Commission may

"make any findings or conclusions that in its judgment are proper and on the basis of the record." *Id.* The Commission's review is *de novo* as to both law and facts. *Id.*; *see* 15 U.S.C. § 78d-1(b). And while the Commission as a matter of practice accords "considerable weight" to some ALJ credibility findings, it does not accept such findings "blindly," Pet. App. 92a-93a n.117 (quotation omitted), and is under no legal obligation to accept or defer to those findings at all, *see* 17 C.F.R. §§ 201.411(a), 201.452.

Finally, the Commission's review is not limited to the record before the ALJ. Rather, the Commission may—as it did in this case, *see infra* at 12—remand the matter to the ALJ "for further proceedings," 17 C.F.R. § 201.411(a), including "the taking of additional evidence," *id.* § 201.452, and may even elect to "accept or hear additional evidence" itself, *id.*

c. Notably, no ALJ initial decision can become final without a subsequent affirmative act of the Commission. The Commission will review an ALJ's initial decision on a petition for review, *id.* § 201.411(b), and can do so *sua sponte* if no petition is filed, *id.* § 201.411(c). Even if the Commission decides not to conduct plenary review, the ALJ's decision does not automatically become final, nor does it otherwise carry any force of its own. Rather, no initial decision by an ALJ becomes final until the Commission enters its own finality order. *Id.* § 201.360(d)(2). Moreover, were the Commission ever to delegate to ALJs the authority to issue a decision that took effect without the Commission's affirmative sanction, that decision would, by operation

of statute, be the decision of the Commission, not the ALJ. *See* 15 U.S.C. § 78d-1(c).

Thus, contrary to petitioners' assertion that an SEC ALJ decision becomes final even if it is not "affirmatively adopted by the agency," Pet. Br. 32, no initial decision becomes final simply because of "the lapse of time"; it is "the Commission's issuance of a finality order" that makes an initial decision not selected for plenary review "effective and final." Pet. App. 90a (quotation omitted). As the Commission emphasized below, the "effect of this rule … is that [SEC] ALJs' initial decisions ... do not become the final and effective decision of the agency without affirmative action on [the Commission's] part—specifically, [its] issuance of a finality order." Pet. App. 90a n.109.

The same is true if an ALJ finds a party to be in "default." 17 C.F.R. § 201.155. An initial decision based on default has no effect absent further action by the Commission. *See In re Alchemy Ventures, Inc.*, 2013 WL 6173809, at *4 (SEC Oct. 17, 2013); 17 C.F.R. § 201.360(d)(2).[6]

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[6] Petitioners state that "[i]n about 90% of cases, … the ALJ's initial decision 'become[s] final without plenary agency review.'" Pet. Br. 32 (quoting *Bandimere v. SEC*, 844 F.3d 1168, 1180 n.25 (10th Cir. 2016)). SEC Commissioner Jackson recently provided context for that statistic. During 2014 and 2015, 80% of all SEC ALJ decisions arose from a default, and in the remainder of initial decisions that did not receive plenary review, no petition for review was filed. Review was sought in approximately 10% of cases, and granted in every one of those. Robert J. Jackson, Jr., *Fact and Fiction: The SEC's Oversight of Administrative Law Judges*, The CLS Blue Sky Blog (Mar. 9, 2018), https://perma.cc/EM5Y-B7R2.

C. Proceedings Before The Commission

1. On September 5, 2012, the Commission instituted administrative proceedings against petitioners for four alleged violations of the Investment Advisers Act. *See In re Raymond J. Lucia Cos.*, 2012 WL 3838150 (Sept. 5, 2012). The Commission assigned ALJ Elliot to oversee the initial stages of the proceeding. *See id.*

After the ALJ issued an initial decision concluding that petitioners had violated the securities laws as to one of the four charges and recommending sanctions, *see In re Raymond J. Lucia Cos.*, 2013 WL 3379719 (July 8, 2013), the Commission *sua sponte* remanded the case for further findings on the three charges the ALJ did not address in that initial decision, concluding that "even if no party chooses to seek review, the law judge's findings would assist [the Commission's] determination of whether to order review on [its] own initiative," Pet. App. 242a.

The ALJ subsequently issued a revised initial decision, considering the additional three charges and concluding that "[t]he sanction determinations made in the [original initial decision] remain[ed] appropriate." Pet. App. 118a.

2. a. Both petitioners and the SEC Division of Enforcement petitioned for review. The Commission granted review and concluded, based "on an independent review of the record," except as to unchallenged factual findings, that petitioners violated the securities laws and imposed the sanctions recommended by the ALJ. Pet. App. 39a-40a.

b. The Commission also rejected petitioners' argument that the ALJ's initial decision was void because the ALJ was an "Officer of the United States," concluding that "the appointment of Commission ALJs is not subject to the requirements of the Appointments Clause," Pet. App. 86a, because they are employees, not constitutional officers, *see* Pet. App. 86a-95a.

Two Commissioners dissented on the merits, and also noted that an Article III court should decide the Appointments Clause issue. Pet. App. 110a-114a.

D. Proceedings Below

The court of appeals denied petitioners' petition for review of the Commission's decision, including their Appointments Clause challenge.

The court explained that SEC ALJs are not "Officers of the United States" required to be appointed in conformity with the Appointments Clause because they have not "been delegated sovereign authority to act independently of the Commission," and do not "have the power to bind third parties, or the government itself, for the public benefit." Pet. App. 16a. SEC ALJs, the court reasoned, cannot issue any decision that becomes final absent affirmative Commission action. Pet. App. 14a-15a. And ultimate decision-making authority in all events remains with the Commission: the Commission reviews ALJs' initial decisions *de novo* and it "may make any findings or conclusions that in its judgment are proper and on the basis of the record," Pet. App. 18a-19a (quoting 17 C.F.R. § 201.411(a)); the Commission "controls

the record for review and decides what is in the record," Pet. App. 19a (quotation omitted); the Commission "may 'remand for further proceedings,'" *id.* (quoting 17 C.F.R. § 201.411(a)), or "the taking of additional evidence," *id.* (quoting 17 C.F.R. § 201.452); and the Commission may "hear additional evidence" itself, *id.* (quoting 17 C.F.R. § 201.452). Moreover, "the Commission may defer to [ALJs'] credibility determinations where the record provides no basis for disturbing the finding, but … is not required to adopt the credibility determinations of [the] ALJ." *Id.* (citing *Kay v. FCC*, 396 F.3d 1184, 1189 (D.C. Cir. 2005)).

The court of appeals granted rehearing en banc, Pet. App. 244a-246a, but denied the petition for review by an equally divided court, Pet. App. 1a-2a.

SUMMARY OF ARGUMENT

I. A federal appointee is an "Officer of the United States" under the Appointments Clause if she holds a continuing position established by federal law (which is undisputed here) and she has been delegated (i) the power to bind the government or private parties (ii) in her own name rather than in the name of a superior officer.

A. The consistent understanding of Congress, the Executive Branch, and knowledgeable observers since the Founding era is that an individual is an "Officer of the United States" only if (among other things) she has been delegated a portion of the sovereign authority of the United States, meaning that she can bind the government or alter the rights of private parties. Persons whose acts have no force

absent the subsequent sanction of a superior officer, in contrast, are not constitutional officers.

Thus, for example, persons who can authoritatively interpret the law, bring enforcement actions and make litigation decisions on behalf of the United States, promulgate regulations, or issue decisions binding on private parties may be constitutional officers. It has been established since at least the Nineteenth Century, however, that persons who perform investigative functions but can only make recommendations based on the results of their investigation are not officers. That is so even if those individuals have power to perform hearing-related functions such as issuing subpoenas, administering oaths, taking testimony, and receiving documents.

That result is fully consistent with this Court's precedent.

B. It has also been understood since the First Congress, and this Court's cases confirm, that even an individual who has de facto authority to bind the government or alter private-party rights is not a constitutional officer for purposes of the Appointments Clause if she can only exercise that authority in the name of a superior officer rather than in her own name. Such an individual is considered an agent of a principal who is a constitutional officer, not an officer herself. The principal—i.e., the constitutional officer—will be held accountable for the acts of the agent done in the principal's name.

C. This Court's modern cases have described constitutional officers as those who exercise "significant authority pursuant to the laws of the United

States." *Buckley*, 424 U.S. at 126. Although the Court has not had occasion to flesh out the precise contours of that standard, it is fully consistent with the longstanding historical rule just described.

Petitioners and the Solicitor General argue for a substantially broader understanding of officer status, relying on a portion of this Court's opinion in *Freytag v. Commissioner*, 501 U.S. 868 (1991), that describes as "significant" certain hearing-related functions of the Tax Court special trial judges at issue there—i.e., taking testimony, conducting trials, ruling on the admissibility of evidence, and enforcing compliance with discovery orders. Some of these functions bind neither the government nor private parties, so the Court's opinion could be read as adopting a broader understanding of officer status inconsistent with the longstanding view described above. But *Freytag*'s holding is fully consistent with that longstanding view, and this Court should not construe the opinion more broadly, for several reasons.

First, the special trial judges in *Freytag* could bind the government and private parties by issuing final judgments in their own name in some circumstances. It is true that language in the Court's opinion suggests that the Court might have viewed the hearing-related functions described in the previous paragraph as by themselves sufficient to make special trial judges constitutional officers, even absent the ability to enter final binding judgments. But that language was unnecessary to the holding in *Freytag*, and in any event, even those hearing-related functions included the ability to bind the

government and private parties, because special trial judges have the authority to enforce their own discovery orders by punishing contempt. While other functions set forth in the opinion—such as ruling on the admissibility of evidence—are unrelated to any enforcement authority, the Court did not consider whether such powers alone would suffice to establish officer status, and there is no basis to read *Freytag* broadly to indicate that they would, inconsistent with the historical understanding described above.

Second, not only could petitioners' standard call into question the constitutionality of the appointment process of untold number of federal actors who perform "significant" functions, it would also cast significant doubt on the constitutionality of the more-than-a-century-old practice of establishing investigative commissions whose members, including members of Congress, are not appointed in the manner prescribed by the Appointments Clause. These commissions generally do not have the power to punish contempt, but do have the power to issue subpoenas, administer oaths, examine witnesses, and receive documents—i.e., similar powers to those exercised by the special trial judges in *Freytag* (and SEC ALJs). Despite these powers, both Congress and the Executive Branch have repeatedly concluded that so long as a commission can only make recommendations based on the results of the investigation but not act on those recommendations—for example, by promulgating a regulation—the commission members are not constitutional officers. That conclusion is crucial not only for purposes of the Appointments Clause, but also because the Incompati-

bility Clause, U.S. Const. art. I, § 6, cl. 2, prevents members of Congress from being appointed to federal "Offices." Petitioners' understanding of *Freytag* would likely preclude members of Congress from serving on such commissions, and invalidate more than one hundred years of consistent practice and understanding.

Third, limiting officers to persons who have authority to bind the government or private parties in their own name furthers the purpose of the Appointments Clause. The President (directly or through his direct subordinates) is appropriately held to account for persons who bind the government or private parties in their own name. But there is no reason to hold the President accountable for those whose acts require subsequent sanction by a superior—or those who can act only in a superior's name—because the President will be held accountable for the acts of the officer who grants subsequent sanction or in whose name the act is done.

Fourth, the historical understanding provides Congress and the President an administrable rule for determining when the Appointments Clause and other provisions that turn on officer status (such as the Foreign Emoluments Clause) apply. A rule that hinges officer status on the "significance" (in a colloquial sense) of a person's functions would make it difficult for Congress and the President to structure the government consistent with those provisions.

II. SEC ALJs are not constitutional officers because, although they occupy continuing positions in the federal government established by law, they sat-

isfy neither of the traditional rule's other necessary prerequisites for officer status.

A. An SEC ALJ has no authority to bind the Commission in any respect because the Commission can review any ALJ decision or determination—including credibility findings and decisions about what constitutes the record—*de novo*. The fact that the Commission sometimes chooses to defer to an ALJ's credibility determinations even though it is not required to do so is irrelevant, because what matters is whether the Commission is *bound* by any ALJ act. It is not.

Nor can SEC ALJs alter the rights of private parties (or bind the Commission) by entering final decisions—even in cases when the Commission does not conduct plenary review, an ALJ decision has no force at all until the Commission affirmatively enters a finality order. The Solicitor General contends that despite the Commission's finality-order requirement, an ALJ initial decision that the Commission decides not to review *de novo is* a final decision of the ALJ because it "shall, for all purposes … be deemed the action of the Commission." 15 U.S.C. § 78d-1(c). That is wrong for two reasons. First, § 78d-1(c) only applies to actions that the Commission has delegated ALJs the authority to perform in the first place, and the Commission has not delegated ALJs the authority to enter decisions that have any effect without affirmative Commission adoption. Second, even if the Solicitor General's understanding of subsection (c) were correct, all final decisions under that provision are issued in *the Commission's* name, not the ALJ's. The ALJ, in other words, acts

only as the Commission's agent, and the fact that every final decision is entered in the Commission's name ensures that it is the Commissioners who are held accountable.

Petitioners also argue that SEC ALJs are constitutional officers even absent the power to enter binding decisions because SEC ALJs possess hearing-related powers similar to those of the special trial judges in *Freytag*, including the power to issue subpoenas, swear oaths, and receive evidence. But those are not functions limited to constitutional officers. And ALJs have no authority to punish contempt (or do anything else) in a manner that alters a party's legal rights.

Moreover, although SEC ALJs share some features in common with Article III judges and other adjudicators the Court has held are constitutional officers, the powers that render those persons officers—e.g., the power to enter binding judgments and punish contempt—are powers that SEC ALJs lack.

B. Holding that SEC ALJs are employees rather than officers promotes the core accountability purpose of the Appointments Clause because no SEC ALJ decision has binding effect absent affirmative Commission action, and every binding decision is made in the Commission's name. The Commissioners will thus be held fully accountable for those decisions.

C. Nothing in the APA or the securities laws suggests that Congress understood ALJs in general or SEC ALJs in particular to be constitutional officers. To the contrary, every indication is that Con-

gress has always understood that ALJs are civil-service employees, not "Officers of the United States."

III. If this Court holds that SEC ALJs are constitutional officers, petitioners present an argument about the appropriate remedy for an Appointments Clause violation, and the Solicitor General asks the Court to decide whether restrictions on ALJs' removal are constitutional (or whether a serious constitutional question can be avoided by narrowly construing those restrictions). The Court has not invited Court-appointed *amicus* to take a position on either question, because neither implicates arguments "in support of the judgment below." 138 S. Ct. 923. Moreover, the Court did not add a question presented concerning the removal question despite requests that it do so, indicating that the removal question is not properly before the Court.

ARGUMENT

The Appointments Clause requires that "Officers of the United States" be appointed by the President with the advice and consent of the Senate, except that Congress may alternatively provide that "inferior Officers" be appointed by the President alone, the Head of a Department, or a Court of Law. U.S. Const. art. II, § 2, cl. 2. The ALJ who presided over petitioners' hearing, and the SEC's other ALJs, were not initially appointed in any of those ways, but instead were selected by SEC staff under authority delegated from the Commission. *See supra* at 7. The question presented is whether that manner of appointing SEC ALJs is unlawful because they are constitutional officers. The answer is no.

As the parties ultimately agree, the question whether SEC ALJs must be appointed pursuant to the Appointments Clause turns on whether SEC ALJs "exercis[e] significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126.[7] This Court has not had occasion to articulate the precise scope of that constitutional precondition. But a centuries-old understanding of the term "Officers of the United States" yields a rule fully consistent with the Appointments Clause's purpose and this Court's cases: An individual wields "significant authority" only if she holds an office that has been "delegat[ed] by legal authority … a portion of the sovereign powers of the federal government." 2007 OLC Op. 78; *see* Resp. Br. 15. And for the reasons explained below, that criterion is satisfied only if the individual has (i) the power to bind the government or third parties (ii) in her own name rather than in the name of a superior officer.

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[7] Petitioners suggest that any appointee whose position includes "'tenure, duration, continuing emolument, or continuous duties'" is a constitutional officer. Pet. Br. 18 (quoting *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890)). It is true that holding "a continuing position[]" in the federal government "established by law"—as SEC ALJs indisputably do, *see supra* at 4-5—is a necessary precondition for officer status. *See*, *e.g.*, *Freytag*, 501 U.S. at 881; *Germaine*, 99 U.S. at 511-12; *see also The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 139-42, 145-47 (1996). But as the Solicitor General explains, it is not sufficient. An official must *both* "wield significant authority" *and* "occupy a continuing office" to become an "Officer of the United States." Resp. Br. 17-18 n.3; *accord* 2007 OLC Op. 73-74.

SEC ALJs are not "Officers of the United States" because they can do neither of these things. An SEC ALJ has no authority to bind the government or alter the rights of third parties at all. And regardless, even if an SEC ALJ in theory had such authority, it could be exercised solely in the name of the Commission, not in the ALJ's own name. The decision below should be affirmed.

I. ONLY SOMEONE WHO HAS BEEN LAWFULLY DELEGATED AUTHORITY TO BIND THE GOVERNMENT OR THIRD PARTIES IN HER OWN NAME CAN BE AN "OFFICER" UNDER THE APPOINTMENTS CLAUSE

As the Solicitor General agrees, an individual appointed to a continuing, statutorily created position in the federal government exercises "significant authority pursuant to the laws of the United States," *Buckley*, 424 U.S. at 126, and is therefore a constitutional officer, only if she has been delegated power to "exercise a portion of the sovereign authority of the United States." Resp. Br. 15. Such sovereign authority primarily consists of the power to "bin[d] the government or third parties for the benefit of the public, such as by administering, executing, or authoritatively interpreting the laws." 2007 OLC Op. 77; *see* Resp. Br. 15.[8] And even appointees who have

[8] "Delegated sovereign authority also includes other activities of the Executive Branch concerning the public that … have long been understood to be sovereign functions, particularly the authority to represent the United States to foreign nations or to command military force on behalf of the government." 2007

such authority are not constitutional officers unless they have authority to exercise it in their own name rather than as a mere agent of a superior officer.

A. Only Persons Who Have Been Lawfully Delegated Authority To Bind The Government Or Third Parties Can Be Constitutional Officers

1. a. It has long been understood—and at least the Solicitor General does not dispute, Resp. Br. 15—that a constitutional officer is an individual "invested with some portion of the sovereign functions of government, to be exercised by him for the benefit of the public." Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 1, at 1-2 (1890). As Mechem's treatise explained, "[r]eflecting the understanding from the first hundred years of American law, including pre-Founding English law," 2007 OLC Op. 84, the "delegation … of some of the sovereign functions of government" is the "most important characteristic which distinguishes an office," and "[u]nless the powers conferred are of this nature, the individual is not a public officer," Mechem, *supra*, § 4, at 5; *accord* 2007 OLC Op. 77; *Office—Compensation*, 22 Op. Att'y Gen. 184, 187 (1898); *Appointment—Holding of Two Offices—Commissioner of Labor*, 26 Op. Att'y Gen. 247, 249 (1907).

This Court has explained, albeit in a somewhat different context, what it means to exercise a portion

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OLC Op. 77. Those other types of sovereign authority are not implicated here.

of the sovereign powers of the United States—*viz.*, to take action that "alter[s] the legal rights, duties and relations of persons," whether private parties or government actors. *I.N.S. v. Chadha*, 462 U.S. 919, 952 (1983); *see also* The Federalist No. 64, at 436 (Jay) (referring to the Constitution's allocation of "power to do" each "act of sovereignty by which the citizens are to be bound and affected"). The question is *not* whether the person can or does exercise functions that can be considered important—the fact that countless federal employees have "substantial practical authority" does not make them subject to the Appointments Clause. 2007 OLC Op. 98. Rather, the understanding since the Nation's early years has been that the *sine qua non* of officer status is the lawfully delegated authority to exercise "*legal* power" and "bind[] the government or third parties for the benefit of the public." *Id.* at 77, 98 (quotation omitted).

Acts that bind the government include filing enforcement actions in court or before an administrative body, making litigation decisions that bind the United States, and issuing binding interpretations of the law. Acts that bind private parties include issuing regulations that carry the force of law and entering final decisions in adjudications (which often also bind the government). Individuals holding continuing federal positions who exercise such sovereign authorities must be appointed pursuant to the Appointments Clause.

By contrast, "a person whose acts have no authority and power of a public act or law absent the subsequent sanction of an officer or the legisla-

ture"—for example, a person exercising "advisory" or "investigative" functions—is not an "Officer of the United States" but an employee. *Id.* at 95, 98 (quotation omitted). Thus, persons serving on an investigatory commission with the power (for example) to issue subpoenas, administer oaths, and examine witnesses but no authority to act on their findings or recommendations are not "Officers of the United States." *See infra* at 39-42.

b. This understanding of the meaning of a public "office" or "officer" is reflected in commentary from knowledgeable observers beginning before the Founding and continuing through the Nation's first Century.

The Continental Congress, for example, understood officers in England to be "persons holding sovereign authority delegated from the King that enabled them in conducting the affairs of government to affect the people 'against [their] will, and without [their] leave.'" 2007 OLC Op. 82 (quoting *King v. Burnell*, Carth. 478, 478 (K.B. 1700)).

Similarly, in 1822, the Supreme Judicial Court of Maine—in providing "the fullest early explication" of the term "Officer of the United States," *id.* at 83—explained that "[t]here is a manifest difference between an office, and an employment under the government," *Opinion of the Justices*, 3 Greenl. (Me.) 481, 482 (1822). An office "implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office," that "in its effects[,] … will bind the rights of others." *Id.* Mere employment, in contrast, characterizes appointees who are "agent[s] act[ing] only on behalf of [their]

principal"—i.e., a superior officer—whose "sanction is generally considered as necessary to give the acts performed the authority and power of a public act." *Id.*

Surveying these and other materials, the Judiciary Committee of the House of Representatives in 1899 similarly concluded that an "office" requires a delegation of sovereign authority, which "involves necessarily the power to (1) legislate, or (2) execute law, or (3) hear and determine judicially questions submitted," 1 Asher C. Hinds, *Hinds' Precedents of the House of Representatives* 604, 607 (1907) ("Hinds")—i.e., the power to "bind the Government or do any act affecting the rights of a single individual citizen," *id.* at 610. Thus, the Committee concluded, membership on "a commission created by law to investigate and report, but having no legislative, judicial, or executive powers," did not constitute an "office." *Id.* at 604.

Likewise, the Executive Branch's longstanding view has been that an "Officer of the United States" is someone holding a continuing position created by federal law who has authority to "bind[] the government or third parties for the benefit of the public," 2007 OLC Op. 77, whereas a mere employee is "a person whose acts have no authority and power of a public act or law absent the subsequent sanction of an officer or the legislature," *id.* at 95 (quotation omitted); *see also Constitutionality of Proposed Regulations of Joint Committee on Printing*, 8 Op. O.L.C. 42, 48 (1984) (while the "administration and enforcement" of the law must be performed by constitutional officers, "investigative and informative" func-

tions need not be); *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 249 (1989) (person occupying position that is merely "advisory," "investigative," or "informative" does not qualify as an officer).

2. This Court's more recent cases have stated that a constitutional officer has the power to exercise "significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126; *see Freytag*, 501 U.S. at 881; *Edmond*, 520 U.S. at 663; *Free Enter. Fund*, 561 U.S. at 486. The Court has not had occasion to more concretely articulate the governing standard, but as the Office of Legal Counsel has explained, "the phrase 'significant authority pursuant to the laws of the United States'" should be understood as a "shorthand for the full historical understanding of the essential elements of a public office." 2007 OLC Op. 87. And this Court's cases from the beginning have labeled "officers" only those holding a continuing position in the federal government who are, at a minimum, authorized to bind the government or alter the rights of private parties.

a. This Court's recent cases reflect this understanding. The heads of the Federal Election Commission at issue in *Buckley* were authorized to "administer and enforce" federal legislation, and their "enforcement power [was] both direct and wide ranging." 424 U.S. at 111. They therefore possessed power both to bind the United States and to alter private parties' rights. And the members of the Public Company Accounting Oversight Board in *Free Enterprise Fund* were "charged with enforcing" various securities laws and standards, and were authorized

to issue regulations that carry the force of law. 561 U.S. at 485.

The Tax Court special trial judges and Court of Criminal Appeals military judges this Court considered in *Freytag* and *Edmond* possessed similar authorities to bind the government and alter third-party rights. Court of Criminal Appeals judges, for example, review *de novo* the most serious court-martial judgments, *Edmond*, 520 U.S. at 662, and review of their decisions is limited, particularly as to factual findings, *id.* at 664-65. Moreover, Court of Criminal Appeals judges have authority to "render a final decision on behalf of the United States," subject to review by superior executive officers. *Id.* at 665. Tax Court special trial judges also have the power, among other things, to enter final decisions in some cases. *Freytag*, 501 U.S. at 882, 891; *see infra* at 36.

This Court's modern cases, in short, have never held to be a constitutional officer anyone lacking authority to bind the government or alter the legal rights of private parties.

b. The same is true of this Court's earlier cases. As the Solicitor General correctly explains, many of those cases concerned "whether Congress *intended* to treat a position it had created by statute as an 'office,' not whether the functions of the position were so significant that the Constitution *required* that the position be held by an officer" of the United States. Resp. Br. 24. Therefore not all of those cases provide particularly helpful guidance about the type of significant authority this Court has deemed necessary for *constitutional* officer status. *See id.*

Even so, the positions that this Court's earlier cases called "offices" were delegated power to bind the government or alter private rights. *See*, *e.g.*, *Ex parte Siebold*, 100 U.S. 371, 380 (1880) (federal marshals had authority, among other things, to "keep the peace and protect [election] supervisors in the discharge of their duties," "prevent fraudulent registration and voting," and "immediately to arrest any person who commits, or attempts to commit, … any offence against the laws of the United States"); *id.* at 379-80 (election supervisors authorized, among other things, "to cause such names to be registered as they may think proper to be so marked … and for purposes of identification to affix their signatures to each page of the original list," "to challenge any vote the legality of which they may doubt," and to "require[]" deputy marshals to perform certain duties, Act of Feb. 28, 1871, 16 Stat. 433, 436[9]); *United States v. Allred*, 155 U.S. 591, 594-95 (1895) (federal circuit court commissioners, among other things, "issue[d] warrants," "cause[d] the offenders to be arrested and imprisoned, or bailed, for trial," and "institute[d] prosecutions under the laws relating to crimes against the elective franchise and civil rights of citizens"); *Rice v. Ames*, 180 U.S. 371, 374 (1901) (extradition commissioners, like other commissioners, had power to issue arrest warrants and imprison offenders); *Go-Bart Importing Co. v. United States*, 282

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[9] *See also United States v. Gitma*, 25 F. Cas. 1323, 1323 (C.C.E.D. Va. 1879) (relevant Act "provides that *'when required' to do so by the supervisors* it shall be the duty of deputy marshals to 'attend the polls' in their districts or precincts" (emphasis added)).

U.S. 344, 353 n.2 (1931) (federal district court commissioners had authority, among other things, to "arrest and imprison" defendants, to "issue warrants for" fugitives, to "issue search warrants," and to "institute prosecutions under laws relating to the elective franchise and civil rights"); *Myers v. United States*, 272 U.S. 52, 158 (1926) (postmaster first-class assumed to be an officer was authorized by statute to, among other things, resolve certain disputes, Act of June 8, 1872, Ch. 335, 17 Stat. 283, 307, issue money orders, *id.* at 297-300, and "affix his signature to the certificate of sufficiency of guarantors or sureties," *id.* at 313); *Myers*, 272 U.S. at 159 (U.S. Attorney, who can make litigation decisions on behalf of the United States, is an "inferior officer"); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230 (1839) (district court clerk described as an "inferior officer" was required to provide a bond to the United States in case of a suit brought against him, *see* Act of Sept. 24, 1789, Ch. 20, 1 Stat. 73, 76, making clear that he exercised authority that affected individual rights).

This Court's cases are thus fully consistent with the traditional understanding that federal appointees are "Officers of the United States," requiring appointment in conformity with the Appointments Clause, only if (among other things) they have authority to bind the government or alter the rights of private parties.

B. Appointees Who Have Authority To Bind The Government Or Alter Private-Party Rights Only As Agents Of A Superior Officer Are Not Themselves Constitutional Officers

Although the authority to bind the government or private parties is a necessary precondition of constitutional officer status—and the lack of it here resolves this case, *see infra* Part II—it is not sufficient. Longstanding practice, Executive Branch understanding, and this Court's precedents all confirm that even an appointee to a continuing position in the federal government who has the de facto power to bind the government or alter private rights is *not* a constitutional officer if that power cannot be exercised in the appointee's own name, but only in the name of a superior who is a constitutional officer.

The First Congress, for example, established various deputy positions and vested appointment authority for those positions in the deputies' principals even though the principals were not department heads. Specifically, the First Congress authorized marshals, collectors, and surveyors—none of whom was the head of a department—to appoint their own deputies to assist them in their duties. 1 Stat. 73, 87; Act of Aug. 4, 1790, Ch. 35, 1 Stat. 145, 155; *see also* Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443, 525-26 & nn.491-96 (2018) (explaining why the appointing officers were not department heads).

The fact that the First Congress chose a method of appointment for these deputies that the Appointments Clause does not specify demonstrates that it

did not consider them to be constitutional officers. Yet these deputies had substantial authority to impact the rights of nongovernmental parties. To take one example, deputy marshals assisted their principal in maintaining custody over federal prisoners. 1 Stat. 73, 88; *see United States v. Mundell*, 6 Call. 245, 246, 248-49 (C.C.D. Va. 1795). To take another, collectors could authorize their deputies to grant permits for ships to unload imported goods. 1 Stat. 152, 155. The First Congress thus understood that deputies who acted only as agents of their superiors (rather than under authority delegated to their own office) need not be constitutional officers.

This Court reached the same conclusion in *Germaine*, where it held that a civil surgeon appointed by the commissioner of pensions was not a constitutional officer because "[h]e [wa]s but an agent of the commissioner." 99 U.S. at 512; *accord Auffmordt*, 137 U.S. at 328. And in *Steele v. United States*, 267 U.S. 505 (1925), the Court concluded that deputy marshals were "not in the constitutional sense … officer[s] of the United States" even though they, along with the marshal, "are the persons chiefly charged with the enforcement of the peace of the United States, as that is embraced in the enforcement of federal law," *id.* at 508, and even though deputy marshals are "called upon to exercise great responsibility and discretion in the service of" their duties, *id.*

Executive Branch opinions have long reflected the same view. In 1871, for example, the Attorney General explained that Congress provided non-Article II selection methods for positions such as

deputy marshal because "the office was substantially in the principal." *Civil-Service Commission*, 13 Op. Att'y Gen. 516, 521 (1871). These deputies, in other words, were only the "representatives" of a principal who was ultimately "responsible for their conduct." *Id.* Deputy district court clerks, in contrast, *were* officers because they were not only granted authority to "do every act which [their] principal[s] might do," but could do them in their "own name as deputy." *Deputy Clerks of United States District Courts—Premium on Official Bonds*, 29 Op. Att'y Gen. 593, 597 (1912). Thus, as the Office of Legal Counsel has more recently explained, an "agent" who "acts only on behalf of his principal" and has no power in his own office is merely an employee. 2007 OLC Op. 98 (quotation omitted); *cf. The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. at 144 n.57 ("That an employee may not exercise *independent* discretion does not, of course, mean that his or her duties may not encompass responsibilities requiring the exercise of judgment and discretion under the ultimate control and supervision of an officer."). This long-established rule "preserve[s] political accountability," *Edmond*, 520 U.S. at 663, because the principal will be held accountable for the agent's acts in the principal's name.

C. This Court Should Not Expand The Meaning Of The Term "Officers Of The United States" Beyond Its Historically Understood Limits

Petitioners (and the Solicitor General) seek to expand the category of constitutional officers dra-

matically beyond its historical limits, contending that this category is "expansive" and "sweeping." Pet. Br. 16. Although petitioners never clarify exactly how "significant authority" should be measured, they suggest that the category includes any authority that can colloquially be described as important, significant, or non-ministerial. *See*, *e.g.*, Pet. Br. 21-23. And they rely heavily on this Court's statement in *Freytag* that characterized as "significant" the authority of special trial judges to "take testimony, conduct trials, rule on the admissibility of evidence, and … enforce compliance with discovery orders." 501 U.S. at 881-82. Petitioners contend that any federal appointee who exercises similar hearing-related functions (including SEC ALJs) must be a constitutional officer. Pet. Br. 23; *see* Resp. Br. 21.

It is true that language in *Freytag* could be construed broadly to require that anyone who exercises authority that could be deemed "significant" in a colloquial sense—such as presiding over a hearing—is an officer even if she has no authority to bind the government or alter private-party rights, let alone to do so in the name of her own office. But *Freytag* never considered, let alone purported to alter, the longstanding traditional view of the scope of the Appointments Clause. *Cf.* 2007 OLC Op. 86 (the reference to "significant authority" in *Buckley* and subsequent cases "does vary somewhat from the well-established historical formulation, but nothing in the Court's opinion suggests any intention to break with the longstanding understanding of a public office or fashion a new term of art" (citation omitted)). And there is no need to adopt petitioners' and the Solici-

tor General's ahistorical and overly broad construction to support the holding in *Freytag*, which is fully consistent with the traditional understanding.

Petitioners' reading of *Freytag*, moreover, would have significant negative practical consequences (including calling into question the constitutionality of more than a century's worth of presidential and congressional investigative commissions), would not materially advance the purpose of the Appointments Clause, and would be difficult for the political branches to administer.

1. The traditional rule fully supports the Court's holding in *Freytag* because the special trial judges at issue in that case undoubtedly had authority to bind the government and private parties, in at least two respects.

First, they could enter binding final judgments in their own name in some circumstances, 501 U.S. at 882, which suffices to establish their officer status. It is true that the Court's opinion stated that the authority to issue final judgments "would" confirm special trial judges' officer status "[e]ven if" their hearing-related duties described above "were not as significant" as the Court believed. *Id.* Even so, special trial judges' ability to enter final judgments fully supported the Court's holding, and it was therefore unnecessary to the Court's holding to consider the constitutional status of other appointees who do not possess such authority.

Second, the hearing-related functions of special trial judges that this Court collectively labeled "significant" included the power to bind the government

and private parties by "enforc[ing] compliance with discovery orders." *Id.* at 881-82. As the SEC explained below, special trial judges had "power to enforce compliance with discovery orders" because they had authority to punish contempt. SEC C.A. En Banc Br. 31 (quotation omitted).[10] And the "power of contempt is a hallmark of an adjudicative official's status as a constitutional officer," *id.* at 33, precisely because it is a power to bind the government and private parties.

The Solicitor General acknowledges this contempt power but argues that what the Court in *Freytag* found important was that special trial judges could enforce discovery orders, and not "the particular type" of enforcement power special trial judges possessed. Resp. Br. 21 n.4 (quotation omitted). But it is not apparent what authority other than the power to punish contempt allowed special trial judges to "enforce compliance with discovery orders," 501 U.S. at 882, as the Commission acknowledged below, SEC C.A. En Banc Br. 31. If special trial judges lacked contempt power, they would have been "dependent upon [a] court for enforcement" of a subpoena or other order. *Proposed Legislation to Grant*

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[10] The Court in *Freytag* noted the Tax Court's contempt power. *See* 501 U.S. at 891 (citing 26 U.S.C. § 7456(c)). The Tax Court has delegated to special trial judges various hearing-related powers, including the power to issue subpoenas, administer oaths, examine witness, and rule on the admissibility of evidence, and has also delegated "such further and incidental authority … as may be necessary for the conduct of trials and other proceedings." Tax Ct. R. 181 (1990). Congress labeled the contempt power an "incidental" authority in the statute granting that authority to the Tax Court. 26 U.S.C. § 7456(c).

Additional Power to The President's Commission on Organized Crime, 7 Op. O.L.C. 128, 130 (1983).

Admittedly, the other special trial judge functions that this Court mentioned—i.e., the power to "take testimony, conduct trials, [and] rule on the admissibility of evidence," *Freytag*, 501 U.S. at 881-82—are unconnected to the power to punish contempt or otherwise bind the government or alter private-party rights. But *Freytag* did not consider whether—let alone conclude that—any such authority alone would have been enough to establish officer status. Certainly, the mere mention of such functions among others that *do* empower special trial judges to bind parties should not be read to overcome the centuries-old understanding that the power to bind the government or private parties is a necessary condition for constitutional officer status.[11]

2. Adopting petitioners' standard would also have significant adverse practical consequences.

For one thing, a rule that classifies anyone who performs "important," "significant," or "non-ministerial" tasks as an officer could result in subjecting, for example, every government attorney, investigator, and law-enforcement officer to the Ap-

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[11] Special trial judges arguably also have power to bind the government in another respect: the Tax Court must accept their findings of fact unless "clearly erroneous." *See* Tax Ct. R. 183(d) ("the findings of fact recommended by the Special Trial Judge shall be presumed to be correct"); *see also Stone v. Comm'r*, 865 F.2d 342, 347 (D.C. Cir. 1989) (interpreting same language in prior version of Tax Court rules to provide for clearly erroneous standard of review).

pointments Clause. Petitioners' rule could cast doubt on the constitutionality of the method of appointment of many thousands of civil servants.

Adopting petitioners' and the Solicitor General's reading of *Freytag*, moreover, would call into significant doubt the validity of a more-than-a-century-old, unbroken congressional practice of establishing commissions that include members not appointed under the Appointments Clause—including members of Congress—and that have historically been granted authority to exercise hearing-related powers akin to those possessed by special trial judges (and SEC ALJs, *see infra* at 48-50), but *not* the power to punish contempt. For example, such commissions typically possess the powers incident to investigation, e.g., to issue subpoenas, administer oaths, collect documents, and call and examine witnesses. *See*, *e.g.*, *Proposed Legislation to Grant Additional Power to The President's Commission on Organized Crime*, 7 Op. O.L.C. at 130 & n.7 (list of many such commissions); *Proposed Commission on Deregulation of International Ocean Shipping*, 7 Op. O.L.C. 202, 202 (1983) (discussing congressional commissions). If such authorities sufficed to establish officer status, then these commissions would be irredeemably unconstitutional: even if they could otherwise be staffed with properly appointed constitutional officers, members of Congress would absolutely be precluded from serving on them by the Incompatibility Clause, which prohibits Senators and Representatives from being "appointed to any civil Office under the Authority of the United States." U.S. Const. art. I, § 6, cl. 2.

Yet both Congress and the Executive have for more than a century consistently concluded that such committees pose no Appointments Clause or Incompatibility Clause problem precisely because, despite the hearing-related powers they (like special trial judges) possess, such commissions can investigate, make findings, and make recommendations, but (unlike special trial judges) they cannot enforce those findings or recommendations to bind the government or private parties.

Thus, for example, the House Judiciary Committee's 1899 report described earlier, after "extensively survey[ing] the definition of an 'office,'" 2007 OLC Op. 85, and concluding that investigation and reporting are not officer functions, *see supra* at 27, applied its analysis to certain commissions that Congress had recently created, considering whether the Incompatibility Clause precluded members of Congress from serving on them, Hinds at 611. The Committee concluded that commission membership was not an office, even when the commission was empowered to, for example, administer oaths, issue subpoenas, and collect documents and examine witnesses. *See*, *e.g.*, An Act of 1898, Ch. 447, 30 Stat. 445; An Act of 1898, Ch. 466, 30 Stat. 476.

The Office of Legal Counsel similarly has concluded that investigative commission members are not constitutional officers despite subpoena and other related powers when they "possess no enforcement authority or power to bind the Government." *Proposed Commission on Deregulation of International Ocean Shipping*, 7 Op. O.L.C. at 202; *see also id.* at 203 (noting relevant commission's power to is-

sue subpoenas and examine witnesses); *see also Constitutionality of Proposed Regulations of Joint Committee on Printing*, 8 Op. O.L.C. at 48 (non-officers may exercise "investigative and informative powers of the type generally delegated to congressional committees"). And that Office has specifically concluded that non-officers can issue subpoenas and administer oaths, and explained that the subpoena power in particular "has not been viewed as the exercise of a coercive power": the issuing agent is "dependent upon the courts for enforcement" of the subpoena by punishing contempt, and no "matter what the issuing agent finds out, it cannot, in the absence of any other power, use the information to *do* anything, such as enact or execute a law, adjudicate a dispute, or otherwise take any affirmative action which will affect an individual's rights." *Proposed Legislation to Grant Additional Power to The President's Commission on Organized Crime*, 7 Op. O.L.C. at 130 (quotation omitted). The same is true of other hearing-related powers, such as the power to call witnesses, admit evidence, and administer oaths—if those authorities do not include the power to use the information collected "to *do* anything" that binds the government or private parties, it has uniformly been understood that those powers need not be wielded by officers.[12]

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[12] The Office of Legal Counsel has also made clear that such commissions *would* meet the other requirements of a constitutional office—e.g., tenure and continuing duties—if the commission *could* take binding action based on its findings. *See*, *e.g.*, *Constitutionality of the Ronald Reagan Centennial Commission Act of 2009*, 2009 WL 2810453, at *2 & n.6 (O.L.C.

Petitioners' argument that hearing-related powers similar to those typically possessed by investigative commissions establish officer status cannot be reconciled with this joint Legislative and Executive Branch practice and understanding.[13]

3. Petitioners' standard would also not materially advance the purpose of the Appointments Clause, namely, "to preserve political accountability relative to important Government assignments." *Edmond*, 520 U.S. at 663.

The constrained historical understanding of the attributes of a constitutional office appropriately ensures that the President (directly or through a direct appointee) will be accountable for the acts of those who themselves bind the government or private parties, because the President or his direct appointee is responsible for appointing the actor who exercised that authority. By contrast, when "a person['s] …

Apr. 21, 2009) ("members of an unpaid commission … [can] hold offices in the constitutional sense" (citing prior opinions)).

[13] Petitioners' sweeping construction could also have unpredictable implications for the application of other constitutional provisions that turn on "Officer" status, such as the Impeachment Clause and the Foreign Emoluments Clause, both of which only apply to constitutional officers. U.S. Const. art. I, § 9, cl. 8; *id.* art. II, § 4; *see*, *e.g.*, *Application of the Emoluments Clause to a Member of the President's Council on Bioethics*, 29 Op. O.L.C. 55, 70-71 & n.8 (2005) (describing and approving the traditional view of the Department of Justice that "Office of Profit or Trust under [the United States]" in the Foreign Emoluments Clause is synonymous with "Officer of the United States" in the Appointments Clause, thereby limiting the number of persons in the federal workplace who are subject to the complex restrictions of the former).

acts have no authority … absent the subsequent sanction of an officer," 2007 OLC Op. 95 (quotation omitted), the officer who grants the "subsequent sanction" (and the President or the President's direct subordinate who appointed that officer) will be, and should be, held *directly* accountable for the decision. Likewise, when an employee acts solely in the name of a superior officer, that superior will be blamed or praised for acts done in his name—regardless of the method by which the employee was hired—and the President is accountable for the superior's appointment. *Cf. Andrade v. Regnery*, 824 F.2d 1253, 1257 (D.C. Cir. 1987) (such delegation "does not offend the Appointments Clause so long as the duly appointed official has final authority over the implementation of the governmental action").

4. Finally, construing "Officer of the United States" to turn on the authority to bind the government or alter private rights in the officer's own name—rather than on an amorphous standard based on a subjective assessment of the perceived importance or significance of the appointee's authority —would provide an administrable rule for Congress and the Executive Branch to determine which positions require compliance with the Appointments Clause and other constitutional provisions applicable to officers. Adopting petitioners' vague standard would complicate the political branches' efforts to comply not only with the Appointments Clause but also other constitutional provisions (such as the Foreign Emoluments Clause, *see supra* at 42 n.13) that turn on officer status.

II. SEC ADMINISTRATIVE LAW JUDGES ARE NOT "OFFICERS OF THE UNITED STATES" FOR PURPOSES OF THE APPOINTMENTS CLAUSE

Under the foregoing principles, SEC ALJs are not constitutional officers subject to the Appointments Clause.

A. SEC ALJs Are Not Constitutional "Officers" Because They Cannot Bind The Government Or Alter The Rights Of Private Parties In Their Own Name

1. *SEC ALJs Have No Authority To Bind The Government Or Private Parties*

a. SEC ALJs have no authority to bind the Commission in any respect. Congress provided that "the Commission shall retain a discretionary right to review the action of any [delegee, including an] administrative law judge, … upon its own initiative or upon petition of a party to or intervenor in such action." 15 U.S.C. § 78d-1(b). Consistent with that directive, the Commission can revisit *de novo* any finding of fact or determination of law made by an ALJ, *see id.*, and "ultimately controls the record for review and decides what is in the record," Pet. App. 91a; *see* 17 C.F.R. §§ 201.411(a), 201.452. Thus, unlike (for example) the Court of Criminal Appeals military judges in *Edmond*, whose factual findings could be revised only when not supported by substantial evidence, 520 U.S. at 665, every decision an SEC ALJ makes can be revised fully by the Commission, so the Commission "is in no way bound by the decision"

of the ALJ, *Attorney General's Manual on the Administrative Procedure Act* 83 (1947).

Petitioners and the Solicitor General believe it important that, as a factual matter, the Commission often decides to defer to an ALJ's credibility determinations, Pet. Br. 24; Resp. Br. 36-37, but that is irrelevant: it is undisputed that the Commission has no legal obligation to defer to ALJ credibility determinations, and thus that ALJs have no authority to bind the Commission, *see* Pet. App. 92a-93a n.117, which is what matters for officer status. If and when the Commission *chooses* to defer to the ALJ, the Commission itself is accountable for that decision.

b. SEC ALJs also lack authority to make final decisions that are binding on private parties (or the Commission). They are authorized only to issue initial decisions, 17 C.F.R. § 201.360, which have no force of their own—no party's rights are affected until *the Commission* issues a final decision.

The Commission can issue a final decision after conducting plenary review, either when a petition for review is filed, *id.* § 201.411(b), or when the Commission elects to review the ALJ's decision on its own initiative, *id.* § 201.411(c). If the Commission decides not to conduct plenary review, an ALJ initial decision cannot take effect until the Commission issues a finality order. *Id.* § 201.360(d)(2).[14] Even in the case of a default, the ALJ must issue an initial

[14] Petitioners err in describing finality orders as "non-discretionary." Pet. Br. 33. The Commission issues a finality order only if it has decided not to exercise its discretion to conduct plenary review. 17 C.F.R. § 201.360(d)(1).

decision, which is then subject to review through one of the mechanisms just described. *See supra* at 11.

Both petitioners and the Solicitor General emphasize that the Commission does not actually engage in plenary review in most cases. Pet. Br. 32-33; Resp. Br. 22. That is true, *see supra* at 11 n.6, but beside the point. The relevant question, as petitioners admit, "'is simply whether a position possesses delegated sovereign authority to act in the first instance, whether or not that act may be subject to direction or review by superior officers.'" Pet. Br. 30-31 (quoting 2007 OLC Op. 75). SEC ALJs have *not* been delegated "sovereign authority to act in the first instance" because their initial decisions do not themselves alter the legal rights of individuals (or bind the government). Those initial decisions "have no authority and power of a public act or law absent the subsequent sanction of an officer," 2007 OLC Op. 95 (quotation omitted)—i.e., the sanction of the Commission either after plenary review or through the issuance of a finality order.

The lack of any delegated power to issue binding decisions distinguishes SEC ALJs from the special trial judges in *Freytag*. *See supra* at 36. It also distinguishes SEC ALJs from judges on the Court of Criminal Appeals in *Edmond*. Those judges had authority to enter binding final decisions in their own name, subject to review (but not *de novo* review) by superior executive officers. *Edmond*, 520 U.S. at 665; *see also* U.S. *Edmond* Br., 1997 WL 33018, at *25 (Court of Criminal Appeals "authorized by statute to issue final decisions that are reviewable under a deferential standard"). As petitioners and the So-

licitor General correctly note, Pet. Br. 29; Resp. Br. 35, the fact that the Court of Criminal Appeals' final decisions were reviewable by a superior executive officer was, in part, what made those judges inferior rather than principal officers. *Edmond*, 520 U.S. at 665. But the fact that they could issue final decisions that became effective absent subsequent sanction by a superior officer is at least one reason why those judges were constitutional officers in the first place.

c. The Solicitor General recognizes that under Commission regulations, even when the Commission decides not to conduct plenary review, an ALJ's initial decision has no force absent a Commission finality order. Resp. Br. 35. He contends, however, that "the ALJ's decision is still the Commission's final decision by operation of [§ 78d-1(c)]," *id.*, which provides that if the Commission declines to exercise review, or if no review is sought, "then the action of [the delegee, including an] administrative law judge, … shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission," 15 U.S.C. § 78d-1(c).

That is incorrect. Subsection (c) does not come into play at all unless the ALJ exercises a function delegated under subsection (a). But the Commission has not delegated ALJs the authority to enter a decision that can have effect without the Commission's affirmative sanction through a finality order. *See supra* at 10-11. Thus, subsection (c)'s "deemed" provision does not apply to ALJ initial decisions.

Moreover, even if the Solicitor General's reading of § 78d-1(c) were correct, it would only confirm that

SEC ALJs are not constitutional officers. After all, § 78d-1(c) deems an ALJ's initial decision to be the decision *of the Commission*, not the ALJ. In other words, even if ALJs had de facto authority to alter a party's rights, they could only do so in the name *of the Commission*.

In this respect, ALJs are akin to the non-officer deputies that Congress established as early as 1789—"agent[s]" who "act[] only on behalf of [their] principal," i.e., the Commission. 2007 OLC Op. 98 (quotation omitted). The fact that Congress did not delegate SEC ALJs any power to issue decisions in their own name shows that they are not officers but "representatives" of the Commission, which is ultimately "responsible for their conduct," *Civil-Service Commission*, 13 Op. Att'y Gen. at 521, and which can and will be held accountable for that conduct, consistent with the Appointments Clause's purpose, *see supra* at 1-2.

d. Petitioners and the Solicitor General also rely heavily on other functions SEC ALJs may perform when presiding over hearings. They note that SEC ALJs may, for example, administer oaths, issue subpoenas, hold hearings, take testimony, and admit evidence. Pet. Br. 23; Resp. Br. 21. But as explained earlier, it has long been understood that non-officers can exercise such hearing-related powers—powers routinely possessed by bodies serving investigative functions whose members are not constitutional officers. *See supra* at 39-42.

Petitioners and the Solicitor General point to *Freytag*'s statement that the power to "take testimony, conduct trials, rule on the admissibility of evi-

dence, and … enforce compliance with discovery orders," 501 U.S. at 881-82, is "significant." But SEC ALJs do *not* have the power to "enforce" discovery or any other orders in any way relevant to the Appointments Clause, because they "have no authority to punish disobedience of discovery orders or other orders with contempt sanctions of fine or imprisonment." Pet. App. 7a; *see supra* at 9. Indeed, as the Commission explained, SEC ALJs are even "powerless to enforce their subpoenas. The Commission itself would need to seek an order from a federal district court to compel compliance." Pet. App. 94a n.120 (citing 15 U.S.C. § 78u(c)). SEC ALJs only have power to deal with "contemptuous conduct" "during a proceeding"—they can exclude the offending party from the hearing room or prevent him from representing others in the proceedings. 17 C.F.R. § 201.180(a). That limited authority is subject to immediate review by the Commission, *id.* § 201.180(a)(2), and if not reviewed is deemed an action of the Commission, 15 U.S.C. § 78d-1(c), so it cannot create officer status. *See supra* at 47-48. And even if done in the ALJ's own name, this power—along with SEC ALJs' other hearing-related powers, such as the power to admit evidence—is an authority anyone performing an investigative function would have.

Such authority, by itself, does not establish a constitutional office, *see supra* at 39-42, because its exercise does not by itself "alter[] the legal rights, duties and relations of persons." *Chadha*, 462 U.S. at 952. To be sure, an officer who *does* have authority to bind the government or private parties may use

powers inherent in conducting a hearing or investigation to find the facts necessary to determining the parties' legal rights. But if "no matter what [a federal actor] finds out" at the conclusion of the hearing or investigation, the actor cannot "use the information to *do* anything, such as enact or execute a law, adjudicate a dispute, or otherwise take any affirmative action which will affect an individual's rights," *Proposed Legislation to Grant Additional Power to The President's Commission on Organized Crime*, 7 Op. O.L.C. at 130 (quotation omitted), she is not an officer.

To be sure, an appointee's role in "shaping the record" through such functions, Pet. Br. 24; Resp. Br. 20, 24, *could* suggest officer status if the appointee's evidentiary rulings and other acts actually "shaped the record" in a manner binding on the agency.[15] But as explained above, no SEC ALJ's evidentiary

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[15] Contrary to petitioners' suggestion, magistrate judges are not officers based solely on their ability to "shape the evidentiary record" in a federal court case. Pet. Br. 30. Magistrate judges are authorized to enter final judgments, 28 U.S.C. § 636(c)(1), and enter unreviewable orders, *Roell v. Withrow*, 538 U.S. 580, 585 (2003); 28 U.S.C. § 636(c)(3). They may also enforce those orders and others through the contempt power, and may summarily order imprisonment or a fine. 28 U.S.C. § 636(e). Magistrates can also issue arrest warrants, 18 U.S.C. § 3041; authorize criminal complaints, Fed. R. Crim. P. 3; order pre-trial detention, 18 U.S.C. §§ 3141(a), 3142(a)(4); detain material witnesses, 18 U.S.C. § 3144; try misdemeanor cases, 18 U.S.C. § 3401(a); and impose sentences for petty offenses without the parties' consent, 28 U.S.C. § 636(a)(4). Magistrate judges are therefore constitutional officers for reasons having nothing to do with their ability to "shape the evidentiary record."

ruling is binding on the Commission, which has plenary authority to determine and analyze the record—an authority the Commission exercised in this case. *See supra* at 12. SEC ALJs simply have no power to bind the government or private parties, let alone the power to do so in the ALJ's own name rather than that of the Commission. SEC ALJs therefore are not constitutional officers subject to the Appointments Clause.

2. *SEC ALJs Are Not Comparable To Article III Judges In Any Relevant Respect*

Petitioners and the Solicitor General also argue that SEC ALJs are constitutional officers because of a "parallel between ALJs and Article III judges." Resp. Br. 25; *see* Pet. Br. 18-20. Not so.

SEC ALJs preside over proceedings that "are adversarial in nature." *Butz*, 438 U.S. at 513. ALJs thus may do many things that Article III judges also do, including exercise the hearing-related functions described above. And ALJs are "functionally comparable" to judges in the sense that "the process of agency adjudication," like the process by which a court decides a case, is "structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." *Id.*

Thus, ALJs' adjudicative functions render them sufficiently analogous to trial judges to afford ALJs absolute immunity for actions taken in presiding over agency hearings. *Id.* at 514. The similarities between agency adjudications and judicial proceed-

ings also warrant granting the States sovereign immunity in agency proceedings held before ALJs, *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753-67 (2002), although the final decision in *Federal Maritime Commission* was rendered by the Commission, not an ALJ, *id.* at 750. But it does not follow that SEC ALJs must be "Officers of the United States" simply because district court judges are. SEC ALJs lack the crucial authorities that district courts possess—*viz.*, the authority to bind the government or private parties, for example by entering binding final judgments or punishing contempt. SEC ALJs thus are nothing like district court judges in any way that matters for Appointments Clause purposes.

It is certainly true, as the Solicitor General explains, Resp. Br. 27, that Congress in the APA sought to make ALJs "a special class of semi-independent subordinate hearing officers." *Ramspeck*, 345 U.S. at 132 (quotation omitted). Congress achieved this balance by giving ALJs "limited separation from their agencies with respect to 'their tenure and compensation,'" Pet. Br. 37 (quoting *Ramspeck*, 345 U.S. at 132 n.2), so that they would be able to maintain neutrality in evaluating evidence and formulating their initial decisions, *see supra* at 3-5. But as petitioners recognize, by keeping ALJs within the agency, Congress also ensured that hearing examiners would be "subordinate to their respective agencies" in "every … significant respect" *other than* "tenure and compensation." Pet. Br. 37-38. Crucially, Congress did *not* seek to increase ALJ independence—and certainly not SEC

ALJ independence—by granting ALJs independent authority to bind the government or private parties. That is the authority that matters, and it is lacking here.

There is some irony, moreover, in petitioners' complaint that, despite the structural independence that Congress *has* provided ALJs, they are still not sufficiently "independent." Pet. Br. 38-40. If that is so, adopting petitioners' position would only make matters worse, since requiring appointment by a high-level political officer is itself a form of political control over the appointee. *Cf.* Barron & Kagan, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 223 n.80 (2001) ("Presidents often have a good deal of actual control over independent agencies [despite for-cause removal restrictions] by virtue of their appointments and other powers."). Congress gave agencies like the Commission flexibility to enhance ALJs' structural independence beyond what the APA requires by authorizing them to delegate the power to hire ALJs to non-political employees—as the Commission had until recently done, *see supra* at 7—while at the same time reserving policymaking and decisionmaking authority (and thus accountability) to the Commission. The manner in which Congress achieved this balance is fully consistent with the Appointments Clause, and there is no reason to disturb it.

B. SEC ALJs' Employee Status Is Consistent With The Purpose Of The Appointments Clause

The Appointments Clause's accountability purpose is fully served by classifying SEC ALJs as em-

ployees rather than constitutional officers. Because "the Commission is not bound in any way by its ALJ[s'] decisions," "the blame for its unpopular decisions," as well as the praise for its good ones, "fall[s] squarely on the commissioners and, in turn, the president who appointed them." *Bandimere*, 844 F.3d at 1198 (McKay, J., dissenting). Indeed, because SEC ALJ decisions have no force without subsequent Commission action—and because those decisions in all events are issued in the name of the Commission, not the ALJ—it is "quite clear where the buck stops" in matters initially heard by an SEC ALJ. *Id.* Thus, "[s]o long as *the commissioners* have been validly appointed"—which no one disputes here—"the Appointments Clause is satisfied." *Id.* (emphasis added).

C. Congress Has Not Adopted The View That ALJs Are Constitutional "Officers Of The United States"

Finally, petitioners (but, notably, not the Solicitor General) also argue that "Congress provided, in both the securities laws and the APA, that ALJs are 'officers,'" a designation petitioners say "is all but dispositive of [SEC ALJs'] status under the Appointments Clause." Pet. Br. 12. Although congressional intent is "not dispositive of the constitutional question here," Resp. Br. 29, Congress has long made abundantly clear its view that ALJs are *not* constitutional officers but employees.

Petitioners correctly note that the APA originally described ALJs as "officers," and the securities laws refer to them as "officers of the Commission." *See* Pet. Br. 35-36. But that does not mean that

Congress understood SEC ALJs to be constitutional officers for purposes of the Appointments Clause. Petitioners cite *Germaine*, which concluded that the statutory term "Officer of the United States" there carried the same meaning as under the Appointments Clause. 99 U.S. at 510. Unlike in *Germaine*, however, Congress has never referred to ALJs as officers *of the United States*. And even if Congress had used that more specific term, this Court has held that the phrase "'officer of the United States,' when employed in the statutes of the United States, is to be taken usually to have the limited constitutional meaning," but can also "include others than those appointed by the President, heads of departments, and courts." *Steele*, 267 U.S. at 507. Congress's reference to ALJs as simple "officers" or "officers of the Commission" does not demonstrate an intent to create a constitutional office. *See also Lamar v. United States*, 240 U.S. 60, 65 (1916) ("words may be used in a statute in a different sense from that in which they are used in the Constitution"); *United States v. Hendee*, 124 U.S. 309, 313 (1888) (clerk was "officer" under compensation statute, even though he was "not, in the constitutional sense of the word, an officer of the United States").

In any event, any doubt about Congress's understanding was erased in 1966, when it restated and codified Title 5 of the U.S. Code "without substantive change." H.R. Rep. No. 89-901, at 1 (1965). Petitioners correctly explain that Congress in 1966 "*defined* 'officer' in the APA as 'an individual … required by law to be appointed in the civil service by' 'the President,' 'a court of the United States,' or 'the

head of an Executive agency' or 'military department.'" Pet. Br. 36 (emphasis in original) (citing 5 U.S.C. § 2104(a)(1)); *see* Pub. L. No. 89-554, 80 Stat. 378, 408-09 (1966). What petitioners miss, however, is that Congress simultaneously deleted every reference to ALJs (then called "hearing examiners") as "officers," and replaced each such reference with "employee," *e.g.*, 80 Stat. 386-87, which is how these provisions read today, *e.g.*, 5 U.S.C. §§ 556, 557 (describing ALJ as "presiding employee"); *see also id.* § 2105(a) (defining "employee" to include individuals "appointed in the civil service by … an individual who is an employee under this section"). The fact that Congress added definitions of "officer" and "employee" to Title 5 and at the same time made clear that ALJs were employees refutes petitioners' contention that Congress understood ALJs to be constitutional officers.[16]

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[16] Petitioners err in asserting that the APA's legislative history shows that Congress "understood that hearing examiners would be executive Officers." Pet. Br. 36. When formulating the APA, Congress considered a proposal "that the Judicial Conference appoint an officer to appoint and remove examiners," *Administrative Procedure Act: Legislative History, 79th Congress, 1944-46*, at 50, which raised concerns about possible "constitutional problems as to the appointing power," *id.*, given that "the Judicial Conference is a committee and not a court," *id.* at 42. The problem was not that *hearing examiners* had to be appointed in conformity with the Appointments Clause, but that a position assigned responsibility for appointing and removing hearing examiners for all agencies might have to be filled by a constitutional officer chosen under the Appointments Clause—which would not have occurred under the proposal that the Judicial Conference choose the appointing officer, because the Judicial Conference is not a court of law (or depart-

Petitioners also suggest in passing what appears to be a *statutory* argument: that by granting the "agency" authority to appoint ALJs, 5 U.S.C. § 3105, Congress intended that ALJs could be appointed only by agency *heads*, an obligation petitioners believe "the Commission has failed to discharge," Pet. Br. 3. Not so. Congress authorized the Commission to delegate "any of its functions to," among others, "an employee." 15 U.S.C. § 78d-1(a). Petitioners do not explain why this broad delegation authority does not encompass delegation of the power to hire ALJs.

To the extent petitioners contend that the word "agency" in § 3105 precludes delegation because it necessarily refers only to the head of the agency, that construction is implausible. For example, the very next section of the Code uses the phrase "the head of an Executive department." 5 U.S.C. § 3106. And Title 5 elsewhere uses the term "agency head." *E.g.*, *id.* § 608. Had Congress intended that ALJs could be appointed only by a department head, it

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ment head). Congress, of course, ultimately decided that hearing examiners would be "appointed and removed within the usual framework of the public service," *id.* at 50, an arrangement that raised no constitutional concerns at all.

Petitioners also incorrectly contend that the Attorney General, when asked to opine on the extent of the Civil Service Commission's authority under section 11 of the APA, deemed hearing examiners constitutional officers. Pet. Br. 37; *see Administrative Procedure Act, Promotion of Hearing Examiners*, 41 Op. Att'y Gen. 74 (1951). The Attorney General instead concluded that section 11 would pose no Appointments Clause problem *even if* ALJs were inferior officers. *See id.* at 79-80. The Attorney General therefore did not have to—and in fact did not—consider whether ALJs actually were inferior officers.

would have used one of those readily available formulations. The fact that Congress did not do so confirms that it considered ALJs employees that need not be appointed under the Appointments Clause.

III. THE COURT HAS NOT INSTRUCTED THE COURT-APPOINTED *AMICUS* TO BRIEF THE PARTIES' REMEDIAL AND REMOVAL ARGUMENTS

Petitioners present arguments about the appropriate remedy for an Appointments Clause violation. Pet. Br. 42-58. The Solicitor General, meanwhile, argues that if the Court reverses the court of appeals as to the Appointments Clause question, it should also consider whether Congress's decision to grant ALJs "good cause" removal protection is unconstitutional, and whether the Court can avoid that question by construing "for cause" and the Merit System Protection Board's authority under 5 U.S.C. § 7521 narrowly. Resp. Br. 39-55. This brief does not consider those questions because the Court has not instructed Court-appointed *amicus* to take a position on them.

A. *Amicus* was appointed to "brief and argue this case … in support of the judgment below." 138 S. Ct. 923. Petitioners' remedial arguments by their terms are relevant only if the judgment below is reversed. The Court has thus not instructed the Court-appointed *amicus* to address those arguments.

B. So too with the Solicitor General's removal argument. The judgment below rests on the conclusion that SEC ALJs are not constitutional officers. The Solicitor General argues that the Court should

reach the removal question "[s]hould the Court agree that the Commission's ALJs are officers." Resp. Br. 39-40 n.7. If the Court concludes that SEC ALJs are officers under the Appointments Clause, the judgment below would be reversed regardless of the answer to the removal question. *See* Pet. Cert. Reply 11. Because any argument as to removal would not be in support of the judgment below, it is similarly outside the scope of *amicus*'s appointment.

Moreover, the Court has indicated that the removal issue is not properly before it. The Solicitor General asked the Court at the certiorari stage to add an additional question concerning removal if the Court did not believe that issue to be within the scope of the question presented in the petition. Resp. Cert. Br. 21, 26. Petitioners objected, explaining that the removal question was not "even remotely encompassed by petitioners' question presented," Pet. Cert. Reply 10, and presented several additional arguments for why the Court should not consider the removal question, including that it has never been decided by any court and that the answer would not affect the judgment, *id.* at 9-11. But petitioners specifically "requeste[d]" that if "the Court nevertheless [were] inclined to decide the removal issue now," that "the Court [should] formulate a specific question on that topic," as the Solicitor General had also requested. *Id.* at 11. This Court declined to add an additional question presented, indicating the Court's agreement with petitioners that the removal question is not properly before it.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

RELEVANT CONSTITUTIONAL PROVISIONS

Article I, Section 6, Clause 2 of the United States Constitution (Incompatibility Clause):

* * *

[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Article I, Section 9, Clause 8 of the United States Constitution (Foreign Emoluments Clause):

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Article II, Section 2, Clause 2 of the United States Constitution (Appointments Clause):

* * *

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Article II, Section 4 of the United States Constitution (Impeachment Clause):

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

RELEVANT STATUTES

5 U.S.C. § 554:

Adjudications.

* * *

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of

this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

* * *

5 U.S.C. § 556:

Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) 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.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The func-

tions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;

(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;

(9) dispose of procedural requests or similar matters;

(10) make or recommend decisions in accordance with section 557 of this title; and

(11) take other action authorized by agency rule consistent with this subchapter.

* * *

5 U.S.C. § 557:

Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall

first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

* * *

5 U.S.C. § 2104:

Officer.

(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.

(b) Except as otherwise provided by law, an officer of the United States Postal Service or of the Postal Regulatory Commission is deemed not an officer for purposes of this title.

5 U.S.C. § 2105:

Employee.

(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. § 3105:

Appointment of administrative law judges.

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. Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.

5 U.S.C. § 5372:

Administrative law judges.

(a) For the purposes of this section, the term "administrative law judge" means an administrative law judge appointed under section 3105.

(b)(1)(A) There shall be 3 levels of basic pay for administrative law judges (designated as AL–1, 2, and 3, respectively), and each such judge shall be paid at 1 of those levels, in accordance with the provisions of this section.

(B) Within level AL–3, there shall be 6 rates of basic pay, designated as AL–3, rates A through F, respectively. Level AL–2 and level AL–1 shall each have 1 rate of basic pay.

(C) The rate of basic pay for AL–3, rate A, may not be less than 65 percent of the rate of basic pay for level IV of the Executive Schedule, and the rate of basic pay for AL–1 may not exceed the rate for level IV of the Executive Schedule.

(2) The Office of Personnel Management shall determine, in accordance with procedures which the Office shall by regulation prescribe, the level in which each administrative-law-judge position shall be placed and the qualifications to be required for appointment to each level.

(3) (A) Upon appointment to a position in AL–3, an administrative law judge shall be paid at rate A of AL–3, and shall be advanced successively to rates B, C, and D of that level at the beginning of the next pay period following completion of 52 weeks of service in the next lower rate, and to rates E and F of that level

at the beginning of the next pay period following completion of 104 weeks of service in the next lower rate.

(B) The Office of Personnel Management may provide for appointment of an administrative law judge in AL–3 at an advanced rate under such circumstances as the Office may determine appropriate.

(4) Subject to paragraph (1), effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5303 in the rates of basic pay under the General Schedule, each rate of basic pay for administrative law judges shall be adjusted by an amount determined by the President to be appropriate.

(c) The Office of Personnel Management shall prescribe regulations necessary to administer this section.

5 U.S.C. § 7521:

Actions against administrative law judges.

(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

(b) The actions covered by this section are—

(1) a removal;

(2) a suspension;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but do not include—

(A) a suspension or removal under section 7532 of this title;

(B) a reduction-in-force action under section 3502 of this title; or

(C) any action initiated under section 1215 of this title.

15 U.S.C. § 78d-1:

Delegation of functions by Commission.

(a) *Authorization; functions delegable; eligible persons; application of other laws.*

In addition to its existing authority, the Securities and Exchange Commission shall have the authority to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter. Nothing in this section shall be deemed to supersede the provisions of section 556(b) of Title 5, or to authorize the delegation of the function of rulemaking as defined in subchapter II of chapter 5 of Title 5, with reference to general rules as distinguished from rules of particular applicability, or of the making of any rule pursuant to section 78s(c) of this title.

(b) *Right of review; procedure.*

With respect to the delegation of any of its functions, as provided in subsection (a) of this section, the Commission shall retain a discretionary right to review the action of any such division of the Commission, individual Commissioner, administrative law judge, employee, or employee board, upon its own initiative or upon petition of a party to or intervenor in such action, within such time and in such manner as the Commission by rule shall prescribe. The vote of one member of the Commission shall be sufficient to bring any such action before the Commission for review. A person or party shall be entitled to review by the Commission if he or it is adversely affected by action at a delegated level which (1) denies any request for action pursuant to section 77h(a) or section 77h(c) of this title or the first sentence of section 78*l*(d) of this title; (2) suspends trading in a security pursuant to section 78*l*(k) of this title; or (3) is pursuant to any provision of this chapter in a case of adjudication, as defined in section 551 of Title 5, not required by this chapter to be determined on the record after notice and opportunity for hearing (except to the extent there is involved a matter described in section 554(a)(1) through (6) of such Title 5).

(c) *Finality of delegated action.*

If the right to exercise such review is declined, or if no such review is sought within the time stated in the rules promulgated by the Commission, then the action of any such division of the Commission, individual Commissioner, administrative law judge, employee, or employee board, shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission.

15 U.S.C. § 78u:

Investigations and actions.

* * *

(c) *Judicial enforcement of investigative power of Commission; refusal to obey subpena; criminal sanctions.*

In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

* * *

RELEVANT REGULATIONS

17 C.F.R. § 200.14:

Office of Administrative Law Judges.

(a) Under the Administrative Procedure Act (5 U.S.C. 551-559) and the federal securities laws, the Office of Administrative Law Judges conducts hearings in proceedings instituted by the Commission. The Administrative Law Judges are responsible for the fair and orderly conduct of the proceedings and have the authority to:

(1) Administer oaths and affirmations;

(2) Issue subpoenas;

(3) Rule on offers of proof;

(4) Examine witnesses;

(5) Regulate the course of a hearing;

(6) Hold pre-hearing conferences;

(7) Rule upon motions; and

(8) Unless waived by the parties, prepare an initial decision containing the conclusions as to the factual and legal issues presented, and issue an appropriate order.

(b) The Chief Administrative Law Judge performs the duties of an Administrative Law Judge under the Administrative Procedure Act and the duties delegated to him or her by the Commission that are compatible with those duties. The Chief Administrative Law Judge is responsible for the orderly functioning of the Office of Administrative Law Judges apart from the conduct of administrative proceedings and acts as liaison between that Office and the Commission.

17 C.F.R. § 201.110:

Presiding officer.

All proceedings shall be presided over by the Commission or, if the Commission so orders, by a hearing officer. When the Commission designates that the hearing officer shall be an administrative law judge, the Chief Administrative Law Judge shall select, pursuant to 17 CFR 200.30-10, the administrative law judge to preside.

17 C.F.R. § 201.111:

Hearing officer: Authority.

The hearing officer shall have the authority to do all things necessary and appropriate to discharge his or her duties. No provision of these Rules of Practice shall be construed to limit the powers of the hearing officer provided by the Administrative Procedure Act, 5 U.S.C. 556, 557. The powers of the hearing officer include, but are not limited to, the following:

(a) Administering oaths and affirmations;

(b) Issuing subpoenas authorized by law and revoking, quashing, or modifying any such subpoena;

(c) Receiving relevant evidence and ruling upon the admission of evidence and offers of proof;

(d) Regulating the course of a proceeding and the conduct of the parties and their counsel;

(e) Holding prehearing and other conferences as set forth in § 201.221 and requiring the attendance at any such conference of at least one representative of each

party who has authority to negotiate concerning the resolution of issues in controversy;

(f) Recusing himself or herself upon motion made by a party or upon his or her own motion;

(g) Ordering, in his or her discretion, in a proceeding involving more than one respondent, that the interested division indicate, on the record, at least one day prior to the presentation of any evidence, each respondent against whom that evidence will be offered;

(h) Subject to any limitations set forth elsewhere in these Rules of Practice, considering and ruling upon all procedural and other motions, including a motion to correct a manifest error of fact in the initial decision. A motion to correct is properly filed under this Rule only if the basis for the motion is a patent misstatement of fact in the initial decision. Any motion to correct must be filed within ten days of the initial decision. A brief in opposition may be filed within five days of a motion to correct. The hearing officer shall have 20 days from the date of filing of any brief in opposition filed to rule on a motion to correct;

(i) Preparing an initial decision as provided in § 201.360;

(j) Upon notice to all parties, reopening any hearing prior to the filing of an initial decision therein, or, if no initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Commission; and

(k) Informing the parties as to the availability of one or more alternative means of dispute resolution, and encouraging the use of such methods.

17 C.F.R. § 201.155:

Default; motion to set aside default.

(a) A party to a proceeding may be deemed to be in default and the Commission or the hearing officer may determine the proceeding against that party upon consideration of the record, including the order instituting proceedings, the allegations of which may be deemed to be true, if that party fails:

(1) To appear, in person or through a representative, at a hearing or conference of which that party has been notified;

(2) To answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding; or

(3) To cure a deficient filing within the time specified by the commission or the hearing officer pursuant to § 201.180(b).

(b) A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. In order to prevent injustice and on such conditions as may be appropriate, the hearing officer, at any time prior to the filing of the initial decision, or the Commission, at any time, may for good cause shown set aside a default.

17 C.F.R. § 201.180:

Sanctions.

(a) *Contemptuous conduct—*

(1) *Subject to exclusion or suspension.* Contemptuous conduct by any person before the Commission or a hearing officer during any proceeding, including at or in connection with any conference, deposition or hearing, shall be grounds for the Commission or the hearing officer to:

(i) Exclude that person from such deposition, hearing or conference, or any portion thereof; and/or

(ii) Summarily suspend that person from representing others in the proceeding in which such conduct occurred for the duration, or any portion, of the proceeding.

(2) *Review procedure.* A person excluded from a deposition, hearing or conference, or a counsel summarily suspended from practice for the duration or any portion of a proceeding, may seek review of the exclusion or suspension by filing with the Commission, within three days of the exclusion or suspension order, a motion to vacate the order. The Commission shall consider such motion on an expedited basis as provided in § 201.500.

(3) *Adjournment.* Upon motion by a party represented by counsel subject to an order of exclusion or suspension, an adjournment shall be granted to allow the retention of new counsel. In determining the length of an adjournment, the Commission or hearing officer shall consider, in addition to the factors set forth in § 201.161, the availability of co-counsel for the party or of other members of a suspended counsel's firm.

(b) *Deficient filings; leave to cure deficiencies.* The Commission or the hearing officer may reject, in whole or in part, any filing that fails to comply with

any requirements of these Rules of Practice or of any order issued in the proceeding in which the filing was made. Any such filings shall not be part of the record. The Commission or the hearing officer may direct a party to cure any deficiencies and to resubmit the filing within a fixed time period.

(c) *Failure to make required filing or to cure deficient filing.* The Commission or the hearing officer may enter a default pursuant to § 201.155, dismiss one or more claims, decide the particular claim(s) at issue against that person, or prohibit the introduction of evidence or exclude testimony concerning that claim if a person fails:

(1) To make a filing required under these Rules of Practice; or

(2) To cure a deficient filing within the time specified by the Commission or the hearing officer pursuant to paragraph (b) of this section.

17 C.F.R. § 201.360:

Initial decision of hearing officer and timing of hearing.

(a)(1) *When required.* Unless the Commission directs otherwise, the hearing officer shall prepare an initial decision in any proceeding in which the Commission directs a hearing officer to preside at a hearing, provided, however, that an initial decision may be waived by the parties with the consent of the hearing officer pursuant to § 201.202.

(2) *Time period for filing initial decision and for hearing—*

(i) *Initial decision.* In the order instituting proceedings, the Commission will specify a time period in which the hearing officer's initial decision must be filed with the Secretary. In the Commission's discretion, after consideration of the nature, complexity, and urgency of the subject matter, and with due regard for the public interest and the protection of investors, this time period will be either 30, 75, or 120 days. The time period will run from the occurrence of the following events:

(A) The completion of post-hearing briefing in a proceeding where the hearing has been completed; or

(B) The completion of briefing on a § 201.250 motion in the event the hearing officer has determined that no hearing is necessary; or

(C) The determination by the hearing officer that, pursuant to § 201.155, a party is deemed to be in default and no hearing is necessary.

(ii) *Hearing.* Under the 120-day timeline, the hearing officer shall issue an order scheduling the hearing to begin approximately four months (but no more than ten months) from the date of service of the order instituting the proceeding. Under the 75-day timeline, the hearing officer shall issue an order scheduling the hearing to begin approximately 2½ months (but no more than six months) from the date of service of the order instituting the proceeding. Under the 30-day timeline, the hearing officer shall issue an order scheduling the hearing to begin approximately one month (but no more than four months) from the date of service of the order instituting the proceeding. These deadlines confer no substantive rights on respondents. If a stay is granted pursuant

to § 201.161(c)(2)(i) or § 201.210(c)(3), the time period specified in the order instituting proceedings in which the hearing officer's initial decision must be filed with the Secretary, as well as any other time limits established in orders issued by the hearing officer in the proceeding, shall be automatically tolled during the period while the stay is in effect.

(3) *Certification of extension; motion for extension.*

(i) In the event that the hearing officer presiding over the proceeding determines that it will not be possible to file the initial decision within the specified period of time, the hearing officer may certify to the Commission in writing the need to extend the initial decision deadline by up to 30 days for case management purposes. The certification must be issued no later than 30 days prior to the expiration of the time specified for the issuance of an initial decision and be served on the Commission and all parties in the proceeding. If the Commission has not issued an order to the contrary within 14 days after receiving the certification, the extension set forth in the hearing officer's certification shall take effect.

(ii) Either in addition to a certification of extension, or instead of a certification of extension, the Chief Administrative Law Judge may submit a motion to the Commission requesting an extension of the time period for filing the initial decision. First, the hearing officer presiding over the proceeding must consult with the Chief Administrative Law Judge. Following such consultation, the Chief Administrative Law Judge may determine, in his or her discretion, to submit a motion to the Commission requesting an extension of the time period for filing the initial decision. This motion may request an extension of any

length but must be filed no later than 15 days prior to the expiration of the time specified in the certification of extension, or if there is no certification of extension, 30 days prior to the expiration of the time specified in the order instituting proceedings. The motion will be served upon all parties in the proceeding, who may file with the Commission statements in support of or in opposition to the motion. If the Commission determines that additional time is necessary or appropriate in the public interest, the Commission shall issue an order extending the time period for filing the initial decision.

(iii) The provisions of this paragraph (a)(3) confer no rights on respondents.

(b) *Content.* An initial decision shall include findings and conclusions, and the reasons or basis therefor, as to all the material issues of fact, law or discretion presented on the record and the appropriate order, sanction, relief, or denial thereof. The initial decision shall also state the time period, not to exceed 21 days after service of the decision, except for good cause shown, within which a petition for review of the initial decision may be filed. The reasons for any extension of time shall be stated in the initial decision. The initial decision shall also include a statement that, as provided in paragraph (d) of this section:

(1) The Commission will enter an order of finality as to each party unless a party or an aggrieved person entitled to review timely files a petition for review of the initial decision or a motion to correct a manifest error of fact in the initial decision with the hearing officer, or the Commission determines on its own initiative to review the initial decision; and

(2) If a party or an aggrieved person entitled to review timely files a petition for review or a motion to correct a manifest error of fact in the initial decision with the hearing officer, or if the Commission takes action to review as to a party or an aggrieved person entitled to review, the initial decision shall not become final as to that party or person.

(c) *Filing, service and publication.* The Secretary shall promptly serve the initial decision upon the parties and shall promptly publish notice of the filing thereof on the SEC Web site. Thereafter, the Secretary shall publish the initial decision in the SEC Docket; provided, however, that in nonpublic proceedings no notice shall be published unless the Commission otherwise directs.

(d) *Finality.*

(1) If a party or an aggrieved person entitled to review timely files a petition for review or a motion to correct a manifest error of fact in the initial decision, or if the Commission on its own initiative orders review of a decision with respect to a party or a person aggrieved who would be entitled to review, the initial decision shall not become final as to that party or person.

(2) If a party or aggrieved person entitled to review fails to file timely a petition for review or a motion to correct a manifest error of fact in the initial decision, and if the Commission does not order review of a decision on its own initiative, the Commission will issue an order that the decision has become final as to that party. The decision becomes final upon issuance of the order. The order of finality shall state the date on which sanctions, if any, take effect. Notice of the

order shall be published in the SEC Docket and on the SEC Web site.

17 C.F.R. § 201.410:

Appeal of initial decisions by hearing officers.

(a) *Petition for review; when available.* In any proceeding in which an initial decision is made by a hearing officer, any party, and any other person who would have been entitled to judicial review of the decision entered therein if the Commission itself had made the decision, may file a petition for review of the decision with the Commission.

(b) *Procedure.* The petition for review of an initial decision shall be filed with the Commission within such time after service of the initial decision as prescribed by the hearing officer pursuant to § 201.360(b) unless a party has filed a motion to correct an initial decision with the hearing officer. If such correction has been sought, a party shall have 21 days from the date of the hearing officer's order resolving the motion to correct to file a petition for review. The petition shall set forth a statement of the issues presented for review under § 201.411(b). In the event a petition for review is filed, any other party to the proceeding may file a cross-petition for review within the original time allowed for seeking review or within ten days from the date that the petition for review was filed, whichever is later.

(c) *Length limitation.* Except with leave of the Commission, the petition for review shall not exceed three pages in length. Incorporation of pleadings or filings by reference into the petition is not permitted. Motions to file petitions in excess of those limitations are disfavored.

(d) *Financial disclosure statement requirement.* Any person who files a petition for review of an initial decision that asserts that person's inability to pay either disgorgement, interest or a penalty shall file with the opening brief a sworn financial disclosure statement containing the information specified in § 201.630(b).

(e) *Prerequisite to judicial review.* Pursuant to Section 704 of the Administrative Procedure Act, 5 U.S.C. 704, a petition to the Commission for review of an initial decision is a prerequisite to the seeking of judicial review of a final order entered pursuant to such decision.

17 C.F.R. § 201.411:

Commission consideration of initial decisions by hearing officers.

(a) *Scope of review.* The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record.

(b) *Standards for granting review pursuant to a petition for review—*

(1) *Mandatory review.* After a petition for review has been filed, the Commission shall review any initial decision that:

(i) Denies any request for action pursuant to Section 8(a) or Section 8(c) of the Securities Act of 1933, 15 U.S.C. 77h(a), (c), or the first sentence of Section 12(d) of the Exchange Act, 15 U.S.C. 78*l*(d);

(ii) Suspends trading in a security pursuant to Section 12(k) of the Exchange Act, 15 U.S.C. 78*l*(k); or

(iii) Is in a case of adjudication (as defined in 5 U.S.C. 551) not required to be determined on the record after notice and opportunity for hearing (except to the extent there is involved a matter described in 5 U.S.C. 554(a) (1) through (6)).

(2) *Discretionary review.* The Commission may decline to review any other decision. In determining whether to grant review, the Commission shall consider whether the petition for review makes a reasonable showing that:

(i) A prejudicial error was committed in the conduct of the proceeding; or

(ii) The decision embodies:

(A) A finding or conclusion of material fact that is clearly erroneous; or

(B) A conclusion of law that is erroneous; or

(C) An exercise of discretion or decision of law or policy that is important and that the Commission should review.

(c) *Commission review other than pursuant to a petition for review.* The Commission may, on its own initiative, order review of any initial decision, or any portion of any initial decision, within 21 days after the end of the period established for filing a petition for review pursuant to § 201.410(b). A party who does not intend to file a petition for review, and who desires the Commission's determination whether to order review on its own initiative to be made in a shorter time,

may make a motion for an expedited decision, accompanied by a written statement that the party waives its right to file a petition for review. The vote of one member of the Commission, conveyed to the Secretary, shall be sufficient to bring a matter before the Commission for review.

(d) *Limitations on matters reviewed.* Review by the Commission of an initial decision shall be limited to the issues specified in an opening brief that complies with § 201.450(b), or the issues, if any, specified in the briefing schedule order issued pursuant to § 201.450(a). Any exception to an initial decision not supported in an opening brief that complies with § 201.450(b) may, at the discretion of the Commission, be deemed to have been waived by the petitioner. On notice to all parties, however, the Commission may, at any time prior to issuance of its decision, raise and determine any other matters that it deems material, with opportunity for oral or written argument thereon by the parties.

(e) *Summary affirmance.*

(1) At any time within 21 days after the filing of a petition for review pursuant to § 201.410(b), any party may file a motion in accordance with § 201.154 asking that the Commission summarily affirm an initial decision. Any party may file an opposition and reply to such motion in accordance with § 201.154. Pending determination of the motion for summary affirmance, the Commission, in its discretion, may delay issuance of a briefing schedule order pursuant to § 201.450.

(2) Upon consideration of the motion and any opposition or upon its own initiative, the Commission

may summarily affirm an initial decision. The Commission may grant summary affirmance if it finds that no issue raised in the initial decision warrants consideration by the Commission of further oral or written argument. The Commission will decline to grant summary affirmance upon a reasonable showing that a prejudicial error was committed in the conduct of the proceeding or that the decision embodies an exercise of discretion or decision of law or policy that is important and that the Commission should review.

(f) *Failure to obtain a majority*. In the event a majority of participating Commissioners do not agree to a disposition on the merits, the initial decision shall be of no effect, and an order will be issued in accordance with this result.

17 C.F.R. § 201.452:

Additional evidence.

Upon its own motion or the motion of a party, the Commission may allow the submission of additional evidence. A party may file a motion for leave to adduce additional evidence at any time prior to issuance of a decision by the Commission. Such motion shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously. The Commission may accept or hear additional evidence, may remand the proceeding to a self-regulatory organization, or may remand or refer the proceeding to a hearing officer for the taking of additional evidence, as appropriate.