

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-130

RAYMOND J. LUCIA, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

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

MOTION OF THE SECURITIES AND EXCHANGE COMMISSION
FOR DIVIDED ARGUMENT

Pursuant to Rules 21 and 28 of the Rules of this Court, the Solicitor General, on behalf of respondent Securities and Exchange Commission (Commission), respectfully moves for divided argument in this case. The case is scheduled for argument on April 23, 2018. The division of argument time would offer the Court distinct perspectives on the important issues presented in this case. Petitioners have consented to divide petitioners' time equally with the Commission, with 15 minutes allotted for each. Granting this motion therefore would not require the Court to enlarge the overall time for argument.

1. This case concerns whether administrative law judges (ALJs) of the Commission are "Officers of the United States" within the meaning of the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2. Petitioners were registered investment advisers who were charged by the Commission with violating the securities laws. The initial stages of their proceedings were assigned to an ALJ, who presided over witness hearings and rendered an initial decision finding that petitioners had violated the securities laws and ordering sanctions against petitioners. Pet. App. 195a-233a. On appeal, the Commission upheld the ALJ's liability finding and affirmed, with limited exceptions, the sanctions imposed. Id. at 66a-107a. The Commission rejected petitioners' Appointments Clause challenge. Id. at 86a-93a.

On appeal of the Commission's order, a panel of the court of appeals denied the petition for review. Pet. App. 3a-36a. The court also rejected petitioners' Appointments Clause argument, holding that the Commission's ALJs are mere employees rather than officers under the Clause because they do not exercise "significant authority pursuant to the laws of the United States." Id. at 11a (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam)). The court also determined that substantial evidence supported the Commission's liability findings and that the Commission had not abused its discretion in ordering sanctions against petitioners. Id. at 21a-36a.

Petitioners sought rehearing en banc, which the court granted, id. at 244a-246a, but the en banc court issued a per curiam judgment denying the petition for review "by an equally divided court," id. at 1a-2a.

2. The government took the position before the court of appeals that the Commission's ALJs are mere employees, rather than constitutional officers. Upon further consideration, and in light of the implications for the exercise of executive power under Article II, the government is now of the view that such ALJs are officers because they exercise "significant authority pursuant to the laws of the United States." Buckley, 424 U.S. at 126. The government thus has filed a brief in this Court supporting petitioners. The brief argues that the Commission's ALJs, who adjudicate disputes on behalf of the Commission, perform important executive functions comparable to those of a trial judge.

The government's brief also argues that the status of the Commission's ALJs as constitutional officers has implications for whether the statutory constraints on removing them from office unconstitutionally impair the President's ability to faithfully execute the laws. The government's brief urges the Court to address the removal issue now, to alleviate significant uncertainty surrounding the constitutionality of administrative proceedings conducted by the Commission and by other agencies

throughout the government that use ALJs in adversarial proceedings.

3. Petitioners have filed a merits brief before this Court likewise arguing that the Commission's ALJs are constitutional officers. Unlike the government, however, petitioners argue that the Appointments Clause error in this case requires, at a minimum, the initiation of new proceedings before a different, properly appointed ALJ; they encourage the Court to rule that the Commission's recent efforts to ratify the appointments of their ALJs are invalid and that dismissal of the proceedings against petitioners would be an appropriate sanction; and they do not address the removal question. Thus, with respect to both the appropriate remedy for an Appointment Clause violation and the statutory restrictions on removal of the Commission's ALJs, there are significant differences between the positions of petitioners and the Commission.

4. The Court has appointed an amicus curiae to defend the judgment below. The amicus has filed a brief arguing that the Commission's ALJs are not constitutional officers under the Appointments Clause because they have not been delegated authority to bind the government or third parties in their own names. The amicus's brief declines to address the government's removal argument or petitioners' argument regarding the appropriate remedy.

5. Divided argument is warranted in this case because the government and petitioners offer different perspectives that will assist the Court's resolution of the case. The Solicitor General, on behalf of the Commission, is well positioned to address the use of ALJs not only by the Commission but also by various agencies across the government. Although the government's brief in this case argues that the ALJ who presided over petitioners' case was an officer who was not properly appointed, the government has a systemic interest in ensuring that the Court adopts principles for identifying constitutional officers that are neither unduly narrow nor unduly broad. In addition, only the government has addressed in its brief the merits of the removal question. Petitioners, by contrast, have a case-specific interest in the favorable resolution of the Commission's proceedings against them, and they can address the argument made in their brief about why they believe dismissal of the proceedings would be an appropriate sanction.

6. In cases in which this Court has appointed an amicus to defend the judgment below because the government as respondent supports the petitioner, the Court has repeatedly allowed the government to divide argument time with the petitioners. See, e.g., McLane Co., Inc. v. EEOC, 137 S. Ct. 1159 (2017); Beckles v. United States, 137 S. Ct. 886 (2017); Welch v. United States, 136 S. Ct. 1257 (2016); Mata v. Lynch,

135 S. Ct. 2150 (2015); Millbrook v. United States, 569 U.S. 50 (2013); Dorsey v. United States, 567 U.S. 260 (2012); Setser v. United States, 566 U.S. 231 (2012). The government respectfully submits that the same course is even more warranted here, given the substantial differences between the positions of petitioners and the Commission.

Respectfully submitted.

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Solicitor General
Counsel of Record

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