No. 17-130

IN THE
Supreme Court of the United States

RAYMOND J. LUCIA
AND RAYMOND J. LUCIA COMPANIES, INC.,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE OF JUDGMENT BELOW

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INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 55 national and international labor organizations with a total membership of over 12 million working men and women.[1] This case addresses whether administrative law judges at the Securities and Exchange Commission are inferior officers within the meaning of the Appointments Clause and must, therefore, be appointed in accordance with the Clause. The unions affiliated with the AFL-CIO are significant stakeholders in the administrative decisionmaking processes of the National Labor Relations Board and of other federal agencies such as the Occupational Safety and Health Review Commission and the Federal Mine Safety and Health Review Commission, all of which rely, in part, but in diverse manners, on fact-finding by administrative law judges.

SUMMARY OF THE ARGUMENT

The question of whether administrative law judges are Officers of the United States who must be appointed in accordance with the Appointments Clause cannot be decided categorically because the answer depends on the nature of the authority exercised by particular judges. Congress, in a particular agency's enabling statute, may vest that agency's administra-

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[1] Counsel for the petitioners and counsel for the respondent have consented to the filing of *amicus* briefs. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

tive law judges with specific authority. Alternatively, Congress may vest the agency's principal officers with discretion to delegate some portion of their statutory decisionmaking power to the agency's administrative law judges and the principal officers may exercise that discretion in whole or in part. In either case, this Court must examine the authority actually possessed by the specific administrative law judges at issue in order to determine if they are Officers of the United States whose appointment is governed by the Clause.

The authority administrative law judges must possess in order to be Officers of the United States is the authority to issue final decisions not subject to plenary, *sua sponte* review by superior officers. The authority to conduct fact-fidning hearings coupled with "purely recommendatory" power is not sufficient. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 509-10 (2010).

The National Labor Relations Act (NLRA) helpfully illustrates how the Appointments Clause applies in the context of independent agencies. Congress has twice amended the NLRA to redistribute decisionmaking power between the National Labor Relations Board (NLRB or "the Board") and lesser functionaries within the agency, specifically administrative law judges and regional directors. The result is that the Board has exercised its statutory discretion to delegate authority to conduct trials in unfair labor practice cases and to issue "a recommended order" to administrative law judges, but continues to have plenary authority under the Act to modify or set aside

any order *sua sponte*. 29 U.S.C. § 160(d); 29 C.F.R. §§ 102.35, 102.48. In contrast, the Board has exercised its statutory discretion "to delegate to its regional directors its powers" to resolve questions of representation. 29 U.S.C. § 153(b). A regional director's decision is a "final determination" not subject to plenary, *sua sponte* Board review. *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 141 (1971) (quoting 105 Cong. Rec. 19770 (statement of Senator Goldwater)). Thus, the Board's administrative law judges are non-officer employees while its regional directors are inferior officers.

As is directly relevant to this case, Congress similarly vested the Securities and Exchange Commission (SEC) with statutory authority to delegate decision making authority in certain categories of cases to its administrative law judges. Because the SEC has declined, however, to actually delegate that power—instead preserving its own authority to render final decisions in all cases—the Court below correctly determined that SEC administrative law judges, like those at the NLRB, remain non-officer employees.

Finally, even if the SEC administrative law judges were inferior officers, there would be no need for the Court to rewrite the Administrative Procedures Act to narrow its protection of administrative law judges as suggested by the Solicitor General. The agency's own discretionary choice to use administrative law judges, even if they have statutory just cause protection, does not create the type of separation of powers concerns that underlay this Court's decision in *Free Enterprise Fund*. In *Free Enterprise Fund*, Congress established the inferior offices, vested their

occupants with authority, and shielded the officers from discharge. Here, in contrast, the executive branch agency has chosen to use administrative law judges who have statutory just cause protection and chosen how much decisionmaking authority to vest in those judges. "The President can . . . choose to restrain himself in his dealings with subordinates" in this manner without implicating separation of powers concerns. 561 U.S. at 497.

ARGUMENT

I. Determining Whether Administrative Law Judges Are Officers of the United States Requires Examination of the Particular Statutory Scheme Under Which They Operate

"[T]he very size and variety of the Federal Government . . . discourage[s] general pronouncements" concerning whether particular "civil servants within independent agencies would . . . qualify as 'Officers of the United States,' who 'exercis[e] significant authority pursuant to the laws of the United States[.]'" *Free Enterprise Fund*, 561 U.S. at 506 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)). Not surprisingly, then, this Court has recognized that "[w]hether administrative law judges are necessarily 'Officers of the United States' is disputed." *Id.* at 507 n.10. As we explain below, administrative law judges within a particular agency are inferior officers only if Congress, in the enabling statute, vested the administrative law judges with final decisionmaking power or vested the agency's principal officers with authority to delegate some portion of their final decisionmak-

ing power to the agency's judges and the principal officers have done so.

A. Administrative Law Judges Are Officers of the United States Only If They Have Authority to Issue Final Decisions

Independent agencies are headed by one or more "executive 'Officers,'" *Free Enterprise Fund*, 561 U.S. at 506—principal officers who are endowed by the agency's enabling statute with some aspect of the "sovereign functions of government." *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 84 (2007) (quoting Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 4, at 5 (1890)). This "sovereign authority" is "power lawfully conferred by the government to bind third parties, or the government itself, for the public benefit." 31 Op. O.L.C. at 87. Pursuant to the Appointments Clause, such principal officers, whose offices must "be established by law," are subject to presidential appointment "with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2.

Unlike the power to appoint principal officers—which must be exercised by the President directly—"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." *Id.* In the case of independent agencies, Congress "ordinarily" vests this appointment authority in "the department head, rather than the President," *i.e.*, in the agency's principal officer. *Free Enterprise Fund*, 561 U.S. at 493. *See also Edmond v. United States*, 520 U.S. 651, 662 (1997) (noting that

"the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President"). *Cf. id.* at 663 (citing example of "the first executive department, the Department of Foreign Affairs" in which the Secretary, the "principal officer," would be appointed by the President, and "the chief Clerk," "an inferior officer [was] to be appointed by the said principal officer").[2]

Whether a particular agency's functionaries are inferior officers who must be appointed consistent with the Appointment Clause rather than non-officer employees turns not on what actions an agency's functionaries take in any given case, but rather on the authority vested in the functionaries. *See*, *e.g.*, *Freytag v. Commissioner*, 501 U.S. 868, 882 (1991) (disregarding what "duties" a functionary "on occasion performs," and looking instead to whether that functionary "is an inferior officer for purposes of [the governing statute]," in which case "he is an inferior officer within the meaning of the Appointments Clause"). In other words, the question is whether, under the agency's enabling statute, the functionaries are vested with "power . . . to bind third parties, or the government itself, for the public benefit," 31 Op. O.L.C. at 87.

As Judge Stephen Williams explained in *Landry v. FDIC*, 204 F.3d 1125, 1134 (D.C. Cir. 2000), the deci-

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[2] In the case of agencies headed by a multi-member board or commission, such as the SEC and NLRB, this Court has concluded that that body, acting as a whole, is the "Head[] of [a] Department[]" for purposes of the Appointments Clause. *Free Enterprise Fund*, 561 U.S. at 512-13.

sion on which the Court below relied, in *Freytag*, "the S[pecial] T[rial] J[udge]s' power of final decision [delegated to the STJs by the Internal Revenue Code] in certain classes of cases was critical." That is evident because "the Court laid exceptional stress on the STJs' final decisionmaking power" "even though in his case the STJ had *not* been exercising" the power, an "explanation [that] would have been quite unnecessary if the purely recommendatory powers were fatal in themselves." *Id.* (emphasis in original). Referring specifically to STJs' authority to "take testimony, conduct trials, rule on the admissibility of evidence, and . . . enforce compliance with discovery orders," this Court stated, "[t]he fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution." *Freytag*, 501 U.S. at 881-82. *Accord Free Enterprise Fund*, 561 U.S. at 509-10 (stating that if the Court were to "restrict the [Public Company Accounting Oversight] Board's enforcement powers, so that it would be a purely recommendatory panel[,]" "its members would no longer be 'Officers of the United States' ").

Implicit in this reasoning is a recognition that, short of a legal delegation of the "power of final decision," it is not possible to define, and thus this Court has not specified and should not attempt to specify, the precise quantum of "purely recommendatory powers," *Landry*, 204 F.3d at 1134, necessary to distinguish between non-officer employees and inferior officers. Surely Congress does not convey "officer" status to any individual employed by the government who merely "take[s] testimony," who only "regulat[es]

document production and depositions," or who is limited to "ruling on the admissibility of evidence." *Bandimere v. U.S. Securities and Exchange Commission*, 844 F.3d 1168, 1179-80 (10th Cir. 2016). At what point, then, does the combination of these "more than ministerial tasks" add up to the "exercis[e of] significant authority pursuant to the laws of the United States"? *Freytag*, 501 U.S. at 881-82. The answer—implicit in this Court's two observations in *Free Enterprise Fund*: (1) that, "unlike members of the [Public Company Accounting Oversight] Board," who the Court assumed were Offices of the United States, "many administrative law judges . . . possess purely recommendatory powers," and (2) that "[w]hether administrative law judges are *necessarily* 'Officers of the United States' is disputed," *Free Enterprise Fund*, 561 U.S. at 507 n.10—is never.

Just as "[t]he fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution[,]" *Freytag*, 501 U.S. at 882, the fact that an individual performs some more-than-ministerial, yet still recommendatory, tasks does not transform her into an Officer of the United States. As a leading early decision summarized this key distinction: "[A] delegation of a portion of the sovereign power" involves "a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the State," in contrast with 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. *Opinion of the Jus-*

tices, 3 Greenl. (Me.) 481, 482 (1822). *See also* 31 Op. O.L.C. at 82-83, 95 (describing the Supreme Judicial Court of Maine's opinion as providing "the fullest early explication" of "the original meaning" of the term "public office" and noting that "[o]ther courts treated this early analysis as authoritative").

B. Examination of the NLRA and Its Legislative History Illustrates the Type of Case-by-Case Analysis Needed to Determine If Administrative Law Judges Are Officers of the United States

Congress' varying methods of distributing decisionmaking authority within different independent agencies on a statute-by-statute basis in furtherance of specific congressional policy goals is helpfully illustrated by the National Labor Relations Act (NLRA).

The principal officers of the agency created by the NLRA—all appointed by the President with the advice and consent of the Senate—are the five members of the National Labor Relations Board and the General Counsel. 29 U.S.C. §§ 153(a) & (d). The NLRA assigns two responsibilities to the Board: the prevention of unfair labor practices, 29 U.S.C. § 160, and the determination of collective bargaining representatives within appropriate bargaining units, 29 U.S.C. § 159.[3]

Under the original National Labor Relations Act of 1935 ("the Wagner Act"), Pub. L. 74-198, 49 Stat. 449,

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[3] The General Counsel is charged with investigating and prosecuting unfair labor practice complaints before the Board and supervising the agency's regional offices. 29 U.S.C. § 153(d).

451 § 3(a), Congress assigned both of these responsibilities to a three-member Board. For unfair labor practice cases, the Wagner Act permitted the Board to assign a "designated agent or agency" to conduct a hearing, testimony from which "shall be reduced to writing and filed with the Board" so that the Board could decide "[i]f upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any . . . unfair labor practice." 49 Stat. at 453-54, §§ 10(b) & (c). In the years that followed, the Board established the practice of using "trial examiners"[4] to conduct unfair labor practice hearings. *See*, *e.g.*, *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 224-28 (1938) (describing unfair labor practice hearing before trial examiner under Wagner Act).

A little over a decade later, in response to significant congressional dissatisfaction with the NLRB decision-making process in unfair labor practice cases, Congress enacted the Labor Management Relations Act of 1947 ("the Taft-Hartley Act"), Pub. L. 80-101, 61 Stat. 136. That law substantially altered the NLRB's role vis-à-vis trial examiners, expanding the Board's responsibility to decide unfair labor practice cases itself, while cabining the role played by trial examiners.

First, the Taft-Hartley Act increased the size of the Board from three members to five and permitted the

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[4] The title "administrative law judge" was substituted for "trial examiner" in the NLRA pursuant to 5 U.S.C. § 3105 and Pub. L. 95-251, 92 Stat. 184 § 3 (March 27, 1978) (codified as a note to 5 U.S.C. § 3105). We use the two terms interchangeably in reference to the NLRB.

new five-member Board to delegate its decisionmaking power not to trial examiners, but to three-member panels of the Board itself. 61 Stat. at 139, §§ 3(a) & (b), codified as 29 U.S.C. §§ 153(a) & (b). A primary purpose of this amendment was "to increase the Board's efficiency by permitting multiple three-member groups to exercise the full powers of the Board." *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 699 (2010) (Kennedy, J., dissenting) (citing S. Rep. No. 105, 80th Cong., 1st Sess., 8 (1947)). But Congress also wanted the NLRB to take greater responsibility for its own policy decisions, perceiving the Board as "hav[ing] fallen into the habit of delegating the reviewing of transcripts of the hearings and findings of trial examiners" to others within the agency, rather than "familiariz[ing] themselves with the briefs and bills of exception" so that "the divergent views of the different [Board members] may be reflected in each decision." S. Rep. No. 105, 80th Cong., 1st Sess. 8-9, reprinted in 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947* 414-15 (1948) ("Leg. Hist.").

At the same time, the Taft-Hartley Act circumscribed the role played by trial examiners, limiting them to "issu[ing] and caus[ing] to be served on the parties to the proceeding a *proposed* report, together with a *recommended* order." 61 Stat. at 147, § 10(c) (emphasis added), codified at 29 U.S.C. § 160(c). This proposed report and recommended order "shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become

effective as therein prescribed." *Id.* To make clear that the decision whether to adopt a trial examiner's decision rested solely with the Board, Congress retained § 10(d) of the NLRA, stating that "the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it[,]" "[u]ntil the record in a case shall have been filed in a court." 29 U.S.C. § 160(d). On the basis of this provision, "the Board has long held that, under the plain language of Section 10(d), it has the authority to modify its orders *sua sponte*." *Dorsey Trailers, Inc.*, 322 NLRB 181, 181 (1996) (citing cases), *enf. denied on other grounds*, 134 F.3d 125 (3rd Cir. 1998).

Finally, Congress stated explicitly that "no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations." 61 Stat. at 140, § 4(a), codified at 29 U.S.C. § 154(a). This amendment emphasized the limited role of the trial examiner as neutral fact-finder, eliminating the then-prevailing practice of "permit[ting] a trial examiner, after his findings have alternately been assailed and defended at public hearing [before the Board], to make a final defense of his published determination behind the scenes." S. Rep. No. 105, 80th Cong., 1st Sess. 10, 1 Leg. Hist. at 416. *See also* 93 Cong. Rec. 5117, 5145, 2 Leg. Hist. at 1494 (decrying "the practice of permitting the trial examiner to argue ex parte, before the Board, in defense of his findings, after the open hearing").

A little over a decade after passage of the Taft-Hartley Act, Congress amended the NLRA again.

This time, in sharp contrast to the earlier amendments, Congress expressly "authorized [the Board] to delegate to its regional directors its powers under section 9 [29 U.S.C. § 159] to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot . . . and certify the results thereof." Labor-Management Reporting and Disclosure Act of 1959, Pub. L. 86-257, 73 Stat. 519, 542 § 701(b), codified as 29 U.S.C. § 153(b). As this Court has explained—rejecting a claim by an employer that "plenary review by the Board of the regional director's unit determination is necessary at some point"—"§ 3(b) [29 U.S.C. § 153(b)] was added" for the purpose of "'expedit[ing] final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination.'" *Magnesium Casting*, 401 U.S. at 141 (quoting 105 Cong. Rec. 19770 (statement of Senator Goldwater)).

By enabling the Board to "turn over" a portion of its statutory power to another actor within the agency "for final determination"—permitting "regional directors . . . to act in all respects as the Board itself would act" in representation cases, *id.*—Congress made clear that regional directors are inferior officers for Appointments Clause purposes. Tellingly, the NLRB treats them as such. Regional directors are appointed and subject to discharge by the NLRB General Counsel with the approval of the Board. NLRB, *Board Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the National Labor Relations Board (Ef-*

fective April 1, 1955), 20 Fed. Reg. 2175 (April 1, 1955). Because they "exercise[] important policy-making, policy-determining, or other executive functions," 5 U.S.C. § 3132(a)(2)(E), regional directors are also members of the federal government's Senior Executive Service, meaning they are subject to being "reassigned or reviewed by agency heads." *Free Enterprise Fund*, 561 U.S. at 506-07.

The difference in statutory decisionmaking authority delegated to NLRB regional directors and to the agency's administrative law judges is laid bare by "[t]he fact that Congress in 1961 rejected a reorganization which would have delegated decisionmaking power in unfair labor practice cases to the hands of trial examiners subject to discretionary Board review[.]" *Magnesium Casting*, 401 U.S. at 142 (citing 107 Cong. Rec. 10223, 12905-12932). As this Court has explained, "it is unmistakably plain . . . that . . . Congress did allow the [National Labor Relations] Board to make a delegation of its authority over determination of the appropriate bargaining unit to the regional director," just as it is plain "that Congress . . . rejected a reorganization plan which would have delegated decisionmaking power in unfair labor practice cases to the hands of trial examiners." *Id.* The result is that, under the NLRA, as serially amended by Congress, NLRB regional directors are inferior officers and NLRB administrative law judges are not.[5]

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[5] Nevertheless, the NLRB itself appoints its administrative law judges consistent with the Administrative Procedures Act. *See* 29 U.S.C. § 154(a); 5 U.S.C. § 3105.

C. The SEC Administrative Law Judges Are Not Officers of the United States

Pursuant to this same statute-by-statute approach to understanding the Appointments Clause, the Court below correctly determined that SEC administrative law judges—who have a far narrower scope of authority under their governing statute than did the special trial judges at issue in *Freytag* under the Internal Revenue Code—are not inferior officers. Although the securities laws permit the SEC to delegate some decisionmaking power to its administrative law judges, the SEC has by regulation declined to do so. Because the SEC has retained final decisionmaking power for itself, its administrative law judges remain non-officer employees.

As the Court below explained, "[o]ver time Congress expanded the responsibilities of the [Securities and Exchange] Commission, and by 1960 it was administering six statutes[.]" *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 281 (D.C. Cir. 2016). In 1961, "the President sent Congress a proposal to allow the Commission to delegate some of its responsibilities to divisions and individuals within the Commission" and "[i]n response, Congress enacted 'An Act to Authorize the Securities and Exchange Commission to Delegate Certain Functions.'" *Id.* (citing 1961 U.S.C.C.A.N. 1351, 1351-52 (President's proposal), and Pub. L. No. 87-592, 76 Stat. 394, 394-95 (1962)).

This law provides, in relevant part, that the SEC "shall have the authority to delegate, by published order or rule, any of its functions to . . . an adminis-

trative law judge, . . . including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter." 15 U.S.C. § 78d-1(a). At the same time, the law makes clear that, "[w]ith respect to the delegation of any of its functions, . . . the Commission shall retain a discretionary right to review the action of any . . . administrative law judge . . . 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." 15 U.S.C. § 78d-1(b). "The vote of one member of the Commission shall be sufficient to bring any action before the Commission for review." *Id.*

Declining to take full advantage of its statutory authorization to "delegate . . . any of its functions to . . . an administrative law judge, including . . . with respect to . . . determining . . . any . . . matter," 15 U.S.C. § 78d-1(a), the SEC has, by regulation, reaffirmed its authority to, "on its own initiative, order review of any initial decision, or any portion of any initial decision [issued by an administrative law judge]." 17 C.F.R. § 201.411(c). The use of the term "initial decision" to describe an administrative law judge's findings is revealing. Although, as a general matter, "[r]eview by the Commission of an initial decision shall be limited to the issues" raised by the party seeking review, agency regulations make clear that, "[o]n notice to all parties, . . . the Commission may, at any time prior to the issuance of its decision, raise and determine any other matters that it deems material." 17 C.F.R. § 201.411(d). In all cases, an administrative law judge's initial decision has no

effect until "the Commission . . . issue[s] an order that the decision has become final." 17 C.F.R. § 201.360(d)(2). *See also id.* ("The decision becomes final upon issuance of the order.").

The Court below acknowledged that, under the statute, "the Commission *could* have chosen to adopt regulations whereby an ALJ's initial decision would be deemed a final decision of the Commission upon the expiration of a review period, without any additional Commission action." *Lucia*, 832 F.3d at 286 (emphasis in original). "But that is not what the Commission has done[,]" reserving for itself both the authority "to determine whether it wishes to order review even when no petition for review is filed" and the authority to determine when "the initial decision [of the ALJ] becomes final," thus "retain[ing] full decision-making powers" for the Commission. *Id.* (citing 17 C.F.R. § 201.411(c)).

As a result, "the Commission's ALJs neither have been delegated sovereign authority to act independently of the Commission nor, by other means established by Congress, do they have the power to bind third parties, or the government itself, for the public benefit." *Id.* at 286 (citing 31 Op. O.L.C. at 87). Whatever may be true of administrative law judges in other agencies—subject to congressional direction set forth in those agencies' own enabling statutes and to delegation decisions by their own agency's principal officers—SEC administrative law judges, like NLRB administrative law judges, are employees, not inferior officers.

II. Because the SEC Has Discretion Not to Use Administrative Law Judges and to Define the Scope of Their Authority, the Judges' Statutory Just Cause Protection Creates No Separation of Powers Problem Under *Free Enterprise Fund*

Finally, it bears brief mention that the Solicitor General's suggestion that—if this Court were to find the SEC administrative law judges to be inferior officers—the Court should adopt a novel, narrowing construction of the statutory removal protections for the judges in order to avoid "serious separation-of-powers concerns," SEC Br. 39, is wholly without merit.[6] The operation of the legislative restriction on executive action in relation to the administrative law judges at issue here is easily distinguishable from the legislative intrusion on executive authority over the Public Company Accounting Oversight Board (PCAOB) at issue in *Free Enterprise Fund*, so interpretive contortion of the sort the Solicitor General suggests is not required.

The Court in *Free Enterprise Fund* made clear that the fundamental flaw with the law creating the PCAOB was that, "[w]ithout the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct." 561 U.S. at 496. Key to this conclusion, however, was that Congress man-

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[6] We agree with the Court-Appointed Amicus Curiae in Support of the Judgment Below, for the reasons stated in his brief, that the Solicitor General's argument is not properly before the Court. We present the argument above only as an additional grounds for the Court not to address the matter.

dated the creation of the Board and vested it with specified authority; the SEC had no discretion over whether to create the Board or ability to shape what it would do and, once appointed, Board members could only be removed "'for good cause shown.'" *Id.* at 486 (quoting 15 U.S.C. § 7211(e)(6)).[7] As a result, "the [SEC] Commissioners are not responsible for the Board's actions." *Id.* at 496.

In contrast, both the securities laws at issue here and the NLRA vest complete discretion in the SEC and the NLRB over whether to use administrative law judges at all. *See* 15 U.S.C. § 78d-1(a); 29 U.S.C. §§ 160(b) & (c). The NLRA, for example, permits the Board to decide that an evidentiary hearing in an unfair labor practice case should be held "before the Board or a member thereof" or "before a designated agent or agency," such as an administrative law judge. 29 U.S.C. §§ 160(b) & (c). The Board's own regulations, not the statute, vest authority in the administrative law judges and define its scope. *See* 29 C.F.R. §§ 102.35, 102.48. This form of discretionary delegation of authority by an executive agency does not create the separation of powers problem identified in *Free Enterprise Fund*.

When an executive branch agency chooses, without legislative compulsion, to employ administrative

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[7] The SEC did have statutory authority to remove functions from the PCAOB, but only as a sanction and only under limited circumstances specified in the statute. *See* 15 U.S.C. § 7217(d)(1). Indeed, this Court made clear that "the Act forbids" such removal of functions "without Commission findings equivalent to those required to fire the Board." *Free Enterprise Fund*, 561 U.S. at 505.

law judges, even when those judges are protected from removal by statute, Congress has not encroached on the executive's power. This Court explained in *Free Enterprise Fund*: "The President can always choose to restrain himself in his dealings with subordinates." 561 U.S. at 497.[8]

As a result of their discretion not to use administrative law judges at all, the SEC and the NLRB, if dissatisfied with administrative law judge decisionmaking, could simply decline to delegate cases to the judges or exercise their regulatory authority to limit the scope of administrative law judge decisionmaking. "The President could then hold the [SEC or the NLRB] to account for its supervision of the [administrative law judges], to the same extent that he may hold the [SEC or the NLRB] to account for everything else it does." *Free Enterprise Fund*, 561 U.S. at 495-96.

Even if this Court were to find the SEC administrative law judges to be inferior officers, therefore, there is no separation of powers problem under *Free Enterprise Fund* and thus no reason for this Court to rewrite the Administrative Procedures Act as the Solicitor General suggests.

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[8] Of course, such a choice is different from the president's decision to sign legislation. As this Court explained immediately after the above-quoted language, "He cannot, however, choose to bind his successors by diminishing their powers." *Free Enterprise Fund*, 561 U.S. at 497.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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