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 Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

MARK A. PERRY
Counsel of Record
JASON NEAL
KELLAM M. CONOVER
SHANNON U. HAN
STEPHEN P. DENT
MINH NGUYEN-DANG
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Petitioners

RULE 29.6 STATEMENT

The corporate disclosure statement contained in the Brief for Petitioners remains accurate.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES

Cases *(continued)* **Page(s)**

TABLE OF AUTHORITIES

Cases *(continued)* **Page(s)**

Constitutional Provisions

Statutes

TABLE OF AUTHORITIES

Statutes *(continued)* **Page(s)**

Regulations

TABLE OF AUTHORITIES

Regulations *(continued)* **Page(s)**

Other Authorities

TABLE OF AUTHORITIES

Other Authorities *(continued)* **Page(s)**

TABLE OF AUTHORITIES

Other Authorities *(continued)* **Page(s)**

REPLY BRIEF FOR PETITIONERS

I. SEC ALJs Are Officers Of The United States

This Court has long recognized that "exercising significant authority" is the touchstone for whether a federal official is an Officer of the United States within the meaning of the Appointments Clause. *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam). SEC ALJs readily satisfy that standard. *See* Pet. Br. 20-26; U.S. Br. 20-32. In defending the judgment (but not the reasoning) of the court below, the Court-appointed *Amicus* therefore proposes rewriting the intentionally flexible *Buckley* standard to include a rigid two-part test under which all Officers must have *both* final decision-making authority *and* the power to exercise that authority in their own name, without any approval by a superior. *Amicus* does not, however, argue that *Buckley* was "wrongly decided," nor does he offer any "'special justification'" for "overturning [such] a long-settled precedent." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) (citation omitted). *Amicus* has not made the case for the radical reworking of *Buckley* that his proposed approach would entail.

A. SEC ALJs Are Officers Under The *Buckley* Standard

The Court has consistently and without apparent difficulty applied *Buckley*'s standard to conclude that non-Article III adjudicators who preside over adversarial proceedings are Officers, *Freytag* v. *Comm'r*, 501 U.S. 868, 881-82 (1991), whether or not they can render final decisions, *Edmond* v. *United States*, 520 U.S. 651, 652 (1997). Under those precedents,

SEC ALJs are Officers—full stop. Pet. Br. 20-26; U.S. Br. 20-32.

1. As *Buckley* recognized, the term "Officer" was "taken by all concerned" at the Founding "to embrace all appointed officials exercising responsibility" under federal law. 424 U.S. at 131. That broad definition served the Appointments Clause's purpose of ensuring "political accountability relative to important Government assignments." *Edmond*, 520 U.S. at 663. Accordingly, a long line of precedents has held that quasi-judicial officials as varied as court commissioners, *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 352-54 (1931), district-court clerks, *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839), and judges of election, *Ex parte Siebold*, 100 U.S. 371, 397-99 (1880), are Officers.

Distilling these principles and precedents, *Buckley* articulated a framework for determining Officer status: Those who exercise "significant" federal authority are Officers, whereas "lesser functionaries subordinate to officers of the United States" are not. 424 U.S. at 126 & n.162 (citing *Auffmordt* v. *Hedden*, 137 U.S. 310, 327 (1890)). This framework is necessarily context-dependent—considerations relevant to an adjudicator's status, for instance, may differ from those relevant to an administrator's. The Court has repeatedly reiterated *Buckley*'s "significant authority" standard, expressing no doubts about its utility or vitality. *See Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 506 (2010); *see also NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 947 (2017) (Thomas, J., concurring).

Although *Amicus* complains (at 28) that *Buckley*'s standard has not been "fleshed out," *Buckley*'s discussion of the Appointments Clause was extensive, and the Court has since applied *Buckley* in a series of cases

involving, as here, non-Article III adjudicators. Each time, the Court unanimously held that adjudicators who preside over adversarial enforcement proceedings are Officers—most notably, that special trial judges (STJs) of the Tax Court are Officers because they exercise significant authority in presiding over hearings and shaping the record. *Freytag*, 501 U.S. at 881-82; *see also Edmond*, 520 U.S. at 662, 665 (military appellate judges whose decisions are subject to review are Officers); *Weiss* v. *United States*, 510 U.S. 163, 167-69 (1994) (military trial judges whose sentences are never final are Officers). This Court has *never* held that an adjudicatory official is *not* an Officer.

2. SEC ALJs undisputedly exercise federal authority; and that authority is "significant" because it includes all the functions this Court found "significant" in *Freytag*—"tak[ing] testimony, conduct[ing] trials, rul[ing] on the admissibility of evidence, and hav[ing] the power to enforce compliance with discovery orders," 501 U.S. at 881-82—and then some. Among other things, SEC ALJs:

- take testimony by "[e]xamin[ing] witnesses," 17 C.F.R. § 200.14(a)(4), and regulating cross-examination, *id.* § 201.326;
- conduct trials by "[r]egulat[ing] the course of hearing[s]," *id.* §§ 200.14(a)(5), 201.111(d);
- receive "relevant evidence" and rule upon its admissibility, *id.* § 201.111(c);
- regulate discovery by "[i]ssu[ing] subpoenas," *id.* §§ 200.14(a)(2), 201.111(b), ordering depositions, *id.* §§ 201.233-.234, and ordering production of evidence, *id.* §§ 201.111(c), .230, .232; and

- enforce compliance with those orders by rejecting filings, *id.* § 201.180(b), and imposing sanctions for "contemptuous conduct," *id.* § 201.180(a).

Amicus never meaningfully addresses these powers, or the many others that Congress and the Commission have delegated to SEC ALJs. *See* Pet. Br. 21-23 (listing powers); U.S. Br. 21 (same). That lacuna is telling.

3. It is not seriously debatable that SEC ALJs are equivalent to STJs in every respect specified in *Freytag*. Indeed, *Amicus* reluctantly concedes (at 16) that "the Court might have viewed the hearing-related functions … as by themselves sufficient to make [STJs] constitutional officers, even absent the ability to enter final binding judgments." His arguments that *Freytag* is nevertheless distinguishable are either illusory or irrelevant.

a. *Amicus* argues (at 46) that, unlike STJs, SEC ALJs cannot enter binding decisions in any category of cases. That is incorrect.

As the Commission has explained, SEC ALJs "have long exercised the authority to enter default orders that make findings, order payment of penalties and disgorgement, and order a party to cease and desist. And we have long understood such orders to be enforceable." *In re Alchemy Ventures, Inc.*, Exchange Act Release No. 70,708, 2013 WL 6173809, at *4 (Oct. 17, 2013). Although the Commission currently prefers its ALJs to enter initial decisions of default, *ibid.*, they indisputably have the *power* to enter immediately enforceable default decisions. *See* Pet. Br. 32; U.S. Br. 22 n.5.

Moreover, SEC ALJs enter initial decisions that are "deemed the action of the Commission" and become binding absent review. 15 U.S.C. § 78d-1(c); *see also* 17 C.F.R. § 201.360(d)(2). *Amicus* argues (at 47) that this statute "does not apply to ALJ initial decisions" because the Commission has not delegated final decision-making authority to ALJs. That question-begging argument cannot be reconciled with either the statute or the government's explanation of it. *See* U.S. Br. 35. And since *Congress* has permitted SEC ALJs to make final decisions, it does not matter for constitutional purposes whether the Commission has allowed them to exercise that power in any or every case.

Amicus also suggests (at 46) that the Commission "sanction[s]" each unreviewed decision. But if the Commission does not timely order review, it *must* enter a finality order. 5 U.S.C. § 557(b) ("initial decision[s]" become final "without further proceedings" absent further review). Moreover, SEC "staff"—not the Commission itself—"reviews *every* initial ALJ decision." Commissioner Robert J. Jackson, Jr., *Fact and Fiction: The SEC's Oversight of Administrative Law Judges*, The CLS Blue Sky Blog (Mar. 9, 2018), https://bit.ly/2v8o6S9 (all Internet sites last visited April 11, 2018). Finality orders thus indicate not that the Commission has approved the decision, but merely that it "has not chosen to review." *E.g.*, *In re Horizon Wimba, Inc.*, Exchange Act Release No. 75,929, 2015 WL 5439958, at *1 (Sept. 16, 2015). Because 90% of ALJ decisions become final without any Commission review, *Bandimere* v. *SEC*, 844 F.3d 1168, 1180 n.25 (10th Cir. 2016), those decisions are not recommendatory—much less "purely" so, *Free Enter. Fund*, 561 U.S. at 507 n.10.

b. *Amicus* further argues (at 37) that *Freytag* is distinguishable because, he says, STJs had the contempt power. *Freytag* noted, however, only that STJs could "enforce compliance with discovery orders," 501 U.S. at 882—which SEC ALJs can do too, *see* 17 C.F.R. §§ 201.111(b), .180. *Freytag* mentioned contempt only in assessing the *Tax Court*'s status as a "court of law," *see* 501 U.S. at 891; and the statute on which *Amicus* relies provided that the Tax Court—not STJs—had contempt authority, *see* 26 U.S.C. § 7456(c). Regardless, there is no doctrinal basis for elevating contempt power to a threshold requirement for Officer status, since *most* executive Officers—including principal Officers such as SEC Commissioners—lack such power. *See ICC* v. *Brimson*, 154 U.S. 447, 488-89 (1894).

c. Other *amici* attempt to distinguish *Freytag* on the ground that STJs' findings were reviewed deferentially while SEC regulations provide that ALJs' findings may be reviewed *de novo*. *See* Constitutional and Administrative Law Scholars (CAC) Br. 25-26. But the issue of deference was "not relevant" to *Freytag*'s analysis. 501 U.S. at 874 n.3. Besides, just as the Tax Court adopted a deferential standard by procedural rule, the Commission's unwavering practice is to "accept [an SEC ALJ's] credibility finding, absent *overwhelming* evidence to the contrary," *In re Clawson*, Exchange Act Release No. 48,143, 2003 WL 21539920, at *2 (July 9, 2003) (emphasis added). Here, for example, the Commission deferred to the ALJ's credibility determinations, Pet. App. 69a-70a, even though one witness had admittedly filed a false claim against Lucia, and the other had "holes in his memory," *id.* 194a.

There is, in short, no difference of constitutional magnitude between the STJs in *Freytag* and SEC ALJs.

B. *Amicus*'s Attempt To Rewrite *Buckley* Fails

Unable to defend the judgment below under this Court's precedents, *Amicus* attempts to rewrite the *Buckley* standard by proposing that an official can be an Officer "*only* if the individual has (i) the power to bind the government or third parties (ii) in her own name." *Amicus* Br. 22 (emphasis added). While *Amicus* calls this the "historical" or "traditional" approach, it is neither. No court has ever adopted *Amicus*'s approach or anything like it—and for good reason.

Amicus's proposed test for Officer status cannot be reconciled with this Court's precedents, particularly *Freytag* and *Edmond*. And it contravenes the text and structure of the Appointments Clause, which clearly provides for a cadre of inferior Officers whose defining feature is that they are "directed and supervised" by principal Officers. *Edmond*, 520 U.S. at 663. In any event, SEC ALJs would be Officers even under *Amicus*'s proposed test.

1. *Amicus*'s Test Conflicts With Precedent

In *Freytag*, the government argued that STJs were employees who "act[ed] only as an aide to the Tax Court" because they had "no *independent* authority whatever," but instead entered only proposed findings and a proposed opinion in the type of case at bar. Resp. Br. at 29-31, *Freytag*, 501 U.S. 868 (1991) (No. 90-762). The Court unanimously rejected that argument, reasoning that the government's focus on STJs' lack of final decision-making authority:

> ignore[d] the significance of the duties and discretion that special trial judges possess. … [S]pecial trial judges perform more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, special trial judges exercise significant discretion.

501 U.S. at 881-82. *Amicus*'s proposed "authority to bind others in one's own name" requirement is substantively indistinguishable from the "independent authority" requirement that *Freytag* rejected.

The Court *could* have decided *Freytag* based on its alternative holding that STJs' power to enter final decisions in other cases also made them Officers. But it didn't: *Freytag*'s principal holding was that "[STJs] exercise significant" authority in administering trials. 501 U.S. at 882. The Court held only in the alternative that *even if* that authority were not significant, STJs' ability to enter final decisions in some cases also "would be" sufficient. *Ibid.*

Adopting *Amicus*'s rule, therefore, would require the Court to ignore *stare decisis* and walk away from *Freytag*'s core holding. It also would require the Court to revisit *Edmond* and *Weiss*, which held that military judges whose decisions were never final, *see Weiss*, 510 U.S. at 168, or were not final until approved by other executive Officers, *see Edmond*, 520 U.S. at 665, were Officers. Tellingly, *Amicus* never even mentions *Weiss*. And he incorrectly suggests (at 47) that *Edmond* is distinguishable because the adjudicators there purportedly could enter decisions "that became effective absent subsequent sanction by a superior officer." In fact, their decisions were always subject to

approval by the Judge Advocate General, who could "order … review" by superior officers in every case. *Edmond*, 520 U.S. at 665 (citing 10 U.S.C. § 867(a)).

Nothing in *Buckley* or its progeny suggests a narrower definition of "significant authority." *See Buckley*, 424 U.S. at 120-36; *Freytag*, 501 U.S. at 880-82. This Court has explained that final decision-making authority is a key attribute of *principal* Officers. *See Edmond*, 520 U.S. at 665; *see also*, *e.g.*, *Dep't of Transp.* v. *Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1239 (2015) (Alito, J., concurring). While discretionary authority to bind may be sufficient for Officer status, it is not necessary. *See Freytag*, 501 U.S. at 881-82. These teachings are flatly inconsistent with *Amicus*'s view (at 14-15) that inferior Officers, too, must be able to make final decisions "absent the subsequent sanction of a superior officer."

2. *Amicus*'s Test Conflicts With The Constitution

Amicus's unprecedented test also conflicts with the original meaning and structure of the Appointments Clause. Contrary to *Amicus*'s lengthy but ultimately empty exegesis, there are no "traditional" requirements that Officers be able to bind others—let alone in their own name. Indeed, the inferior Officers specified in the Appointments Clause generally lack the characteristics that *Amicus* proposes.

a. As this Court has explained, the phrase "Officers of the United States" "embrace[s] all appointed officials exercising responsibility" under federal law, *Buckley*, 424 U.S. at 131, irrespective of whether they can bind others. The original public meaning of "Officer"—derived from dictionaries, the ratification debates, and other Founding-era documents—confirms

that an "Officer" need only have "ongoing responsibility for carrying out a governmental task." Mascott Br. 3-4; *see also United States* v. *Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (Marshall, C.J.) ("An office is defined to be 'a public charge or employment' and he who performs the duties of an office, is an officer").

Nineteenth-century treatises and practice did not condition Officer status on the power to bind. Rather, leading treatises selectively quoted by *Amicus* defined an "office" as a public position "invested with some portion of the sovereign functions of government, to be exercised … for the benefit of the public." Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 1, at 1-2 (1890); *see also* James L. High, *A Treatise on Extraordinary Legal Remedies* 581 (3d ed. 1896) (similar). Further, examples of officials who could not bind others but were held by this Court to be Officers are legion, including "thousands of clerks" in various departments, *United States* v. *Germaine*, 99 U.S. 508, 511 (1879), responsible for "the records, books, and papers appertaining to the office," *Hennen*, 38 U.S. (13 Pet.) at 259. *See also* Jennifer Mascott, *Who Are 'Officers of the United States'?*, 70 Stan. L. Rev. 443, 523 n.471, 528 n.508, 533 (2018).

Even *Amicus*'s own authorities (at 26-27) demonstrate that an official whose actions are subject to "subsequent sanction" by a superior can be an Officer. His primary authorities—a 2007 OLC opinion and an 1822 letter from Maine's Supreme Judicial Court—concluded that the question "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 officer*s." *Officers of the United States Within the Meaning of the*

Appointments Clause, 31 Op. O.L.C. 73, 95 (2007) (emphasis added) (discussing *Opinion of the Justices*, 3 Greenl. (Me.) 481, 482 (1822)). SEC ALJs indisputably have authority to act in the first instance, subject to direction and review by the Commission. The 2007 OLC opinion fully supports the conclusion that SEC ALJs are Officers. *See* Pet. Br. 30-31; U.S. Br. 15, 17.

b. *Amicus*'s second requirement—that Officers must possess power to act in their own name—can be found in no treatise, case, or even legal opinion, let alone the text of the Appointments Clause. And early practice demonstrates that this was not a requirement of Officer status.

For example, the First Congress provided that certain department heads could "appoint" clerks "as they shall find necessary." Act of Sept. 11, 1789, § 2, 1 Stat. 68, 68. These "rank-and-file clerks" "engaged merely in tasks like recording the receipt of registration certificates from merchant ships importing goods." Mascott, *supra*, 70 Stan. L. Rev. at 462, 511. Subsequent Congresses similarly provided for the constitutional appointment of a "deputy quartermaster," Act of Mar. 3, 1795, ch. 44, § 11, 1 Stat. 430, 431 (amended 1796), and an "apothecary-general," charged with the "safe-keeping and delivery" of army medical equipment, Act of Mar. 2, 1799, ch. 27, §§ 1, 3, 1 Stat. 721, 721 (amended 1802). Petitioners are aware of no indication that these officials could bind others in any way, much less in their own name.

Amicus notes (at 33) that deputy marshals and deputy customs officials, who purportedly had "substantial authority to impact the rights of nongovernmental parties," were not appointed as Officers. But those deputies did not hold offices "established by Law," U.S. Const. art. II, § 2, cl. 2, because their duties

and salary were not "specified by statute," *Freytag*, 501 U.S. at 881, and they were not even distinct legal actors. Rather, statutes referenced the deputies only in passing, and their sole function was to assist Officers, while the Officers remained legally responsible for the deputies' actions. *See* Judiciary Act of 1789, § 27, 1 Stat. 73, 87; Act of Aug. 4, 1790, § 7, 1 Stat. 145, 155; *see also* Mascott, *supra*, 70 Stan. L. Rev. at 517-18.

c. The Framers deliberately set up a tripartite classification of officials subordinate to the President: his principal Officers, their inferior Officers, and non-Officer employees. *See* U.S. Const. art. II, § 2, cl. 2; *Buckley*, 424 U.S. at 126 & n.162. This approach recognizes the breadth and variety of functions required to run the government, and the authority to perform those functions necessarily increases as one moves up this hierarchy. *Most* federal officials "'rende[r] service to the government … without thereby becoming its office[rs]'" because they do not wield significant federal authority. *Free Enter. Fund*, 561 U.S. at 506 n.9 (citation omitted). But those who wield *enough* power must be Officers—and that is necessarily a context-dependent question. Within the category of Officers, the Framers clearly identified a sub-category of inferior Officers who presumably outnumber their superiors. *See Edmond*, 520 U.S. at 662-63.

Amicus's proposed test would wipe out the category of inferior Officers altogether. The inability to make binding decisions marks "'inferior officers,'" "whose work" by definition "is directed and supervised" from above by a presidentially appointed, Senate-confirmed "'principal officer.'" *Edmond*, 520 U.S. at 663. Whereas principal Officers can unilaterally issue final decisions that are binding on the Executive,

the hallmark of inferior Officers is that they "have no power to render a final decision … unless permitted to do so" by their superiors. *Id.* at 665; *accord Free Enter. Fund* v. *PCAOB*, 537 F.3d 667, 672 (D.C. Cir. 2008). In short, the only officials to pass *Amicus*'s proposed test would be *principal* Officers. Accepting that test thus would rewrite our Constitution, transforming an essential distinction between types of Officers into one between Officers and employees.

Moreover, *Amicus*'s proposed requirement that Officers have authority to bind others *in their own name* cannot be reconciled with the nature of delegated authority. Because all executive power is vested in the President, delegated authority is exercised not in the name of a subordinate Officer, but on behalf of the President (or the United States). For example, United States Attorneys—who are Officers, *Myers* v. *United States*, 272 U.S. 52, 159 (1926)—exercise executive power not in their own name, but on behalf of the United States. Appellate judges similarly speak for the court of appeals, not themselves, and issue majority opinions in the court's name. *Amicus*'s second proposed requirement, therefore, could be interpreted to read out *all* Officers from the Constitution's executive structure, since only the President actually acts in his own name.

Amicus argues (at 42-43) that because the President will be accountable for the actions of his principal Officers, there is no reason to hold the President (or, by extension, any principal Officer) accountable for the actions of inferior Officers. This confirms that *Amicus*'s proposed test reads inferior Officers out of the Constitution entirely. The Appointments Clause demands, however, that even the appointment of inferior Officers be accountable, directly or indirectly, "to

political force and the will of the people." *Freytag*, 501 U.S. at 884; *see also Edmond*, 520 U.S. at 663.

Amicus's test simply is not compatible with the Republic the Framers established. They adopted the Appointments Clause to ensure that *no one* exercising significant sovereign authority would be left unaccountable to the will of the people. Accordingly, this Court should reject *Amicus*'s unprecedented and unconstitutional test out of hand.

3. SEC ALJs Are Officers Even Under *Amicus*'s Test

Even taking *Amicus*'s test on its own terms, SEC ALJs still would be Officers because they have discretionary authority to bind in their own name.

For example, *Amicus* concedes (at 50) that SEC ALJs' authority to shape the record would suffice if it could bind the agency. That authority actually is binding because the Commission neither reviews evidence the ALJ has excluded, nor makes credibility determinations on its own. And because the SEC ALJ's decision is itself "a part of the record," 5 U.S.C. § 557(c)(3), the Commission *must* "conside[r]" the ALJ's credibility determination and cannot overturn it at will. *Univ. Camera Corp.* v. *NLRB*, 340 U.S. 474, 496 (1951).

SEC ALJs further bind private parties by issuing decisions that "become final." 17 C.F.R. § 201.360(d)(2). Because the Commission is not required to review every initial decision, its ALJs necessarily have the power to enter final decisions, at least where the Commission declines review. Although *Amicus* asserts (at 19) that SEC ALJs enter final decisions "in *the Commission's* name," they sign and en-

ter initial decisions in their own name—and the Commission publishes those decisions by authoring ALJ, *see* SEC, ALJ Initial Decisions, https://www.sec.gov/litigation/aljdec.shtml. Even when those decisions become final, they are not re-issued in the Commission's name, but are "deemed the action of the Commission," 15 U.S.C. § 78d-1(c); *see also Horizon Wimba*, 2015 WL 5439958, at *1 ("the initial decision of the administrative law judge has become the final decision of the Commission").

Other examples abound. SEC ALJs can "[i]ssue subpoenas," 17 C.F.R. §§ 200.14(a)(2), 201.111(b), which are issued in the ALJ's own name and are *themselves* binding because they create the obligation for the recipient to appear at a stated time and place. Private citizens and mere employees have no such power. SEC ALJs also can bind private parties by excluding or suspending counsel from a proceeding for "contemptuous conduct." *Id.* § 201.180(a). As *Amicus* seemingly concedes (at 49), such authority is exercised "in the ALJ's own name," and it plainly affects the rights of counsel and client alike.

Even if this Court were to adopt *Amicus*'s proposed test, therefore, SEC ALJs still would be Officers.

C. The SEC Should Be Accountable For The Appointment Of Its ALJs

Amicus's defense of the judgment below, while spirited, offers no meaningful answer to a simple question: Why *would* the Framers have exempted SEC ALJs from the Appointments Clause? Adjudicators who preside over adversarial proceedings that decide the property rights and livelihood of American citizens are precisely the sort of officials whose actions

should be "accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884.

1. *Amicus* expresses concern (at 53) that SEC ALJs could lose their "independen[ce]" if recognized to be Officers. *See also*, *e.g.*, CAC Br. 30-31. That concern is misplaced.

SEC ALJs are not, and cannot be, "independent" of the President or the Commission. SEC ALJs are not Article III judges who, by constitutional design, are independent of the political branches. *See* Pet. Br. 39. Although they "exercise judgment concerning facts" and "interpret the provisions" of applicable statutes and regulations, such decisions "are typically made by officers charged with executing a statute" and, indeed, constitute "the very essence of 'execution' of the law." *Bowsher* v. *Synar*, 478 U.S. 714, 733 (1986). There would be no liability here, for example, had Judge Elliot not implemented executive policy by "creat[ing] from whole cloth" and retroactively applying a definition of "backtest," Pet. App. 111a, that the Commission agreed with by a bare 3-2 vote. Because SEC ALJs undisputedly exercise executive power, the Constitution requires that they be subject to Presidential control. *See Free Enter. Fund*, 561 U.S. at 492-95; *id.* at 517 (Breyer, J., dissenting).

Congress gave the Commission a choice: It could bring an enforcement proceeding in an Article III court, which is independent of the Commission, or before an SEC ALJ, who is not. *See* 15 U.S.C. § 78u. What the Commission cannot do is proceed before its captive adjudicators while holding them out—as it continues to do—as "independent adjudicators." SEC, Office of Administrative Law Judges, https://www.sec.gov/alj. By misleading investors, courts, and the public about the subordinate nature of its ALJs,

the Commission seeks to evade the very "political accountability" that the Appointments Clause requires. *Edmond*, 520 U.S. at 663.

The Appointments Clause requires the President and his principal Officers (here, the SEC Commissioners) to take responsibility for the actions of their inferior Officers—to take credit for the good and suffer blame for the bad. The President (or the Commission) must also have the power to remove inferior Officers, but the question whether extant limitations on removing SEC ALJs transgress the separation of powers was not litigated below, and the Court has already "indicated that the removal issue is not properly before it." *Amicus* Br. 59. The Court should follow its established practice and consider the removal question only when and if properly presented. *Cf. Free Enter. Fund*, 561 U.S. at 507 n.10 (reserving this question).

2. *Amicus* also contends (at 39-42) that recognizing SEC ALJs to be Officers will "call into significant doubt the validity" of congressionally established commissions that supposedly exercise similar "hearing-related powers" without using Officers. Not so.

"[T]here can be no question" that non-Officers can perform investigative and information-gathering functions that "fal[l] in the same general category as those powers which Congress might delegate to one of its own committees." *Buckley*, 424 U.S. at 137. But where, as here, such functions "go beyond" this general category of powers—to include, for example, *enforcing* federal law against an individual in an adversarial trial process—an Officer is required. *Id.* at 138.

All of the commissions *Amicus* cites reflect this well-established distinction. *Compare*, *e.g.*, *Proposed*

Legislation to Grant Additional Power to the President's Commission on Organized Crime, 7 Op. O.L.C. 128, 128 n.2, 138 (1983) (no Officers needed on "purely advisory" committee "survey[ing] the general nature of organized crime"), *with*, *e.g.*, *Constitutionality of the Ronald Reagan Centennial Commission Act of 2009*, 2009 WL 2810453, at *2 (O.L.C. Apr. 21, 2009) (Officers needed on commission performing "'clearly executive'" functions). Simply put, recognizing that non-Article III *adjudicators* are Officers, as this Court has already done in *Freytag* and *Edmond*, says nothing about the status of non-adjudicatory *investigators*.

Amicus likewise asserts (at 43) that *Buckley*'s standard is not "administrable." But *Amicus* offers no evidence of confusion in this Court, which has been unanimous virtually every time it has applied *Buckley*'s "significant authority" standard. The only "confusion" in the lower courts has arisen as a result of the divided decision in *Landry* v. *FDIC*, 204 F.3d 1125 (D.C. Cir. 2000)—which *Amicus* cannot even bring himself to cite. The Court granted certiorari in this case, however, to resolve that confusion.

Amicus's further conjecture (at 38-39) that "every government attorney, investigator, and law-enforcement officer" could become an Officer is misdirected. The possibility of closer questions as to how *Buckley* might apply to other kinds of officials is no reason to distort the law in this case involving adjudicators, where the answer is clear. As *Amicus* elsewhere concedes (at 6 n.3), the constitutional status of officials who "exercise functions different from those of SEC ALJs" simply is "not at issue here."

A straightforward application of *Freytag* in this case thus would affect only federal adjudicators who, like SEC ALJs, preside over adversarial enforcement

proceedings subject to Sections 556 and 557 of the APA. Pet. Br. 41-42. Other types of ALJs—such as Social Security Administration ALJs, who dispense federal benefits in informal, non-adversarial proceedings—perform substantially different functions and must be analyzed independently. *See*, *e.g.*, Ass'n of ALJs Br. 12-19; NOSSCR Br. 5, 12-13. Accordingly, the Court's decision in this case will logically extend to only about 150 ALJs, *see* Pet. Br. 41-42—or about 0.007% of the 2.1 million civilian officials in the federal government, *see* Office of Management and Budget, An American Budget: Analytical Perspectives, Budget of the U.S. Government, Fiscal Year 2019, at 65 (2018). The sky is not falling.

3. *Amicus* finally argues (at 54-58) that Congress did not intend to make SEC ALJs Officers. This Court has already said the opposite: "Congress intended to make" SEC ALJs a class of "'subordinate hearing *officers*.'" *Ramspeck* v. *Fed. Trial Exam'rs Conference*, 345 U.S. 128, 132 (1953) (emphasis added).

This Court long ago established that, where Congress says "officer," it means "constitutional officer," because if Congress meant "others than officers as defined by the Constitution, words to that effect would be used." *Germaine*, 99 U.S. at 510. *Germaine* established the baseline against which the APA and the securities laws were enacted. Because Congress referred to SEC ALJs as "officers" thirteen times, *see* Pet. Br. 35-36—not "as servant[s], agent[s], [or] person[s] in the service or employment of the government"—it intended to create a constitutional office, *Germaine*, 99 U.S. at 510.

Amicus suggests (at 54-55) that Congress used "officer" without *meaning* "Officer of the United

States." But Congress does not need to spell out "Officer of the United States within the meaning of the Appointments Clause." *See Beck* v. *Prupis*, 529 U.S. 494, 500-01 (2000) (Congress is presumed to adopt the "settled meaning" of terms). As *Amicus*'s primary authority explains, the statutory term "officer" encompasses more than constitutional Officers only where "context" indicates as much. *Steele* v. *United States*, 267 U.S. 505, 507 (1925). Context indicates the opposite here.

Congress endowed SEC ALJs with a primary function—presiding over adversarial enforcement hearings. That function otherwise can be performed only by principal Officers: the Commission as a body or individual Commissioners. *See* 15 U.S.C. §§ 77u, 78v, 80a-40, 80b-12; *see also* 5 U.S.C. § 556(b) (requiring the agency, one of its members, or an ALJ to "preside at the taking of evidence" in formal adjudication). In performing those functions, SEC ALJs are "directed and supervised" by principal Officers, *Edmond*, 520 U.S. at 663—namely, SEC Commissioners. The suggestion that SEC ALJs are on par with file clerks (or janitors) simply blinks reality.

The APA's definition of "officer" cements this interpretation by closely modeling the Appointments Clause's prescriptions for the appointment of inferior Officers. *Compare* 5 U.S.C. § 2104(a)(1), *with* U.S. Const. art. II, § 2, cl. 2. *Amicus* suggests (at 55-56) that this definition is not instructive because Congress replaced all references to hearing examiners as "officers" in the APA with "employees." But *Amicus* omits that Congress simultaneously defined "employee" to *include* all "officers." *See* 5 U.S.C. § 2105(a) (defining "employee" as "an officer and an individual

who is … appointed in the civil service"). Those revisions thus provide no basis for treating SEC ALJs as mere employees.

By constitutional and congressional design, therefore, the Commission must accept responsibility for its ALJs.

II. THE CONSTITUTIONAL VIOLATION REQUIRES A MEANINGFUL REMEDY

No mere employee could have presided over the hearing that ruined Ray Lucia's life and career. Judge Elliot critically shaped the evidentiary record—including by crediting the testimony of two unreliable witnesses (who had never complained of being misled) and disregarding that FINRA-registered broker-dealers had repeatedly approved Lucia's presentations in advance—and held Lucia liable retroactively for violating Judge Elliot's *own* definition of "backtest" even though Lucia had explicitly disclosed the assumptions underlying his use of the term. *See* Pet. Br. 5-9. Judge Elliot even permanently exiled Lucia from his profession, despite no investor losses, misappropriated funds, or customer complaints. *See ibid*.

Because Lucia "ma[de] a timely challenge to the constitutional validity of [Judge Elliot's] appointment," he "is entitled" not only to "a decision on the merits," but *also* "whatever relief may be appropriate." *Ryder* v. *United States*, 515 U.S. 177, 182-83 (1995). The scope of such relief is undisputedly encompassed within the Question Presented. *See Amicus* Br. 58 (remedy issue is "relevant … if the judgment below is reversed"); U.S. Mot. for Divided Arg. 4-5 (agreeing that petitioners "can address the [remedial] argument").

The Constitution itself requires a new "hearing before a properly appointed" adjudicator. *Ryder*, 515 U.S. at 188. Every *amicus* that addresses the remedial issue agrees with that core proposition. *See* J.S. Oliver Br. 20-25; WLF Br. 18-22; Cornell Clinic Br. 26. Although one *amicus* suggests a purely "prospective application of [the Court's] holding," NBLA Br. 12, that approach is unavailable here because the Court must "set aside" unlawful "agency action" on a petition for review under the APA, 5 U.S.C. § 706(2)(A); *see also Ryder*, 515 U.S. at 184-85 (rejecting "prospective application only" of Appointments Clause holding). At a bare minimum, therefore, the Court should ensure that Lucia receives an entirely new hearing before a constitutionally appointed adjudicator other than Judge Elliot. *See* Pet. Br. 42-49.

A new hearing must be truly *new*—the Commission (or an ALJ) cannot merely "ratify" the previous proceedings. The Commission has forfeited any ability to raise ratification or similar defenses in *this* case, as petitioners repeatedly have noted, with no objection by the government. *E.g.*, Pet. Br. 53; *see also id.* at 49-56 (providing additional reasons why "ratification" is unavailable).

The Commission's so-called Ratification Order nevertheless demonstrates that the Commission needs to be instructed that the Appointments Clause is a binding requirement of our founding compact, not a mere "matter of 'etiquette or protocol.'" *Edmond*, 520 U.S. at 659 (citation omitted). Despite the Commission's continuing failure to comply with the Clause, multiple ALJs have declared themselves "bound by" the Commission's erroneous pronouncement that it has "resolv[ed] any Appointments Clause claims" in pending SEC administrative proceedings.

E.g., *In re Snisky*, Admin. Proc. Rulings Release No. 5,658, at 2-3 (Mar. 26, 2018); *see also* WLF Br. 25-26 & n.10. The sting of dismissal would force the Commission to internalize that its systematic breach of the Constitution is a serious matter.

Dismissal is further warranted here because the taint of unconstitutionality reaches back to the order instituting proceedings, which required petitioners to appear "before an Administrative Law Judge." C.A.D.C. JA32. That order and all the proceedings that followed were unlawful because there were no constitutionally appointed SEC ALJs at the time. *See*, *e.g.*, J.S. Oliver Br. 27; WLF Br. 26 & n.11. Given that the process petitioners received was unconstitutional from root to blossom—and given the tremendous personal and financial cost already inflicted on petitioners—"the only reasonable remedy" is to instruct the Commission to dismiss the proceedings in their entirety. *Laccetti* v. *SEC*, — F.3d —, 2018 WL 1439616, at *4 (D.C. Cir. Mar. 23, 2018). That is particularly so because to this day no SEC ALJ has been constitutionally appointed. *See* Pet. Br. 51-53.

SEC ALJs exercise extraordinary power to affect citizens' lives through formal adjudication. They rule on evidence, apply law to facts, and issue decisions that, as here, can have devastating consequences. The Appointments Clause requires that the appointment of such officials be "accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884. Because nobody was accountable for Judge Elliot when he decided Ray Lucia's fate, the Constitution demands meaningful relief.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

MARK A. PERRY
Counsel of Record
JASON NEAL
KELLAM M. CONOVER
SHANNON U. HAN
STEPHEN P. DENT
MINH NGUYEN-DANG
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Petitioners

April 13, 2018