

No. 17-567

In the Supreme Court of the United States

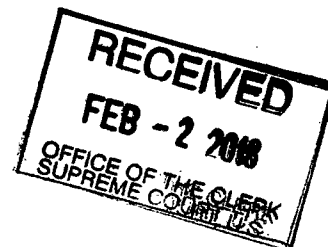
**G. HARRISON SCOTT, JOHNNY C. CROW,
and SHARRY R. SCOTT,**

Petitioners,

-v-

**FEDERAL DEPOSIT
INSURANCE CORPORATION,**

Respondent.



**On Petition for Writ of Certiorari to the United
States Court of Appeals for the Fifth Circuit**

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

At the outset, it should be noted that the Government opposition brief addresses only one of the five questions presented in the Petition for Writ of Certiorari—and then only on procedure. It does not contest whether the Administrative Law Judge (ALJ) had the subject matter authority; *i.e.*, whether an employee or inferior officer who would be subject to the Constitution's Appointments Clause. There were four other questions that the Government chose not to contest, those relating to: Mixed Cases, Deference, Summary Disposition, and Meaningful Review. The Government opted not to challenge the underlying facts or merits of the case, instead focusing its efforts on a narrow claim that the jurisdictional issue was not raised below.



CLARIFICATION OF KEY FACTS

Here, a brief restatement of certain critical facts is provided for clarification

Under "Regulation O," 12. C.F.R. Pt 215, a bank may not "extend credit to any insider of the bank" unless (i) the extension is made available "on substantially the same terms" as to the general public, and (ii) the extension "[d]oes not involve more than the normal risk of repayment or present other unfavorable features." (emphasis added).

The FDIC contending it only need prove one or the other, substituted "or" for "and".

The ALJ, at commencement of the hearing, announced that he "intended" to rule the facts were undisputed and Petitioners were guilty as charged. As such, the only issue was the Civil Money Penalties for which there was no need of culpability. Based on this "intention," he precluded all evidence on the merits.

The ALJ precluded key evidentiary items, including no risk of repayment. Officer P. was not an "executive officer" as well as evidence of age discrimination by FDIC employees, including a message calling for the death of Petitioner Scott (App.143a). There was no formal evidentiary hearing on the facts giving rise to penalties; instead, the hearing was conducted only to determine the severity of the civil penalties, which FDIC contends, did not require culpability.

The ALJ never issued the "intended" ruling. Nonetheless, the ALJ issued a Recommended Decision and Order based on the "intended" ruling.

The Board "adopted" the Decision and Order; however, neither were signed by the Board. The decision was not signed and the order was signed by the Executive Secretary.



ARGUMENT

The Government acknowledges that this petition meets the criteria for certiorari under Rule 10 of the Supreme Court. "Petitioners are correct that a division of authority exists with respect to the constitu-

tional status of ALJs of the Securities and Exchange Commission...”, *Raymond J. Lucia Cos. v. SEC*, 868 F.3d 1021 (2017) (per curiam), certiorari granted, Supreme Court No. 17-130. (Opp.Br.4) the Government also concedes that Petitioner’s case would be suitable for holding pending the final outcome of *Lucia*, but for the Government’s claim that the Petitioner’s jurisdictional claim is untimely. Alas, the Government’s opposition argument fails because the final outcome has not been rendered in the *Lucia* case.

I. THE PETITIONER’S OBJECTION TO THE ALJ’S PARTICIPATION AS A JUDGE IS TIMELY

A. Subject Matter Jurisdiction May Be Challenged at Any Time

Subject matter jurisdiction is the authority of a court to hear cases of a particular type or to hear cases relating to a specific subject matter. Subject matter jurisdiction is limited in the United States federal courts, and bound by Article III, Section 2 of the U.S. Constitution, and then further bound by Congressional enabling/limiting statutes. An ALJ who is unconstitutionally appointed has no ability to act as a inferior officer and therefore has no subject matter jurisdiction.

“Indeed, a court without subject matter jurisdiction is akin to an adjudicator, like an SEC ALJ who was appointed improperly, and therefore lacked the authority to exercise jurisdiction over the case before him.” Kaela Dahan, *The Constitutionality of SEC Administrative Proceedings: The SEC Should Cure Its Appointment Scheme*, *CARDOZO LAW REVIEW*, 38: 1211, 1242 (2017).

The Petitioners contend that the ALJ has acted in the capacity of an inferior officer, without being constitutionally appointed. This is a violation of the Article II of the Constitution.

Federal Rule 12(h)(3) states that, “[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” Fed. R. Civ. P. 12(h)(3). “The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) (citations omitted) (jurisdiction upheld); see also *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”) (jurisdiction upheld).

On appeal—even for the first time at the Supreme Court—a party may attack jurisdiction after the entry of judgment in the district court. See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). *Freytag v. Commissioner*, 501 U.S. 868 (1991).

B. Unconstitutional Appointment of Administrative Law Judge Invalidates the ALJ’s Decision

The standing requirement, as governed by Article III of the Constitution, permits federal courts to adjudicate only cases or controversies that comprise an actual injury that can be redressed. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). Subject-matter jurisdiction does not exist in the absence of constitutional standing.

Thus, due to the constitutional nature of the ALJ's jurisdictional deficiency, the Petitioner's Question regarding the status of the ALJ as officer or employee is ripe for review by this Court, whether by statutory right under Rule 12(h)(3) or by "plain error" analysis. This case presents a question of pure law, whether a non-constitutionally appointed Administrative Law Judge has the power to act in the capacity of an Article 3 judge. In its Brief for the Respondent in *Lucia*, the Government concurs that this is an issue of monumental significance:

The requirements of the Appointments Clause are "among the significant structural safeguards of the constitutional scheme" and are "designed to preserve political accountability relative to important Government assignments." *Edmond v. United States*, 520 U.S. 651, 659, 663 (1997).

Government Brief for the Respondent, *Lucia*, at 11.

C. The Government Concurs that ALJs are Unconstitutionally Appointed

In its brief submitted to this Court in *Lucia*, on November 29, 2017, the Government, agrees that ALJs appointed in the same manner as that in the instant case brought by Petitioners, are invalid.

Under the Appointments Clause, Congress 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." U.S. Const. Art. II, § 2, Cl. 2. The appointment of the ALJ who presided in petitioners' case did not conform

to that command. That ALJ was selected by the Commission's Chief ALJ, subject to approval by the Commission's Office of Human Resources. *See* pp. 2-3, *supra*. The Commission itself, as the constitutional "Head [] of Department []," did not play any role in the selection.

Government Brief for the Respondent, *Lucia*, at 19.
(emphasis added)



CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari, or in the alternative, should hold the disposition of this petition pending the outcome of *Lucia*.

Respectfully submitted,

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