No. 18-1117

In the Supreme Court of the United States

KABANI & COMPANY, INC., ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners forfeited their Appointments Clause challenge to the appointment of the Public Company Accounting Oversight Board hearing officer in their case by failing to raise any such challenge before the Board, before the Securities and Exchange Commission, and in their opening and reply briefs in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is unreported but is available at 733 Fed. Appx. 918. The order of the court of appeals construing petitioners' motion for reconsideration as a petition for rehearing and denying that petition (Pet. App. 5) is unreported. The opinion of the Securities and Exchange Commission (Pet. App. 6-58) is reported at 116 SEC Docket 1095 and available at 2017 WL 947229.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2018. A motion for reconsideration was denied on September 25, 2018. On November 5, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including January 23, 2019. On December 18, 2018, Justice Kagan further extended the time to and including February 22, 2019,

and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Public Company Accounting Oversight Board (Board) disciplined petitioners for a "wide-spread and resource-intensive" effort to falsify audit documents in order to deceive the Board's inspectors. Pet. App. 7. The Securities and Exchange Commission (Commission) sustained that disciplinary action. *Id.* at 8. The court of appeals affirmed the Commission's order and denied the petition for review, holding that petitioners' claim under the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2—raised for the first time in a Federal Rule of Appellate Procedure 28(j) letter after the completion of briefing in the court of appeals—had been forfeited. Pet. App. 1-4.

1. The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, established the Board to oversee the accounting industry. The Board issues auditing and ethics standards, inspects accounting firms, and conducts investigations. 15 U.S.C. 7213-7215. Every accounting firm that participates in auditing public companies must register with the Board and comply with its rules. 15 U.S.C. 7211, 7212, 7213, 7216. If a company violates those rules, the Board may issue sanctions to punish it. 15 U.S.C. 7215(c)(4).

This case involves two auditing standards established by the Board. Under the first standard, a firm must assemble complete and final documentation for an audit within 45 days after the release of the audit report. Pet. App. 9. Under the second, a firm that adds documents to an audit file after this 45-day deadline must mark the documents with the date of addition, the

name of the person making the addition, and the reason for the addition. *Ibid.*

2. Petitioner Kabani & Company (Company) is an accounting firm that was registered with the Board. Pet. App. 7. Petitioners Hamid Kabani, Michael Deutchman, and Karim Khan Muhammad are accountants associated with the Company. *Ibid.*

In June 2008, the Board's inspectors notified the Company that it planned to inspect the Company's audit records. Pet. App. 9. In response, petitioners began what they described as a "[c]leanup" of the Company's audit files. *Id.* at 10. In the course of this project, petitioners added documents to, and falsified documents in, their audit files—even though the deadline for completing the files had passed. *Id.* at 10, 12. Petitioners also failed to indicate when, why, and by whom the alterations were made. *Id.* at 14. Petitioners "intentionally reset internal computer clocks" to conceal the dates on which they had made the alterations, and they "backdated their signatures on relevant work papers." *Id.* at 7.

This "cleanup" effort was "resource-intensive." Pet. App. 7. It "consumed so much of the staff's time" during the two months preceding the inspection that the Company "could not do much billing" on paying projects. *Id.* at 10. One employee described it as "a huge project where everyone was working on it, they were working overtime, they were working against the deadlines." *Ibid.* The effort intensified in October 2008, when the Board's inspectors sent the Company an email identifying the audit files they would be inspecting. Kabani forwarded the list to Company staff, stating: "Please note below the clients selected by the PCAOB. We will be working 12 hrs per day, next week, including Saturday and possibly Sunday. Everybody is expected to make

arrangement[s] and resolve the[ir] personal matters. No exceptions." *Id.* at 11-12 (brackets in original).

On October 20, 2008, the Board's inspectors visited the Company's office and reviewed its files. Pet. App. 12. "No one informed the inspectors that work papers had been supplemented or altered after" the applicable deadlines. *Ibid.*

A year after the inspection, a former employee of the Company alerted the Board about these irregularities. Pet. App. 13. The Board accordingly opened an investigation, asked the Company to produce its audit files, compared the documents produced by the Company to copies provided by the former employee, and reviewed the documents' metadata (information stored on a computer about a document's properties, including information about who had last edited the document and when). *Id.* at 14-19. The investigation revealed that petitioners had altered their audit files after the applicable deadlines, but had failed to indicate when, why, or by whom the changes were made. *Id.* at 14.

3. a. In June 2012, the Board initiated disciplinary proceedings against petitioners. Pet. App. 19. The Board alleged that petitioners had improperly added, altered, and backdated documents across multiple audit files. *Ibid.* A hearing officer selected by the Board presided over the disciplinary proceedings. *Id.* at 19-20.

After the hearing, the Board's hearing officer issued an initial decision finding that petitioners had violated the Board's rules "by participating in a 'wide-spread and resource-intensive effort' to alter documents in three issuer audit files in an attempt 'to deceive PCAOB inspectors in an upcoming inspection about the deficiencies in the Firm's audit work papers.'" Pet. App. 20. To punish these violations, the initial decision censured all

four petitioners; revoked the Company's registration; barred Kabani, Deutchman, and Khan from associating with a registered public accounting firm; and imposed civil penalties on Kabani, Deutchman, and Khan. *Ibid.*

Petitioners did not argue at any point in those proceedings that the hearing officer's appointment violated the Appointments Clause.

b. Petitioners sought review of the hearing officer's decision before the Board. Petitioners argued, among other things, that the hearing officer had lacked sufficient experience and expertise, that he had allocated the burden of proof incorrectly, that he had improperly prevented them from calling an expert witness, and that the Board had denied them due process by taking too long to complete the investigation and disciplinary proceedings. C.A. E.R. 9755, 9758, 9759 n.3, 9779. In a separate motion, petitioners demanded the Board's recusal on the ground that it was biased. *Id.* at 9836. Petitioners did not argue before the Board that the hearing officer's appointment violated the Appointments Clause.

The Board denied the recusal motion and summarily affirmed the hearing officer's decision. Pet. App. 20-21.

c. Petitioners sought review of the Board's decision before the Commission. Petitioners contended, among other things, that the disciplinary proceedings "were unconstitutional and violated [their] procedural due process rights" because the hearing officer lacked relevant experience and the Board was biased, and because both had committed a variety of errors. 3-16518 Pet. Br. i-ii. Petitioners did not argue before the Commission that the hearing officer's appointment violated the Appointments Clause.

The Commission sustained the Board's decision and rejected each of petitioners' arguments. Pet. App. 21-58.

d. Petitioners sought review of the Commission's decision in the court of appeals, advancing the same arguments that they had made before the Commission. Pet. C.A. Br. 2-4. Petitioners did not argue in their opening or reply brief that the hearing officer's appointment violated the Appointments Clause.

After briefing ended, petitioners submitted a citation of supplemental authorities under Federal Rule of Appellate Procedure 28(j). Pet. C.A. Rule 28(j) Letter (Pet. Letter) 1-6. In that letter, petitioners invoked this Court's decision in *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), and argued for the first time that the Board's hearing officers, like the administrative law judges at issue in *Lucia*, are officers of the United States who must be appointed in accordance with the Appointments Clause. Pet. Letter 2-3. Petitioners acknowledged that *Lucia* required them to make a "timely challenge to the constitutional validity of the appointment," 138 S. Ct. at 2055 (citation omitted), but stated that they had satisfied this requirement by arguing to the Commission that they had suffered a "denial of basic procedural protections" under "the Fourteenth Amendment." Pet. Letter 3-4 (citation omitted).

The Commission filed its own Rule 28(j) letter, asserting that petitioners had forfeited any Appointments Clause challenge to the appointment of the hearing officer. Gov't C.A. Rule 28(j) Letter 1-2. The Commission explained that "[t]he only timely challenge petitioners raised to the validity of their hearing officer was their claim that he 'had no experience in the practice of auditing and accounting,'" and that "[t]his argument does not

come close to preserving [a] Constitutional challenge to the hearing officer under the Appointments Clause." *Id.* at 1 (quoting Pet. C.A. Br. 57).

The court of appeals denied the petition for review. Pet. App. 1-4. The court held that "[s]ubstantial evidence support[ed] the SEC's finding," that the "proceedings comported with procedural due process," and that petitioners' "other procedural complaints [we]re meritless." *Id.* at 2-3. The court of appeals also held that petitioners had "forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency." *Id.* at 4.

Petitioners moved for reconsideration of the court of appeals' order. Pet. App. 5. The court of appeals denied the motion, construed the motion as a petition for panel rehearing, and denied the petition as well. *Ibid.*

ARGUMENT

Petitioners challenge the court of appeals' determination that they forfeited their Appointments Clause challenge to the appointment of their hearing officer by failing to raise it in their opening brief, in their reply brief, and before the agency. The court's application of settled forfeiture principles is correct, does not conflict with any decision of another court of appeals, and does not raise any question that warrants this Court's review. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that petitioners had forfeited their Appointments Clause challenge to the appointment of their hearing officer.

a. "No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited by the failure to make a

timely assertion of the right before a tribunal having jurisdiction to determine it." *Stern* v. *Marshall*, 564 U.S. 462, 482 (2011) (internal quotation marks and ellipsis omitted). As a general rule, a litigant must raise "objections to the proceedings of an administrative agency" before the "administrative body" itself. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). In the court of appeals, moreover, the litigant must present his claims in his "opening brief." *Clark Cnty. Sch. Dist.* v. *Breeden*, 532 U.S. 268, 273 (2001) (per curiam).

A litigant does not adequately preserve a claim by raising it for the first time in a Rule 28(j) letter. "The proper function of Rule 28(j) letters, after all, is to advise the court of 'new authorities' a party has learned of after oral argument, not to interject a long available but previously unmentioned issue for decision." *Niemi* v. *Lasshofer*, 728 F.3d 1252, 1262 (10th Cir. 2013) (Gorsuch, J.) (citing Fed. R. App. P. 28(j)). Allowing parties to use Rule 28(j) letters "to introduce any sort of new issue after briefing is complete" "risks leaving opponents with no opportunity * * * for a proper response," "risks an improvident opinion from th[e] court by tasking [it] with the job of issuing an opinion without the full benefits of the adversarial process," and "invites an unsavory degree of tactical sandbagging by litigants in future cases." *Ibid.*

These established rules are fully applicable to Appointments Clause claims. "Appointments Clause claims * * * have no special entitlement to review." *Freytag* v. *Commissioner*, 501 U.S. 868, 893 (1991) (Scalia, J., concurring in part and concurring in the judgment). A litigant therefore is "entitled to relief" under the Clause only if he "makes a timely challenge to the constitutional validity of the appointment." *Lucia*, 138 S. Ct. at

2055 (citation omitted). And whether such a challenge is timely turns on "ordinary principles of waiver and forfeiture." *Jones Bros., Inc.* v. *Secretary of Labor*, 898 F.3d 669, 678 (6th Cir. 2018).

The court of appeals correctly applied these well-settled principles to conclude that petitioners had failed to assert a timely challenge to the validity of the hearing officer's appointment. Petitioners did not raise a claim under the Appointments Clause "before the agency." Pet. App. 4. They failed again to raise the claim in their opening or reply brief in the court of appeals. *Ibid.* Petitioners instead presented the claim for the first time in their Rule 28(j) letter. As the court of appeals correctly held, that was too late.

b. Petitioners' contrary arguments lack merit.

In arguing that they properly preserved their Appointments Clause claim, petitioners contend (Pet. 18) that they contested "the appointment of the officer" before the agency and in their opening briefs. At those stages of the case, however, petitioners contested the appointment only on the ground that the hearing officer "had no experience in the practice of auditing and accounting"—not on the ground that his appointment violated the Appointments Clause. Pet. App. 22 n.10; see Pet. C.A. Br. 10. Petitioners also state (Pet. 19) that they argued to the agency and the court of appeals that "they were deprived of their due process rights and that the administrative forum in which they were forced to defend themselves was unfairly biased, unconstitutional, and constructed in a manner that violates vested, protected property rights and constitutionally protected, fundamental fairness." But petitioners' claims of procedural unfairness—that the hearing officer allocated the burden of proof incorrectly and improperly

prevented them from calling an expert witness, and that the Board was biased, took too long to complete proceedings, failed to investigate exculpatory evidence, and denied a jury trial—have nothing to do with the validity of the hearing officer's appointment under the Appointments Clause. Finally, petitioners emphasize that their appellate reply brief stated that they were "subjected to sanctions * * * based on an unconstitutional framework" because "Congress assigned executive power to the Board without sufficient oversight, accountability, or allegiance." *Ibid.*; Pet. C.A. Reply Br. 31-32. But this remark does not suffice, both because it came in the reply brief and because it did not make or develop any argument about the appointment of the hearing officer.

Petitioners also contend that the court of appeals adopted "an inflexible specific-verbiage requirement" under which a litigant must incant "magic words" in order to raise an Appointments Clause challenge. Pet. 17, 23 (capitalization altered and emphasis omitted). But the court held only that "petitioners forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency." Pet. App. 4. This restatement of elementary forfeiture rules cannot fairly be read to impose a "magic words" requirement. Petitioners' forfeiture rests not on their failure to use a specific linguistic formulation, but on their failure to raise the substance of their current claim before the agency and in their opening and reply briefs in the court of appeals.

Finally, petitioners suggest (Pet. 20) that their Appointments Clause claim is timely because they filed their Rule 28(j) letter "promptly" "[a]fter this Court's decision in *Lucia*." Where "Circuit precedent preclude[s]" a litigant from pursuing a claim in his opening

brief, but "an intervening Supreme Court decision" overturns that precedent, the court of appeals may accept "supplemental or substitute briefs" raising the new claim. *Joseph* v. *United States*, 135 S. Ct. 705, 706 (2014) (statement of Kagan, J., respecting denial of certiorari). But petitioners do not contend that circuit precedent precluded them from pursing their Appointments Clause challenge in their opening brief. This Court emphasized in *Lucia* that existing case law "says everything necessary to decide this case," 138 S. Ct. at 2053, and "many other litigants pressed the issue before *Lucia*," *Island Creek Coal Co.* v. *Wilkerson*, 910 F.3d 254, 257 (6th Cir. 2018). Petitioners identify no pre-*Lucia* Ninth Circuit decision that prevented them from doing the same.

2. The decision below does not conflict with any decision of another court of appeals.

a. The courts of appeals uniformly agree that "a letter submitted pursuant to rule 28(j) *cannot* raise a new issue." *United States* v. *LaPierre*, 998 F.2d 1460, 1466 n.5 (9th Cir. 1993); see *United States* v. *Nason*, 9 F.3d 155, 163 (1st Cir. 1993), cert. denied, 510 U.S. 1207 (1994); *Sompo Japan Ins. Co. of Am.* v. *Norfolk S. Ry. Co.*, 762 F.3d 165, 175 n.18 (2d Cir. 2014); *United States* v. *Khorozian*, 333 F.3d 498, 506 n.7 (3d Cir.), cert. denied, 540 U.S. 968 (2003); *United States* v. *Ashford*, 718 F.3d 377, 381 (4th Cir. 2013); *Block* v. *Tanenhaus*, 815 F.3d 218, 221 n.3 (5th Cir. 2016); *In re Lewis*, 398 F.3d 735, 748 n.9 (6th Cir. 2005), *United States* v. *Dyer*, 892 F.3d 910, 913 n.1 (7th Cir. 2018); *Valdez* v. *Mercy Hosp.*, 961 F.2d 1401, 1404 (8th Cir. 1992); *Hill* v. *Kemp*, 478 F.3d 1236, 1250-1251 (10th Cir. 2007), cert. denied, 552 U.S. 1096 (2008); *United States* v. *Silvestri*, 409 F.3d 1311, 1338 n.18 (11th Cir.), cert. denied,

546 U.S. 1048 (2005); *Worldwide Moving & Storage, Inc.* v. *District of Columbia*, 445 F.3d 422, 427 n.7 (D.C. Cir. 2006).

The courts of appeals that have considered the issue further agree that these preservation rules apply to Appointments Clause challenges. In *NLRB* v. *RELCO Locomotives, Inc.*, 734 F.3d 764 (2013), the Eighth Circuit ruled that a company had forfeited an "appointments clause challenge" by failing to raise it "before the [agency] or in its initial briefs on appeal," and by presenting it only "in a Rule 28(j) letter." *Id.* at 795. In *Island Creek Coal Co.*, *supra*, the Sixth Circuit ruled that a litigant had "forfeited its Appointments Clause challenge" because it "did not raise the issue when it mattered most: in its opening brief in the Sixth Circuit." 910 F.3d at 256. And in *Turner Brothers, Inc.* v. *Conley*, No. 17-9545, 2018 WL 6523096 (Dec. 11, 2018), the Tenth Circuit ruled that a litigant had forfeited its Appointments Clause challenge because it "did not mention this issue in its filings with [the agency], and did not raise the issue until after it filed its brief with th[e] court." *Id.* at *1. Under the approaches of all of these courts, petitioners' claim would be deemed forfeited.

b. Petitioners' efforts (Pet. 11) to show "a deepening conflict in the federal courts" are unpersuasive.

Contrary to petitioners' contention (Pet. 12-13), the decision below does not conflict with the Sixth Circuit's decision in *Jones Brothers*, *supra*. As the Sixth Circuit later recognized, *Jones Brothers* addressed only "the subsidiary question whether the claimant must preserve his argument *in the administrative process*." *Island Creek Coal*, 910 F.3d at 256 (emphasis added). It did not address a failure to raise an argument in the

opening brief in the court of appeals—the dispositive point in *RELCO*, *Island Creek Coal*, *Turner Brothers*, and this case. And even in *Jones Brothers*, the court agreed that the litigant had "forfeit[ed] its constitutional claim" by failing to present it before the agency, but held that this forfeiture was excusable for two reasons. 898 F.3d at 677 (emphasis omitted). First, it was not clear whether the agency at issue, the Mine Safety Health Review Commission, could have entertained an Appointments Clause challenge given the statutory limits on the Commission's review authority, and the court "underst[ood] why *that* question may have confused Jones Brothers." *Id.* at 678. Second, Jones Brothers had at least identified the Appointments Clause issue for the agency's consideration and then squarely raised its Appointments Clause argument in its opening brief in the court of appeals. *Id.* at 677-678 On those facts, the Court exercised its discretion to excuse Jones Brothers' forfeiture, but explained that this outcome was exceptional: "We generally expect parties like Jones Brothers to raise their as-applied or constitutional-avoidance challenges before the Commission and courts to hold them responsible for failing to do so." *Id.* at 677. Petitioners fail to demonstrate any conflict between that approach and the general recognition among the courts of appeals that Appointments Clause claims are subject to forfeiture.

The same flaws undermine petitioners' contention (Pet. 14) that "district courts across the country have developed their own patchwork of approaches" about "the extent to which parties must go in order to preserve an Appointments Clause challenge." On petitioners' own account, the cited district-court decisions ad-

dress the steps that a challenger must take "at the administrative level," not the steps he must take in court. *Ibid.* (citation omitted); see *ibid.* ("raise an Appointments Clause issue before or during the ALJ's hearing") (citation omitted); Pet. 15 ("failing to raise the Appointments Clause issue before the ALJ or other officer"); Pet. 16 ("raise the constitutional challenge before the ALJ"). And some of the decisions that petitioners cite involve a court's exercise of its "discretion" to overlook a forfeiture. *Ibid.* (citation omitted). Those decisions do not suggest that a court is *required* to excuse a litigant's failure to raise an Appointments Clause challenge before the relevant agency, let alone that a court of appeals must entertain such a challenge when it is first raised in a Rule 28(j) letter after the litigant has filed its opening and reply briefs.

3. "The courts of appeals have wide discretion to adopt and apply 'procedural rules governing the management of litigation,'" *Joseph*, 135 S. Ct. at 705 (statement of Kagan, J., respecting the denial of certiorari) (quoting *Thomas* v. *Arn*, 474 U.S. 140, 146 (1985)), and this Court "do[es] not often review the circuit courts' procedural rules," *id.* at 707. The gist of petitioners' challenge, moreover, is simply that the court of appeals misapplied its procedural rules to the facts of this case. The court below found that petitioners had "fail[ed] to raise [the Appointments Clause claim] in their briefs or before the agency," Pet. App. 4, but petitioners insist that they "actually *had* raised the Appointments Clause claim before the agency and in their briefs," Pet. 18. That fact-bound dispute does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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