No. 17-130

IN THE

Supreme Court of the United States

RAYMOND J. LUCIA, *et al.*,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

BRIEF FOR MARK CUBAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Mark Cuban is a successful businessman and investor. He defeated an attempt by the U.S. Securities and Exchange Commission (the "SEC" or "Commission") to sanction him as an "insider trader" based on a defective legal theory and incorrect facts. As a first-hand witness to and victim of SEC overreach, Mr. Cuban has an interest in supporting Petitioners' appeal in this case, and in particular demonstrating that both statutory language and legislative history clearly show that Congress specifically intended that SEC hearings only be held before constitutional officers.

According to its website, "[t]he mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[2] When the laws are applied inconsistently or the process by which they are enforced is rigged to favor the government, capital formation is impeded because market participants do not have clear rules for understanding their investment risks. Put differently, investment risk from arbitrary and biased securities law enforcement is no less a threat to

1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or his counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.2(a), both parties received timely notice of the intent to file this brief and have consented to the filing of this brief.

2. *See What We Do*, U.S. Sec. & Exch. Comm'n., https://www.sec.gov/Article/whatwedo.html (last visited Aug. 25, 2017).

capital formation than investment risk resulting from lax enforcement; they are two sides of the same coin.

As a businessman who has faced down a misguided SEC enforcement litigation, Mr. Cuban has an abiding interest in challenging the SEC when it takes misguided and incorrect positions in litigation. Here, the SEC has done exactly that in claiming that Congress's chosen language is "irrelevant" and that the Commission can ignore legislative intent and delegate to mere employees, rather than to constitutional officers, the power to preside over hearings having a profound effect on peoples' livelihoods, reputations, and finances.

SUMMARY OF ARGUMENT

The *Lucia* panel not only misapplied *Freytag*'s test for determining whether an individual is required to be a constitutional officer, but also incorrectly dismissed clear congressional intent that SEC administrative law judges ("ALJs") be constitutional officers. *See Raymond J. Lucia Co., Inc. v. SEC*, 832 F.3d 277, 289 (2016), *aff'd en banc by an equally divided court*, 2017 WL 2727019 (D.C. Cir. June 26, 2017). This *amicus* brief focuses on the second of those defects in the panel decision because the use of the word "officer" in the relevant provisions of the securities laws, the plain wording of the relevant provisions of the Administrative Procedure Act ("APA"), as well as their respective legislative histories, all manifest congressional intent that Commission hearings be held by officers of the United States only. In other words, the Court should grant the Petition for Writ of Certiorari here because the panel's decision thwarts clearly expressed congressional language, understanding, and intent. Of course, as

Petitioners point out, the Petition should be granted because it also misapplies this Court's long-standing, uninterrupted precedent and, until recently, the Executive Branch's own view. *See* Petition for Writ of Certiorari at 18-19, *Lucia v. SEC*, No. 17-130 (July 21, 2017).

The *Lucia* panel erred when it summarily dismissed the language of the federal securities laws commanding that hearings be held before the Commission or "*an officer or officers of the Commission designated by it*," *see, e.g.*, 15 U.S.C. § 77u (emphasis added), by adopting the SEC's formulation that "there is no indication Congress intended these officers to be synonymous with 'Officers of the United States.'" *Raymond J. Lucia Co., Inc.*, 832 F.3d at 289; *see also*, Opinion of the Commission, *In re Raymond J. Lucia Co., Inc.*, Admin. Proc. File No. 3-15006, 2015 WL 5172953, at *23 n.122 (Sept. 3, 2015). The deliberate use of the words "officer or officers" is, of course, one such indication because the word "officer" is imbued with constitutional meaning. The relevant legislative history is another. Yet, the panel was silent in response to Mr. Cuban's statutory interpretation points, as well as his analysis of the legislative history demonstrating that Congress meant and understood that the terms "constitutional officers" and "officers" were synonyms.

The panel's finding of no evidence of congressional intent "that the ALJ who presides at an enforcement proceedings [sic] be delegated the sovereign power of the Commission to *make the final decision*," *Raymond J. Lucia Co., Inc.*, 832 F.3d at 287 (emphasis added), is beside the point, for it confuses *what* may be delegated with *to whom*. It is clear from the legislative history that Congress's intent was not dependent on delegation

of power to issue final decisions; Congress required that hearings be held by constitutional officers because of the seriousness of the subject matter as well as the powers attendant to conducting them (and even gathering evidence in advance of them). To allow the SEC to delegate its hearing powers, or any subset of them, to someone who is not an officer would thwart that plain congressional intent.

In short, when the securities laws and APA are read together, both the statutes and the legislative histories show that while Congress did allow for the possibility that not all ALJs had to be "officers," it clearly intended that SEC ALJs did.

ARGUMENT

I. THE SECURITIES LAWS REQUIRE THAT OFFICERS HOLD SEC HEARINGS.

Congress chose the following language to authorize SEC hearings:

> All hearings shall be public and may be held before the Commission or ***an officer or officers of the Commission designated by it*** . . . .

Securities Act of 1933, 15 U.S.C. § 77u (emphasis added).[3]

3. *See also* Securities Exchange Act of 1934, 15 U.S.C. § 78v ("Hearings . . . may be held before the Commission, any member or members thereof, or any officer or officers of the Commission designated by it . . . ."); Investment Advisers Act of 1940, 15 U.S.C. § 80b-12 (same); Investment Company Act of 1940, 15 U.S.C. § 80a-40 (same).

Plain language of legislation must be given its plain meaning. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) ("[W]e begin by analyzing the statutory language . . . . We must enforce plain and unambiguous statutory language according to its terms." (citations omitted)); *United States v. Germaine*, 99 U.S. 508, 510 (1878) (finding that when Congress uses the phrase "officers of the United States," it means "constitutional officers" and stating that an intent to describe someone other than a constitutional officer is denoted by words such as "servant, agent, person in the service or employment of the government"). Unless contrary intent is apparent, in other words, one must assume that Congress meant "officers" in the constitutional sense when it used the word "officers" for at least three reasons. First, the word "officer" is imbued with significant meaning in our constitutional framework—Article II, Section 2 of the Constitution itself refers to the "principal Officer in each of the executive Departments," "Officers of the United States," and "inferior Officers." U.S. Const. art. II, § 2; *see Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976). Second, because this Court has expressly interpreted the phrase "officer of the United States" in legislation as meaning "constitutional officer." *See Germaine,* 99 U.S. at 510; *see also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 589-90 (2010) ("[W]hen 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'" (citations omitted)). And third, the grouping of the Commission itself with its officers in this provision implies a parity of stature—*i.e.*, this is a reference to constitutional officers because they are empowered to "exercis[e] significant authority pursuant to the laws of the

United States." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 486 (2010) (quoting *Buckley*, 424 U.S. at 125-26).

II. LEGISLATIVE HISTORY OF THE RELEVANT STATUTES CONFIRMS THE PLAIN LANGUAGE—CONGRESS INTENDED TO DELEGATE EXECUTIVE POWER TO CONSTITUTIONAL OFFICERS.

Even if there were some ambiguity to Congress's chosen language justifying a search for intent, the relevant legislative history demonstrates Congress's intent that SEC hearings be held before constitutional officers.

A. The Legislative History of the Securities Act.

Congressional debate in connection with the House bill that eventually became the Securities Act of 1933 reflects deep concerns about vesting with any non-judicial officer the power to hold hearings, administer oaths and affirmations, compel attendance, and recommend severe sanctions. Indeed, initially there was even dissension as to whether the Commission itself and any of its members—all principal officers—should hold this power.

A predecessor provision to Sections 20 and 21 in the initial House draft would have authorized the Commission (then the Federal Trade Commission) to revoke a company's registration if, among other things, it found that the company was in unsound condition. H.R. 4314, 73d Cong. § 6 (1933).[4] Certain members of Congress expressed

4. The current provision for Cease-and-Desist Proceedings appears at 15 U.S.C. § 77h-1; the current provision for Injunctions

concern that the power to take away someone's business because it was "unsound" was both unprecedented and immense. *See, e.g.*, *Federal Securities Act: Hearing Before the H. Comm. on Interstate and Foreign Commerce*, 73d Cong. 45 (1933) (Representative Clarence Lea described this power as "a rather radically different field" than the one of controlling publicity or disclosures).

To address these concerns, drafters initially proposed vesting such powers only in *principal* officers of the United States. For example, an early draft bill, H.R. 4314, placed officers empowered to act for the Commission on the same footing as Commission members who were principal officers:

> SEC. 6. That the Commission may revoke the registration of any security by entering an order to that effect . . . . In making such examination ***the Commission or other officer or officers designated by it*** shall have access to and may compel the production of all the books and papers of such issuers . . . and may administer oaths to and examine the officers of such issuers . . . and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities . . . .

H.R. 4314, 73d Cong. § 6 (1933) (emphasis added). Initial drafts of this legislation always contemplated that

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and Prosecution of Offenses appears at 15 U.S.C. § 77t; and the current provision for Hearings by Commission appears at 15 U.S.C. § 77u.

members of the Commission would be principal officers.[5] Therefore, the use of the word "other" to modify the words "officer or officers" suggests parity; reflecting congressional intent that investigations and hearings be conducted either by principal officers who are Commissioners or other principal officers designated by the Commission for that purpose.

Congress was concerned about vesting this amount of control and power *even* with principal officers. In one illuminating exchange during the hearings, the Chairman of the relevant House Committee questioned whether *any* administrative officer of the government should have that much power. *Federal Securities Act: Hearing Before the H. Comm. on Interstate and Foreign Commerce*, 73d Cong. 135 (1933) (statement of Rep. Sam Rayburn, Chairman, H. Comm. on Interstate and Foreign Commerce) ("Do you believe that an administrative officer of the Government ought to be given that much power, as a general principle—to pass upon whether or not a man's business is based on sound principles? . . . [B]ut the question that this committee has got to determine is whether or not they want to give anybody that kind of authority."). This concern was echoed at various times throughout the House and Senate Committee hearings. *See, e.g.*, *id.* at 135-36 ("And yet we are committing [these powers] into the hands of a commission, of men appointed by the President, and, of course, confirmed by the Senate. But you know, . . . a board or a commission, is just about as good in its administration, or as bad, as the personnel of the commission."); *Securities Act: Hearings Before the S. Comm. on Banking and Currency*, 73d Cong. 104 (1933)

5. That Commission is "composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate." 15 U.S.C. § 41.

(statement of Sen. James F. Byrnes, Member, S. Comm. on Banking and Currency) ("That is quite a lot of power to give to an official, to determine that in his opinion a given enterprise is not based upon sound principles.").

Similarly, a related draft provision authorizing investigations and giving powers to compel production of evidence and take sworn testimony provided:

> For the purpose of all investigations . . . , ***the Commission and officer or officers designated by it*** are empowered to subpena [sic] witnesses, examine them under oath, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry.

H.R. 4314, 73d Cong. § 15(b) (1933) (emphasis added).[6] Given the revocation-for-being-unsound debate context, the only reasonable interpretation of this language is that it too referred to constitutional officers.

A later draft bill, H.R. 5480, narrowed Section 6 and removed the power to revoke registration of securities based on an unsound condition of an issuer. *See* H.R. 5480, 73d Cong. § 6 (1933). It allowed the Commission to enter a stop order suspending a registration statement if it appeared that the statement included any material false statements or omissions. *Id.* § 8(d). Additionally, it slightly modified the language regarding who was authorized to conduct stop order examinations by replacing the words "other officer" with the words "any officer." *Compare*

6. The current provision states, in relevant part: "[A]ny member of the Commission or any officer or officers designated by it . . . ." 15 U.S.C. § 77s(c).

H.R. 4314, 73d Cong. § 6 (1933) *with* H.R. 5480, 73d Cong. § 8(e) (1933).

This modification shows two things: First, by replacing the word "other" with the word "any," the new draft provision empowered both inferior and principal officers. One can infer that once the drafters narrowed the grounds on which the Commission could revoke a registration, they were comfortable permitting inferior officers to hold examinations and exercise attendant powers. Second, this is a deliberate, considered change because it obviously changes the meaning of the provision. H.R. 5480 was passed on May 5, 1933. 77 Cong. Rec. 2910-55 (1933).

The original Senate draft bill, S. 875, largely tracked the original House bill, H.R. 4314; it too included a clause that would have allowed revocation of a registration of an "unsound" business. *See* S. 875, 73d Cong. § 6(e) (1933). However, the Senate passed a modified version of H.R. 5480. 77 Cong. Rec. 2978-84, 2986-3000 (1933). The differences between the two chambers' bills were reconciled in a Conference Report, and the final public law had three key parts:

> (1) It retained the language in H.R. 5480 regarding the powers of "***the Commission or any officer or officers designated by it***" to examine witnesses under oath and require the production of documents in connection with a stop order examination, *id.* at 3894 (emphasis added);[7]

7. The relevant language remains materially the same today. *See* 15 U.S.C. § 77h(e).

(2) It modified the language of H.R. 5480 regarding investigations, so that "***any member of the Commission or any officer or officers designated by it*** are empowered to administer oaths and affirmations, subpena [sic] witnesses, take evidence, and require the production" of documents for purposes of investigations, 77 Cong. Rec. 3896 (1933) (emphasis added);[8] and

(3) It added a section entitled "Hearings by Commission," directing that: "All hearings shall be public and may be held before ***the Commission or an officer or officers of the Commission designated by it*** . . . ," 77 Cong. Rec. 3896-97 (1933) (emphasis added).

The Conference Report was subsequently agreed to by both the House and Senate. *Id.* at 3903, 4009 (1933).

In sum, Congress chose the word "officer" carefully and calibrated its grant of authority to executive officers based on the scope of delegated powers.

B. The Legislative History of the Securities Exchange Act.

The following year, Congress passed a companion act, the Securities Exchange Act of 1934. This act, of course,

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8. Note that "and" was replaced with "or," resulting in "the Commission ***or*** any officer or officers," and indicating that Congress was focused on this provision. *Compare* H.R. 4314, 73d Cong. § 15(b) (1933) *with* 77 Cong. Rec. 3896 (1933).

set up the SEC. In it, Congress imbued the Commission and the officers it designated with certain executive functions, such as subpoenaing witnesses, administering oaths, and compelling the production of documents.

Notably, the initial version of the Senate bill included much of the same language and structure as the Securities Act on the relevant issues. That draft started by outlining the "Special Powers of the Commission" in Section 18:

> For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this Act, ***any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena [sic] witnesses, compel their attendance, take evidence, and require the production of*** any books . . . .

S. 2693, 73d Cong. § 18(e) (1934) (emphasis added). As with the Securities Act, this was a grant of executive power to the Commission members and any officers designated by the Commission (and no one else).[9]

The attention to the wording of the provision authorizing hearings in the Exchange Act further indicates that Congress intended hearings to be held by constitutional officers. The draft provided: "All hearings shall be public and may be held before the Commission, ***any member or members thereof*** or an officer or officers of the Commission designated by it, and appropriate records thereof shall be kept." S. 2693, 73d Cong. § 21 (1934)

9. The relevant language remains materially the same today. *See* 15 U.S.C. § 78u(b).

(emphasis added). Note that the highlighted language was an addition to the language in the Securities Act's analogous provision, making it even more explicit that not all hearing officers needed to be principal officers, *i.e.*, Commission members. Apparently, having resolved (with the Securities Act's passage) that inferior officers could also hold hearings, Congress added the highlighted language to reflect that. In short, Congress chose carefully who could wield the hearing-related powers it was delegating. That careful choice would be upended were one to read "employee" where Congress said "officer."

Finally, Congress understood that the choice of the words "employee" or "officer" in the Exchange Act carried legal implications. For example, the use of the word "appoint" in Section 4, which establishes the Commission and authorizes it to employ staff, indicates that Congress was sensitive to the significance of the term "officer."[10] Specifically, initial House and Senate drafts did not authorize the Commission to "appoint" officers or anyone else. *See, e.g.*, H.R. 7924, 73d Cong. § 3 (1934); S. 2642, 73d Cong. § 4(e) (1934) (initial Senate draft: "The Commission is further authorized, in accordance with the civil service laws, to employ . . . such officers and employees . . . as may be necessary . . . ."). The addition of the word "appoint" in the enacted law signified that Congress understood that the Commission needed authority to appoint "officers."[11]

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10. Section 4(b) of the final enacted law reads, in relevant part: "The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and other experts as may be necessary . . . and the Commission may . . . appoint such other officers and employees as are necessary . . . ." S. 875, 73d Cong. § 4(b) (1933).

11. The current provision is: "The Commission shall appoint and compensate officers, attorneys, economists, examiners, and

C. The Legislative History of the APA.

The plain language and legislative history of the APA also clearly indicate congressional intent that SEC ALJs be inferior constitutional officers. In fact, under the APA, Congress determined the method for appointing ALJs—following lengthy discussions and analysis—with the constraints of the Appointments Clause in mind, *i.e.*, that certain of the ALJs would be "inferior Officers."

1. The APA places ALJs on the same footing with principal officers.

In parallel with the placement of hearing officers on par with the Commission members in the securities laws, the APA also places ALJs on par with heads of departments, *i.e.*, principal officers; to wit: "There shall preside at the taking of evidence—(1) the agency; (2) one or more members of the body which comprises the agency; or (3) one or more administrative law judges appointed under section 3105 of this title." 5 U.S.C. § 556(b).[12] As the discussion below shows, this was no accident; this

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other employees in accordance with section 4802 of title 5." 15 U.S.C. § 78d(b)(1).

12. In 1978, Congress amended the United States Code to change the title of "hearing examiners" to "Administrative Law Judges" and to increase the number of such positions at the GS-16 level. Act of Mar. 27, 1978, Pub. L. No. 95-251, 92 Stat. 183, 183-84 (reclassifying hearing officers as administrative law judges). Before this public law was enacted, the Senate Committee on Governmental Affairs issued a Senate Committee Report explaining that "individuals appointed as ALJ's [sic] hold a position with tenure very similar to that provided for Federal judges under the Constitution." S. Rep. No. 95-697, at 2 (1978).

language reflects Congress's policy choices and careful analysis.

2. Empowerment of ALJs was a reaction to earlier functioning of administrative agencies.

The APA stemmed from a review of administrative agencies following the expansion of the administrative state after the Great Depression. A report by the Attorney General's Committee on Administrative Procedures outlined certain procedural and substantive defects in the then-current administrative functions, including in formal adjudications, and provided a proposed draft of the APA. *See* Attorney Gen.'s Comm. on Admin. Procedure, Letter of Transmittal of Final Report (1941); *see generally* Attorney Gen.'s Comm. on Admin. Procedure, Final Report (1941). The concerns raised in the report animated the passage of the APA and informed much of its language.

The Committee recommended that:

- Agency heads delegate much of the investigatory and prosecutorial functions to capable officers and the initial adjudicative functions to other independent officers. Attorney Gen.'s Comm. on Admin. Procedure, Final Report 55-57 (1941).

- The status of all hearing officers be elevated to allow them to exercise independent and executive functions. *Id.* at 43-44, 46.

- The hearing officers' initial decisions be given real weight, *i.e.*, the initial decision would become final absent clear error. *Id.* at 51.

- Congress empower the hearing officers to exercise certain executive or sovereign functions, such as "preside at hearings, issue subpoenas, administer oaths, rule upon motions, carry out other duties incident to the proper conduct of hearings, and make findings of fact, conclusions of law, and orders for the disposition of matters coming before them." *Id.* at 50.

- An independent body be in charge of approving candidates to ensure that they are well qualified, noting "the hearing commissioner is in a very real sense acting for the head of the agency." *Id.* at 47.

3. Congress intended ALJs to be "presiding officers," appointed in accordance with the Appointments Clause.

Acting on the above-described prescriptions, Congress passed the APA, which, as detailed below: (1) made the hearing examiners "presiding officers"; (2) granted them certain executive powers; (3) mandated that the decisions of subordinate officers be given weight and force; and (4) made certain that the appointment of ALJs are made in conformity with the Appointments Clause.

(i) Congress referred to hearing examiners as "presiding officers."

To start, Congress referred to hearing examiners as "presiding officers" in the original legislation, to wit:

> ***Presiding officers.***—There shall preside at the taking of evidence (1) the agency, (2) one or

> more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; . . . The ***functions of all presiding officers and of officers participating in decisions*** in conformity with section 8 shall be conducted in an impartial manner.

Administrative Procedure Act of 1946, Pub. L. No. 79-404, § 7(a), 60 Stat. 237 (1946) (emphasis added). Parallel to the Exchange Act, this provision covered three categories of persons: the Commission acting together, individual Commissioners, and other persons appointed to hold the hearing. The words "the functions of all presiding officers" referred to all three of these categories. The sole sensible reading of this language is that the grouping of examiners with principal officers in this section indicates the elevation of examiners to officer status.

The very next provision of the APA as originally adopted supports this reading. It states:

> ***Hearing powers.—Officers presiding at hearings shall have authority***, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas [sic], . . . and (9) take any other action authorized by agency rule consistent with this Act.

Id. § 7(b) (emphasis added). Moreover, that "hearing examiners" were given the same powers as principal officers of the United States is yet another indication that Congress intended delegation of sovereign powers, rendering them inferior officers.

(ii) The statutory definitions of "officer" and "employee" confirm that Congress intended SEC ALJs to be "inferior officers."

In 1965, in connection with the adoption of the revised Title 5, Congress restated "in comprehensive form, without substantive change, the statutes in effect before July 1, 1965, that relate to Government employees, the organization and powers of Federal agencies generally, and administrative procedure . . . ." H. R. Rep. No. 89-901, at 1 (1965). In short, Congress made language changes to streamline and standardize terms across various interrelated statutory provisions without changing their meaning. *Id.* at 2-3.[13]

Among other things, Congress defined the terms "officer" and "employee" in new Sections 2104 and 2105, respectively. *See generally id.* at 8, 10, 12-13. Applying these definitions, Congress amended the hearing-authorizing provisions of the APA thus:

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13. The House Judiciary Committee's Report accompanying these language changes provides, in relevant part:

> ***Substantive change not intended***.—Like other recent codifications undertaken as a part of the program of the Committee on the Judiciary of the House of Representatives to enact into law all 50 titles of the United States Code, there are no substantive changes made by this bill enacting title 5 into law. . . . In a codification statute, [courts presume that] the statute is intended to remain substantively unchanged.

Id. at 3.

> The words "employee" and "employees" [were] substituted [in Section 556(b)] for "officer" and "officers" ***in view of the definition of "employee" in section 2105***. The sentence "A presiding or participating employee may at any time disqualify himself[,]" is substituted for the words "Any such officer may at any time withdraw if he deems himself disqualified."

Id. at 13 (emphasis added).

Similar changes and qualifying comments were made in Section 557. *Id.* By noting that the substitution of "employee" for "officer" was made in view of the expansive definition of "employee," Congress indicated that it understood that "officer" and "employee" were not interchangeable terms and that, therefore, as originally drafted, officer did not mean employee. *See id.* An analysis of these definitions shows that SEC ALJs are officers under the APA.

"Officer" is defined thus:

> (a) For the purpose of this title, "officer", except as otherwise provided by this section or when specifically modified, means a justice or judge of the United States and ***an individual who is***—
>
> > (1) ***required by law to be appointed*** in the civil service ***by*** one of the following acting in an official capacity—
> >
> > > (A) the President;
> > > (B) a court of the United States;

> (C) ***the head of an Executive agency***; or
> (D) the Secretary of a military department;
>
> (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
>
> (3) subject to the supervision of an authority named by paragraph (1) of this section, or the Judicial Conference of the United States, while engaged in the performance of the duties of his office.

5 U.S.C. § 2104 (emphasis added).

"Employee" is defined thus:

> (a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, ***means an officer*** and an individual who is—
>
> (1) appointed in the civil service by one of the following acting in an official capacity—
>
> (A) the President;
> (B) a Member or Members of Congress, or the Congress;
> (C) a member of a uniformed service;

> (D) an individual who is an employee under this section;
> (E) the head of a Government controlled corporation; or
> (F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;
>
> (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
>
> (3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

5 U.S.C. § 2105 (emphasis added). In other words, the definition automatically includes all officers (both principal and inferior) as well as certain non-officers falling within subsections (a)(1), (a)(2), and (a)(3).

SEC ALJs meet the statutory definition of "employee" in Section 2105 solely because they meet the statutory definition of "officer" in Section 2104. SEC ALJs are not covered by subsections (a)(1) and (a)(3) of Section 2105 because they must be designated by the Commission under the securities laws (as discussed above) and, under the APA, they must be appointed by the "agency." *See* 5 U.S.C. § 3105 ("Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title."). In other words, SEC ALJs do not meet Section

2105's tests for non-officer employees. But, SEC ALJs are "officers" under Section 2104 because they (1) must be appointed by the Commission; (2) perform their duties under authority of law; and (3) are subject to supervision by the head of an executive agency—the Commission.[14] Accordingly, because they are officers under Section 2104, they also are "employees" under the preambular language of Section 2105(a).

4. Congress explicitly made certain that ALJs' appointment complied with the Appointments Clause.

The Attorney General's Committee Report recommended that hearing officers be appointed by an independent government body. Attorney Gen.'s Comm. on Admin. Procedure, Final Report 47-48 (1941). To accomplish this, the Committee recommended the formation of an "Office of Administrative Justice," whose Director would be appointed by the Judicial Conference and who would, in turn, appoint hearing examiners. S. Doc. No. 79-248, at 41-42 (1944-46).

This proposal was rejected because it ran afoul of the Appointments Clause. As explained by the Senate Judiciary Committee:

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14. The word "agency" refers to the entire body that comprises the agency, *i.e.*, all Commissioners acting together as a Commission. The Commission acting together is the head of the agency. *See* Opinion of the Commission, *In re Timbervest, LLC*, Admin. Proc. File No. 3-15519, 2015 WL 5472520, at *23 n.137 (Sept. 17, 2015) ("The Commission constitutes the 'head of a department' when its commissioners act collectively." (quoting *Free Enter. Fund*, 561 U.S. at 512-13)). "Agency" is, therefore, another term for the agency head.

> The legal difficulty with the suggestion, however, is that the ***Constitution provides for the placing of powers of appointment*** "in the courts of law" whereas the Judicial Conference is a committee and not a court and hence may ***not be within the constitutional authorization for appointing powers***.

Id. at 42 (emphasis added).

The same concerns were voiced in the House hearings. The then-President of the American Bar Association ("ABA") testified as follows:

> Third is a suggestion that the Judicial Conference appoint an officer to appoint and remove examiners. This suggestion is attractive, but may present constitutional problems as to the appointing power. Perhaps a solution would be for the Presidential appointment of such an officer or officers, with provision for the Judicial Conference to make recommendations to the President.

Id. at 50. The very next suggestion taken up (and ultimately adopted) by the Senate Judiciary Committee was that the "examiners be appointed '***by*** each agency' rather than [just] 'for each agency.'" *Id.* at 42. In those instances where agency heads are heads of departments, such as the SEC, this change ensured proper Article II appointments.

5. Congress was conferring significant executive powers in the APA.

Were Congress not conferring significant executive powers on ALJs, it would not have bothered with the Appointments Clause. The following comment from the Senate Judiciary Committee is illuminating:

> It has been suggested that this bill should grant the subpena [sic] power to all hearing officers, ***whether or not the agency has been granted such power***. It may seem logical that hearing officers should have compulsory process powers, but it has been felt that the grant of such powers is of such a nature and so important as to be better left to Congress in connection with specific legislation rather than dealt with by a general statute.

Id. at 29-30 (emphasis added). There would be no reason to consider giving ALJs *independent* subpoena powers if Congress meant them to be mere employees whose job was limited to serving as aides to the Commission. Note that the decision not to vest ALJs with independent subpoena power did not rest on their status as mere employees or aides. Rather, Congress saw the delegation of subpoena power to be significant enough to require a specific statutory grant. *A fortiori*, the grant of subpoena powers to SEC ALJs is a delegation of significant executive power.

To be sure, the original APA text distinguished between supervising officers and subordinate officers, but that distinction is most naturally read as tracking the Constitution's distinction between principal and inferior

officers, because every inferior officer, by definition, is subordinate to, and is subject to supervision by, a principal officer. In referring to subordinate examiners, therefore, Congress repeatedly used the word "officer":

> ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, ***the officer who presided*** (or, in cases not subject to subsection (c) of section 5, ***any other officer or officers*** qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require . . . the entire record to be certified to it for initial decision. Whenever ***such officers*** make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions ***of such officers*** . . . . Whenever the agency makes the initial decision without having presided at the reception of the evidence, ***such officers*** . . . .

Administrative Procedure Act of 1946 § 8(a) (emphasis added). It is hard to fathom what Congress could have meant here if not that the persons conducting hearings were constitutional officers—*i.e.*, Commission members who are subordinates for this purpose or their subordinates, inferior officers.

In short, Congress empowered ALJs carefully and in full recognition of the importance of officer status to their functions. As the Senate Judiciary Committee explained,

the APA was "designed to assure that the presiding officer will perform a real function rather than serve merely as a notary or policeman." S. Doc. No. 79-248, at 207, 269.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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August 25, 2017

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