No. 17-475

IN THE

Supreme Court of the United States

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

DAVID F. BANDIMERE,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Administrative Law Judges of the Securities and Exchange Commission are "inferior Officers" within the meaning of the Appointments Clause.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

CONSTITUTIONS, STATUTES, RULES, AND REGULATIONS

TABLE OF AUTHORITIES—Continued

SEC RELEASES

ATTORNEY GENERAL OPINIONS

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

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INTRODUCTION

The five administrative law judges (ALJs) of the U.S. Securities and Exchange Commission (SEC) preside over all SEC administrative enforcement proceedings throughout the Nation, and issue decisions imposing substantial monetary and non-monetary sanctions, 90 percent of which receive no further review and become final agency action by operation of law. The Tenth Circuit held that these ALJs are "inferior Officers" under the Constitution's Appointments Clause because they wield substantial authority and discretion under the laws of the United States. And because it was conceded that SEC ALJs are not appointed consistent with the Clause's requirements, the court set

aside the decision in the SEC's enforcement action against Respondent David Bandimere.

The government's petition for certiorari should be denied outright for three reasons.

First, the government's petition literally does not ask this Court to grant certiorari and set this case for argument. Instead, the government argues, in a scant two-and-a-half pages, that this Court should either grant *another* party's petition *against* the government in the *Lucia* case (and then hold this one), or else to deny the government's own petition here. Meanwhile, the government pointedly refuses to offer any substantive arguments at all, claiming that it will make them in its brief in opposition in *Lucia* (now on its second extension), leaving Mr. Bandimere with no opportunity to respond. This Court need not entertain a purported petition for certiorari that seeks to string along the prevailing party below but refuses to join issue on the merits.

Second, the Tenth Circuit's decision is correct and flows directly from this Court's Appointments Clause precedents. This Court has held that whether officials are "Officers" or mere employees depends on whether they "exercise significant discretion" in "carrying out … important functions." *Freytag* v. *C.I.R.*, 501 U.S. 868, 882 (1991); *accord Edmond* v. *United States*, 520 U.S. 651, 662 (1997) ("The exercise of 'significant authority pursuant to the laws of the United States' marks … the line between officer and nonofficer."). SEC ALJs—a small group of federal officials who exercise wide-ranging power over SEC enforcement proceedings throughout the Nation—readily meet the standard set forth in this Court's modern decisions. That conclusion is only confirmed by the numerous

historical opinions of this Court, other courts, and the Executive Branch that indicate that an array of officials—from naturalization examiners, to administrative clerks, to lighthouse keepers—traditionally have been considered inferior officers under the Constitution. *See, e.g.*, Pet. App. 8a-10a. The Tenth Circuit committed no error.

Third, that there is no clear division in lower court authority. While there is a pending petition for certiorari on the same question in *Lucia*, the D.C. Circuit panel's judgment in that case was vacated, and the petition for review was then denied by an equally divided *en banc* court in an unpublished *per curiam* order. The precedential value of the *Lucia* panel opinion is now unclear at best. Even if it made sense in the abstract to consider the question presented, this Court should not do so now, when only the Tenth Circuit has squarely addressed the issue in a precedential opinion. That is especially true because the government itself identifies additional cases in the pipeline in several other courts of appeals, which will permit further percolation of the issue.

If this Court nonetheless wishes to review the question presented now, though, it should not hold this petition for *Lucia*, as the government suggests. If the Court will not deny the government's petition outright, then Mr. Bandimere would not oppose this Court's granting certiorari here and reviewing the Appointments Clause question at issue in Mr. Bandimere's case, where there is a comprehensive, precedential opinion that this Court may readily review and affirm. The government offers no argument to the contrary, except its oblique notation that Justice Gorsuch was still a judge of the Tenth Circuit while the petition for rehearing *en banc* was pending, while omitting the fact

that Justice Gorsuch appears not to have participated in the denial of rehearing. The government offers no reason to think that Justice Gorsuch would be recused in this case, and we know of none.

The petition should be denied, or else it should be granted and the case set for argument. It should not be held.

STATEMENT

A. Mr. Bandimere Is The Victim Of A Ponzi Scheme

"[W]hen a pair of now-convicted fraudsters zeroed in on David Bandimere, … they found not only a ready stream of cash, but a churchgoing man with name recognition willing to spread their word." Migoya, *Denver businessman Bandimere among those caught in Ponzi scheme*, Denver Post, Nov. 1, 2013, http://www.denverpost.com/2013/11/01/denver-businessman-bandimere-among-those-caught-in-ponzi-scheme.

Mr. Bandimere, a 72-year-old devout Christian, has spent his life working for his family business in Colorado and as an active volunteer for faith groups in Denver. *E.g.*, CAJA 774, 790-791. Between 2005 and 2009, on the advice of a trusted friend, Mr. Bandimere invested over $1 million in two related Ponzi schemes. CAJA 1298. Specifically, in 2005, Mr. Bandimere's longtime friend Richard Dalton introduced Mr. Bandimere to Larry Michael Parrish, who ran an investment program called IV Capital ("IVC"). CAJA 29-30. IVC promised 5% returns, and Dalton recommended that Mr. Bandimere invest in IVC. *Id.* Mr. Bandimere in-

vested $200,000 with IVC in late 2005 and early 2006. CAJA 234; *see also* Pet. App. 76a.[1]

Mr. Bandimere's initial investments performed as represented, and after Mr. Bandimere shared the news about the successful investment, some of his family and friends asked to participate. Mr. Bandimere let them do so through his personal account. CAJA 234-235.

One of these new investors was Cameron Syke, a Denver lawyer, accountant, and former stockbroker who was Mr. Bandimere's friend and colleague on the board of Global Connections International ("GCI"), a Christian humanitarian group. CAJA 165, 673-674, 678. Mr. Bandimere suggested IVC as a possible investment for GCI at a late 2006 board meeting, and Syke subsequently investigated IVC, meeting with Parrish, speaking with other investors, and reviewing purported trading records. CAJA 236-237, 674. After Syke completed this due diligence in 2007, both Syke personally and GCI invested in IVC through Mr. Bandimere's account. CAJA 236-237, 689 690.

In mid-2007, Syke in turn sought to share the IVC opportunity with his friends and family and created an investment vehicle called Exito, LLC to do so. CAJA 236-237. Syke and Mr. Bandimere were co-managers of Exito; Mr. Bandimere and his wife performed administrative services, while Syke handled tax and legal issues. CAJA 237-240, 679. Syke also advised Mr. Bandimere on how to create a similar LLC investment vehicle for Mr. Bandimere's own friends and family to

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[1] Parrish defrauded Mr. Bandimere while in the midst of active litigation with the SEC over a different fraudulent scheme, for which Parrish consented in 2007 to an administrative order barring him from industry activity for five years, in addition to millions in disgorgement. *E.g.*, CAJA 28-29.

invest in IVC. CAJA 236, 792. Based on that advice, Mr. Bandimere created Victoria Investors, LLC. *Id.*; *see also* CAJA 680. Despite performing due diligence in IVC, Syke never informed Mr. Bandimere that the IVC investments were securities which needed to be registered. CAJA 694. Nor did Syke inform Mr. Bandimere that telling family and friends about IVC, and receiving management fees via the LLCs, might constitute acting as a "broker" under Section 15(a) of the Exchange Act. CAJA 693-694.

In addition to the IVC investments, the LLCs also invested in another opportunity that was brought to Mr. Bandimere's attention by his friend Dalton: In 2008, Dalton, who by then was no longer working with Parrish, approached Mr. Bandimere with opportunities to invest in a note trading program and a diamond financing venture through Dalton's Universal Consulting Resources ("UCR") vehicle. Pet. App. 78a.

In all, Mr. Bandimere personally invested $1,145,419 in IVC and UCR. CAJA 1298. Both turned out to be Ponzi schemes: IVC stopped paying returns in May 2009, and UCR stopped in March 2010, and the fraudulent nature of the schemes was revealed soon thereafter. Including the returns and management fees he had received before the scam was uncovered, and payments that he made voluntarily to investors from his own resources once the fraud was uncovered, Mr. Bandimere ultimately incurred tens of thousands of dollars in net *losses*. *Id.*; *see also* Pet. App. 149a (acknowledging that Mr. Bandimere "lost funds that he invested in the fraudulent schemes").

B. Mr. Bandimere Reports The Scheme To The SEC, Which Then Targets Him In An Administrative Enforcement Action

Once they learned the truth, Mr. Bandimere and Syke brought Parrish's IVC scam to the SEC's attention. *E.g.*, CAJA 400, 801. The SEC brought a civil enforcement action against Parrish in 2012, and he ultimately pleaded guilty to criminal charges. CAJA 29, 400. The SEC also sued Dalton, and he and his wife each pleaded guilty to criminal charges as well. CAJA 30, 400.

The SEC has a term for the type of scheme in which Mr. Bandimere was entangled: "affinity fraud."

> At its core, affinity fraud exploits the trust and friendship that exist in groups of people who have something in common. Fraudsters use a number of methods to get access to the group. A common way is by enlisting respected leaders from within the group to spread the word about the scheme. Those leaders may not realize the 'investment' is actually a scam, and they may become unwitting victims of the fraud themselves.

SEC Office of Investor Education and Advocacy, *Investor Alert: Affinity Fraud*, SEC Pub. No. 167 (June 2014), https://www.sec.gov/files/ia_affinityfraud.pdf.

But despite Mr. Bandimere's status as a victim of fraud, the SEC also brought an enforcement action against him.[2] The SEC charged Mr. Bandimere with securities fraud, arguing that, notwithstanding his large personal investment in the scams, he had

[2] No SEC action was ever brought against Syke.

knowledge of the fraud in light of various supposed "red flags." CAJA 26, 34. The SEC also charged Mr. Bandimere with "willfully" selling unregistered securities and acting as an unregistered broker. CAJA 37.

ALJ Cameron Elliot, who presided over the enforcement action, found that the Commission's Division of Enforcement failed to prove that Mr. Bandimere either knew or should have known that the IVC and UCR programs were Ponzi schemes. CAJA 308. Nevertheless, the ALJ found Mr. Bandimere liable for securities fraud as to six out of more than 80 investors, based on fraud theories that the SEC's enforcement division itself had not asserted. *See* CAJA 292-304. The ALJ also found Mr. Bandimere liable for "willfully" violating the registration requirements, CAJA 277-285, notwithstanding the fact that Mr. Bandimere had been misinformed on this point by Syke. ALJ Elliot imposed a number of sanctions, including more than $1 million in penalties and disgorgement. CAJA 317-318.

The SEC reviewed ALJ Elliot's adverse findings, adopted yet another set of factual theories (neither argued by the SEC's enforcement division nor relied on by the ALJ) to support the finding of securities fraud, and imposed essentially the same sanctions. *See* Pet. App. 70a-154a.

C. The Significant Authority Of SEC ALJs

SEC ALJs are invested with substantial powers and significant discretion under the laws of the United States. Under the Administrative Procedure Act, ALJs are the only persons empowered to preside over agency hearings required to be "on the record," other than the Commission itself, or individual Commissioners. 5 U.S.C. §§ 554(a) and 556(b). The Securities Ex-

change Act allows the SEC to delegate to its ALJs "any of [the SEC's] functions" except for rule-making, and SEC regulations accordingly task ALJs with "conduct[ing]" hearings in enforcement proceedings across the Nation. Pet. App. 16a (citing 15 U.S.C. § 78d-1(a); 17 C.F.R. § 200.14). Consistent with the SEC Rules of Practice, SEC ALJs' powers include administering oaths, consolidating proceedings, making evidentiary determinations, examining witnesses, entering default judgments, issuing subpoenas, ordering depositions and document production, punishing contempt, ruling on dispositive motions, making permanent or setting aside temporary sanctions by the SEC, and preparing initial decisions, including findings of fact and conclusions of law. Pet. App. 16a-18a, 19a-21a (citing sources).

The SEC itself describes its ALJs as "independent judicial officers who in most cases conduct hearings and rule on allegations of securities law violations initiated by the SEC's Division of Enforcement[,]" and who "conduct public hearings at locations throughout the United States in a manner similar to non-jury trials in the Federal District courts." SEC, *Office of Administrative Law Judges*, www.sec.gov/alj (visited Oct. 10, 2017).[3]

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[3] Similarly, in its 2011 announcement of ALJ Elliot's appointment, the SEC described the role thusly:

> Administrative law judges are independent judicial officers who rule on allegations of securities law violations in public administrative proceedings instituted by the Commission. They conduct public hearings, in a manner similar to non-jury trials in federal district courts, issue initial decisions, and have authority to impose a broad range of sanctions. Those sanctions include suspending or revoking the registration of registered securities, brokers, dealers, investment companies, investment ad-

Moreover, SEC ALJ initial decisions are "deemed the action of the Commission" by express operation of statute whenever no further review is sought or whenever the Commission declines review. 15 U.S.C. § 78d-1(c). Thus, while the SEC theoretically may review any ALJ action, *id.* § 78d-1(b), it is undisputed that "90 percent" of SEC ALJ decisions "become final without plenary review" by the Commission. Pet. App. 22a n.25. The SEC need not even issue a formal order for unreviewed ALJ decisions to become the "action of the Commission"; instead, a form "notice of finality" is issued by the General Counsel of the Commission explaining that the "Commission has not chosen to review" the case and that "the initial decision of the administrative law judge has become the final decision of the Commission." *E.g.*, *In re Bill the Butcher, Inc.*, SEC Release No. 79893, 2017 WL 394322 (Jan. 30, 2017). Nothing in the record suggests that anything other than the passage of time underlies a "notice of finality." And the SEC does not review independently any "findings not challenged on appeal." *E.g.*, Pet. App. 72a; *see* 17 C.F.R. § 201.411(d).

In addition, in the few cases where an SEC ALJ's decision is actually reviewed by the Commission, the

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> visers, municipal securities dealers, municipal advisors, transfer agents, and nationally recognized statistical rating organizations. In addition, they can order disgorgement, civil penalties, censures, and cease-and-desist orders against these entities, as well as individuals, and can suspend or bar persons from association with these entities or from participating in an offering of penny stock.

SEC, *SEC Announces Arrival of New Administrative Law Judge Cameron Elliot* (Apr. 25, 2011), https://www.sec.gov/news/press/2011/2011-96.htm.

ALJ's factual findings—particularly credibility determinations—are treated deferentially. *E.g.*, Pet. App. 21a & n.23 (collecting cases).[4]

D. Proceedings In The Court Of Appeals

Mr. Bandimere argued to the Commission that ALJ Elliot was required to be appointed pursuant to the Constitution's Appointments Clause. *E.g.*, Pet. App. 121a-128a. The Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

Before the Commission, the government admitted that SEC ALJs are not appointed by the President, a court, or a Head of Department as required for "inferior Officers" under the Clause, Pet. App. 121a-122a, but argued that the ALJs were mere employees, not inferior officers. The Commission agreed, ruling that ALJ Elliot was a "mere employee[]" whose appointment was not subject to the Appointments Clause at all. *Id.* 121a-128a.

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[4] *See e.g.*, *In re Thomas C. Gonnella*, SEC Release No. 4476, 2016 WL 4233837, at *9 n.25 (Aug. 10, 2016) ("We generally defer to an ALJ's demeanor-based credibility determinations, absent a showing that the substantial weight of the evidence warrants a different finding."); *In re Gregory O. Trautman*, SEC Release No. 9088A, 2009 WL 6761741, at *5 n.25 (Dec. 15, 2009) (ALJ's "credibility findings are entitled to considerable weight and deference.").

The U.S. Court of Appeals for the Tenth Circuit granted Mr. Bandimere's petition for review and held that SEC ALJs are inferior officers subject to the Appointments Clause's strictures. Accordingly, the Tenth Circuit set aside the SEC's decision. Pet. App. 38a.

The panel majority first discussed the Clause's important role in bolstering the separation of powers, checks and balances, and the political accountability of public officials, Pet. App. 5a-7a & nn.5-6, and noted that the term "Officer" has historically swept very broadly, encompassing surgeons, marshals, vice consuls, and numerous others, *id.* 8a-10a. It then explained that this Court's decision in *Freytag* v. *C.I.R.*, 501 U.S. 868 (1991), which decided that special trial judges ("STJs") of the Tax Court were officers, "controls the result of this case." Pet. App. 10a. In *Freytag*, this Court explained that whether officials are officers or employees is based on whether they "exercise significant discretion" in "carrying out … important functions." *Id.* 19a; *see Freytag*, 501 U.S. at 880-882. Applying *Freytag* and other cases, the panel majority noted the broad powers exercised by SEC ALJs, Pet. App. 14a-18a (listing powers in 3-page chart), and explained that these were sufficient to make SEC ALJs inferior officers. *Id.* 19a-25a. Indeed, the court explained, SEC ALJs "closely resemble the STJs described in *Freytag*." *Id.* 23a.

The panel majority also rejected the government's argument that an official must have final decision-making authority in order to be an inferior officer. Pet. App. 25a-29a. As the panel noted, a final decision-making requirement for *inferior* officers would be especially odd, given this Court's teaching that final decision-making authority is a hallmark of *principal* officers. *Id.* 29a-31a (citing and discussing, *inter alia*, *Edmond* v. *United States*, 520 U.S. 651, 665 (1997)).

Judge McKay dissented, expressing the concern (never raised by the Commission) that the majority's decision might be applicable to every federal ALJ. Pet. App. 51a-67a. Judge Briscoe, who joined the majority opinion in full, wrote a concurring opinion to explain why policy arguments regarding non-SEC ALJs were irrelevant and in any event unpersuasive. *Id.* 39a-50a.

The government filed a petition for rehearing *en banc* on March 13, 2017, almost six weeks after Justice Gorsuch had been nominated to this Court. On May 3, 2017—nearly four weeks after Justice Gorsuch was confirmed as a Justice of this Court—the Tenth Circuit denied rehearing by a 9-2 vote of the court's active members, with Judge Lucero dissenting, joined by Judge Moritz. Pet. App. 157a-158a. The order denying rehearing does not indicate that Justice Gorsuch took part in the rehearing decision. *Id.*

The government sought and received the statutory maximum of 60 days' extension for the filing of its petition for certiorari. No. 17A101 (U.S. July 24, 2017) (30-day extension); *Id.* (U.S. Aug. 22, 2017) (additional 30-day extension).

ARGUMENT

I. THE PETITION SHOULD BE DENIED OUTRIGHT

A. The Petition Is Incomplete And Improper

At the outset, the government's petition can be denied in this Court's discretion because it purposely refuses to join issue and contravenes the spirit of this Court's Rules. *Cf. Wade* v. *Mayo*, 334 U.S. 672, 680 (1948) ("Writs of certiorari are matters of grace."); S. Ct. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion."). The Rules contemplate that a party seeking a writ of certiorari ordi-

narily will, if the writ is granted, brief and argue the case before the Court. *See* S. Ct. R. 16(2). Petitions for certiorari must elaborate on the reasons that this Court should grant review. *Id.* 14(h). And they *must* be filed within 150 days of the court of appeals' denial of rehearing. *Id.* 13(1), (5); *accord* 28 U.S.C. § 2101(c).

Here, though, the government waited until the 150th day, and then filed a document that does not contain its complete argument, and that pointedly does not ask the Court to hear this case at all. Instead, the government asks this Court only to hold this case and grant certiorari in another, separate case, Pet., *Lucia* v. *SEC*, No. 17-130 (U.S. July 21, 2017), in which the government is the respondent and has yet to state its substantive position. Pet. 7-9. The government expressly refuses to engage on the merits of the question presented here, stating that it will not tell the Court "why [it] should review the Appointments Clause question presented here" until it files its *Lucia* opposition on October 25. *Id.* 9. The government's filing thus forces this Court (and Mr. Bandimere) to wait well past the 150-day mark before actually getting the government's full argument on its petition, and meanwhile seeks to ensure that, no matter what happens, the merits will *never* be aired in Mr. Bandimere's case.

There is no good reason to string Mr. Bandimere along in this manner, denying him finality in his case while foreclosing his ability to press his side of the argument. The government's only stated reason, that Justice Gorsuch was a member of the Tenth Circuit when the government filed its petition for rehearing, is no reason at all. Justice Gorsuch was not a member of the Tenth Circuit when the petition was decided, and the actual order as well as the timing of the rehearing briefing suggests that the petition was not before him.

See infra p. 28; *see also* Pet. App. 157a-158a. Meanwhile, the only argument the government actually offers in this case is its claim of a circuit split, but that argument is flawed as explained below, *see infra* Part I.C (noting vacatur of panel's judgment in *Lucia*), and if it weren't, a split would be a reason to *grant* the petition here, not to hold it.

Perhaps the government wants this Court to address the legal issue presented here in the context of a different record. Tellingly, the government makes no effort to summarize the facts of this case, which reveal that Mr. Bandimere was a victim, and that the Commission failed to protect him and others from a predator with an active case before the SEC involving a separate fraudulent scheme. *See supra* pp. 4-6 & n.1. But while it might be understandable for the government to prefer opponents like the petitioners in *Lucia*, whom it could tar with phrases like "Buckets of Money," *see Lucia* Pet. 5, No. 17-130 (U.S. July 21, 2017), the government's purely strategic preference of one vehicle over another does not justify holding Mr. Bandimere's rights in stasis. This Court should deny the petition.

B. The Tenth Circuit's Decision Is Correct

In any event, an outright denial would be the right course even if the government had properly sought this Court's review. The Tenth Circuit's decision is correct and flows directly from this Court's decisions.

1. The Tenth Circuit correctly applied *Freytag* and this Court's other decisions

a. This Court has already ruled that an office not materially distinguishable from that of an SEC ALJ is subject to the strictures of the Appointments Clause. *Freytag* v. *C.I.R.*, 501 U.S. 868, 880 (1991). According-

ly, and as the Tenth Circuit held, *Freytag* "controls the result of this case." Pet. App. 10a.

Freytag involved Tax Court STJs who were appointed by the court's Chief Judge and tasked with "assist[ing] [Tax Court] judges." 501 U.S. at 870. STJs could preside over hearings and issue final decisions in a "narrow category of cases" (declaratory actions and low-dollar cases), and could also preside over and then "prepare proposed findings and an opinion" in "'any other proceeding which the Chief Judge may designate.'" *Id.* at 873-875. Within that "'sweeping'" latter category of cases, the "actual decision" was issued by a "regular judge of the Tax Court." *Id.* at 873. *Freytag* involved an appeal in a case where the STJ had no power to issue a final decision. *Id.* at 879.

This Court concluded unanimously that STJs—who, like SEC ALJs, were statutorily-created hearing officers who presided over a proceeding and prepared an initial decision—were inferior officers subject to the Appointments Clause. *See* 501 U.S. at 881-882; *id.* at 901 (Scalia, J., concurring in part and concurring in the judgment). The Court held that the characteristics and powers of STJs—"the significance of the duties and discretion that [they] possess," *id.* at 881—made them inferior officers. As the Court described it, the Appointments Clause applied to STJs because

> [t]he office of special trial judge is "established by Law," and the duties, salary, and means of appointment for that office are specified by statute. … Furthermore, special 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 … carry-

> ing out these important functions, the special trial judges exercise significant discretion.

Id. at 881-882 (citations omitted).[5]

An official's substantive duties and level of discretion are thus the touchstone of the Appointments Clause analysis. Indeed, the *Freytag* inquiry into "the significance of the duties and discretion that [an officer] possess[es]," 501 U.S. at 881, is confirmed by this Court's other Appointments Clause cases. *See, e.g.*, *Morrison* v. *Olson*, 487 U.S. 654, 671-672 (1988) (independent counsel was inferior, not principal, officer in light of removability by higher officer and limitations on duties, jurisdiction only over particular people and offenses, and temporary tenure); *accord United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868) (treasury clerk was officer under Appointments Clause; "[t]he term ['office'] embraces the ideas of tenure, duration, emolument, and duties"). As this Court put it in its next major Appointments Clause decision after *Freytag*, "[t]he exercise of 'significant authority pursuant to the laws of the United States' marks … the line between officer and nonofficer." *Edmond* v. *United States*, 520 U.S. 651, 662 (1997); *see also Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam) ("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States.'").

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[5] This reasoning tracked that of the Second Circuit in a decision that *Freytag* expressly approved. *See Samuels, Kramer & Co.* v. *C.I.R.*, 930 F.2d 975, 985-986 (2d Cir. 1991) (STJs were inferior officers because they "exercise a great deal of discretion and perform important functions, characteristics that we find to be inconsistent with the classifications of 'lesser functionary' or mere employee"); *see also Freytag*, 501 U.S. at 881-882 (approving *Samuels*).

This context-specific analysis serves the Appointments Clause's basic purpose. The Clause "limit[s] the distribution of the power of appointment," in order to "ensure that those who wield[] it [a]re accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884. Thus, whenever any grant of significant, discretionary authority is made to an executive branch official, the accountability requirements of the Clause must follow. And throughout the Nation's history, numerous officials with authority comparable to or even less significant than that of SEC ALJs have been held to be inferior officers, from postmasters and court clerks, *Buckley*, 424 U.S. at 126-127 (citations omitted), to election supervisors and vice consuls, *Edmond*, 520 U.S. at 661-662 (citations omitted), to naturalization examiners (the forerunners to modern immigration judges), *Borak* v. *United States*, 78 F. Supp. 123, 125 (Ct. Cl. 1948), and marshals, administrative clerks, medical personnel, and scores of others, *see Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 538-540 (2010) (Breyer, J., dissenting) (listing examples and explaining that "[e]fforts to define ['inferior officers'] inevitably conclude that the term's sweep is unusually broad"); Pet. App. 8a-10a (listing numerous examples).[6]

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[6] Attorney General opinions from a century ago indicate that, consistent with contemporaneous judicial decisions, a broad swath of minor officials were considered inferior officers. *See* 29 Op. Att'y Gen. 593, 594 (1912) (deputy clerk); 24 Op. Att'y Gen. 52, 53 (1902) (language interpreters); 18 Op. Att'y Gen. 344, 345 (1886) (lighthouse keepers); 17 Op. Att'y Gen. 475, 475 (1882) (assistant postmaster of Washington, D.C.); 11 Op. Att'y Gen. 209, 212 (1865) (assistant assessors of internal revenue); 10 Op. Att'y Gen. 449, 450 (1863) (army hospital chaplains); 10 Op. Att'y Gen. 204, 206 (1862) (inspectors of hulls and boilers); 4 Op. Att'y Gen. 165 (1843) (customs inspector). And as discussed below (at 19), more recent Executive Branch guidance regarding ALJs is in accord.

b. In light of these principles, the Tenth Circuit did not err in ruling that SEC ALJs are "Officers of the United States" under the Appointments Clause.

The government does not and cannot dispute that SEC ALJs' positions are "established by law," or that their "duties, salary, and means of appointment … are specified by the statute." *Freytag*, 501 U.S. at 881; *see also* Pet. App. 14a-15a, 16a-19a, 22a. Nor is there any dispute about the nature of SEC ALJs' duties and discretion.

By law, SEC ALJs may be delegated "any of [the SEC's] functions" except for rule-making. Pet. App. 16a (citing 15 U.S.C. § 78d-1(a)). SEC regulations task ALJs with "conduct[ing]" hearings in enforcement proceedings. *Id.* 15a (citing 17 C.F.R. § 200.14). SEC ALJs are thus invested with broad, discretionary power over virtually every aspect of SEC enforcement proceedings, from procedural matters, to discovery, to sanctions, to presiding over hearings and taking evidence, to ruling on dispositive motions, to preparing and issuing initial decisions, to imposing life-altering penalties under the federal securities laws. *Id.* 16a-18a (three-page chart detailing SEC ALJs' duties and statutory bases); *supra* pp. 8-9 & n.3; *see also* Pet. App. 19a-21a.

SEC ALJs' role and discretion are even more substantial because the initial decisions that they issue are "deemed the action of the Commission" by express operation of statute whenever no further review is sought or whenever the full Securities and Exchange Commission declines review. 15 U.S.C. § 78d-1(c). Thus, the Tenth Circuit correctly explained—and the government does not deny—that "90 percent" of SEC ALJ decisions "become final without plenary review" by the

Commission. Pet. App. 22a n.25. And even when the Commission does review an ALJ's decision, it defers to the ALJ's fact-finding, especially credibility determinations. *See supra* pp. 9-10 & n.4. Indeed, the SEC accorded such deference to ALJ Elliot in this very case. Pet. App. 49a (Briscoe, J., concurring); *see also*, *e.g.*, CAJA 461 n.83.

The Tenth Circuit thus correctly concluded that "SEC ALJs closely resemble the STJs" whom this Court held in *Freytag* were inferior officers under the Appointments Clause. Pet. App. 23a. Like the STJs, SEC ALJs are hearing officers who "occupy offices established by law," "have duties, salaries, and means of appointment specified by statute," and preside over significant proceedings involving the enforcement of federal law on a nationwide basis, wherein they "exercise significant discretion while performing 'important functions' that are 'more than ministerial tasks.'" *Id.*

2. The government's potential counterarguments lack merit

a. While the government has refused to join issue on the merits in its petition, its consistent refrain below was that, to be an inferior officer, an official must have final decision-making authority, *i.e.*, the power to bind the government. As the Tenth Circuit correctly recognized, *Freytag* itself refutes that assertion. *E.g.*, Pet. App. 25a-31a (discussing this argument).

In *Freytag*, the government argued that Tax Court STJs were mere employees because in most cases they "act[ed] only as … aide[s]" to the ultimate decision maker, "d[id] no more than assist the Tax Court judge in taking the evidence and preparing the proposed findings and opinion," and "lack[ed] authority to enter a fi-

nal decision." 501 U.S. at 880-881. The Court expressly rejected that argument, explaining that the "final authority" argument "ignores the significance of the duties and discretion that [STJs] possess." *Id.* at 881; *see also id.* at 881-882 (approving of the Second Circuit's reasoning in *Samuels, Kramer & Co.* v. *C.I.R.*, 930 F.2d 975, 985-986 (2d Cir. 1991), which also rejected this power-to-bind argument).[7] Indeed, such a bright line rule would render superfluous the case-by-case analysis of the "characteristics" of a particular officer—the statutory basis of the office, the hiring process, their "duties and functions" and the significance of the "tasks" they perform—that was endorsed and applied in *Freytag*. 501 U.S. at 881-882; *accord* Pet. App. 39a (Briscoe, J., concurring) (citing *Freytag*, 501 U.S. at 880-882).

Moreover, the idea that an inferior officer must have final decision-making power fails on its own terms. The very notion of an *inferior* officer implies oversight by a *superior*. *Edmond*, 520 U.S. at 662-663 ("[I]n the context of a Clause designed to preserve political accountability …, we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed

[7] The Court also explained that "[e]ven if the duties of [STJs in cases where they lacked final decision-making power] were not as significant as we … have found them to be, our conclusion would be unchanged," because the government had conceded STJs' inferior officer status as to cases where STJs *could* issue final decisions, and STJs "are not inferior officers for purposes of some of their duties …, but mere employees with respect to other[s]." *Freytag*, 501 U.S. at 882. As the Tenth Circuit explained here, this "even if" statement explicitly confirms that the Court's "conclusion"—that STJs were inferior officers—was based in the first instance on their "significant" "duties" in cases where they *lacked* the power to bind the government. *See* Pet. App. 26a-29a.

by Presidential nomination with the advice and consent of the Senate."). The fact that SEC ALJ decisions may theoretically be reviewed by the Commission means that SEC ALJs are not *principal* officers, but does not mean that they are not *inferior* officers.[8]

b. The government may also claim that it is due some kind of deference as to whether particular Executive Branch officials are subject to the Appointments Clause. But that cannot be right; "Neither Congress nor the Executive can agree to waive [the Appointments Clause's] structural protection." *Freytag*, 501 U.S. at 880 (citing *INS* v. *Chadha*, 462 U.S. 919, 942 n.13 (1983)); *see also Buckley*, 424 U.S. at 134 (policy arguments against political appointment of federal elections commissioners, "however rational, do not by themselves warrant a distortion of the Framers' work"); *accord* Pet. App. 30a-32a. The Appointments Clause would not serve its purpose if Congress could simply switch it off.

Even if it mattered, though, nothing suggests that Congress intended ALJs to be non-officer employees. The government might point, as it did in its petition for rehearing below, to a mid-century description of hearing examiners (the forerunners to ALJs) as "classified Civil Service employees," *Ramspeck* v. *Federal Trial Examiners Conference*, 345 U.S. 128, 133 (1953). But the fact that *Ramspeck* used the term "employee" is irrelevant, as the Appointments Clause was not at issue in that case, and in any event because it is the signifi-

[8] Nor could the government possibly explain how the wide swath of minor officials who have historically been considered to be officers for purpose of the Appointments Clause, like treasury clerks and lighthouse keepers, *supra* pp. 18-19 & n.6, all possessed the last word in their respective domains.

cance of the role, and not any particular appellation, that matters for these purposes. *See* 20 Op. O.L.C. 124, 145 (1996) ("Congress and the President may not avoid the strictures of the Clause by vesting federal employees with the independent or discretionary responsibility to perform any 'significant governmental duty.'" (quoting *Buckley*, 424 U.S. at 141)). And with respect to the substance of ALJs' roles, *Ramspeck* generally confirms that Congress "enhanced" the authority and duties of these quasi-judicial hearing examiners through the Administrative Procedure Act (APA), by making them *more* independent from heads of departments. 345 U.S. at 130-133.

Indeed, the Department of Justice has repeatedly issued opinions indicating or outright concluding that certain ALJs are inferior officers. In response to the APA issue before the Court in *Ramspeck*, the Attorney General explicitly considered the Appointments Clause's application to hearing examiner promotions. *Administrative Procedure Act, Promotion of Hearing Exam'rs*, 41 Op. Att'y Gen. 74, 79-80 (1951). He opined not that the Clause was inapplicable, but that the Clause was satisfied if the examiners were appointed by the Civil Service Commission (then considered a "[H]ead[] of [D]epartment[],"*see* 37 Op. Att'y Gen. 227, 228-230 (1933)). The Attorney General stated that, "[e]ven if a mere change in salary were to be regarded as a new appointment … , it is clear that there is no constitutional requirement that the Congress 'vest the appointment of *inferior officers* in that … particular executive department to which the duties of such officers appertain.'" 41 Op. Att'y Gen. at 79-80 (quoting *Ex parte Siebold*, 100 U.S. 371, 397 (1880) (emphasis added)). The entire premise of this discussion, of course, was that hearing examiners under the newly-passed

APA were "inferior officers." As recently as 1991, the Department of Justice's Office of Legal Counsel also took the position that Department of Education ALJs appointed pursuant to the APA were inferior officers due to the "characteristics of the office." 15 Op. O.L.C. 8, 14 (1991). These considered views of the Executive Branch further support the Tenth Circuit's decision.

c. The government may also offer the type of policy arguments advanced by Judge McKay in his dissent in this case, based on the fear that ALJs, who are removable for cause by the Merit Systems Protection Board (MSPB), are allowed the same type of double-for-cause protection that this Court held unconstitutional in *Free Enterprise Fund* and thus will need to be stripped of civil service protections if they are inferior officers. But concerns about the end of the administrative state as we know it are overblown.

The *Freytag* analysis proceeds case-by-case, and this case deals only with the duties and qualities of a particular set of five SEC ALJs, and not, for example, with the different characteristics of the social security ALJs who make up the vast bulk of all federal ALJs. *See* Pet. App. 42a-44a (Briscoe, J., concurring). And in any event, the Appointments Clause's requirements for inferior officers are simply not onerous (nor has the SEC claimed them to be): As Judge Briscoe's concurrence explained, the putative double-for-cause problem could be satisfied while retaining ALJ civil service protections by allowing the President to remove MSPB members at will. *Id.* 43a-44a; *see also Free Enter. Fund*, 561 U.S. at 508-509 ("[W]hen confronting a constitutional flaw in a statute, we try to limit the solution to the problem."). Even if policy concerns controlled the constitutional question here (though they do not) and even if this case involved anything more than a

handful of particularly powerful ALJs (though it does not), there is no reason to deviate from modest accountability rules that have long served the Republic.

C. There Is No Split Of Authority

A putative circuit split is the *only* argument for review the government offers. *See* Pet. 7-9. But in fact there is no sufficient split of authority on the question presented.

There is indeed a divergence between the Tenth Circuit's opinion here and the opinion of the D.C. Circuit panel in *Lucia* (reported at 832 F.3d 277 (2016)). But the full D.C. Circuit granted rehearing *en banc* in that case, which operated to vacate the *Lucia* panel's judgment. *See* D.C. Cir. R. 35(d). And the *en banc* court then divided evenly and issued a *per curiam* order denying the initial petition for review without further commentary. Order, *Raymond J. Lucia Cos.* v. *SEC*, No. 15-1345 (D.C. Cir. Feb. 16, 2017).

Judges of the D.C. Circuit have indicated that, in those circumstances, the panel opinion is no longer binding precedent. *See Crooker* v. *Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1070 n.49 (D.C. Cir. 1981) (en banc) (Edwards, J.) ("Because the panel opinion was vacated …, and the District Court decision was affirmed by an equally divided court, there is no opinion of the court."), *abrogated on other grounds by Milner* v. *Department of Navy*, 562 U.S. 562 (2011); *id.* at 1077 (Mackinnon, J., concurring) ("[T]he precedential value of a panel opinion under ordinary circumstances is practically nil when the case is placed en banc"); *id.* at 1112 n.84 (Wilkey, J., dissenting) (explaining that decision under discussion "was merely one of the district court, since the panel opinion … had been vacated and

the district court opinion had been affirmed by an equally divided court").[9] Indeed, in another case, the government itself has voiced uncertainty over whether the panel opinion in *Lucia* continues to have force. *See* Mot. to Hold Case in Abeyance 5-6, *Timbervest, LLC* v. *SEC*, No. 15-1416 (D.C. Cir. July 20, 2017) (acknowledging that the *Lucia* panel opinion might not bind future panels). Of course, there is not really a circuit split to speak of if a future panel of the D.C. Circuit would not be bound by the *Lucia* panel opinion and could reach the same result as the Tenth Circuit.[10]

The dubious nature of the supposed split here is reason enough to deny certiorari outright. And that conclusion is reinforced by the government's own frank admission that the question presented here is now working its way up through the courts of appeals in

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[9] While D.C. Circuit Rule 35(d) provides that "[i]f rehearing en banc is granted, the panel's judgment, but ordinarily not its opinion, will be vacated," a panel opinion may lose precedential force even in the absence of formal vacatur. *Cf. Animal Legal Def. Fund* v. *Veneman*, 490 F.3d 725, 728 (9th Cir. 2007) (Bybee, J., concurring) (explaining that the Ninth Circuit treats a panel opinion as "'not precedential'" after a grant of rehearing, but does not "formally vacate" the panel opinion because that could lead to the omission of the panel's opinion from the Federal Reporter).

[10] While the government might have argued (if it had joined issue) that the decision in Mr. Bandimere's case is incompatible with the D.C. Circuit's earlier decision in *Landry* v. *FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), that case dealt with different ALJs and is thus distinguishable. Indeed, this very argument will be ripe for decision by the D.C. Circuit as soon as this Court denies certiorari in *Lucia*. *See* Final Pet'rs Br. 29-30, 35-38, *Timbervest, LLC* v. *SEC*, No. 15-1416 (D.C. Cir. Jan. 6, 2017) (arguing, in case subsequently held pending resolution of *Lucia*, that *Landry* is distinguishable because it involved FDIC ALJs, who differ from SEC ALJs in key respects).

multiple other circuits. *See* Pet. 8 & n.2 (citing *Gonnella* v. *SEC*, No. 16-3433 (2d Cir. filed Oct. 7, 2016); *Bennett* v. *SEC*, Nos. 16-3827, 16-3830 (8th Cir. filed Oct. 3, 2016); *J.S. Oliver Capital Mgmt.* v. *SEC*, No. 16-72703 (9th Cir. filed Aug. 15, 2016); *Feathers* v. *SEC*, No. 15-70102 (9th Cir. filed Jan. 12, 2015); *Bennett* v. *SEC*, No. 17-9524 (10th Cir. filed May 22, 2017); and *Timbervest, LLC* v. *SEC*, No. 15-1416 (D.C. Cir. filed Nov. 13, 2015)). It is simply unnecessary for the Court to take this issue up now.

II. IF THIS PETITION IS NOT DENIED, IT SHOULD BE GRANTED, NOT HELD

Notwithstanding all of the reasons to deny this petition outright, if the Court is inclined to review the question presented at this time, the government's petition should be granted and this case should be set for argument.

The government offers only one argument for holding this case in favor of *Lucia*: the fact that Justice Gorsuch was still a judge of the Tenth Circuit when the government filed its petition for rehearing in this case. But we know of no reason (and the government offers no reason) why any Member of the Court should be required to recuse in this case. The government does not suggest that Justice Gorsuch's "impartiality might reasonably be questioned" in this case. 28 U.S.C. § 455(a). Nor does it appear that then-Judge Gorsuch even participated in the *en banc* proceedings. Mr. Bandimere's response to the petition for rehearing *en banc* was not even filed until 13 days before Justice Gorsuch's confirmation. And the order denying rehearing *en banc* issued one month after Justice Gorsuch was confirmed. That order omits Justice Gorsuch's name from list of judges who decided the petition and thus suggests that

Justice Gorsuch did not take part in the proceeding. *See* Pet. App. 157a-158a.

On the other hand, there is at least one real reason why Mr. Bandimere's case is a superior vehicle to *Lucia*. As just discussed, the panel opinion in *Lucia* has, in the wake of the D.C. Circuit's grant of rehearing *en banc* and the evenly-divided vote of the *en banc* court, diminished if not depleted force. *See supra* pp. 26-27. The D.C. Circuit, either as a panel or the full court, could take the issue up again and decide it differently. By contrast, Mr. Bandimere's case cleanly presents the question of SEC ALJs' status under the Appointments Clause, and allows this Court an unambiguously precedential court of appeals opinion to review (and affirm). Although Mr. Bandimere's primary goal is finality of the decision in his favor, if the Court is not willing to deny the petition outright, it should grant it and schedule this case for argument.

CONCLUSION

The petition for a writ of certiorari should be denied, or else granted and the case set for argument.

Respectfully submitted.

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