No. 17-475

In the Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

DAVID F. BANDIMERE

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

REPLY BRIEF FOR THE PETITIONER

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Respondent does not dispute the importance of the question whether administrative law judges (ALJs) employed by the Securities and Exchange Commission must be appointed as "inferior Officers" under the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2. Nor does respondent deny that panels of the D.C. Circuit and the Tenth Circuit have squarely split over the question, see Br. in Opp. 25 (acknowledging "a divergence" between the Tenth and D.C. Circuits); that the en banc D.C. Circuit divided evenly over the issue, see *Raymond J. Lucia Cos.* v. *SEC*, 868 F.3d 1021 (2017) (per curiam), petition for cert. pending, No. 17-130 (filed July 26, 2017); or that cases raising the same question are pending before the Second, Eighth, and Ninth Circuits, see Br. in Opp. 27 (citing cases); see also 17-130 Pet. 34-35 ("The same question has also been raised in at least 13 other cases pending in the courts of appeals

and 30 proceedings pending before the Commission.").[1] This Court's review is accordingly warranted. Because the government's petition for rehearing en banc in this case was filed while Justice Gorsuch was still a member of the court of appeals, however, the government has respectfully suggested that the Court may wish to hold this petition and instead grant the petition in *Lucia*.

1. Respondent incorrectly contends (Br. in Opp. 25-26) that there is no division among the courts of appeals because the D.C. Circuit denied the petition for review in *Lucia* by an equally divided vote. Under D.C. Circuit Rule 35(d), an order granting en banc review vacates "the panel's judgment, but ordinarily not its opinion." Consistent with that rule, in granting rehearing en banc, the D.C. Circuit ordered that "the *judgment* filed August 9, 2016 [shall] be vacated," Order, *Raymond J. Lucia Cos.* v. *SEC*, No. 15-1345 (Feb. 16, 2017) (emphasis added), but it left the *Lucia* panel opinion undisturbed. After the en banc hearing, the court reentered a judgment that denied the petition for review (just as the panel had done). Judgment, *Raymond J. Lucia Cos.* v. *SEC*, No. 15-1345 (June 26, 2017). In these circumstances, the panel's opinion remains undisturbed under D.C. Circuit Rule 35(d).

Respondent asserts (Br. in Opp. 25) that, in similar circumstances, the D.C. Circuit has treated as non-precedential panel opinions that were later reviewed en banc. But the lone decision that respondent cites,

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[1] The disagreement regarding the constitutionality of the Commission's ALJs reflects a similar disagreement regarding the ALJs of the Federal Deposit Insurance Corporation. Compare *Landry* v. *FDIC*, 204 F.3d 1125 (D.C. Cir.), cert. denied, 531 U.S. 924 (2000), with *Burgess* v. *FDIC*, 871 F.3d 297 (5th Cir. 2017); see also Pet. App. 25a-31a (expressly disagreeing with *Landry*).

Crooker v. *Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981), does not support that assertion. *Crooker* discussed the D.C. Circuit's previous decision in *Ginsburg, Feldman & Bress* v. *Federal Energy Administration*, 591 F.2d 717 (D.C. Cir. 1978), cert. denied, 441 U.S. 906 (1979), in which the "panel opinion was vacated" by a majority vote of the en banc court. *Crooker*, 670 F.2d at 1069 n.49; see *id.* at 1055 ("[A] majority of the full court of appeals voted to vacate the panel opinion."). In *Lucia*, by contrast, the D.C. Circuit chose *not* to vacate the *Lucia* panel's opinion, consistent with the applicable local rule.[2]

The Commission has accordingly explained, in other cases raising Appointments Clause challenges, that the *Lucia* panel opinion remains in effect. See, *e.g.*, Commission Br. at 62, *Gonnella* v. *SEC*, No. 16-3433 (2d Cir. July 17, 2017). The Commission has also urged the D.C. Circuit to hold follow-on cases raising the same question in abeyance pending this Court's disposition of the petition for a writ of certiorari in *Lucia*. See, *e.g.*, Mot. to Hold Case in Abeyance, *Timbervest, LLC* v. *SEC*, No. 15-1416 (July 20, 2017). The D.C. Circuit has granted those abeyance motions. See, *e.g.*, Order, *Timbervest, LLC* v. *SEC*, No. 15-1416 (Aug. 8, 2017).

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[2] Respondent also cites (Br. in Opp. 26 n.9) the Ninth Circuit's practice of treating panel opinions as non-precedential once en banc review has been granted. See Fed. R. App. P. 35-1 to 35-3, 9th Cir. Advisory Committee Notes at (3) (2017) ("The three-judge panel opinion shall not be cited as precedent by or to this Court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court."). That is not the practice, however, in either the D.C. Circuit or the Tenth Circuit in circumstances like these; instead, the panel opinion is not normally vacated unless the en banc court states otherwise. See D.C. Cir. R. 35(d); 10th Cir. R. 35.6.

2. Respondent further suggests (Br. in Opp. 15) that the Commission may prefer *Lucia* as a vehicle for resolving the Appointments Clause question because the Commission seeks to avoid the facts of respondent's underlying case. That contention is meritless. The Commission's petition for a writ of certiorari did not elaborate on respondent's violations of the securities laws because those violations do not bear on the question presented. Respondent does not suggest any reason why the particular violations at issue in this case (or in *Lucia*) would affect the proper Appointments Clause analysis. Indeed, the court of appeals did not discuss the underlying facts of respondent's case in its opinion ruling in respondent's favor. See Pet. App. 1a-3a.

In any event, respondent's one-sided account of his own conduct has little basis in the record. As the Commission explained in its decision, respondent violated the anti-fraud provisions of the securities laws by failing to disclose to potential investors material facts, including the substantial commissions he received based on their investments. See Pet. App. 73a-75a, 95a-117a. And respondent has not challenged the Commission's determinations that he offered and sold unregistered securities, and that he acted as an unregistered broker, in violation of 15 U.S.C. 77e(a) and 78*o*(a). See Pet. App. 75a-95a.

3. The government has recommended that the Court grant plenary review in *Lucia* rather than in this case because in *Lucia* there is no apparent reason why any member of this Court might be unable to participate in consideration and decision of the case. If respondent believes there is some unique feature of this case that casts light on the proper resolution of the question presented (though he has cited none), respondent could file

an amicus brief in *Lucia* and call that feature to the Court's attention.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be held pending this Court's consideration of the petition for a writ of certiorari in *Lucia* v. *SEC*, No. 17-130, and then disposed of as appropriate.

Respectfully submitted.

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Solicitor General

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