No. 17-475

IN THE
Supreme Court of the 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 FOR *AMICI CURIAE* RAYMOND J. LUCIA AND RAYMOND J. LUCIA COMPANIES, INC. IN SUPPORT OF NEITHER PARTY

MARK A. PERRY
Counsel of Record
JASON NEAL
KELLAM M. CONOVER
SHANNON U. HAN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page(s)**

TABLE OF AUTHORITIES

CASES (*continued*) **Page(s)**

RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES

OTHER AUTHORITIES (*continued*) **Page(s)**

INTEREST OF *AMICI CURIAE* AND SUMMARY OF ARGUMENT[1]

Raymond J. Lucia and Raymond J. Lucia Companies, Inc. (collectively, "Lucia") are the petitioners in No. 17-130 (docketed July 26, 2017), which presents the identical question as the petition in this case—*viz.*, whether Administrative Law Judges of the Securities and Exchange Commission are Officers of the United States under the Appointments Clause. The courts of appeals in these two cases reached diametrically opposite answers to this question: In *Lucia*, the D.C. Circuit said "no," but in *Bandimere*, the Tenth Circuit said "yes."

In light of this open and acknowledged conflict on a recurring question of constitutional law, the Commission is indisputably correct that the question whether SEC ALJs are Officers under the Appointments Clause "warrants review by this Court." Pet. 9. And as the Solicitor General (who represents the Commission in both cases) recognizes, the *Lucia*

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel for *amici curiae* states that counsel for petitioner and respondent were notified of *amici*'s intent to file this brief and waived the notice requirement. All parties have consented in writing to the filing of this brief.

petition presents the better vehicle for deciding the Appointments Clause question. *Ibid.* Indeed, while these two petitions raise the same important issue, only one—*Lucia*—clearly poses no risk of potential recusal or other vehicle problems. Therefore, the Court should grant the *Lucia* petition and deny or hold the *Bandimere* petition.

ARGUMENT

As the Commission recognizes, this Court needs to decide whether SEC ALJs are Officers under the Appointments Clause, and *Lucia* is the better vehicle for deciding that question. Pet. 9.

1. There is no question that this Court's review of the Appointments Clause question is required: The Tenth Circuit and the D.C. Circuit reached "opposite conclusion[s] under materially identical circumstances" on a constitutional question that is of enormous importance. Pet. 7. Indeed, the Tenth Circuit expressly acknowledged in this case that it "disagree[d]" with the D.C. Circuit in *Lucia*. Pet. App. 25a-26a. And the Fifth Circuit recently deepened the split among the circuits by "expressly disagreeing with the D.C. Circuit's" interpretation of this Court's decision in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991). Pet. 9 n.2 (discussing *Burgess* v. *FDIC*, 871 F.3d 297 (5th Cir. 2017)).

Bandimere acknowledges (at 25) the "divergence between" the panel decisions in this case and in *Lucia*, but suggests that this split is not "sufficient" because the D.C. Circuit subsequently reheard the *Lucia* case en banc. Bandimere ignores, however, that the en banc D.C. Circuit reached a 5-5 deadlock on the Appointments Clause question, thus confirming that only this Court can resolve it.

The *judgment* of the en banc D.C. Circuit is that Lucia's petition for review has been denied, while the *judgment* of the Tenth Circuit is that Bandimere's petition for review has been granted. The *only* question necessarily decided by each court's judgment was whether the same ALJ—Cameron Elliot—is an Officer of the United States. Therefore the *judgments* of the two courts are irreconcilable. *See Camreta* v. *Greene*, 563 U.S. 692, 704 (2011) ("[t]his Court reviews judgments, not statements in opinions" (alteration in original; internal quotation marks omitted)).

Moreover, the Tenth Circuit (and more recently the Fifth Circuit) expressly disagreed with not just the *Lucia* decision, but also the D.C. Circuit's previous decision in *Landry* v. *FDIC*, 204 F.3d 1125 (D.C. Cir. 2000)—which remains on the books. *Landry* itself was a 2-1 decision in which the majority ruled that ALJs of a different agency are not Officers because they lacked the "power of final decision." *Id.* at 1134. As Judge Randolph correctly pointed out, the *Landry* majority misread this Court's Appointments Clause precedents. *Id.* at 1142 (opinion concurring in part and concurring in the judgment); *see also*, *e.g.*, *Edmond* v. *United States*, 520 U.S. 651, 665 (1997) (military judges with "no power to render a final decision" were Officers). The circuit split is therefore clear and acknowledged, and does not turn on how "authoritative" the panel opinion in *Lucia* remains.

In any event, the *Lucia* panel decision remains binding within the D.C. Circuit. Under that court's rules, if rehearing en banc is granted, "the panel's judgment, but *ordinarily not its opinion*, will be vacated." D.C. Cir. R. 35(d) (emphasis added). That

practice enables the en banc court of appeals to perform a "law-clarifying function" efficiently by undertaking only "limited en banc disposition." *Church of Scientology of Cal.* v. *IRS*, 792 F.2d 153, 155-56 n.1 (D.C. Cir. 1986) (en banc), *aff'd*, 484 U.S. 9 (1987); *see also*, *e.g.*, *Coal. for Pres. of Hispanic Broad.* v. *FCC*, 931 F.2d 73, 80 (D.C. Cir. 1991) (en banc) ("adher[ing] to the panel opinion" on some issues but "vacat[ing] the panel opinion as it relates to" another issue). The *Lucia* panel opinion remains authoritative because the en banc order in *Lucia* vacated the panel judgment, but not the panel opinion. *See* Order, *Raymond J. Lucia Cos., Inc.* v. *SEC*, No. 15-1345 (D.C. Cir. Feb. 16, 2017). Bandimere's sole authority is not to the contrary, for there "the panel opinion was vacated." *Crooker* v. *Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1069 n.49 (D.C. Cir. 1981) (en banc), *abrogated on other grounds by Milner* v. *Dep't of Navy*, 562 U.S. 562 (2011).[2]

---

[2] Bandimere suggests (at 26 n.9) that "a panel opinion may lose precedential force even in the absence of formal vacatur." But Bandimere's sole authority is a "cf." citation to a concurrence from a Ninth Circuit case where the panel decision was actually vacated and independently lacked precedential value because—unlike the D.C. Circuit—the Ninth Circuit specifies in each order granting rehearing en banc that "'[t]he three-judge panel opinion shall not be cited as precedent by or to this court.'" *Animal Legal Def. Fund* v. *Veneman*, 490 F.3d 725, 726 (9th Cir. 2007) (en banc) (Bybee, J., concurring) (alteration in original) (citation omitted). That case does not speak to the status of non-vacated panel opinions in the D.C. Circuit.

The D.C. Circuit has since confirmed that the *Lucia* panel decision remains authoritative. In another case raising the same Appointments Clause issue, the government requested a stay pending resolution of the *Lucia* petition because "the panel decision in *Lucia* establishes [the D.C. Circuit's] view that the Commission's ALJs" are exempt from the Appointments Clause. Mot. to Hold Case in Abeyance 6, *Timbervest, LLC* v. *SEC*, No. 15-1416 (D.C. Cir. July 20, 2017). The D.C. Circuit granted the government's request, implicitly rejecting the alternative view that "it is an open question" whether *Lucia* is still controlling. *Ibid.*; *see* Order, *Timbervest, LLC* v. *SEC*, No. 15-1416 (D.C. Cir. Aug. 8, 2017).

This circuit split warrants the Court's review all the more because the Commission has not acquiesced in *Bandimere*. Instead, it has stayed *all* enforcement proceedings in which a petition for review could be filed in the Tenth Circuit. Order, *In re Pending Administrative Proceedings*, Securities Act Release No. 10,365 (May 22, 2017). That situation is untenable—for the Enforcement Division, for persons caught up in administrative enforcement proceedings, and ultimately for the Judiciary. The government is plainly correct, therefore, that "[t]he Appointments Clause question at issue in this case and in *Lucia* warrants review by this Court." Pet. 9. The *only* open issue is which case presents a better vehicle for reviewing and resolving that question.

2. The *Lucia* petition is a better vehicle for the full Court to resolve the Appointments Clause question, for two reasons.

a. There is a significant likelihood that Justice Gorsuch may be recused in this case because the Commission's petition for rehearing en banc was

pending before the full Tenth Circuit while he was still an active member of that court. Pet. 9; *see also* Pet. 35 n.*, *Lucia* v. *SEC*, No. 17-130 (U.S. July 21, 2017).

The *Bandimere* panel issued its decision on December 27, 2016, while then-Judge Gorsuch was an active member of the Tenth Circuit. Pet. App. 1a. On January 31, 2017, the President nominated then-Judge Gorsuch to be an Associate Justice. *See* White House, *President Trump's Nominee for the Supreme Court Neil M. Gorsuch*, https://www.whitehouse.gov/nominee-gorsuch (Jan. 31, 2017). In March 2017, the petition for rehearing and Bandimere's response were filed and "transmitted to all the judges of the court who are in regular active service." Pet. App. 157a; *see* Pet. for Reh'g or Reh'g En Banc, *Bandimere* v. *SEC*, No. 15-9586 (10th Cir. Mar. 13, 2017); Resp. to the Pet. for Reh'g En Banc, *Bandimere* v. *SEC*, No. 15-9586 (10th Cir. Mar. 24, 2017). Only after that transmittal, on April 7, 2017, was Justice Gorsuch confirmed. *See* White House, *President Donald J. Trump Congratulates Judge Neil M. Gorsuch on His Historic Confirmation*, https://www.whitehouse.gov/the-press-office/2017/04/07/president-donald-j-trump-congratulates-judge-neil-m-gorsuch-his-historic (Apr. 7, 2017). The Tenth Circuit subsequently denied the Commission's petition on May 3, 2017. Pet. App. 157a.

To be sure, Justice Gorsuch is not listed among the judges on the order denying rehearing en banc. *See* Pet. App. 157a. But that is undoubtedly because he was already serving on this Court when that order was entered. Justice Gorsuch was, however, an active Tenth Circuit judge at the time the panel decision was filed, and it is Lucia's understanding that

he remained in regular active service while the rehearing petition was pending and was distributed among the judges of the Tenth Circuit.

In fact, Justice Gorsuch has now recused himself in at least two other cases in this precise procedural posture. *See Rife* v. *Okla. Dep't of Pub. Safety*, 846 F.3d 1119 (10th Cir. 2017), *reh'g en banc denied*, 854 F.3d 637 (Apr. 12, 2017), *cert. denied*, 2017 WL 3731208 (U.S. Oct. 16, 2017); *Wolfe* v. *Bryant*, 678 F. App'x 631 (10th Cir. 2017), *reh'g en banc denied*, Order, No. 16-5150 (Mar. 3, 2017), *cert. denied*, 2017 WL 2119468 (U.S. Oct. 2, 2017). In both cases, a petition for rehearing en banc was filed after Justice Gorsuch's nomination, but before his confirmation. In each case, the petition likewise was distributed to all judges "who are in regular active service" during the period when Justice Gorsuch's nomination was pending. In each case, the order denying rehearing en banc did not state whether then-Judge Gorsuch participated in consideration of the petition. And when each case reached this Court, Justice Gorsuch recused himself from considering the petition.

Accordingly, it seems probable that Justice Gorsuch may be recused in this case. The *Lucia* case, in contrast, presents no potential recusal issues. Because there are two pending petitions that present the identical question, the Court's institutional interests would best be served by granting certiorari in the case with no possibility of recusal. This will ensure that all nine Justices can participate in this important decision, and eliminate any potential for criticism regarding consistent application of (non-public) recusal policies.

b. In addition, the Appointments Clause issue has been more thoroughly briefed and considered in

Lucia than in this case. The Commission first decided the Appointments Clause question in *Lucia*; the Commission in *Bandimere* simply followed its decision in *Lucia*—repeating pages of analysis verbatim. *Compare*, *e.g.*, Pet. App. 122a-125a, *with In re Raymond J. Lucia Cos., Inc. & Raymond J. Lucia, Sr.*, Exchange Act Release No. 75,837, 2015 WL 5172953, at *21-22 (Sept. 3, 2015).

Lucia and the government also debated the constitutional issue at length before the D.C. Circuit panel, in a rehearing petition, and in another round of full briefing before the en banc D.C. Circuit—where six *amici curiae* briefs were filed. This thorough scrubbing ensures that there are no lurking vehicle problems in *Lucia*. For example, the government did not offer any alternative grounds for affirmance in *Lucia*: As the panel expressly held (and the government did not dispute at the en banc stage), if "Commission ALJs are Officers within the meaning of the Appointments Clause, then the ALJ in [Lucia's] case was unconstitutionally appointed and the court *must grant the petition for review*." *Raymond J. Lucia Cos., Inc.* v. *SEC*, 832 F.3d 277, 283 (D.C. Cir. 2016) (emphasis added). The Court thus can be confident that it can reach and decide the Appointments Clause question in *Lucia*.

In contrast, the briefing and argument in *Bandimere* have been much less extensive than—and largely derivative of—*Lucia*. Moreover, the Tenth Circuit's decision in *Bandimere* indicates that there is a threshold constitutional avoidance issue that could prevent the Court from reaching the Appointments Clause question. *See* Pet. App. 4a-5a. And because *Bandimere* has not been vetted to the same extent as *Lucia*, there could be still further vehicle

issues that would preclude resolution of the constitutional issue.

Bandimere's principal submission is that the petition in this case should be denied because the Tenth Circuit's decision is correct. *See* BIO 13-27. That is one path available to the Court. At the same time, however, Bandimere identifies no prejudice from holding this case for *Lucia*, and it is hard to imagine any given that he prevailed below; and that would be the more usual course for this Court to follow where, as here, two petitions present the same question. Certainly there is no merit to Bandimere's tacked-on suggestion (at 27-28) that the Court should grant plenary review in this case—a position that the government does not agree with, Lucia disagrees with, and Bandimere himself advances only tentatively. Rather, the Court should take the parties in this case at their word and either deny the petition (as Bandimere requests) or hold it (as the government requests). Meanwhile, the *Lucia* petition should be granted.

* * *

This Court has pending before it two petitions that present the important question whether SEC ALJs are Officers subject to the requirements of the Appointments Clause. Only in *Lucia*, however, is it beyond doubt that the full Court can participate in the decision of this constitutional question, and that no potential vehicle issues might stand in the way of the Court's definitively answering this question. Accordingly, the Court should grant the *Lucia* petition and either deny the Commission's petition in this case or hold it pending the Court's decision on the merits in *Lucia*.

CONCLUSION

The petition for a writ of certiorari in *Lucia* should be granted; the petition in this case should be either denied or held for *Lucia*.

Respectfully submitted.

MARK A. PERRY
Counsel of Record
JASON NEAL
KELLAM M. CONOVER
SHANNON U. HAN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Amici Curiae

October 24, 2017