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No. 17-____

# In the Supreme Court of the United States

G. HARRISON SCOTT, JOHNNY C. CROW, and SHARRY R. SCOTT,

*Petitioners,*

–v–

FEDERAL DEPOSIT INSURANCE CORPORATION,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Conflicting Decisions

Is the Administrative Law Judge an "Inferior Officer" or an "employee"?

II. Mixed Cases

Where does a Respondent seek judicial review when alleging age discrimination?

III. Deference

Should the Court give "deference" to the Federal Deposit Insurance Board's interpretation of Regulation O, Civil Money Penalties and the Freedom of Information Act?

IV. Summary Disposition

Are reasons and ruling granting a Motion for Summary Disposition separate and distinct from a ruling on the merits?

V. Meaningful Review

Could there be a meaningful review if there was a preclusion of evidence and a denial of judicial notice?

## TABLE OF CONTENTS

## TABLE OF CONTENTS – Continued

Page

## APPENDIX TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

### CASES



### STATUTES

## TABLE OF AUTHORITIES—Continued

## PETITION FOR A WRIT OF CERTIORARI

Petitioners G. Harrison Scott, Johnny C. Crow and Sharry R. Scott respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

Opinion of the United States Fifth Circuit Court of Appeals denying Petition for Review of an Order of the Federal Deposit Insurance Corporation (App.1a).

Denial of Motion to take Judicial Notice and to Supplement Record (App.12a).

Decision and Order on Motion to Modify or Set Aside Order, Or, Alternatively, Motion for a Rehearing (App.30a).

Decision (unsigned) and Order (signed by Executive Secretary) of Assessment of Civil Money Penalties. (App.35a).

Recommended Decision on Summary Disposition by Administrative Law Judge (App.64a).

Notice of Intended Ruling by Administrative Law Judge (App.102a).

The Order of the Court of Appeals, denying the Petition for Rehearing En Banc (App. 105a).

## JURISDICTION

The Judgment of the United States Fifth Circuit Court of Appeals was entered on June 13, 2017. (App. 1a). On September 8, Justice Alito granted an extension of the time to file until October 10, 2017. This Court has Jurisdiction under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

### 1. Procedural History and Statement of the Facts

The Bank of Louisiana is a small, community bank, some eighty (80) million dollars, founded in New Orleans in 1958 by former President G. Harrison Scott, James Comiskey, and Dr. Nicholas Chetta. The Bank provides banking services to a small, local, well-known customer base, is well capitalized, has excess liquidity, large loan loss reserve, virtually no loan loss, nor interest rate risk. Management, particularly President Scott, is not accused of any malfeasance, not even by innuendo. To the contrary, it is FDIC's position that it can assess Tier I penalties without culpability.

The FDIC initiated this action on October 22, 2013, when it issued a Notice of Charges and Proposed Order of Civil Money Penalties alleging that the Bank of Louisiana, a federally insured State nonmember bank subject to the FDI Act, had violated Regulation O. Specifically, the Notice alleged that the Bank

made a loan to Director K that had more than a normal risk of repayment and a loan to an executive officer that exceeded the prescribed limitation. The bank had already loaned Director K some $480,000 on the property, which was his home. The new loan of $75,000 was an increase based on a prior approval. The property sold on July 24, 2014, for $995,000, almost twice the amount of the loan. The officer to whom a residential loan was made, was not an executive officer per the by-laws. Pretermitting that he was not an executive officer, the loan of $116,400 exceeded the prescribed limit by $16,400 and the alleged waived overdraft fees amounted to $75.00. The loan is current and paying as agreed. Evidence precluded by means of intended Summary Disposition.

Thereafter, the FDIC filed a Motion for Summary Disposition and/or Partial Summary Disposition. Respondents vigorously disputed the allegations. Administrative Law Judge C. Richard Miserendino issued a Notice of Intended Ruling informing the parties of his intent to grant a partial summary disposition in favor of the FDIC on all issues of liability. He made a disposition on the merits but not on the issue of issuing a summary disposition. nonetheless, based on this "intention," he precluded any evidence contradicting the FDIC's allegations.

> "THE COURT:
>
> On March 27, '14, I issued a Notice of Intended Ruling, which was amended to correct a typographical error on April 2, 2014. In that Amended Notice of Intended ruling, I specifically indicated that it was my intention to grant partial summary

> disposition in favor of the FDIC on four issues, which effectively took care of the alleged violation of Regulation O.
>
> So the issue in this case is what amount, if any, civil money penalty should be assessed against each respondent."

After a hearing on Civil Money Penalties, the ALJ issued the Recommended Decision and Assessment of Civil Money Penalties. The ALJ completely overlooked a decision and order supporting "his intent to grant a summary disposition."

The Bank filed written exceptions to the Recommended Decision. The FDIC Board on November 18, 2014, adopted the ALJ's decision and order. On December 16, 2014, Petitioners claiming age discrimination, filed a Motion for Rehearing which was denied. A Petition for Review was filed with the 5th Circuit Court of Appeals on December 17, 2014. On September 16, 2015, an affidavit by G. Harrison Scott was filed setting forth age discrimination and vendetta.

On August 4, 2016, Petitioners completely frustrated in their efforts to introduce any evidence in the administrative hearing or before the Board, filed a complaint in the U.S. District Court.

The complaint recited constitutional and factual errors committed by the Administrative Law Judge supported by a Scott (Decl) declaration.

The Court ruled that it lacked jurisdiction but recognized Petitioners' frustration.

> The plaintiffs make serious allegations that should not be taken lightly. An example of

> evidence the plaintiffs submit for the age discrimination claim are communications between FDIC employees, dated January 29, 2013 at 8:52 a.m. On that date an FDIC employee states that, "this place will never change until the old man dies, once you work here, you die here." There seems to be no dispute that this statement is referring to G. Harrison Scott and the Bank of Louisiana. It is troubling and merits close judicial scrutiny.

On March 22, 2017, Petitioners sought to introduce contradictory evidence by filing a Motion for the Court to take Judicial Notice of the Scott Declaration. On April 4, 2017, Motion Denied. On April 4, 2017, the Petition for Review was denied. A Rehearing was denied on June 13, 2017. It is from this denial that this application for a writ is being filed.

In summary, were it not so serious, these proceedings are completely ludicrous.

There was no loss on Director K's loans. The collateral proved to be worth almost double the amount of the loans.

Officer P was never an executive officer. Even if he were, the loan originated within the prescribed limit. His wife became incapacitated and with add-ons caused it to exceed the limit by $16,400.00. The overdraft fees-$75.00.

This whole house of cards was orchestrated by an assistant director, who enjoyed controversy and was a menace to the department until she retired. It was perpetrated by an ALJ, known in the depart-

ment as the Summary Disposition Judge who, to use his wording, was nothing more than a rubber stamp, making the victims the culprits.

The Directors, who admittedly were not guilty of any negligence or culpability, were assessed civil money penalties of $10,000 each plus liability for some $250,000 of court costs and attorney fees.

Your Petitioners are in dire need of a "meaningful review."

## REASONS FOR GRANTING THE PETITION

### I. CONFLICTING DECISIONS

In *Raymond J. Lucia v. Securities and Exchange Commission*, No. 15-1345, August 9, 2016 DC Circuit ruled that Administrative Law Judges (ALJs) are "employees". Petition for en banc hearing denied, June 26, 2017.

Lucia filed a petition for a writ of certiorari on July 21, 2017. Case No. 17-130.

Whereas in *Bandimere v. U.S. Securities and Exchange Commission*, No. 15-9586, December 27, 2017, 10th Circuit, ruled that the Administrative Law Judge was an "inferior officer." Rehearing denied May 3, 2017. (The SEC is applying for a writ).

In *Burgess v. Federal Deposit Insurance Corporation,* No. 17-60579, September 7, 2017, 5th Circuit, on a Motion to Stay, considered the Administrative Law Judge to be an "inferior officer."

This case is virtually an exhibit in support of Bandimere and Burgess as the Administrative Law Judge removed any doubt.

The Administrative Law Judge had "authority to shape the administrative record." *Bandimere v. SEC.*

Likewise, he had broad authority to "shape the course and scope of a contested hearing." *Burgess v. FDIC.*

The ALJ, at the very outset, advised that he would make the "decision".

> "My name is Judge C. Richard Miserendino. I'm the administrative law judge who has been assigned to hear and decide this case."

To "shape the course" he made a dispositive ruling that petitioners were guilty of violating Regulation O based on an intended Summary Disposition that he never made.

> "On March 27, '14, I issued a Notice of Intended Ruling, which was amended to correct a typographical error on April 2, 2014. In that Amended Notice of Intended ruling, I specifically indicated that it was my intention to grant partial summary disposition in favor of the FDIC on four issues, which effectively took care of the alleged violation of Regulation O."

Then he precluded all evidence on the merits.

> "So the issue in this case is what amount, if any, civil money penalty should be assessed against each respondent."

We ask the Court to take Judicial Notice of a similar ruling in a companion case, *Bank of Louisiana v. FDIC* 16-60837 currently pending in the 5th Circuit Court of Appeals wherein:

The ALJ, at the very outset, advised that he would make the "decision".

> "My name is Judge C. Richard Miserendino. I am the administrative judge who has been assigned to hear and decide this case."

To "shape the course" he made a dispositive ruling that petitioners were guilty of violating Safety and Soundness, BSA, and Compliance based on an intended Summary Disposition he never made.

> "NOTICE OF INTENDED RULING"
>
> "Pending before me in this matter are the FDIC's motion for summary disposition—."
>
> "All parties are hereby advised that in the final recommended decision it is my intention to grant partial summary disposition in favor of the FDIC on the following issues:"
>
> "—Respondents violated the Bank Secrecy Act—."
>
> "—Respondent violated the Electronic Funds Transfer Act—."
>
> "—Respondent violated the Real Estate Settlement Practices Act—."
>
> "—Respondent violated the Truth-in-Lending Act—."
>
> "—Respondent violated—the National Flood Insurance Program."

> "—Respondent engaged in unsafe and unsound practices—."
>
> "—Respondent violated the Memorandum of Understanding dated April 19, 2011 by:"
>
> "(f) failing to implement staffing changes recommended by Chaffe and Associates, Inc." *i.e.*, fire President Scott.
>
> "SO ORDERED
>
> Dated: January 28, 2015"

He precluded all evidence on the merits:

> "MR. PECK: Your Honor, Mr. Briggett is going to handle cross-examination of Mr. Buford."
>
> "—we may cross exam this witness with respect to CMP penalties for BSA."
>
> "THE COURT: No, you won't."
>
> "—I explained to you in our—, I made it very clear in the order, that we are not expanding this trial beyond the issues that have—that were left open by the Notice of Intended Ruling."
>
> "—I also explained explicitly that the only BSA violations that are still outstanding go to the training and the qualifications of the officer."
>
> "—I made an intended ruling.—anything that falls outside of the intended ruling is addressed here. We are not going to go back and retread."

> "But as it stands now, if they stay—if they focus on the two issues that are remaining, then I am not going to let you go beyond that."
>
> "—I told Mr. Peck at the beginning of this trial, I was not going to allow you to back door and get into a lot of testimony on issues that have already been resolved. And I told you that in an order before, and I told you that verbally before. And I think that is exactly what you are trying to do. Does that make it clear?"
>
> "We are not going to tread back now and go to the underpinnings of my previous ruling, if that is what you are trying to do here."

The foregoing confirms that the ALJ "decide(d) this case" in violation of the regulations he is charged with enforcing.

## II. MIXED CASES

The veracity of discrimination is recognized in a footnote to a companion case, G. Harrison Scott, Johnny Crow, Sharry Scott and *Bank of Louisiana v. Federal Deposit Insurance Corporation,* Case No. 16-13585, currently on appeal in the 5th Circuit, Case No. 17-30044.

> "The plaintiffs make serious allegations that should not be taken lightly. An example of evidence the plaintiffs submit for the age discrimination claim are communications between FDIC employees, dated January 29, 2013 at 8:52 a.m. On that date an FDIC

> employee states that, "this place will never change until the old man dies, once you work here, you die here." There seems to be no dispute that this statement is referring to G. Harrison Scott and the Bank of Louisiana. It is troubling and merits close judicial scrutiny."

In "mixed cases" the "review authority lies in district court." *Perry v. Merit Systems Protection Board*, No. 16-399, June 23, 2017 Supreme Court.

The rationale being discrimination proceedings override the administrative proceedings and reduces duplicity. This defect renders the entirety of the appellant proceedings null and void as a matter of law, requiring reversal of the FDIC's decision.

## III. DEFERENCE

"When a statute is administered by more than one agency, a particular agency's interpretation is not entitled to the Chevron deference."

*Bowen v. American Hospital Association,* 476 U.S. 610 (1986)

The issue of deference is not before the Court, "But, when a petition properly presenting the question comes before us, I will be receptive of granting it."

*Whitman v. United States*, 574 U.S. (2014) Statement of Justice Scalia with whom Justice Thomas joins.

### A. Regulation O

FDIC contends: The Regulation O does not require both "substantially the same terms" AND "more than normal risk of repayment."

Regulation O

Section 215.4 General prohibitions

(a) Terms and creditworthiness – (1) In general. No member bank may extend credit to any insider of the bank or insider of its affiliates unless the extension of credit:

(i) Is made on substantially the same terms—prevailing at the time for comparable transactions by the bank with other persons that are not covered by this part—

And

(ii) Does not involve more than the normal risk of repayment or present other unfavorable features.

In *Bullion v. FDIC*, 1989, the Administrative Law Judge interpreted the regulation to require "both", substantially the same terms as comparable transactions "and" not involve more than the normal risk of repayment. The FDIC Board made a contrary interpretation and read the regulation to mean "or" thereby requiring only "one".

The Appellate Court ruled "Our deference is to the agency and not the ALJ."

This is critical as the FDIC only alleged "more than normal risk of repayment."

Petitioners have vehemently denied any risk of repayment, whatsoever, which is supported by FDIC documents discovered in a related case, *Bank of Louisiana v. FDIC* 16-60837 currently in the 5th Circuit Court of Appeals.

Evidence precluded by intended Summary Disposition.

This defect renders the entirety of the proceeding null and void as a matter of law, requiring reversal of the FDIC's decision.

**B. Civil Money Penalty**

FDIC contends no culpability required for Tier I Civil Money Penalties.

*Atherton v. FDIC*, 519 U.S. 213 (1997)

> "State law sets the standard of conduct for officers and directors of federally insured savings institutions as long as the state standard (such as simple negligence) is stricter than that of § 1821(k). The federal statute nonetheless sets a "gross negligence" floor, which applies as a substitute for state standards that are more relaxed.

La. Revised Statutes 6:291

> "B. A director or officer of a bank—shall not be held personally liable—unless the director or officer acted in a grossly negligent manner—or engaged in conduct which demonstrates a greater disregard of the duty of care than gross negligence—."

DSC Risk Management Manual of Examination Policies – 14.1

"ASSESSMENT OF CIVIL MONEY PENALTIES:

> "Civil money penalties are assessed not only to punish the violator according to the degree of culpability and severity of the violation, but also to deter future violations.—the primary purpose for utilizing civil money penalties is not to effect remedial action."

12 U.S.C. § 1821(k)

> "A director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action—for gross negligence—."

This defect renders the entirety of the proceeding null and void as a matter of law, requiring reversal of the FDIC's decision.

### C. Freedom of Information

FDIC Law, Regulations, Related Acts—8000–Miscellaneous Statutes and Regulations—§ 552b Open meetings

> "(b) every portion of every meeting shall be open to the public."

The FDIC contends that unless it "finds that public interest requires otherwise" meetings can be closed.

This interpretation completely negates the Act and denied Petitioners a hearing.

This defect renders the entirety of the proceeding null and void as a matter of law, requiring reversal of the FDIC's decision.

## IV. Summary Disposition

- Federal Rules of Civil Procedure—
  Rule 56. Summary Judgment

  "—The court should state on the record the reasons for granting or denying the motion." Rule 56(a)

- FDIC Rules of Practice and Procedure—
  § 308.29 Summary Disposition

  "(d) Decision on motion. If the administrative law judge determines that summary disposition is warranted, the administrative law judge should submit a recommended decision to that effect to the Board of Directors."

There is no "recommended decision to that effect." He made a decision on the merits, allegedly supported by a Summary Disposition but there is no Summary Disposition. Accordingly, there is no basis, no established facts, in support of a decision on the merits.

The ALJ advised Petitioners that he "intended to grant a summary disposition," thereby precluding Petitioners from contesting the FDIC's allegations. He never granted the disposition nor an order setting forth which facts were undisputed. This defect renders the entirety of the proceeding null and void as a matter of law, requiring reversal of the FDIC's decision.

## V. Meaningful Review

At the outset, it should be noted that Petitioners fully complied with administrative procedures and recognize that the Court of Appeals can furnish a meaningful review. However, the Appellate Court must have a complete record to make a meaningful review.

A Circuit Court lacks the ability to create a record because it is an appellate court. However,

> "Even without fact finding capabilities, the Federal Circuit may take judicial notice of facts relevant to the constitutional question."

*Elgin v. Dept. of the Treasury*, 132 S.Ct 2126 (2012).

In this case, the ALJ decided at the very outset, without an evidentiary hearing, that Petitioners were guilty and precluded any contradiction. It was not until Petitioners were being stymied in a companion case, *FDIC v. Bank of Louisiana*, that Petitioners, in total frustration, filed a complaint in the U.S. District Court. The complaint set forth charges of age discrimination and violations of due process. In support of the complaint, Petitioners filed a declaration, referred to as the Scott Decl. The FDIC filed exceptions to jurisdiction which were maintained by the District Court. In its opinion, the Court noted the following:

> "No court has seemingly ruled on a similar issue where the plaintiffs bring equal protection and due process claims in the context of an FDIC enforcement proceeding."
>
> "Accordingly, the plaintiffs fail to carry their burden to establish that this Court has the

> authority to exercise subject matter jurisdiction. Not only does Congress limit federal district courts' jurisdiction under clear statutory law, but Supreme Court precedent on similar constitutional claims against administrative agencies teach that the plaintiffs' claims do present circumstances under which district courts have no statutory authority to exercise jurisdiction."

However,

> "The plaintiffs make serious allegations that should not be taken lightly. An example of evidence the plaintiffs submit for the age discrimination claim are communications between FDIC employees, dated January 29, 2013 at 8:52 a.m. On that date an FDIC employee states that, "this place will never change until the old man dies, once you work here, you die here." There seems to be no dispute that this statement is referring to G. Harrison Scott and the Bank of Louisiana. It is troubling and merits close judicial scrutiny."

The District Court's decision is now on appeal in the 5th Circuit Court of Appeals, Case No. 17-30044.

Seeking to complete the record, which was precluded by the ALJ, Petitioners filed a Motion to take Judicial Notice of the Scott decl. in No. 17-30044, which was denied.

The Court never had a complete record for a meaningful review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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