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## NOTES

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# MISCHIEF MANAGED? THE UNCONSTITUTIONALITY OF SEC ALJS UNDER THE APPOINTMENTS CLAUSE

*Jackson C. Blais\**

### INTRODUCTION

Since Congress passed the Administrative Procedure Act in 1946 (APA),<sup>1</sup> the administrative state has expanded exponentially. Today, federal agencies are critical players in the administrative scheme due to their role in establishing and enforcing regulations.<sup>2</sup> An important part within this system is played by Administrative Law Judges (“ALJs”).<sup>3</sup> In 2016, the Tenth Circuit<sup>4</sup> and the D.C. Circuit<sup>5</sup> took up the question of whether ALJs of the Securities and Exchange Commission (SEC) were hired in accordance with the Appointments Clause of the Constitution. The two courts came to opposite conclusions—the Tenth Circuit concluded that SEC ALJs are inferior officers, and as a result, do not comport with the Appointments Clause,<sup>6</sup> whereas the D.C. Circuit determined that the SEC ALJs are employees, and so do not run afoul of the Constitution.<sup>7</sup> Though similar claims have been

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\* Candidate for Juris Doctor, Notre Dame Law School, 2019; Bachelor of Arts in Political Science, Grinnell College, 2016. Thanks to Professor Patricia Bellia for her valuable comments and advice through every step of this process. I am incredibly grateful to my friends and family for their constant support, and to the *Notre Dame Law Review* staff. Special thanks to my dad for his thoughtful edits and for exemplifying the qualities of the lawyer that I aspire to be. All errors are my own.

1 See 5 U.S.C. §§ 551–59 (2012).

2 See JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION: CASES AND MATERIALS* 332 (2d ed. 2013).

3 See Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 798–800 (2013) (noting that ALJs decide over 250,000 cases per year and parallel the function of Article III judges).

4 See *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016).

5 See *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *cert. granted*, 138 S. Ct. 736 (2018).

6 See *Bandimere*, 844 F.3d at 1179.

7 See *Lucia*, 832 F.3d at 289.

made, other circuit courts have not yet decided this argument on the merits.<sup>8</sup> Nevertheless, the Tenth and D.C. Circuits have created a split that the Supreme Court will answer by the end of this term<sup>9</sup>—whether SEC ALJs comport with the Appointments Clause of the Constitution. Answering this question will at least indirectly implicate other agencies’ ALJs because of their similar duties.

This Note argues that SEC ALJs are inferior officers of the United States and, as a result, are unconstitutional under the Appointments Clause. Part I examines the current state of ALJs and the jurisprudence of the Appointments Clause. Part II provides an analysis of the circuit split between the Tenth and D.C. Circuits over the question of SEC ALJs and the Appointments Clause. Part III argues that the Tenth Circuit in *Bandimere v. SEC* correctly decided the question presented. This Part further urges the Supreme Court to reverse the D.C. Circuit’s holding in *Lucia* and, in so doing, adhere to its correctly decided past doctrine, notwithstanding the potential ramifications for the administrative state.

## I. BACKGROUND ON ALJS AND THE APPOINTMENTS CLAUSE

### A. ALJs

Each federal agency is authorized to employ ALJs, the number of which varies according to each agency’s need.<sup>10</sup> The Office of Personnel Management (OPM) manages the application and hiring process of ALJs for all agencies,<sup>11</sup> though the OPM does not actually select which candidates are chosen to become ALJs.<sup>12</sup> Some agencies do not hire or utilize ALJs whatsoever,<sup>13</sup> but other agencies employ hundreds or even thousands of ALJs.<sup>14</sup> Though their number varies, ALJs perform an extensive array of duties in

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8 See *Bandimere*, 844 F.3d at 1171 n.2 (providing citations to other circuit cases in which the court rejected arguments challenging the constitutionality of SEC ALJs due to failure to “raise and exhaust the argument in the administrative proceedings”); see, e.g., *Hill v. SEC*, 825 F.3d 1236, 1237–38 (11th Cir. 2016); *Tilton v. SEC*, 824 F.3d 276, 278–79 (2d Cir. 2016); *Bebo v. SEC*, 799 F.3d 765, 767 (7th Cir. 2015).

9 See *Lucia v. SEC*, 138 S. Ct. 736 (2018).

10 See 5 U.S.C. § 3105 (2012) (empowering agencies to “appoint as many administrative law judges as are necessary for proceedings required” by the APA).

11 See 5 C.F.R. § 930.201 (2017).

12 See *id.* § 930.201(e) (“OPM does not hire administrative law judges for other agencies . . . .”); *id.* § 930.204(a) (noting that “an agency may appoint” an ALJ, rather than the OPM (emphasis added)).

13 See *ALJs by Agency*, OFFICE OF PERS. MGMT., <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> (last visited Oct. 16, 2017) [hereinafter OPM Table of ALJs] (identifying that the Commodities Future Trading Commission, Merit Systems Protection Board, and Small Business Administration do not presently have an ALJ).

14 See *id.* (specifically, the Department of Health and Human Services currently has over one hundred ALJs, while the Social Security Administration currently has 1655 ALJs).

accordance with sections 553 and 554 of the APA.<sup>15</sup> In essence, ALJs hold hearings in each agency and occupy a quasi-judicial role.<sup>16</sup> Within the administrative framework, ALJs make decisions that may be appealed up to the agency's leadership, whose decision can then be appealed to the federal court system.<sup>17</sup>

SEC ALJs, like other ALJs, "serve as independent adjudicators."<sup>18</sup> Currently, they are hired by the Chief ALJ of the SEC,<sup>19</sup> who receives potential nominees from the OPM. SEC ALJs conduct public hearings and issue decisions based on those hearings.<sup>20</sup> The SEC Commission always has the discretionary power to review an SEC ALJ's decision, and sometimes has a mandatory duty to review should a party from the SEC ALJ's decision seek an appeal.<sup>21</sup> If the SEC Commission does not take up an SEC ALJ's decision, the SEC ALJ's decision becomes final.<sup>22</sup>

### B. *Appointments Clause*

The Appointments Clause of the Constitution reads as follows:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls,

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15 See 5 U.S.C. § 556–57; see, e.g., MANNING & STEPHENSON, *supra* note 2, at 546–49 (explaining how ALJs operate within the APA's statutory framework).

16 The Office of Personnel Management describes the "Major Duties" of ALJs as follows:

ALJs conduct formal hearings involving cases where all interested parties are given advance notice of the hearing; an opportunity to submit facts, arguments, offers of settlement or proposals of adjustment; and an opportunity to be . . . represented [ ] and advised by counsel . . . . ALJs rule on preliminary motions, conduct pre-hearing conferences, issue subpoenas, control hearings . . . review briefs, and prepare and issue initial or recommended decisions, along with written findings of fact and conclusions of law therein. Oral or documentary evidence may be received, but irrelevant, immaterial, or unduly repetitious evidence is excluded. Decisions are issued upon consideration of the whole record, or those parts of it cited by a party and supported by and in accord with reliable, probative, and substantial evidence.

*Administrative Law Judges*, OFFICE OF PERS. MGMT., <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=Fact-Sheet> (last visited Nov. 24, 2017).

17 See MANNING & STEPHENSON, *supra* note 2, at 546.

18 *Office of Administrative Law Judges*, SEC, <https://www.sec.gov/alj> (last modified Jan. 26, 2017).

19 Brief for Respondent Supporting Petitioners at 3, *Lucia v. SEC*, No. 17-130 (Feb. 21, 2018), 2018 WL 1251862.

20 See 17 C.F.R. § 200.14 (2017); see also *Bandimere v. SEC*, 844 F.3d 1168, 1171 (10th Cir. 2016); OFFICE OF PERS. MGMT., *supra* note 16. For an extensive list of duties and powers that SEC ALJs are able to exercise in the course of a hearing, see *Bandimere*, 844 F.3d at 1178.

21 See 15 U.S.C. § 78d-1(b) (2012); see also *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 281 (D.C. Cir. 2016), *cert. granted*, 138 S. Ct. 736 (2018).

22 See 15 U.S.C. § 78d-1(c). In so doing, the ALJ's finding is considered to "be deemed the action of the Commission." *Id.*

Judges of the supreme 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.<sup>23</sup>

The Appointments Clause lays out a framework that maintains a separation of powers among the governmental branches by blending the branches' powers and creating checks and balances. For example, the President is given the ability to nominate principal officers,<sup>24</sup> whereas Congress is given the power to choose whether the President, a court, or the head of a department may appoint inferior officers.<sup>25</sup> Furthermore, principal officers are subject to "Advice and Consent of the Senate," which provides an additional check on the Executive's discretion.<sup>26</sup> This appointments framework, though not always clear,<sup>27</sup> or strictly interpreted,<sup>28</sup> has nevertheless ossified into a workable standard.<sup>29</sup>

Most caselaw concerning the Appointments Clause revolves around the distinction between principal and inferior officers.<sup>30</sup> The Appointments Clause does not precisely define what designates an officer as inferior, nor

23 U.S. CONST. art. II, § 2, cl. 2.

24 The Constitution does not explicitly establish the principal officer position—the Court has determined that the labeling of "inferior officers" in the Appointments Clause implicitly creates the principal officer distinction. See, e.g., GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 190 (7th ed. 2016).

25 See, e.g., U.S. CONST. art. II, § 2, cl. 2.

26 *Id.*

27 For example, the Appointments Clause does not mention how officers may be removed from their positions. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 723 (1988) (Scalia, J., dissenting) ("There is, of course, no provision in the Constitution stating who may remove executive officers, except the provisions for removal by impeachment."). The question of officer removal has spawned its own line of caselaw that often commingles with Appointments Clause issues, but *Bandimere* and *Lucia* did not directly address the issue of the removal of SEC ALJs.

28 See Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 484 (2011) (arguing that the Supreme Court has interpreted and applied the Appointments Clause "somewhat inconsistent[ly]" with a strict understanding of separation of powers).

29 See *id.* ("[O]nce [the Supreme Court] arrives at an interpretation [of the Appointments Clause], it is not forgiving if it finds that the provision has been violated."). But see Transcript of Oral Argument at 17, *Lucia v. SEC*, No. 17-130 (Apr. 23, 2018) (Justice Breyer describing the Appointments Clause caselaw as a "contradictory mess").

30 See, e.g., *Edmond v. United States*, 520 U.S. 651, 662–63 (1997) ("Whether one is an 'inferior' officer depends on whether he has a superior. . . . [W]e think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."); *Morrison*, 487 U.S. at 671–72 (listing four factors to discern whether an official is a principal or inferior officer); *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam) ("Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary.").

does it mention government employees. If an official is designated as an employee, as opposed to an officer, she need not comport with the Appointments Clause.<sup>31</sup> Since most Appointments Clause jurisprudence concerns the difference between inferior and principal officers, the distinction between inferior officers and employees has received far less attention. For example, the Court in dicta has briefly mentioned that an employee of the United States is simply a “lesser functionar[y] subordinate to officers of the United States.”<sup>32</sup>

The Supreme Court’s primary case concerning the definitions of inferior officers and employees is *Freytag v. Commissioner of Internal Revenue*, which involved a challenge to the constitutionality of Special Trial Judges (“STJs”) appointed by the Chief Judge of the United States Tax Court.<sup>33</sup> *Freytag* focused on whether the Tax Court, under the Appointments Clause, had the authority to appoint STJs.<sup>34</sup> This necessarily required the Court to answer the threshold question of whether an STJ was an inferior officer or an employee.<sup>35</sup>

For the purposes of this Note, the Court determined that an STJ was an inferior officer.<sup>36</sup> In so finding, the Court relied on three factors: (1) that the office of STJs is “established by law,” (2) that the “duties, salary, and

31 *Freytag v. Comm’r*, 501 U.S. 868, 880 (1991) (“[Employees] need not be selected in compliance with the strict requirements of Article II.”).

32 *Buckley*, 424 U.S. at 126 n.162; *see also* *Auffmordt v. Hedden*, 137 U.S. 310, 326–27 (1890) (holding that a merchant appraiser was not an inferior officer because he was “selected for [a] particular case”; the “position [was] without tenure, duration, continuing emolument, or continuous duties, and he act[ed] only occasionally and temporarily,” “[t]herefore, he [was] not an ‘officer,’ within the meaning of the [Appointments Clause]”); *United States v. Germaine*, 99 U.S. 508, 511–12 (1878) (determining that a surgeon was not an officer because his duties were “not continuing and permanent, and [were] occasional and intermittent”; the Court considered the nature of the surgeon’s “tenure, duration, emolument, and duties” in deciding whether the surgeon was an officer).

33 *Freytag*, 501 U.S. at 870–71; *see* Linda D. Jellum & Moses M. Tincher, *The Shadow of Free Enterprise: The Unconstitutionality of the Securities & Exchange Commission’s Administrative Law Judges*, 70 SMU L. REV. 3, 20 (2017) (noting the difference between an officer and an employee is whether the official in question “exercise[s] significant authority pursuant to the laws of the United States” and that though “[n]o one factor is determinative” courts consider collectively “the manner in which Congress created the position, the appointment process, the responsibilities of the position, the tenure and duration of the position, the amount and manner of pay, the level of supervision, and the identity of the supervisor”); Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233, 262 n.248 (2008) (identifying sources that question whether the *Freytag* decision that the STJ at issue was an employee was assumed by all the Justices).

34 *Freytag*, 501 U.S. at 872 (identifying the issue as whether “the assignment of cases [by the Tax Court] . . . to a special trial judge . . . violated the Appointments Clause”).

35 *Id.* at 880 (“If we . . . conclude that a special trial judge is only an employee, petitioners’ challenge fails, for such ‘lesser functionaries’ need not be selected in compliance with the strict requirements of Article II.” (quoting *Buckley*, 424 U.S. at 126 n.162)).

36 *Id.* at 881.

means of appointment for that office are specified by statute,”<sup>37</sup> and (3) that an STJ carried out “important functions” while exercising “significant discretion.”<sup>38</sup> The IRS Commissioner argued that STJs were employees because they could not enter a final decision, but the Court rejected this notion by identifying the STJs’ significant duties and discretion as proof that STJs were in actuality inferior officers.<sup>39</sup>

## II. *LUCIA* AND *BANDIMERE*

The facts of the circuit split cases, *Lucia* and *Bandimere*, are roughly analogous—both involve the SEC bringing an administrative enforcement action against Lucia and Bandimere for alleged violations of various securities laws.<sup>40</sup> In both cases, the SEC ALJs presiding over the hearing found the defendants liable and imposed various penalties upon them.<sup>41</sup> In their appeals, Lucia and Bandimere argued *inter alia* that because the Chief ALJ who hired the SEC ALJs was not the Head of a Department, the SEC ALJs were hired in violation of the Appointments Clause—as a result, the judgments made by the ALJs could not stand.<sup>42</sup> The ALJs in both cases unsurprisingly found themselves to be employees, which the SEC Commission subsequently affirmed.<sup>43</sup>

### A. *The D.C. Circuit in Lucia*

In *Lucia*, the D.C. Circuit unanimously held that SEC ALJs are employees and not inferior officers, so their hiring process does not run afoul of the Constitution.<sup>44</sup> The court noted that since SEC ALJs were not appointed in a way that satisfies the Appointments Clause, the relevant question was whether an SEC ALJ is an employee or not.<sup>45</sup> Though it recognized the importance

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 881–82.

<sup>39</sup> *See id.* at 881–82 (noting the “significance of the duties and discretion that special trial judges possess” and that when the STJ carried out “important functions, [the STJ] exercise[d] significant discretion”).

<sup>40</sup> *See Bandimere v. SEC*, 844 F.3d 1168, 1171 (10th Cir. 2016); *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 282 (D.C. Cir. 2016), *cert. granted*, 138 S. Ct. 736 (2018).

<sup>41</sup> *See Bandimere*, 844 F.3d at 1171 (citing David F. Bandimere, SEC Release No. 507, 2013 WL 5553898, at \*61–84 (ALJ Oct. 8, 2013)) (noting that the ALJ “barred [petitioner] from the securities industry, ordered him to cease and desist from violating securities laws, imposed civil penalties, and ordered disgorgement”); *Lucia*, 832 F.3d at 283 (citing *Raymond J. Lucia Cos.*, Initial Decision Release No. 495, 2013 WL 3379719, at \*42 (ALJ July 8, 2013)) (noting that the ALJ “impos[ed] sanctions, including a lifetime industry bar [on Lucia]”).

<sup>42</sup> David F. Bandimere, SEC Release No. 9972, 2015 WL 6575665, at \*19–21 (Oct. 29, 2015); *Raymond J. Lucia Cos.*, Exchange Release No. 75837, 2015 WL 5172953, at \*21–24 (Sept. 3, 2015).

<sup>43</sup> *See supra* note 41.

<sup>44</sup> *Lucia*, 832 F.3d at 280.

<sup>45</sup> *Id.* at 283 (“The Commission has acknowledged the ALJ was not appointed as the Clause requires . . . [and so] if the court concludes . . . that [SEC] ALJs are Officers within

of *Freytag*, the court relied upon tests established by its own line of caselaw post-*Freytag* to determine whether an appointee is a constitutional Officer.<sup>46</sup> The court noted that SEC ALJs were “established by Law” and that an ALJ’s “duties, salary and means of appointment” were specified by statute.<sup>47</sup>

The court, relying on its own precedent, then listed the “main criteria” that determine whether an appointee is an employee or an inferior officer: “(1) the significance of the matters resolved by the officials, (2) the discretion they exercise in reaching their decisions, and (3) the finality of those decisions.”<sup>48</sup> According to the court, an official must meet each of these criteria—that is, the official must resolve significant matters, exercise discretion in doing so, and their decisions must be final—in order to be considered an inferior official.<sup>49</sup> The D.C. Circuit proceeded to reject *Lucia*’s argument because an SEC ALJ’s decision is not considered final until the SEC Commission issues a finality order.<sup>50</sup> Though an SEC ALJ may exercise discretion in deciding significant matters, the D.C. Circuit found that an SEC ALJ has no power to bind anyone until the Commission has embraced the ALJ’s decision as its own.<sup>51</sup> Because SEC ALJs therefore lacked final decision-making power, the court held that SEC ALJs are employees and that their hiring process does not violate the Appointments Clause.<sup>52</sup>

One year later, the court in an en banc memorandum opinion upheld the decision, in an even 5–5 split vote.<sup>53</sup> No judge wrote an opinion, so little can be gleaned concerning the disagreements in the split. The split nevertheless indicates that the consensus among the D.C. Circuit judges is not as strong as the original *Lucia* decision made it appear.

### B. *The Tenth Circuit in Bandimere*

A few months after the D.C. Circuit passed down its *Lucia* decision, the Tenth Circuit came to the conclusion that SEC ALJs are inferior officers and,

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the meaning of the Appointments Clause, then the ALJ . . . was unconstitutionally appointed . . .”).

46 *Id.* at 284 (citing *Tucker v. Comm’r*, 676 F.3d 1129, 1132 (D.C. Cir. 2012)); *see also* *Landry v. FDIC*, 204 F.3d 1125, 1131–32 (D.C. Cir. 2000).

47 *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991).

48 *Lucia*, 832 F.3d at 284 (quoting *Tucker*, 676 F.3d at 1133).

49 *See id.* at 284–85.

50 *See id.* at 286 (“[T]he initial decision becomes final when, and only when, the Commission issues the finality order, and not before then . . . [T]he Commission must affirmatively act . . . in every case.”).

51 *See id.* at 288.

52 *See id.* at 289. The remainder of the case consisted of the court upholding the Commission’s findings against *Lucia* and denying his petition for review. *Id.* at 289–96.

53 *Raymond J. Lucia Cos. v. SEC*, 868 F.3d 1021 (D.C. Cir. 2017). Chief Judge Merrick Garland did not vote in the matter, leaving the court in an even split. *Id.* at 1021 n.\*; *see also* Cogan Schneier, *DC Circuit Split Tees Up Supreme Court Review of SEC Judges*, NAT’L L.J. (June 26, 2017), <http://www.nationallawjournal.com/id=1202791407100/DC-Circuit-Split-Tees-Up-Supreme-Court-Review-of-SEC-Judges> (noting that Chief Judge Garland recused himself from the en banc hearing and decision).



as such, are unconstitutional under the Appointments Clause in a divided opinion. The *Bandimere* court first noted the various definitions of inferior officers,<sup>54</sup> and included a list of fifteen positions that the Supreme Court had determined to be inferior officers from 1839 up until 1997.<sup>55</sup> Unlike the D.C. Circuit, which had its own caselaw on the issue of defining an inferior officer, the Tenth Circuit relied entirely upon *Freytag* for its determination.<sup>56</sup> The Tenth Circuit gleaned a three-factor test from *Freytag* to determine whether an official was an employee or an inferior officer: (1) whether the position was “established by Law,”<sup>57</sup> (2) whether “the duties, salary, and means of appointment” of the official are “specified by statute,”<sup>58</sup> and (3) whether the official “‘exercise[d] significant discretion’ in ‘carrying out . . . important functions.’”<sup>59</sup>

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54 See *Bandimere v. SEC*, 844 F.3d 1168, 1173 (10th Cir. 2016). The court quoted Justice Breyer, who noted the difficulty in defining inferior officers:

Inferior officers are, *inter alia*, (1) those charged with “the administration and enforcement of the public law,” (2) those granted “significant authority,” (3) those with “responsibility for conducting civil litigation in the courts of the United States,” and (4) those “who can be said to hold an office,” that has been created either by “regulations” or by “statute.”

*Id.* (citations omitted) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 539 (2010) (Breyer, J., dissenting)).

55 See *id.* at 1173–74; see also *Edmond v. United States*, 520 U.S. 651, 666 (1997) (military judge); *Freytag v. Comm’r*, 501 U.S. 868, 881–82 (1991) (Tax Court special trial judges); *Morrison v. Olson*, 487 U.S. 654, 671 (1988) (independent counsel); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam) (Federal Election Commission commissioners); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352 (1931) (United States commissioner in district court proceedings); *Myers v. United States*, 272 U.S. 52, 173–74 (1926) (postmaster first class); *Rice v. Ames*, 180 U.S. 371, 378 (1901) (extradition commissioners); *United States v. Eaton*, 169 U.S. 331, 343 (1898) (vice consul “charged with the duty of temporarily performing the functions” of consul); *United States v. Allred*, 155 U.S. 591, 595 (1895) (commissioner of the circuit court); *United States v. Perkins*, 116 U.S. 483, 484 (1886) (engineer appointed by Secretary of the Navy); *Ex parte Siebold*, 100 U.S. 371, 397 (1879) (federal marshal); *id.* at 398 (election supervisor); *United States v. Germaine*, 99 U.S. 508, 511–12 (1878) (“clerks in the Department of the Treasury, Interior,” and other departments); *United States v. Moore*, 95 U.S. 760, 761–62 (1877) (assistant surgeon); *In re Hennen*, 38 U.S. 230, 258 (1839) (district court clerk). It should be recognized that the Court has struggled to maintain, or even recognize, a consistent definition of an inferior officer. See Edward Susolik, Note, *Separation of Powers and Liberty: The Appointments Clause*, *Morrison v. Olson*, and *Rule of Law*, 63 S. CAL. L. REV. 1515, 1545 (1990) (arguing that the inferior officer cases that do exist “posit conclusions rather than arguments and provide little insight to justify their results”). However, the cases provided for in this footnote are meant to indicate the sorts of positions and officials that the Court has found to be inferior officials, not to establish a definition that distinguishes between an inferior officer and an employee.

56 See *Bandimere*, 844 F.3d at 1174 (recognizing that “the *Freytag* opinion provides the guidance needed,” and that “*Freytag* controls the result of this case”).

57 *Id.* at 1179 (quoting *Freytag*, 501 U.S. at 881).

58 *Id.* (quoting *Freytag*, 501 U.S. at 881).

59 *Id.* at 1179 (second alteration in original) (quoting *Freytag*, 501 U.S. at 882). Examples of important functions that required significant discretion include, “tak[ing] testi-

The SEC argued that because the SEC ALJ could not render final decisions (whereas the STJ in *Freytag* sometimes could), the ALJ at issue here was an employee.<sup>60</sup> The SEC pointed to the D.C. Circuit’s caselaw, including the recently decided *Lucia* case, because the D.C. Circuit was the only circuit court to have decided the SEC ALJ status question, but the Tenth Circuit rejected this reasoning.<sup>61</sup> The Tenth Circuit determined that the D.C. Circuit’s requirement that an inferior officer must have final decision-making authority departed from the *Freytag* holding.<sup>62</sup> Rather, final decision-making authority is a factor, but is not determinative when deciding whether an official utilized significant authority.<sup>63</sup>

The court then concluded that SEC ALJs met the third criterion of the *Freytag* test—that SEC ALJs exercise significant discretion while performing important functions.<sup>64</sup> This conclusion was reinforced by the similarities between the STJ’s position in *Freytag* with the SEC ALJ, which will be discussed further in Part III.<sup>65</sup>

Judge Briscoe concurred in full and wrote separately to address more fully Judge McKay’s dissent.<sup>66</sup> In particular, the concurrence chided the dissent for suggesting that the court had destabilized the ALJ system,<sup>67</sup> and more clearly rejected the D.C. Circuit’s line of caselaw.<sup>68</sup> The *Bandimere* concurrence provides additional and helpful analysis for answering the inferior officer/employee question, which will be further examined in Part III below. In so doing, Part III will also more closely analyze Judge McKay’s dissent in *Bandimere*.

The SEC petitioned for an en banc hearing, but the Tenth Circuit voted 9–2 to deny the rehearing.<sup>69</sup> Judge Lucero wrote a dissent from the denial, arguing that the court ought to give stronger deference to the Supreme

mony, conduct[ing] trials, rul[ing] on the admissibility of evidence, and hav[ing] the power to enforce compliance with discovery orders.” *Freytag*, 501 U.S. at 881–82.

60 *Bandimere*, 844 F.3d at 1182.

61 *Id.*

62 *Id.* at 1182–83 (“[The] conclusion [in *Freytag*] did not depend on the STJs’ authority to make final decisions.”).

63 *See id.* at 1183–84 (“[T]he Court [in *Freytag*] did not make final decision-making power the essence of inferior officer status.”).

64 *See supra* notes 36–39 and accompanying text.

65 *Compare Freytag*, 501 U.S. at 881–82 (noting that STJs “conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders”), with *Bandimere*, 844 F.3d at 1179–81 (identifying the authorities of SEC ALJs which include “taking testimony, regulating document production and depositions, ruling on the admissibility of evidence, receiving evidence, ruling on dispositive and procedural motions, issuing subpoenas, . . . presiding over trial-like hearings[,] . . . impos[ing] sanctions[,] . . . [and the] power to enter default judgments” (footnotes omitted)).

66 *Id.* at 1188 (Briscoe, J., concurring).

67 *Id.* at 1188–1191.

68 *Id.* at 1191 (arguing that relying on final decision-making authority, as the D.C. Circuit had done, “is wrong”).

69 *Bandimere v. SEC*, 855 F.3d 1128 (10th Cir. 2017).

Court on the question at issue,<sup>70</sup> particularly in light of the consequences such a holding would have on the independence of ALJs.<sup>71</sup> In the following analysis in Part III, both Judge McKay and Judge Lucero's dissents will be considered in tandem, as the two opinions make similar arguments.

### III. ANALYSIS AND ARGUMENT

#### A. *Analyzing Lucia and Bandimere Under Freytag*

*Freytag* is the controlling Supreme Court case concerning the distinction between inferior officers and employees. An inferior officer's position must be "established by Law," and have their duties, salaries, and means of appointment specified by statute.<sup>72</sup> Additionally, the officer must "carry[ ] out . . . important functions" by exercising "significant discretion."<sup>73</sup>

Both courts in *Lucia* and *Bandimere* recognized that SEC ALJs satisfied the first and second requirements set out by *Freytag*.<sup>74</sup> The main conflict between the two courts, then, was the issue of the third requirement—determining how and when an official carries out "important functions" while exercising "significant discretion."<sup>75</sup> Where *Bandimere* attempted to follow the standard set forth by *Freytag*, the D.C. Circuit in *Lucia* split the final *Freytag* requirement into more factors that were based on the court's earlier decision in *Tucker v. Commissioner*.<sup>76</sup> In so doing, the D.C. Circuit deviated from *Freytag* in reading its precedent to require that an inferior officer must have final decision-making power. This requirement runs directly against *Freytag*, and so the D.C. Circuit's conclusion that SEC ALJs are employees must be rejected.

The D.C. Circuit's conclusions relied heavily upon two cases it had decided since the Supreme Court handed down the *Freytag* decision: *Tucker* and *Landry*.<sup>77</sup> *Landry* determined that the *Freytag* Court had relied upon "the STJs' power of final decision in certain classes of cases" in concluding

70 See *id.* at 1130–31 (Lucero, J., dissenting from denial of rehearing en banc) ("In light of the very real and substantial consequences, labeling SEC ALJs 'inferior officers' for the first time in the near-century of their existence should not be done without a clear mandate from the Supreme Court.").

71 See *id.* at 1132 ("[O]n a fundamental level, the consequence of this decision—providing agency heads with the sole power to appoint ALJs of their choosing—threatens the integrity of the ALJ office.").

72 *Freytag v. Comm'r*, 501 U.S. 868, 881 (1991) (quoting U.S. CONST. art. II, § 2, cl. 2).

73 *Id.* at 882.

74 The first requirement is that the office be "established by Law." *Id.* at 881 (quoting U.S. CONST. art. II, § 2, cl. 2). The second is that the "duties, salar[ies], and means of appointment for that office are specified by statute." *Id.*

75 *Id.* at 881–82.

76 *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 284 (D.C. Cir. 2016), *cert. granted*, 138 S. Ct. 736 (2018); *Tucker v. Comm'r*, 676 F.3d 1129, 1133 (D.C. Cir. 2012).

77 See *Raymond J. Lucia Cos.*, 832 F.3d at 284–85 (first citing *Tucker*, 676 F.3d at 1133; and then citing *Landry v. FDIC*, 204 F.3d 1125, 1133–34 (D.C. Cir. 2012)).

STJs were inferior officers.<sup>78</sup> *Tucker* further expounded on this determination by listing three factors to parse out the third criterion of the *Freytag* test: “(1) the significance of the matters resolved by the official[ ], (2) the discretion they exercise in reaching their decisions, and (3) the finality of those decisions.”<sup>79</sup> *Tucker* recognized that the STJs in *Freytag* did not always render final decisions, but also noted that the D.C. Circuit in *Landry* had found that ALJs were employees because they lacked authority to render final decisions.<sup>80</sup> The *Tucker* court further pointed out that the official at issue in *Tucker* had little discretion,<sup>81</sup> and was subject to many limitations, guidelines, and consultations.<sup>82</sup>

*Lucia*’s reliance on the SEC ALJs’ lack of final decision-making authority, however, departs significantly from *Freytag*. The *Lucia* court justified its reliance on final decision-making authority upon the fact that the *Freytag* STJs *could* exercise final decision-making authority under certain provisions of the statutes that empowered the chief judge of the Tax Court to appoint STJs.<sup>83</sup>

But the *Freytag* Court expressly rejected the argument that final decision-making authority was determinative in the inferior officer/employee question.<sup>84</sup> The D.C. Circuit misread the requirements that *Freytag* set forth to determine when an official is an inferior officer. The Court in *Freytag* decided that STJs were inferior officers *before* considering the statutory subsections that gave STJs final decision-making authority.<sup>85</sup> The granting of final decision-making authority to STJs under certain circumstances bolstered the Court’s reasoning, but did not determine its conclusion. The Court emphasized this, saying that “[e]ven *if* STJs did not possess significant duties when they did not possess final decision-making authority, the Court’s

78 *Landry*, 204 F.3d at 1134.

79 *Tucker*, 676 F.3d at 1133.

80 *See id.* at 1134 (“[W]e found the absence of any authority to render final decisions fatal to the claim that the administrative law judges at issue [in *Landry*] were Officers rather than employees.” (citing *Landry*, 204 F.3d at 1133–34)). The ALJs in *Landry* were from the FDIC, rather than the SEC. *Landry*, 204 F.3d at 1128.

81 The official in question in *Tucker* was a “settlement officer” who represented the IRS during a Collection Due Process Hearing. *Tucker*, 676 F.3d at 1131.

82 *See id.* at 1134–35.

83 *Freytag v. Comm’r*, 501 U.S. 868, 882 (1991) (“Under §§ 7443A(b)(1), (2), and (3), and (c), the Chief Judge may assign special trial judges to render the decisions of the Tax Court in declaratory judgment proceedings and limited-amount tax cases. The Commissioner concedes that in cases governed by [these subsections], [STJs] act as inferior officers who exercise independent authority.”).

84 *See id.* at 881 (“The Commissioner reasons that [STJs] may be deemed employees . . . because they lack authority to enter a final decision. But this argument ignores the significance of the duties and discretion that [STJs] possess.”).

85 *See id.* at 881–82; *see, e.g., Landry*, 204 F.3d at 1142 (Randolph, J., concurring in part and concurring in the judgment) (“It is true that the Supreme Court [in *Freytag*] relied on [final decision-making authority] . . . . What the [*Landry*] majority neglects to mention is that the [*Freytag*] Court clearly designated this as an alternative holding.”).

“conclusion would be unchanged.”<sup>86</sup> This suggests that if the statutory and regulatory subsections that granted STJs final decision-making authorities did not exist, the Court still would have found that STJs were inferior officers because they exercised significant authority and discretion. Thus, *Freitag* held that final decision-making authority cannot be a controlling factor in whether STJs are inferior officers—the Court instead looked to whether the STJs more generally exercised significant discretion in carrying out important functions.

In contrast, *Bandimere* properly applied the *Freitag* test by not giving final decision-making authority outsized weight in its determination.<sup>87</sup> The Tenth Circuit determined that *Freitag* required a determination of which functions and discretions were significant and important to merit a finding that SEC ALJs are inferior officers. The dissent critiqued the majority for listing out a number of the duties of SEC ALJs “without telling us which, if any, were more important to its decision than others and why.”<sup>88</sup> This accusation, however, is misleading.

The *Bandimere* court did present a lengthy table listing out the duties of SEC ALJs and the corresponding regulation or statute that gives the ALJs those duties.<sup>89</sup> The list of duties showed that “SEC ALJs perform comparable duties” to the STJs that were at issue in *Freitag*.<sup>90</sup> However, the court proceeded to identify those duties from the list that convinced the court that SEC ALJs are inferior officers.<sup>91</sup> Specifically, the Tenth Circuit highlighted four duties that the *Freitag* Court named in determining that STJs are inferior officers: “They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders.”<sup>92</sup> SEC ALJs perform each of these duties in their legal capacity.<sup>93</sup>

86 *Freitag*, 501 U.S. at 882 (emphasis added).

87 See *Bandimere v. SEC*, 844 F.3d 1168, 1176–82 (10th Cir. 2016).

88 *Id.* at 1199 (McKay, J., dissenting).

89 *Id.* at 1178 (majority opinion).

90 *Id.* at 1181 n.30.

91 See *id.* at 1179–81 (listing important duties and concluding that “[i]n sum, SEC ALJs closely resemble the STJs described in *Freitag*”).

92 See *id.* at 1181 n.30 (quoting *Freitag*, 501 U.S. at 881–82). The Fifth Circuit recently issued an order to stay a motion set forth by the FDIC Board because the court determined the petitioner had a strong likelihood that he would prevail on his claim that the FDIC ALJ holds his office in violation of the Appointments Clause. See *Burgess v. FDIC*, 871 F.3d 297, 299 (5th Cir. 2017). The Fifth Circuit identified the four factors *Freitag* used in categorizing the STJ as an inferior officer and recognized that “FDIC ALJs perform all of these functions.” *Id.* at 302.

93 For an SEC ALJ’s duties of taking testimony, see 5 U.S.C. § 556(b) (2012) (identifying that an ALJ must preside over an administrative hearing); § 556(c)(4) (noting that an ALJ is empowered to “take depositions”). For conducting trials, see § 556(b) (noting that the ALJ’s presiding takes place over “the taking of evidence”); 17 C.F.R. § 200.14(a) (2017) (noting that “the Office of Administrative Law Judges conducts hearings in proceedings instituted by the Commission” and then going on to list eight different duties that fall under this power to conduct trials). For ruling on the admissibility of evidence, see 5 U.S.C. § 556(c)(3) (giving the power to “rule on offers of proof and receive relevant evi-

Thus, *Bandimere* correctly synthesized the third criterion of *Freytag* to mean that an official exercises significant discretion in carrying out important functions when the official (1) takes testimony, (2) conducts trials, (3) makes rulings on evidence, and (4) is able to enforce discovery orders.<sup>94</sup> This is the proper test for analyzing the classification of SEC ALJs, as it represents the core of the *Freytag* determination without any additional or unnecessary requirements.

### B. Revisiting Freytag

All of the foregoing analysis assumes that the Supreme Court will address the SEC ALJ circuit split on the grounds that *Bandimere* and *Lucia* established. It is assumed that the Court will accept *Freytag* on its terms. Appointments Clause issues, however, do not often come before the Court, and even rarer are the cases that squarely confront the question of distinguishing inferior officers from employees.<sup>95</sup>

*Freytag* only dedicated six paragraphs to address the inferior officer/employee distinction.<sup>96</sup> As the *Lucia* and *Bandimere* opinions reveal, *Freytag* essentially is the only Supreme Court case on point for the courts to use in deciding these cases.<sup>97</sup> But the Supreme Court has shown that, particularly in Appointments Clause jurisprudence, it is not necessarily constrained by past precedent.

#### 1. The Supreme Court's Habit of Disregarding Appointments Clause Precedent

Consider *Morrison v. Olson*<sup>98</sup> and *Edmond v. United States*,<sup>99</sup> both cases in which the Supreme Court set out to determine whether an official was a principal or inferior officer.<sup>100</sup> *Morrison* set out a four-factor test to answer this question: (1) whether the official is inferior in terms of “rank and author-

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dence” to ALJs); 17 C.F.R. § 200.14(a)(3) (similarly giving the power to “[r]ule on offers of proof” specifically to SEC ALJs). For the power to enforce compliance with discovery orders, see 17 C.F.R. §§ 201.230, 201.233.

94 The Fifth Circuit likewise identified these four factors as the foundation of *Freytag*'s test to determine whether an official exercises significant discretion in carrying out important duties. See, e.g., *Burgess*, 871 F.3d at 302.

95 See *supra* note 30 and accompanying text.

96 *Freytag*, 501 U.S. at 880–82.

97 See *Bandimere v. SEC*, 844 F.3d 1168, 1174 (10th Cir. 2016) (“*Freytag* controls the result of this case.”); *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 284–85 (D.C. Cir. 2016), cert. granted, 138 S. Ct. 736 (2018) (noting that the D.C. Circuit's line of cases, *Landry* and *Tucker*, based their holdings off of *Freytag*).

98 487 U.S. 654 (1988).

99 520 U.S. 651 (1997).

100 Specifically, *Morrison* determined that an independent counsel was an inferior officer. *Morrison*, 487 U.S. at 671. *Edmond* held that a civilian judge on the Coast Guard Court of Criminal Appeals was an inferior officer. *Edmond*, 520 U.S. at 666.

ity,”<sup>101</sup> (2) the duties the officer is tasked with performing,<sup>102</sup> (3) the official’s jurisdiction,<sup>103</sup> and (4) the official’s tenure.<sup>104</sup> The Court believed that the independent counsel at issue “clearly” fell into the inferior officer category<sup>105</sup>—a notion that Justice Scalia, in a lone dissent, vigorously disputed.<sup>106</sup> Justice Scalia proposed an alternative test: whether the official in question is subordinate to any executive officer.<sup>107</sup> Justice Scalia based this test on the general dictionary definition of “inferiour” from the time of the Constitutional Convention, and argued that given that the Constitution creates the structure of the federal government, the use of “inferior” in Article III, Section 1 would have been understood to mean subordinate.<sup>108</sup>

Nine years later, the Court again addressed the principal/inferior distinction in *Edmond v. United States*. Justice Scalia, the lone dissent in *Morrison*, wrote for the Court in finding that a judge on the Coast Guard Court of Criminal Appeals was an inferior officer.<sup>109</sup> Although the Court acknowledged the four-factor test used in *Morrison*, the Court effectively pushed that test aside because *Morrison* “did not purport to set forth a definitive test” for the principal/inferior distinction.<sup>110</sup> Instead, the Court shifted toward the approach proposed by Justice Scalia in his *Morrison* dissent, holding that an officer is inferior when her work “is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”<sup>111</sup>

Though the Court did not explicitly say so, *Edmond* effectively threw the *Morrison* holding into serious question.<sup>112</sup> Although Appointments Clause

101 *Morrison*, 487 U.S. at 671 (“[T]he fact that [the independent counsel] can be removed by the Attorney General indicates that she is to some degree ‘inferior’ in rank and authority.”).

102 *See id.* (noting that the “independent counsel’s role is restricted primarily to investigation and, if appropriate, prosecution for certain federal crimes,” even though the counsel was also granted full function and power of the Justice Department).

103 *See id.* at 672 (“[A]n independent counsel can only act within the scope of the jurisdiction that has been granted by the Special Division pursuant to a request by the Attorney General.”).

104 *See id.* (“[A]n independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated . . . . [The independent counsel] has no ongoing responsibilities that extend beyond . . . the mission that she was appointed for and authorized by the Special Division to undertake.”).

105 *Id.* at 671.

106 *See id.* at 715–23 (Scalia, J., dissenting) (“[I]t is not clear from the Court’s opinion why the factors it discusses—even if applied correctly to the facts of this case—are determinative of the question of inferior officer status.”).

107 *See id.* at 719.

108 *See id.* at 719–20.

109 *See Edmond v. United States*, 520 U.S. 651, 666 (1997).

110 *Id.* at 661.

111 *Id.* at 663.

112 *See William K. Kelley, The Constitutional Dilemma of Litigation Under the Independent Counsel System*, 83 MINN. L. REV. 1197, 1258 (1999) (arguing that *Edmond*’s “analysis plainly was inconsistent” with *Morrison*).

cases are few in number, the Court notably cited *Edmond* and not *Morrison* in reciting the Court's jurisprudence on the principal/inferior determination in *Free Enterprise Fund*.<sup>113</sup>

## 2. *Freytag* Does Not Require a Reframing

The comparison between *Morrison* and *Edmond* shows that the Court has been willing to depart from, or even functionally ignore, past precedent in the Appointments Clause context. Since the caselaw is so sparse, the Court may not necessarily feel compelled to follow apparent precedent that is difficult to apply to the facts of a case. Indeed, reviewing past Supreme Court Appointments Clause cases reveals no clear interpretative through line.<sup>114</sup> Although the D.C. and Tenth Circuits purported to apply *Freytag*, the Supreme Court may determine that the *Freytag* requirements are not suitable to resolve the SEC ALJ question, and may then establish or develop a new or updated test. However, the Court should not do so, as *Freytag* currently provides a test that is sufficient to resolve the SEC ALJ issue.

The bulk of *Freytag* examines whether the Tax Court is the head of a department or a court for purposes of appointing an inferior officer, rather than the inferior officer/employee distinction.<sup>115</sup> One could argue that the *Freytag* test presents too limited a paradigm, and that the Court should start afresh in establishing a clearer test. It is entirely possible that the Court, confronted with the possibility that the status of thousands of ALJs may be thrown into chaos by a proper application of *Freytag*, would reshape the *Freytag* test in favor of a different interpretation, as the test may be difficult to apply to future instances of the inferior officer/employee distinction.<sup>116</sup>

*Edmond* appeared to wholly disregard the four-factor test set forth by *Morrison*, but a similar approach to *Freytag* is unnecessary. While the inferior officer/employee distinction may require adjustments or modifications in future disputes, *Freytag* sufficiently answers the SEC ALJ issue at hand. Even the parties in *Freytag* recognized that distinguishing inferior officers from employees requires an examination of the level of authority an official exer-

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113 See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 510 (2010).

114 See Susolik, *supra* note 55, at 1545.

115 See *Freytag v. Comm'r*, 501 U.S. 868, 880–82 (1991) (devoting only six paragraphs to determine that STJs are inferior officers).

116 In *Free Enterprise Fund*, Justice Breyer, in dissent, provided a list of officials who could be considered inferior officers. See *Free Enter. Fund*, 561 U.S. at 549–56 app. A (Breyer, J., dissenting). Although the list of officials was intended to show how far the Court's holding regarding certain "double for-cause" removal provisions could extend, the list includes many examples of officials who may be properly considered inferior officers, but who are not similar to SEC ALJs. *Id.* These officials are not necessarily judicial or quasi-judicial, and so the *Freytag* factors may be difficult to apply. Examples include the Chief Actuary of the Social Security Administration, the members of the Civilian Board of Contract Appeals, and the Inspector General of the Postal Service. *Id.*



cises while performing her duties.<sup>117</sup> The analysis has consistently focused on what constitutes “significant authority,” and there appears to be no indication that the *Freytag* framework, which is in part based on *Buckley v. Valeo*, should be seriously questioned.<sup>118</sup> If the Court were to try and rework the inferior officer/employee test, it would require distinguishing at least *Buckley* and *Freytag*, which have formed the admittedly small number of cases that have applied the “significant authority” test.

The Court should not consider refashioning a new standard out of *Freytag* when it decides the SEC ALJ Appointments Clause issue. Replacing the *Freytag* distinction would have enormous ramifications for litigation down the line and would require the Court to attempt to solve a problem that has not been directly presented to them.<sup>119</sup> It is clear that the four functions of *Freytag* STJs are similar to the SEC ALJs. The *Freytag* framework neatly fits the contours of the SEC ALJ problem, so the Court should have no issue applying precedent.<sup>120</sup> There will be future cases with different facts that may invite the Court to clarify the *Freytag* holding if it encounters a challenge to an official whose duties are not similar in kind to STJs and SEC ALJs. But *Bandimere* and *Lucia* are not the proper forums for doing so. Rather, when the Court decides *Lucia v. SEC* later this term, it should directly apply the *Freytag* test and find SEC ALJs to be inferior officers.

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117 See Brief for Petitioners at 27, *Freytag v. Comm’r*, 501 U.S. 868 (1991) (No. 90-762) (arguing that the Court’s “contemporary definition of an ‘officer’ for Appointments Clause purposes” is whether the official “‘exercis[es] significant authority pursuant to the laws of the United States’” (emphasis added) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam))); Brief for the Respondent at 28, *Freytag v. Comm’r*, 501 U.S. 868 (1991) (No. 90-762) (“[I]t is well settled that persons . . . whose authority is not significant under the laws of the United States, are ‘lesser functionaries subordinate to officers of the United States.’” (emphasis added) (quoting *Buckley*, 424 at 126 n.162)).

118 At oral argument in *Freytag*, Justice O’Connor asked counsel for the petitioner whether the Court has “really gone into any depth in defining who is an inferior officer and who is an employee.” Transcript of Oral Argument at 18, *Freytag v. Comm’r*, 501 U.S. 868 (1991) (No. 90-762). Counsel responded that the “test [from *Buckley*] for an officer is whether he exercises significant authority pursuant to the law.” *Id.* at 19. This assertion went unchallenged by the Court. The government, represented by the current Chief Justice, John Roberts, did not directly address this question during its allotted time. See *id.* at 28–55.

119 The Court granted certiorari on the precise question of “[w]hether administrative law judges of the Securities and Exchange Commission are Officers of the United States within the meaning of the Appointments Clause.” Petition for a Writ of Certiorari at i, *Raymond J. Lucia Cos. v. SEC*, 138 S. Ct. 736 (2018) (No. 17-130).

120 One could argue that the *Edmond* Court’s quasi rejection of the *Morrison* framework may have occurred in part because the official in *Edmond*, a military judge on the Coast Guard Court of Criminal Appeals, did not have duties or discretion analogous to those of the official at issue in *Morrison*, an independent counsel. See *Edmond v. United States*, 520 U.S. 651, 661 (1997) (noting that the military judge did not meet two of the four *Morrison* factors, suggesting that the adoption of the test in *Edmond* occurred in part because the *Morrison* test did not properly address the relevant Appointments Clause issues).

*C. Consideration of the Normative Implications of Adopting  
the Rationale of Bandimere*

The SEC ALJ issue, just like every other legal issue that comes before courts, does not exist in a vacuum. Should the Supreme Court find SEC ALJs to be inferior officers, there will be consequences that echo beyond the precise status determination of SEC ALJs. Since this Note argues that SEC ALJs are inferior officers, this Section is intended to more closely examine some of the consequences such a finding would have. The potential ramifications of recognizing SEC ALJs as inferior officers are important to consider. The constitutional requirements of the Appointments Clause, however, outweigh the direst of warnings that finding SEC ALJs to be inferior officers will wreak havoc on the administrative system.

1. Can (and Should) the *Bandimere* Holding Apply to Other Agencies' ALJs?

*Bandimere* and *Lucia* did not claim to make any determination outside the context of SEC ALJs, as neither court claimed to make a judgment as to other agencies' ALJs.<sup>121</sup> Writing for the court in *Bandimere*, Judge Matheson sidestepped this issue because the court was only asked to address the precise issue of the status of SEC ALJs.<sup>122</sup> Judge Briscoe's concurrence briefly addressed the concerns of Judge McKay's dissent, reiterating that because courts only decide issues on a case-by-case basis, the *Bandimere* decision does not affect any ALJ besides SEC ALJs.<sup>123</sup> Although Judge Briscoe correctly noted that not all ALJs necessarily have the same ability to exercise authority as SEC ALJs,<sup>124</sup> the next logical step is to consider how this decision could affect other ALJs. The *Bandimere* dissents<sup>125</sup> make clear that the questionable constitutionality of other agencies' ALJs is the elephant in the room.<sup>126</sup> The

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121 As previously noted, the potential implications for other ALJs did play a large role in the *Bandimere* dissent. See *Bandimere v. SEC*, 844 F.3d 1168, 1199–200 (10th Cir. 2016) (McKay, J., dissenting) (“Are all federal ALJs constitutional officers? . . . [Social Security Administration] ALJs have largely the same duties as SEC ALJs . . . . I cannot discern a meaningful difference between SEC ALJs and SSA ALJs under the majority’s reading of *Freytag*.”).

122 *Id.* at 1188 (majority opinion) (“[N]o other issues have been presented to us here, and we therefore cannot address them. Nothing in this opinion should be read to answer any but the precise question before this court: whether SEC ALJs are employees or inferior officers. Questions about . . . officer status of other agencies’ ALJs . . . and retroactivity are not issues on appeal and have not been briefed by the parties. . . . [W]e must leave for another day any other putative consequences of that conclusion.” (citations omitted)).

123 See *id.* at 1188–89 (Briscoe, J., concurring).

124 *Id.* at 1189 (“Some ALJs within particular agencies may exercise so little authority and also be subject to such complete oversight . . . that they are not Officers.”).

125 In reference to both Judge McKay’s dissent in the original *Bandimere* decision and Judge Lucero’s dissent from the Tenth Circuit’s denial to rehear *Bandimere* en banc.

126 See, e.g., *Bandimere v. SEC*, 855 F.3d 1128, 1132 (10th Cir. 2017) (Lucero, J., dissenting from denial of rehearing en banc) (“By pulling on the Appointments Clause thread, the majority opinion threatens to unravel much of our modern [day] regulatory

*Bandimere* dissents were correct that the *Bandimere* holding would encourage others to challenge the constitutionality of other ALJs,<sup>127</sup> as litigants have already begun to apply the *Bandimere* rationale to other ALJs, with some signs of success.<sup>128</sup>

Though *Bandimere* properly declined to apply its holding to other agencies' ALJs, it is appropriate to more closely examine how the four *Freytag* factors would apply to other ALJs. At the very least, other agencies ought to take notice that their ALJs may not have been appointed in compliance with the Appointments Clause. Agencies of course could preemptively solve this issue by formally ratifying the appointment of their ALJs.<sup>129</sup> Before the Supreme Court granted cert in *Lucia*, the SEC followed this procedure in order to avoid a complete invalidation of the adjudications by their ALJs.<sup>130</sup> If agencies do nothing, however, their ALJs may soon come into litigants' crosshairs.

*Bandimere* provided four factors it had gleaned from the third prong of the *Freytag* test in determining whether an official exercised significant discretion in carrying out important functions.<sup>131</sup> The factors are whether an official takes testimony, conducts trials, rules on the admissibility of evidence, and has the ability to enforce compliance orders of discovery.<sup>132</sup>

As a starting point, the dissent in *Bandimere* noted that Social Security Administration (SSA) ALJs bear a striking resemblance to SEC ALJs.<sup>133</sup> The dissent's intent in comparing SSA ALJs to SEC ALJs was to show "that SEC

framework."); *Bandimere*, 844 F.3d at 1199 (McKay, J., dissenting) ("[A]ll federal ALJs are at risk of being declared inferior officers.").

127 *Bandimere*, 855 F.3d at 1131 (Lucero, J., dissenting from denial of rehearing en banc) ("It is only a matter of time before we see broader challenges to the validity of agency action.").

128 *See, e.g.*, *Burgess v. FDIC*, 871 F.3d 297 (5th Cir. 2017).

129 *See, e.g.*, *Jellum & Tincher*, *supra* note 33, at 34 (suggesting that the SEC could take the simple step by having the Commissioners, acting collectively as the head of a department, appoint the current SEC ALJs, thereby avoiding any Appointments Clause problem).

130 SEC. & EXCH. COMM'N, IN RE: PENDING ADMINISTRATIVE PROCEEDINGS (Nov. 30, 2017), <https://www.sec.gov/litigation/opinions/2017/33-10440.pdf> (announcing that the SEC "in its capacity as head of a department" ratifies the SEC's hiring of its current ALJs). The SEC may have taken this action in order to render the SEC ALJ issue moot, but the Supreme Court still granted certiorari on the question despite the SEC's order. *See* John Elwood, *Relist Watch*, SCOTUSBLOG (Jan. 10, 2018), <http://www.scotusblog.com/2018/01/relist-watch-115/> (noting that the SEC had attempted to "depriv[e] the [*Lucia*] case[ ] of continuing importance"). The government, which actually argued *in support* of *Lucia* in front of the Supreme Court, asserted that the Commission's certification of its ALJs solved the Appointments Clause issue. Transcript of Oral Argument at 33, *Lucia v. SEC*, No. 17-130 (Apr. 23, 2018).

131 *See supra* notes 89–94 and accompanying text. *But see* Transcript of Oral Argument at 11, *Lucia v. SEC*, No. 17-130 (Apr. 23, 2018) (identifying differences between SEC ALJs and SSA ALJs).

132 *See id.*

133 *See Bandimere v. SEC*, 844 F.3d 1168, 1199–1200 (10th Cir. 2016) (McKay, J., dissenting).

ALJs are not unique”<sup>134</sup> and that the holding of *Bandimere* would render “all federal ALJs . . . at risk of being declared inferior officers.”<sup>135</sup> In issuing dire warnings, the dissent extrapolated the holding of the Tenth Circuit in a way that Judges Matheson and Briscoe refused to do.<sup>136</sup> Reading through the doom and gloom predictions, the dissent’s comparison of SSA and SEC ALJs provides a framework from which the question of other agencies’ ALJs’ status can be squarely confronted.

Though this Note is not meant to be an exhaustive examination of each of the thirty-one agencies’ ALJs,<sup>137</sup> a brief survey of other agencies’ ALJs indicates that ALJs throughout the administrative state share many of the duties and discretionary authority that *Freitag* and *Bandimere* suggest are indicative of inferior officer status.<sup>138</sup> SSA ALJs are able to take testimony,<sup>139</sup> hold trials,<sup>140</sup> rule on evidence,<sup>141</sup> and enforce discovery orders,<sup>142</sup> just like SEC

134 *Id.* at 1200.

135 *Id.* at 1199.

136 *See id.* at 1188 (“Nothing in this opinion should be read to answer any but the precise question before this court . . . .”); *id.* at 1189 (Briscoe, J., concurring) (“[C]ourts engage in a case-by-case analysis.”).

137 *See* OPM Table of ALJs, *supra* note 13 (listing the thirty-one agencies that may employ ALJs).

138 For example, ALJs of the Federal Energy Regulatory Commission may take testimony, conduct trials, rule on evidence, and may enforce discovery orders. *See* 18 C.F.R. §§ 385.504(a)(1), 385.504(b)(1)–(3) (2018) (powers to hold trials); §§ 385.504(a)(2), 385.504(a)(4) (power to take testimony); § 385.504(b)(4) (granting ALJs the power to “[r]ule on and receive evidence”); § 385.504(b)(5) (ensure discovery is conducted); § 385.504(b)(18). Another example is the ALJ position for the Department of Housing and Urban Development. *See* 24 C.F.R. § 26.32 (2018) (“The ALJ shall conduct a fair and impartial hearing.”); § 26.32(g) (regulate discovery); § 26.32(i) (take testimony); § 26.32(j) (rule on and limit the taking of evidence). Even the lone ALJ for the United States Postal Service meets the four *Freitag* characteristics. *See* 39 C.F.R. § 952.17(a) (2018) (conduct a hearing); § 952.17(b)(2) (take testimony); § 952.17(b)(3) (rule on evidence); §§ 952.17(b)(12), 952.21 (regulate discovery).

139 *See* 20 C.F.R. § 498.204(b)(4) (2018) (giving SSA ALJs the power to “[a]dminister oaths and affirmations”); § 498.204(b)(8) (“[r]egulat[ing] the course of the hearing and the conduct of representatives, parties, and witnesses”); § 498.204(b)(9) (“[e]xamine witnesses”).

140 *See id.* § 404.929 (recognizing that an administrative law judge will “conduct the hearing” and that the ALJ “will issue a decision based on the preponderance of the evidence”); *see also id.* § 404.930.

141 *See id.* § 498.204(b)(10); *see also id.* §§ 404.935, 404.950.

142 *See id.* § 498.204(b)(5) (giving the ALJ the power to “[i]ssue subpoenas requiring the attendance of witnesses at hearings and the production of documents”); § 498.204(b)(7) (granting the ALJ the power to “[r]egulate the scope and timing of documentary discovery”).

ALJs.<sup>143</sup> The Fifth Circuit has indicated that FDIC ALJs may be similarly situated as well.<sup>144</sup>

*Bandimere* cautioned that a determination of whether an agency's ALJs are inferior officers or employees must be found through separate litigation.<sup>145</sup> Not all ALJs necessarily meet the four *Freitag* characteristics,<sup>146</sup> and this Note should not be read to suggest that *Bandimere* demands that *all* ALJs will inevitably be found to be inferior officers. *Bandimere* made clear that a "case-by-case analysis" approach is necessary—this subsection is meant to show that, while the duties and discretion of other agencies' ALJs are by no means identical to SEC ALJs, they are similar enough to warrant serious attention. The SEC may be the first agency whose ALJs are found to be inferior officers, but it is likely that, barring a Supreme Court holding to the contrary, they will not be the last.

Judge McKay argued in dissent that the court in *Bandimere* had done nothing but create unnecessary constitutional "mischief."<sup>147</sup> To him, the *Bandimere* decision "risk[ed] throwing much into disarray."<sup>148</sup>

There is nothing mischievous about the court's holding, however, even if it does risk upsetting the status quo. Rather, the determination that SEC ALJs are unconstitutionally appointed must be upheld, in spite of possible inconvenience or disruption.<sup>149</sup> Contrary to Judge McKay's worries, the Supreme Court has held that convenience or settled practice cannot outweigh the importance of following what the Constitution demands.<sup>150</sup> If

143 *Bandimere v. SEC*, 844 F.3d 1168, 1200 (10th Cir. 2016) (McKay, J., dissenting) ("[The duties of SSA ALJs] should all sound familiar. SSA ALJs have largely the same duties as SEC ALJs.").

144 See *Burgess v. FDIC*, 871 F.3d 297, 302 (5th Cir. 2017) (recognizing that "FDIC ALJs perform all of the[ ] functions" of the *Freitag* STJs). FDIC ALJs are also empowered to take and rule on evidence. See, e.g., 12 C.F.R. § 308.5(b)(3) (2018); § 308.5(b)(1) (take testimony); §§ 308.5(a), 308.5(b)(5) (conduct trials); §§ 308.25(h), 308.5(b)(4) (compel discovery).

145 See, e.g., *Bandimere*, 844 F.3d at 1188–89 (Briscoe, J., concurring) (arguing that courts must engage in a case-by-case analysis to determine whether an ALJ is an inferior officer or an employee).

146 For example, ALJs of the National Labor Relations Board (NLRB) do not appear to have the power to compel discovery. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 237 (1978) (finding that § 6 of the National Labor Relations Act (codified at 29 U.S.C. § 160 (2012)) is interpreted to give the National Labor Relations Board, as opposed to the NLRB ALJs, the discretion to form its own discovery practice); 29 C.F.R. § 102.35 (2018); see also Bruce A. Miller & Ada A. Verloren, *Discovery at the NLRB—Why Not?*, 51 WAYNE L. REV. 107 (2005).

147 *Bandimere*, 844 F.3d at 1201 (McKay, J., dissenting). Similar to Judge McKay, Judge Lucero wrote that the *Bandimere* decision "threaten[ed] to unravel much of our modern regulatory framework." *Bandimere v. SEC*, 855 F.3d 1128, 1132 (10th Cir. 2017) (Lucero, J., dissenting from denial of rehearing en banc).

148 *Bandimere*, 844 F.3d at 1201 (McKay, J., dissenting).

149 Clearly if other agencies' ALJs are also found to be inferior officers by the courts, this sentiment likewise applies to those ALJs.

150 See *INS v. Chadha*, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government . . . will not

other ALJs are determined under *Freitag* to be inferior officers, then the proper course of action would be for the relevant agency to have their heads of department appoint their respective ALJs in accordance with the requirements of the Appointments Clause.<sup>151</sup>

## 2. Squaring the *Free Enterprise Fund* Double For-Cause Removal Problem with *Bandimere*

In 2010, the Supreme Court held that the Public Company Accounting Oversight Board (PCAOB), a federal entity created by the Sarbanes-Oxley Act and placed under SEC oversight,<sup>152</sup> violated separation of powers principles because the Board members were insulated by a dual layer of removal protection.<sup>153</sup> The Board members were considered inferior officers<sup>154</sup> and could only be removed from their position by SEC Commissioners on a showing of “good cause.”<sup>155</sup> The SEC Commissioners could likewise only be removed from their positions by the President for good cause.<sup>156</sup> The Court found that this double layer of good-cause removal insulated the Board members from presidential control, and therefore was unconstitutional.<sup>157</sup>

A finding that SEC ALJs are inferior officers would appear to conflict with the holding of *Free Enterprise Fund*. SEC ALJs enjoy life tenure, can only be removed for good cause,<sup>158</sup> and are placed under the oversight of the Merit Systems Protection Board,<sup>159</sup> whose members are likewise only removable for good cause.<sup>160</sup> Thus, if SEC ALJs are inferior officers, they would be in a similar, if not identical situation, as PCAOB Board members in *Free Enterprise Fund*, subject to a dual layer of good-cause removal protection.

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save it if it is contrary to the Constitution.”). The Court in *Chadha* rendered almost 200 legislative veto provisions unconstitutional. *Id.* at 977 (White, J., dissenting). Such a shock to the status quo was necessary because the “principle of separation of powers was not simply an abstract generalization in the minds of the Framers.” *Id.* at 946 (majority opinion) (quoting *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) (per curiam)).

151 See Jellum & Tincher, *supra* note 33, at 34.

152 See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484–86 (2010).

153 *Id.* at 484.

154 See *id.* at 488. The status of the Board members as inferior officers was not an issue presented to the Court for consideration.

155 See *id.* at 486 (quoting 15 U.S.C. § 7211(e)(6) (2006)).

156 See *id.* at 487 (“The parties agree that the Commissioners cannot themselves be removed by the President except . . . [for] ‘inefficiency, neglect of duty, or malfeasance in office.’” (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 620 (1935))).

157 *Id.* at 514.

158 See 5 U.S.C. § 7521(a) (2012) (“An action may be taken against an administrative law judge . . . only for good cause . . . .”); 5 C.F.R. § 930.204(a) (2018) (“An administrative law judge receives a career appointment . . . .”).

159 See 5 U.S.C. § 7521(a) (2012); see also *Bandimere v. SEC*, 844 F.3d 1168, 1200 (10th Cir. 2016) (McKay, J., dissenting).

160 See 5 U.S.C. § 1202(d) (2012).

The Court in *Free Enterprise Fund* attempted to distinguish ALJs from the PCAOB members by limiting the application of the Court's holding only to the Board. In one section, the Court argued that none of the positions that the dissent in *Free Enterprise Fund* identified as threatened by the Court's holding were "similarly situated to the Board."<sup>161</sup> Yet, the Court still seemed to recognize that the *Free Enterprise Fund* holding *could* be read to apply more broadly, and tried to head off such assumptions,<sup>162</sup> specifically bracketing off the question of how *Free Enterprise Fund* would apply to ALJs:

[O]ur holding also does not address that subset of independent agency employees who serve as administrative law judges. Whether administrative law judges are necessarily "Officers of the United States" is disputed. And unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, or possess purely recommendatory powers. The Government . . . refused to identify either "civil service tenure-protected employees in independent agencies" or administrative law judges as "precedent for the PCAOB."<sup>163</sup>

*Free Enterprise Fund* was decided before the question of the status of ALJs had come before the circuit courts. The Court only cited *Landry* as the source of the dispute, as the litigation in *Lucia* and *Bandimere* had not yet occurred. The Court referred to ALJs as "employees" in footnote ten because there had been little to no caselaw even bringing up the issue in the first place. The Court is not in the business of making broad, sweeping proclamations about categorizing officials when those specific positions are not before the Court.<sup>164</sup> Since, at that time, the general understanding was that ALJs were employees,<sup>165</sup> it would have been extremely unusual for the Court to identify them as inferior officers. Indeed, *Bandimere* challenged the generally accepted understanding that SEC ALJs are employees. Footnote ten of *Free Enterprise Fund* merely restates that understanding, rather than attempting to settle the issue prematurely. If the Court intended to quash the issue before it fully developed, there would have been no need to even recognize the burgeoning dispute in the first place.

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161 *Free Enter. Fund*, 561 U.S. at 506. ALJs were one of the positions identified by the dissent that could be affected by the Court's holding. *See id.* at 542-43 (Breyer, J., dissenting).

162 *Id.* at 507 (majority opinion) ("Nothing in our opinion . . . should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies.").

163 *Id.* at 507 n.10 (citations omitted) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 699 n.8 (D.C. Cir. 2008)).

164 *Id.* at 507-08 ("There is no reason for us to address whether . . . any [position] not at issue in this case [is] so structured as to infringe the President's constitutional authority."). This mirrors the insistence of the Tenth Circuit only to decide the issue of inferior officer status as applied to SEC ALJs.

165 *Cf.* Kevin M. Stack, *Agency Independence After PCAOB*, 32 *CARDOZO L. REV.* 2391, 2408 (2011) (asserting that "[m]any ALJs are inferior officers" before the *Lucia* and *Bandimere* litigation had occurred).

In dissent, Justice Breyer brought up the ALJ issue and directly questioned how the majority's holding would impact the status of ALJs.<sup>166</sup> Justice Breyer noted that the Court's holding would ostensibly apply to ALJs throughout the administrative state. ALJs are removable for good cause by the members of the Merit System Protection Board, and the members of this Board are themselves only removable for cause.<sup>167</sup> Therefore, if ALJs are indeed inferior officers,<sup>168</sup> they would appear to run afoul of the Court's *Free Enterprise Fund* holding. Following *Free Enterprise Fund* to its "logical conclusion" would mean that the "only available remedy to certain double for-cause problems is to invalidate entire agencies,"<sup>169</sup> a result which only the most zealous anti-administrative activists would welcome.<sup>170</sup>

Footnote ten of the Court's opinion therefore becomes of primary importance, as the Court has explicitly reserved the right to carve out a distinction in its holding for ALJs. The issue, as Justice Breyer pointed out, is that creating an exception from the double for-cause removal restriction for ALJs would be completely arbitrary.<sup>171</sup> Professor Kevin Stack has argued that the *Free Enterprise Fund* decision, rather than reserving the ALJ question for a later case, actually affirmatively answered the question, establishing that so long as an inferior officer "perform[s] only adjudicative functions," the case "preserves [the officer's] removal protections."<sup>172</sup> To Professor Stack, ALJs clearly fall into this adjudicative category,<sup>173</sup> and, if the Court adopted this distinction, it would assuage the concerns of Justice Breyer and Judge McKay

166 See *Free Enter. Fund*, 561 U.S. at 543 (Breyer, J., dissenting) ("Does every losing party before an ALJ now have grounds to appeal on the basis that the decision entered against him is unconstitutional?").

167 See *id.* at 542.

168 It is also of note that Justice Breyer argued that ALJs are inferior officers. See *id.* ("[A]dministrative law judges . . . 'are all executive officers.'" (emphasis omitted) (quoting *Freytag v. Comm'r*, 501 U.S. 868, 910 (1991) (Scalia, J., concurring in part and concurring in the judgment))).

169 *Id.* at 545 (Breyer, J., dissenting). See also Transcript of Oral Argument at 16, *Lucia v. SEC*, No. 17-130 (Apr. 23, 2018) (Justice Breyer noting that his squaring of *Free Enterprise Fund* with the government's test for determining who is an inferior officer means "good-bye to the merit civil service at the higher levels and good-bye to independence of ALJs").

170 See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1249-54 (1994). Even Lawson, who argues that the entire "post-New Deal administrative state is unconstitutional," *id.* at 1231, does not suggest throwing out the system as it presently exists.

171 See *Free Enter. Fund*, 561 U.S. at 545 (Breyer, J., dissenting); see also Stack, *supra* note 165, at 2410 (identifying that the critical question for ALJs is "what, in addition to the dual removal provisions, explains the invalidity of the Board's removal protection [in *Free Enterprise Fund*] yet maintains the constitutionality of protections for ALJs").

172 Stack, *supra* note 165, at 2413. Professor Kent Barnett has suggested another fix for the problem Justice Breyer discusses in *Free Enterprise Fund*, looking not simply to "count[ ] the tiers" of removal, but at the "nature of the tenure-protection provision[s]." Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1372 (2012).

173 See Stack, *supra* note 165, at 2411 (noting that the ALJs that the Court referred to in footnote ten "have only adjudicative functions").



by distinguishing ALJs from the PCAOB members at issue in *Free Enterprise Fund*.<sup>174</sup> Such an understanding of the Court's opinion in *Free Enterprise Fund* would represent an "interesting and important" change in removal power jurisprudence,<sup>175</sup> but if the Court seeks to preserve the employee status of ALJs, who serve as an integral aspect of the administrative state, it may be a necessary shift.

Although the removal question clearly is relevant to the SEC ALJ issue, the Court should not address the issue if it takes up the circuit split between *Bandimere* and *Lucia*.<sup>176</sup> While footnote ten of *Free Enterprise Fund* provides an opportunity for an out to the Court, the Court should only address the issue before it. This subsection has shown, however, that invoking footnote ten would create an entirely new problem for the Court—that is, explaining why officers whose duties are purely adjudicative would not be controlled by the *Free Enterprise Fund* holding. Just as the application of *Bandimere* to other agencies' ALJs ought to wait until litigation directly addresses those ALJs, so too should the double for-cause removal issue wait until it can be squarely addressed.

#### CONCLUSION

The Supreme Court will decide whether SEC ALJs are inferior officers or employees this term.<sup>177</sup> The caselaw on point clearly resolves the issue. The D.C. Circuit incorrectly read into *Freytag* a requirement that inferior officers must be able to issue final decisions. In comparison, *Bandimere* appropriately resolved the question in finding SEC ALJs to be inferior officers. Though this may result in a slew of litigation challenging the constitutionality of other agencies' ALJs and to the application of the *Free Enterprise Fund* holding to SEC ALJs, these future concerns should not factor into the Court's decision.<sup>178</sup>

Although it is entirely possible that various other agencies' ALJs fall into the inferior officer category, agencies who fear such a result for their respective ALJs have a solution that would resolve any concerns.<sup>179</sup> If they fail to

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174 See *Free Enter. Fund*, 561 U.S. at 543 (Breyer, J., dissenting); *Bandimere v. SEC*, 844 F.3d 1168, 1200 (10th Cir. 2016) (McKay, J., dissenting) ("When understood in conjunction with *Free Enterprise Fund*, I worry today's opinion will be used to strip ALJs of their dual layer for-cause protection.").

175 Stack, *supra* note 165, at 2412.

176 See Petition for Writ of Certiorari at 34, *Lucia v. SEC*, 138 S. Ct. 736 (2018) (No. 17-130) (noting that the issue is "tightly focused" and that the "the constitutionality of ALJ removal procedures" was never raised in neither *Lucia* nor *Bandimere*).

177 *Lucia*, 138 S. Ct. at 736.

178 See *INS v. Chadha*, 462 U.S. 919, 959 (1983) ("With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.").

179 See Jellum & Tincher, *supra* note 33, at 34 (arguing that the SEC can and should preemptively appoint ALJs in comportment with the Appointments Clause); see also Transcript of Oral Argument at 33, *Lucia v. SEC*, No. 17-130 (Apr. 23, 2018). Here, the federal

act preemptively, however, these agencies risk having their ALJs found to be unconstitutional. This is a problem for the agencies to resolve individually, not the Court. Although this does not mean that the Court should become willfully blind to the world, neither should the Court be deterred from applying a formal Appointments Clause analysis because of the potential functional ramifications. The Court should refrain from adopting the rationale of the D.C. Circuit in *Lucia*, which appeared, in some part, to go to great lengths to avoid destabilizing the world that ALJs inhabit. *Freytag* requires that the Supreme Court find SEC ALJs to be inferior officers.

Although the Appointments Clause is not often invoked, it is not impotent. The Supreme Court has shown time and again that it takes structural constitutional challenges seriously. When it does so, the Court rarely, if ever, takes into serious consideration the functional consequences of such a determination.<sup>180</sup> There is no reason for the Court to deviate from this practice—the Appointments Clause demands a specific framework within which officers of the United States must comport. Though consequences do exist, the Court should not preemptively address these potential ramifications when they have not been fully litigated.

There is no doubt that ALJs serve a valued and necessary purpose within our governmental system. This important role does not excuse a violation of the Constitution, however. There is no “mischief” in these constitutional challenges.<sup>181</sup> The Constitution demands an ordered system of government, not that the system be convenient. Even if the solution is a tough pill to swallow, the remedy remains clear—SEC ALJs must either be appointed by the head of a department, the President, or a court of law. Until then, they continue to violate the Appointments Clause.

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government argued that the SEC’s ratification of its current ALJs resolved the Appointments Clause issue.

180 See *Chadha*, 462 U.S. at 959–60 (Powell, J., concurring in the judgment) (observing that the Court’s holding “invalidate[d] every use of the legislative veto”); see also Beermann, *supra* note 28, at 484.

181 *Bandimere v. SEC*, 844 F.3d 1168, 1201 (10th Cir. 2016) (McKay, J., dissenting).

