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Lucia v. SEC: The Ambiguity of the Appointments Clause Continues, Sending Tremors Coursing Throughout the Administrative State

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In *Lucia v. SEC*,¹ the Supreme Court considered whether the Appointments Clause² applies to the administrative law judges (“ALJs”) of the Securities and Exchange Commission (“SEC” or “Commission”). Reversing the decision below, the Court concluded that the ALJs are inferior officers subject to the Appointments Clause.³ Properly understanding the Court’s precedent in *Freytag*,⁴ the Court correctly applied it to the SEC ALJs.⁵ However, the Court’s narrow holding failed to clarify the meaning of inferior officers under the Appointments Clause, leaving a trail of uncertainty in its wake.⁶

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¹ 138 S. Ct. 2044 (2018).

² U.S. CONST. art. II, § 2, cl. 2.

³ *Lucia v. SEC*, 138 S. Ct. 2044, 2050 (2018).

⁴ *Freytag v. Comm’r*, 501 U.S. 868 (1991).

⁵ See *infra* Part IV.A.

⁶ See *infra* Part IV.B.

I. THE CASE

Alleging that Raymond Lucia fraudulently misled potential clients, the SEC brought an administrative enforcement action against Lucia in front of SEC administrative law judge Cameron Elliot.⁷ Finding Lucia liable, the ALJ's initial decision⁸ imposed a civil penalty, lifetime bar from the industry, and other sanctions.⁹ Appealing to the SEC, Lucia contended¹⁰ that ALJs are officers of the United States who must be appointed in accordance with the Appointments Clause.¹¹ Because Judge Elliot had been appointed by SEC staff members, who undisputedly were not constitutionally authorized to do so,¹² Lucia argued that Judge Elliot's judgment should be vacated.¹³

Citing *Landry*,¹⁴ the SEC reasoned that the ALJs' lack of significant independent decision-making authority necessarily made the ALJs employees and not inferior officers.¹⁵ Relying on the lack of final decision-making authority, the *Landry* Court held that the ALJs of the

⁷ Raymond J. Lucia Cos. v. SEC, 832 F.3d 277, 282 (D.C. Cir. 2016) *reh'g en banc denied*, 868 F.3d 1021 (D.C. Cir. 2017) (per curiam). The SEC alleged that Lucia had misled potential clients with slideshow presentations about Lucia's wealth management strategy. *Id.*

⁸ The Commission remanded the initial decision for further fact-finding as to other charges, but the ALJ returned a revised initial decision with identical sanctions. *Id.*

⁹ *Id.* at 283.

¹⁰ The SEC also rejected Lucia's argument on the merits. *Id.*

¹¹ *Id.*

¹² The Commission itself counts as "Heads of Department." Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 511–13 (2010) (quoting U.S. CONST. art. II, § 2, cl. 2.). The SEC, however, had left the task of appointing ALJs to SEC staff members who do not share the same constitutional status as the Commissioners. Lucia v. SEC, 138 S. Ct. 2044, 2050 (2018).

¹³ *Lucia*, 832 F.3d at 283.

¹⁴ *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000).

¹⁵ *Lucia*, 832 F.3d at 283.

Federal Deposit Insurance Corporation (“FDIC”) were employees and not inferior officers.¹⁶ Extrapolating *Landry* to other agencies’ ALJs, the SEC rejected Lucia’s argument.¹⁷

Lucia appealed the SEC’s decision in federal court.¹⁸ Denying Lucia’s petition for review, the United States Court of Appeals for the District of Columbia Circuit agreed that the ALJs are not officers governed by the Appointments Clause.¹⁹ Lucia’s petition for an en banc rehearing was subsequently denied in a per curiam order by a divided court.²⁰ Thereafter, the Supreme Court granted certiorari²¹ to decide whether the SEC ALJs are “inferior officers of the United States”²² or simply employees of the federal government.²³

II. LEGAL BACKGROUND

Stipulating the constitutional framework for appointing “officers of the United States,”²⁴ the Appointments Clause²⁵ dictates that only the President, with the advice and consent of the Senate, may appoint principal officers, while Congress may grant the power to appoint “inferior officers”²⁶ to the President alone, Courts of Law, or Heads of Departments.²⁷

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 280.

¹⁹ *Id.* at 285.

²⁰ *Raymond J. Lucia Cos. v. SEC*, 868 F.3d 1021 (D.C. Cir. 2017).

²¹ *Lucia v. SEC*, 138 S. Ct. 736 (2018).

²² U.S. CONST. art. II, § 2, cl. 2.

²³ *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018).

²⁴ U.S. CONST. art. II, § 2, cl. 2.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* While not the focus of this Note, the Supreme Court has distinguished between principle and inferior officers. *See, e.g.*, *Edmond v. United States*, 520 U.S. 651, 662–63 (1997) (holding that an inferior officer is an officer whose work is directed and supervised at some level by a principal

Subordinate officials and employees, however, can be appointed without comporting to the rigorous guidelines of the Appointments Clause.²⁸ In distinguishing between an inferior officer and an employee, the Supreme Court has generally held that an officer who occupies a “continuing position established by law”²⁹ and exercises “significant authority pursuant to the laws of the United States”³⁰ is considered an inferior officer.³¹

Revolving around whether certain government positions were intended by Congress to have the status of an office, early Supreme Court Appointments Clause decisions did not establish what is actually required for an official to be deemed an inferior officer.³² Not until *Freytag*³³ did the Supreme Court directly address the difference between an inferior officer and an employee.³⁴ *Freytag* involved a challenge to the constitutionality of the appointment of the special trial judges (“STJs”) of the United States Tax Court.³⁵ Applying the “significant authority”³⁶ test, the Court held that the STJs were considered inferior officers.³⁷ The Court primarily relied on the fact that the office of the STJs is

officer); *see also* *Morrison v. Olson*, 487 U.S. 654, 671 (1988) (listing four factors to determine if an officer is a principal or inferior officer).

²⁸ *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976) (per curiam); *accord* *Freytag v. Comm’r*, 501 U.S. 868, 880 (1991) (“[Employees] need not be selected in compliance with the strict requirements of Article II.”).

²⁹ *United States v. Germaine*, 99 U.S. 508, 511 (1879).

³⁰ *Buckley*, 424 U.S. at 126.

³¹ *Id.*

³² *See, e.g., Germaine*, 99 U.S. at 512 (holding that a civil surgeon could not be prosecuted under a criminal statute applicable to “officers of the United States guilty of extortion”) (internal citations omitted); *cf.* *United States v. Hartwell*, 73 U.S. 385, 391–92 (1867) (discussed in *Germaine*, 99 U.S. at 511).

³³ *Freytag v. Comm’r*, 501 U.S. 868 (1991).

³⁴ *Id.* at 870–71.

³⁵ *Id.*

³⁶ *Buckley*, 424 U.S. at 126.

³⁷ *Freytag*, 501 U.S. at 881.

“established by law,” the “duties, salary, and means of appointment for that office are specified by statute,” and that the STJs carry out “important functions [with] significant discretion.”³⁸

Although the Supreme Court had clearly held that the STJs were inferior officers,³⁹ the status of ALJs remained unclear.⁴⁰ Adjudicating the constitutionality of the ALJs of the FDIC, *Landry*⁴¹ was the first court to deliberate on the similarities between the STJs and ALJs.⁴² Distinguishing *Freytag*, the *Landry* Court held that the ALJs were employees and not inferior officers.⁴³ Understanding the critical factor in *Freytag* as the STJs’ final decision-making power, the *Landry* Court reasoned that since the ALJs did not have any final decision-making power the ALJs could not be considered officers.⁴⁴

Concurring in the judgment alone, Judge Randolph argued that the ALJs were indistinguishable from the STJs in *Freytag* and that they should be considered officers.⁴⁵ In Judge Randolph’s view, final decision-making authority was not dispositive of *Freytag*.⁴⁶ Rather, *Freytag* primarily focused on the law establishing the office, the statutorily defined duties, salary, and means of appointment, and the significant discretion of the STJs.⁴⁷ Because the ALJs and

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Free Enter. Fund*, 561 U.S. at 507 n.10 (quoting U.S. CONST. art. II, § 2, cl. 2) (“Whether administrative law judges are necessarily ‘Officers of the United States’ is disputed.”).

⁴¹ *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000).

⁴² *Id.*

⁴³ *Id.* at 1134.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1140 (Randolph J., concurring). Judge Randolph concurred with the court’s holding to sustain the FDIC’s decision because there was no prejudicial error. *Id.*

⁴⁶ *Landry*, 204 F.3d at 1142.

⁴⁷ *Id.*

STJs are similar in this regard, argued Judge Randolph, the ALJs should be considered officers.⁴⁸

In *Landry's* wake, the main criteria for differentiating between officers and employees was the significance of the matters resolved by the officials, the discretion the officials exercise in reaching those decisions, and the finality of those decisions.⁴⁹ Recently, however, lower federal courts have been trending away from the *Landry* majority and towards Judge Randolph's concurrence.⁵⁰ Finding ALJs to likely be inferior officers, the United States District Court for the Northern District of Georgia disregarded the *Landry* majority's reasoning, instead relying on Judge Randolph's understanding of *Freytag*.⁵¹

A circuit split soon followed.⁵² In nearly identical circumstances involving an SEC ALJ, the D.C. Circuit reaffirmed the *Landry* precedent in *Lucia*,⁵³ while the Tenth Circuit expressly rejected that analysis in *Bandimere*,⁵⁴ holding that ALJs are officers because of *Freytag*. The dust had barely settled on the *Bandimere* decision when the D.C. Circuit deadlocked on an en banc petition to review the *Lucia*

⁴⁸ *Id.*

⁴⁹ *Tucker v. Comm'r*, 676 F.3d 1129, 1133 (D.C. Cir. 2012).

⁵⁰ *See, e.g., Hill v. SEC*, 114 F. Supp. 3d 1297 (N.D. Ga. 2015), *vacated on other grounds and remanded*, 825 F.3d 1236 (11th Cir. 2016); *accord Duka v. United States SEC*, 124 F. Supp. 3d 287, 289 (S.D.N.Y. 2015).

⁵¹ *Hill*, 114 F. Supp. 3d at 1318.

⁵² *Compare Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 285 (D.C. Cir. 2016), *reh'g en banc denied*, 868 F.3d 1021 (D.C. Cir. 2017) (per curiam) *with Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), *reh'g en banc denied*, 855 F.3d 1128 (10th Cir. 2017).

⁵³ *Lucia*, 832 F.3d at 285.

⁵⁴ *Bandimere*, 844 F.3d at 1168.

decision,⁵⁵ setting the stage for clarification from the Supreme Court on the constitutionality of the SEC ALJs.⁵⁶

III. THE COURT'S REASONING

Reversing the judgment of the Court of Appeals for the District of Columbia Circuit, the Supreme Court, in *Lucia v. SEC*,⁵⁷ concluded that the SEC ALJs are officers of the United States.⁵⁸ Writing for the majority, Justice Kagan first noted the statutory authority of the SEC and the SEC's ubiquitous use of ALJs to administer its proceedings.⁵⁹ Stressing that the ALJs were undisputedly not appointed in accordance with the Appointments Clause, the Court noted that if the ALJs were found to be officers then that would invalidate the judgment.⁶⁰ Briefly describing the Court's guidelines for distinguishing between officers and employees, the majority noted that an officer must have both a continuing position established by law and exercise significant authority.⁶¹

Dancing away from elaborating on the significant authority test, the Court relied on its application of a basic significant authority test to determine that the ALJs are officers.⁶² Holding that the Tax Court's STJs were officers, the *Freytag*⁶³ Court relied on the fact that the office of the STJ was established by law, the STJs served on a continuous basis, and that their duties, salaries, and means of

⁵⁵ 868 F.3d 1021 (D.C. Cir. 2017).

⁵⁶ *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018).

⁵⁷ *Id.* at 2044.

⁵⁸ *Id.* at 2051.

⁵⁹ *Id.* at 2049.

⁶⁰ *Id.* at 2051.

⁶¹ *Id.* (citing *United States v. Germaine*, 99 U.S. 508, 510 (1879); *Buckley v. Valeo*, 424 U.S. 1, 126, n.162 (1976) (per curiam)).

⁶² *Lucia*, 138 S. Ct. at 2052.

⁶³ *Freytag v. Comm'r*, 501 U.S. 868, 882 (1991).

appointment were delineated by statute.⁶⁴ Explaining the *Freytag* Court's reasoning, the majority emphasized that the significant discretion of the STJs to conduct proceedings determined that the STJs were officers even if they did not have final decision-making authority.⁶⁵

Brushing aside the *amicus*'⁶⁶ attempts to distinguish *Freytag*, the majority reasoned that the SEC ALJs were no different than the STJs of the Tax Court.⁶⁷ The ALJs receive career appointments, their duties, salaries, and means of appointment are all clearly stated in the statute, and they wield significant discretion while conducting administrative hearings.⁶⁸ Mimicking federal judges presiding over a bench trial, the ALJs and STJs examine witnesses, take testimony, and rule on the admissibility of evidence.⁶⁹ Seemingly performing almost identical functions, explained the majority, both the ALJs and the STJs have authority to shape the administrative record and enforce compliance with their discovery orders.⁷⁰

Reinforcing its application of *Freytag*, the Court reasoned that the ALJs should be officers, a fortiori.⁷¹ If the STJs are considered officers even though the Tax Court must always review their decisions for them to take effect, then the ALJs, whose decisions do not necessarily need to be reviewed by the SEC for them to take effect, must certainly be considered officers.⁷² Finding the ALJs to be inferior

⁶⁴ *Lucia*, 138 S. Ct. at 2052–53.

⁶⁵ *Id.*

⁶⁶ The Government switched sides in the briefing stage. *Lucia*, 138 S. Ct. at 2050. Thereafter, the Court appointed an *amicus* to brief and argue the case in support of the decision below. *Lucia v. SEC*, 138 S. Ct. 923 (2018).

⁶⁷ *Lucia*, 138 S. Ct. at 2053.

⁶⁸ *Id.*

⁶⁹ *Id.* (citing *Butz v. Economou*, 438 U.S. 478, 513 (1978)).

⁷⁰ *Id.*

⁷¹ *Id.* at 2053–54.

⁷² *Id.*

officers,⁷³ the Court reversed the decision of the Court of Appeals and remanded the case for further proceedings.⁷⁴

Dissenting from the Court's opinion, Justice Sotomayor argued that the ALJs are not officers.⁷⁵ Arguing with the majority's reading of *Freytag*, Justice Sotomayor understood that the STJs' final decision-making authority was the reason that they were considered officers.⁷⁶ In her view, since the ALJs can never issue final decisions on their own without an act of the Commission, the ALJs are employees and not inferior officers.⁷⁷

IV. ANALYSIS

In *Lucia v. SEC*,⁷⁸ the Supreme Court held that the SEC ALJs are inferior officers of the United States.⁷⁹ Correctly identifying the Court's precedential holding in *Freytag*, the Court appropriately applied it to the SEC ALJs.⁸⁰ However, the Court's narrow decision does not clearly define who is considered an inferior officer under the Appointments Clause.⁸¹

A. The Court Properly Identified and Applied the Court's Previous Holding in *Freytag* to the ALJs of the SEC.

Holding that STJs are considered inferior officers, the *Freytag* Court explains the duties and discretion exercised by

⁷³ *Lucia*, 138 S. Ct. at 2054–55.

⁷⁴ *Id.* at 2055–56. The Court's remedy was to give Lucia new hearing in front of a properly appointed ALJ other than Judge Elliot. *Id.*

⁷⁵ *Id.* at 2067 (Sotomayor J., dissenting).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ 138 S. Ct. 2044 (2018).

⁷⁹ *Id.* at 2050.

⁸⁰ See *infra* Part IV.A.

⁸¹ See *infra* Part IV.B.

the STJs, highlighting the law establishing the office of the STJ as well as the statutory specification of their duties, salary, and means of appointment.⁸² Through taking testimony, ruling on the admissibility of evidence, and enforcing compliance with discovery orders, elaborated the *Freytag* Court, the STJs exercise significant discretion while conducting administrative hearings.⁸³ Concluding its Appointments Clause discussion, the *Freytag* Court notes that “even if the duties of the [STJs] under [the relevant parts of the statute discussed above] were not as significant as we and the two courts have found them to be, our conclusion would be unchanged.”⁸⁴ Pointing out that the government had conceded that the STJs could issue final decisions in limited circumstances, the *Freytag* Court concluded that the STJs were at least inferior officers in those limited circumstances.⁸⁵ And since the STJs cannot be considered inferior officers in part and employees in part, reasoned the *Freytag* Court, the STJs must be inferior officers.⁸⁶

The dissent purports that the *Freytag* Court reneged on its initial significant discretion analysis and instead relied upon a final decision-making analysis to reach its conclusion that the STJs are officers.⁸⁷ To read this into the *Freytag* opinion is hard to swallow at best.⁸⁸ The dissent construes language in the *Freytag* opinion, “even if the duties . . . were not as significant . . . our conclusion would be unchanged,”⁸⁹ to mean that the court was going back on its original analysis.⁹⁰ In the eyes of the dissent, the *Freytag* opinion disregards the significant discretion analysis, instead

⁸² *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991).

⁸³ *Id.* at 882.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Lucia v. SEC*, 138 S. Ct. 2044, 2067 (2018) (Sotomayor J., dissenting).

⁸⁸ *Id.* at 2052 n.4 (majority opinion).

⁸⁹ *Freytag*, 501 U.S. at 882.

⁹⁰ *Lucia*, 138 S. Ct. at 2067 (Sotomayor J., dissenting).

choosing final decision-making authority as the dispositive factor for determining who qualifies as an inferior officer.⁹¹ Furthermore, argue the Court's critics, the continuation of the *Freytag* opinion mentions that an official cannot be an inferior officer for some things but not others,⁹² which seems unnecessary to a conclusive significant discretion analysis.⁹³ Using a final decision-making analysis, the dissent argued that *Freytag* is not applicable to the ALJs, since ALJs do not have final decision-making authority.⁹⁴

A close look at the *Freytag* opinion shows that this argument is flawed⁹⁵ and that the majority understood and applied *Freytag* correctly.⁹⁶ The very sentence that the dissent understands to imply a new analysis and rejection of the previous discussion actually expressly states that the court is not retracing its analysis.⁹⁷ “[E]ven if the duties of the [STJs] . . . were not as significant as we . . . have found them to be” wrote the *Freytag* Court, “our *conclusion* would be unchanged.”⁹⁸ If the *Freytag* Court’s analysis of the significant discretion of the STJs was really irrelevant to the *Freytag* Court’s conclusion, then how could the *Freytag* Court refer to its previous analysis as its “conclusion”?⁹⁹ At most, the *Freytag* Court seems to be suggesting an alternative holding, but the *Freytag* Court is clearly not disregarding its

⁹¹ *Id.*

⁹² *Freytag*, 501 U.S. at 882.

⁹³ *Landry v. FDIC*, 204 F.3d 1125, 1134 (D.C. Cir. 2000).

⁹⁴ *Lucia*, 138 S. Ct. at 2067 (Sotomayor J., dissenting); *see also Landry*, 204 F.3d at 1134; *accord Bandimere v. United States SEC*, 844 F.3d 1168 (10th Cir. 2016) (McKay J., dissenting).

⁹⁵ *Landry*, 204 F.3d at 1142 (Randolph J., concurring).

⁹⁶ *Lucia*, 138 S. Ct. at 2052 n.4 (majority opinion).

⁹⁷ *Landry*, 204 F.3d at 1142 (Randolph J., concurring).

⁹⁸ *Freytag v. Comm’r*, 501 U.S. 868, 882 (1991) (emphasis added).

⁹⁹ *Landry*, 204 F.3d at 1142 (Randolph J., concurring) (citing *Freytag*, 501 U.S. at 882).

previous analysis.¹⁰⁰ Correctly understanding that final decision-making authority was not the only *Freytag* factor, the Court also applied *Freytag*'s significant discretion analysis to the ALJs appropriately.¹⁰¹

Furthermore, ALJs do have some final decision-making authority at times.¹⁰² The SEC has discretion to review or decline to review an ALJ's decision.¹⁰³ When an ALJ's initial decision is declined review, however, the ALJ's decision is released untouched.¹⁰⁴ Disregarding the notion that the SEC's choice to decline reviewing an ALJ's decision is enough to consider the ALJ's decision unoriginal, the Court soundly reasons that an ALJ's independently published decision is considered final.¹⁰⁵

Another effort to differentiate *Freytag* notes that while the ALJs' decisions are reviewed de novo by the SEC, the Tax Court defers to the STJs' fact-finding upon reviewing a decision.¹⁰⁶ Arguably, the STJs are understandably inferior officers because their fact-finding is assumed to be credible while the ALJs should not be considered inferior officers because their conclusions of fact are always reviewed de novo.¹⁰⁷ However, the assertion that the ALJs' findings of fact are always reviewed from scratch is not convincing, for the SEC generally considers the SEC ALJs to be the ultimate

¹⁰⁰ *Lucia*, 138 S. Ct. at 2052 n.4; accord *Landry*, 204 F.3d at 1142 (Randolph J., concurring); see also *Bandimere*, 844 F.3d at 1192 (Briscoe J., concurring).

¹⁰¹ *Lucia*, 138 S. Ct. at 2052.

¹⁰² *Id.* at 2053.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2053–54.

¹⁰⁵ *Id.*

¹⁰⁶ *Landry v. FDIC*, 204 F.3d 1125, 1133 (D.C. Cir. 2000).

¹⁰⁷ *Id.*

authority on resolving conflicting evidence, respecting their ALJs' conclusions of fact.¹⁰⁸

Moreover, even if there is a slight difference in the amount of deference granted to STJs and ALJs, the Court correctly applied *Freytag*.¹⁰⁹ Granting certiorari to decide the constitutional separation of powers question presented to it,¹¹⁰ the *Freytag* Court specifically disregarded the amount of deference the Tax Court grants the STJs upon reviewing the STJs' decisions.¹¹¹ And if the deference given to the STJs was not at all relevant to the *Freytag* holding, then it cannot be considered in *Freytag*'s application.¹¹²

The Court fittingly deflected an additional attempt to distinguish *Freytag* on grounds that the STJs have more authority to enforce compliance with discovery orders than the ALJs.¹¹³ While STJs are authorized to punish contempt of their discovery orders by fine or imprisonment, ALJs are not.¹¹⁴ Nonetheless, dismissed the Court, ALJs have other resourceful ways of encouraging compliance.¹¹⁵ The methods of the STJs, while effective, are not the only way of exacting cooperation.¹¹⁶ Suspensions, exclusions from proceedings, and other tactics, are more than enough for the ALJs to maintain cooperativeness with their discovery orders.¹¹⁷ Soundly reasoning that the ALJs power to punish contempt

¹⁰⁸ *Lucia*, 138 S. Ct. at 2054 (internal citations omitted).

¹⁰⁹ *Id.*

¹¹⁰ *Freytag v. Comm'r*, 501 U.S. 868, 873 (1991).

¹¹¹ *Id.* at 874 n.3.

¹¹² *Landry v. FDIC*, 204 F.3d 1125, 1141-42 (D.C. Cir. 2000) (Randolph J., concurring).

¹¹³ *Lucia*, 138 S. Ct. at 2054.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

was similar to the STJs, the Court properly applied the *Freytag* holding to the ALJs of the SEC.¹¹⁸

B. The Court's Narrow Holding Leaves the Appointments Clause Uncertain and the Fate of Federal Agencies' ALJs Unclear.

Properly concluding that the ALJs are inferior officers, the Court's intricate fact-based analysis leaves no clear standard for determining who qualifies as an inferior officer.¹¹⁹ The Court's analysis determines that any official whose office is established by law, whose duties, salary, and means of appointment are delineated by statute, and who exercises significant discretion while conducting administrative proceedings can be considered an inferior officer.¹²⁰ Perhaps *Freytag* is also congruent with the fact that final decision-making authority can also make an official an inferior officer.¹²¹ It is not clear.¹²²

Shying away from establishing a clear definition of what is required to be an inferior officer under the Appointments Clause,¹²³ the Court's narrow decision has left lower courts struggling to implement the Court's decision.¹²⁴ Recent Sixth Circuit decisions, however, seem to indicate

¹¹⁸ *Id.*

¹¹⁹ *Lucia*, 138 S. Ct. at 2056 (Thomas J., concurring).

¹²⁰ *Id.*

¹²¹ See *supra* text accompanying note 100.

¹²² *Lucia*, 138 S. Ct. at 2056 (Thomas J., concurring); see generally Jennifer L. Mascott, *Who Are "Officers of the United States"?* 70 STAN. L. REV. 443, 564 (2018); accord Jennifer L. Mascott, *"Officers" In the Supreme Court: Lucia v. SEC* 2018 CATO SUP. CT. REV. 305, 333 (2018).

¹²³ *Lucia*, 138 S. Ct. at 2056 (Thomas J., concurring).

¹²⁴ See, e.g., *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018) (determining the constitutionality of the ALJs of the Federal Mine Safety and Health Review Commission considering the Court's holding in *Lucia*); see also *Blackburn v. United States Dep't of Agric.*, No. 17-4102, 2018 U.S. App. LEXIS 25824, *1-2 (6th Cir. Sept. 11, 2018).

that *Lucia* is heralding in a new era for Federal ALJs.¹²⁵ Invalidating the decision of an ALJ of the Federal Mine Safety Commission, the Sixth Circuit expressly relied on *Lucia*, holding that since the ALJ had not been appointed properly¹²⁶ the ALJ's judgment was invalid.¹²⁷ Similarly, in a case in which a Department of Agriculture ALJ's decision was on appeal in front of the Sixth Circuit, a motion to remand because of the *Lucia* decision was granted, and the matter is still pending.¹²⁸

Implications of a few Sixth Circuit decisions notwithstanding, the future of Federal ALJs is far from clear.¹²⁹ Firmly entrenched throughout the various administrative agencies, a total of 1,931 ALJs handle the

¹²⁵ See, e.g., *Jones Bros., Inc.*, 898 F.3d at 669; see also *Blackburn*, 2018 U.S. App. LEXIS 25824 at *1–2; see generally Matthew C. McCann, *The Immediate Aftermath of SEC v. Lucia on Administrative Law*, 2018 Emerging Issues 8681 (LexisNexis, Oct. 22, 2018).

¹²⁶ The ALJ had been appointed by the Chief ALJ, who was not constitutionally permitted to do so, but not the commission itself. *Jones Bros., Inc.*, 898 F.3d at 669. The Commission itself, however, collectively serves as Department Head and can constitutionally appoint ALJs. *Lucia v. SEC*, 138 S. Ct. 2044, 2050 (2018) (“To be sure, the Commission itself counts as a Head of Department.”) (internal citations omitted); see also *Free Enter. Fund*, 561 U.S. at 512–13.

¹²⁷ *Jones Bros., Inc.*, 898 F.3d at 669 (“*Lucia v. [SEC]* holds that the SEC's administrative law judges are inferior officers The same problem haunts this case For these reasons, we vacate the Commission's decision and remand to the Commission for fresh proceedings.”) (internal citations omitted).

¹²⁸ *Blackburn*, 2018 U.S. App. LEXIS 25824 at *1–2 (“The Department of Agriculture moves to remand the case for further proceedings, consistent with *Lucia v. SEC*, 138 S. Ct. 2044 (2018), because the ALJ was not appointed consistent with the Appointments Clause at the time of her decision.”). The motion was granted “for further proceedings consistent with the Supreme Court's decision in *Lucia v. SEC*.” *Id.* (internal citations omitted).

¹²⁹ See generally Mascott, *supra* note 122 at 305; Matthew C. McCann, *The Immediate Aftermath of SEC v. Lucia on Administrative Law*, 2018 Emerging Issues 8681 (LexisNexis, Oct. 22, 2018).

bulk of all agency adjudication.¹³⁰ Since most of the ALJs are not appointed in accordance with the Appointments Clause, the Court's decision now threatens to potentially undermine many of these ALJs' decisions.¹³¹

Constitutional challenges to the validity of agency ALJs are nothing new.¹³² The Court's decision, however, provides a powerful precedent to those challenging the ALJs.¹³³ The Social Security Administration ("SSA"), Department of Agriculture, Drug Enforcement Administration, and the Federal Mine Safety and Health Review Commission are already facing post-*Lucia* challenges in court.¹³⁴ And for most of the other federal agencies, it seems like it is only a matter of time.¹³⁵

Employing 1,655 of the 1,931 ALJs working for federal agencies,¹³⁶ the SSA is perhaps the agency most threatened by the Court's decision.¹³⁷ Almost immediately following the Court's decision, a slew of litigation targeting various SSA ALJs' decisions for lack of proper constitutional appointment

¹³⁰ Administrative Law Judges by Agency, OPM.GOV, <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> (last visited Nov. 12, 2018).

¹³¹ See Mascott, *supra* note 122 at 333.

¹³² *E.g.* Landry v. FDIC, 204 F.3d 1125 (D.C. Cir. 2000); Bandimere v. United States SEC, 844 F.3d 1168 (10th Cir. 2016), *reh'g en banc denied*, 855 F.3d 1128 (10th Cir. 2017).

¹³³ See *generally* U.S. DEP'T OF JUSTICE, OFFICE OF THE SOLICITOR GENERAL, GUIDANCE ON ADMINISTRATIVE LAW JUDGES AFTER *LUCIA V. SEC* (S. CT.), <https://static.reuters.com/resources/media/editorial/20180723/ALJ--SGMEMO.pdf>.

¹³⁴ See *e.g.*, *Jones Bros., Inc.*, 898 F.3d at 669; *Blackburn*, 2018 U.S. App. LEXIS 25824, at *1-2; *Morris & Dickson Co. v. Sessions et al*, No. 5:18-cv-01406, 2018 U.S. App. LEXIS 30394 (W.D. La. Oct 26, 2018) (questioning the validity of DEA ALJs).

¹³⁵ See Mascott, *supra* note 122 at 335.

¹³⁶ Administrative Law Judges by Agency, OPM.GOV, <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> (last visited Nov. 12, 2018).

¹³⁷ See *generally* Mascott, *supra* note 122 at 305.

burst forth.¹³⁸ Initially, courts largely deflected these claims on technical grounds, reasoning that the claims had been forfeited for not being raised properly at trial.¹³⁹

This reprieve is ending.¹⁴⁰ Reaching the merits of these claims, some courts have already ordered the SSA to reconcile their ALJ appointment scheme with the Court's decision.¹⁴¹ Although there has yet to be a final decision on

¹³⁸ See e.g., *Rick M. v. Comm'r of Soc. Sec.*, No. 2:17-CV-00283-JTR, 2018 BL 347095 (E.D. Wash. Sept. 25, 2018); *Karl K. v. Comm'r of Soc. Sec.*, No. 2:17-CV-0304-JTR, 2018 BL 327903 (E.D. Wash. Sept. 11, 2018); *Karen S. v. Comm'r of Soc. Sec.*, No. 2:17-CV-00302-JTR, 2018 BL 305890 (E.D. Wash. Aug. 24, 2018); *Crystal F. v. Comm'r of Soc. Sec.*, No. 2:17-CV-00174-JTR, 2018 BL 357432 (E.D. Wash. Sept. 25, 2018); *Iwan v. Comm'r of Soc. Sec.*, No. 17-CV-97-LRR, 2018 BL 324895 (N.D. Iowa Sept. 10, 2018).

¹³⁹ See e.g., *Rick M.*, 2018 BL 347095 at *3 n.2 (“To the extent *Lucia* applies to Social Security ALJs, the parties have forfeited the issue by failing to raise it in their briefing.”); *Trejo v. Berryhill*, No. EDCV 17-0879-JPR, 2018 U.S. Dist. LEXIS 124738, at *3 n.3 (C.D. Cal. July 25, 2018) (“To the extent *Lucia* applies to Social Security ALJs, [the] [p]laintiff has forfeited the issue by failing to raise it during her administrative proceedings.”); see also *Karl K.*, 2018 BL 327903 at *3 n.2; *Karen S.*, 2018 BL 305890 at *3 n.1; *Stearns v. Berryhill*, No. C17-2031-LTS, 2018 WL 4380984 (N.D. Iowa Sept. 14, 2018); *Blackburn v. Berryhill*, No. 0: 17-120-DCR, 2018 BL 385257 (E.D. Ky. Oct. 18, 2018); *Garrison v. Berryhill*, No. 1:17-cv-00302-FDW, 2018 WL 4924554 (W.D.N.C Oct. 10, 2018); *Jodi M. v. Comm'r of Soc. Sec.*, No. 2:17-CV-00291-JTR, 2018 BL 346069 (E.D. Wash. Sept. 24, 2018); *Crystal F.*, 2018 BL 357432 at *3 n.1; *Iwan*, 2018 BL 324895 at *11; *Davis v. Comm'r of Soc. Sec.*, No. 17-CV-80-LRR, 2018 BL 324906 (N.D. Iowa Sept. 10, 2018); *Thurman v. Comm'r of Soc. Sec.*, No. 17-CV-35-LRR, 2018 BL 324870 (N.D. Iowa Sept. 10, 2018); *Holcomb v. Berryhill*, No. EDCV 17-1341-JPR, 2018 BL 229083 (C.D. Cal. June 27, 2018).

¹⁴⁰ See e.g., *Blocker v. Colvin*, No. 2:14-cv-02602-TLP-tmp, 2018 BL 323103 (W.D. Tenn. Sept. 07, 2018) (“The Court has concerns as to whether the holdings in *Lucia v. SEC* and *Jones Bros., Inc. v. Sec’y of Labor* impact the validity of the decision issued by the Administrative Law Judge in this case.”) (internal citations omitted).

¹⁴¹ *Blocker*, 2018 BL 323103, at *1 (“The Court has concerns as to whether the holdings in *Lucia v. SEC* and *Jones Bros., Inc. v. Sec’y of Labor* impact the validity of the decision issued by the Administrative Law Judge in

the matter, pending litigation leaves the SSA struggling to explain itself.¹⁴² The future of ALJs after the Court's decision is far from predictable, leaving agencies, practitioners, and litigants unsure as to what to expect.¹⁴³

CONCLUSION

In *Lucia v. SEC*,¹⁴⁴ the Supreme Court concluded that the ALJs of the SEC are inferior officers whose appointments are governed by the Appointments Clause.¹⁴⁵ Properly identifying the holding in *Freytag*, the Court correctly applied the *Freytag* factors to the SEC ALJs, rebutting several attempts to distinguish *Freytag*.¹⁴⁶ Correctly decided, the Court's decision clearly indicates that a change is coming for Appointments Clause adjudication.¹⁴⁷ Lower courts, however, are struggling to implement the Court's decision.¹⁴⁸ And the narrowness of the Court's decision leaves federal agencies, administrative law practitioners, and litigants wary of the vague future of ALJ adjudication.¹⁴⁹

this case.”) (internal citations omitted); *accord* Faulkner v. Comm'r of Soc. Sec., No. 1:17-cv-01197-STA-egb, 2018 BL 275548 (W.D. Tenn. Aug. 02, 2018) (Ordering the Social Security Commissioner to reconcile the Lucia and Jones Bros. decisions) (internal citations omitted) (Order allowing additional time to respond to order to show cause Oct. 2, 2018).

¹⁴² See, e.g., Parker v. Berryhill, No. 4:17cv143, 2018 BL 388232 (E.D. Va. Oct. 22, 2018); Shelton v. Berryhill, No. 2:17cv609, 2018 BL 388233 (E.D. Va. Oct. 22, 2018).

¹⁴³ See Mascott, *supra* note 122 at 335.

¹⁴⁴ 138 S. Ct. 2044 (2018).

¹⁴⁵ U.S. CONST. art. II, § 2, cl. 2.

¹⁴⁶ See *supra* Part IV.A.

¹⁴⁷ See *supra* Part IV.B.

¹⁴⁸ See *supra* Part IV.B.

¹⁴⁹ See *supra* Part IV.B.