15-901

15-901

No.

IN THE

Supreme Court of the United States

GORDON BRENT PIERCE,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868 (1991), this Court held that an Internal Revenue Service special trial judge, as one who exercised significant authority not unlike the many clerks, assistant surgeons, cadet-engineers, election monitors, federal marshals, military judges, tax court special trial judges and the general counsel for the Transportation Department, is an "inferior Officer" whose appointment must conform to the Appointments Clause. In *Freytag*, this Court also ruled Appointments Clause objections to judicial officers could be considered on appeal whether or not they were raised or ruled on below.

The questions presented by this petition are:

(1) Whether the Securities and Exchange Commission has erroneously departed from this Court's decision in *Freytag* in ruling that its ALJs are not inferior officers but, rather, are employees whose appointment does not implicate Article II, and

(2) Whether the Petitioner may assert an Appointments Clause violation in connection with proceedings that have already been concluded where the issue was first raised in his petition for rehearing and *en banc* consideration.

PARTIES TO THE PROCEEDING

The parties to the proceeding are Petitioner Gordon Brent Pierce, who was the subject of two administrative proceedings and disgorgement orders presided over by ALJ's who were not appointed in conformity with the Appointments Clause, and Respondent, the Securities and Exchange Commission.

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PETITION FOR WRIT OF CERTIORARI

Gordon Brent Pierce respectfully petitions for a writ of certiorari to review the judgment of the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The Court of Appeals for the D.C. Circuit denied the Petitioner's Petition for Rehearing and for *En Banc* Consideration without opinion on August 3, 2015. (A. 1a.)

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2015. A timely petition for rehearing and *en banc* consideration was denied on August 3, 2015. The mandate issued on September 9, 2015. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions are the United States Constitution, Article II, § 2, clause 2, (A. 2a), 17 C.F.R. § 200.14 (A. 3a) and 17 C.F.R. § 201.180. (A. 4a).

STATEMENT

The Securities and Exchange Commission ("SEC") Division of Enforcement ("Division") issued two orders instituting proceedings ("OIPs") against the Petitioner. The first OIP was presided over by

ALJ Carol Fox Foelak and resulted in a final decision ordering Petitioner to disgorge over $2 million in profits for various securities violations. The second OIP, presided over by ALJ Cameron Elliot, concluded in a final decision. That final decision prompted an appeal to the D.C. Circuit Court of Appeals. The court affirmed the final decision and judgment entered against Petitioner on May 22, 2015.

Following both proceedings and the entry of judgment in the Petitioner's appeal, a trial court judge in the Northern District of Georgia granted injunctive relief against the Division in a pending proceeding unrelated to the Petitioner based upon a claim that the ALJ's appointment in that case violated Article II of the Appointments Clause. *Hill v. SEC*, No. 15-CV-1801 (June 8, 2015). The ALJ in the *Hill* matter and the ALJ who presided over the Petitioner's first OIP were one and the same.

Following the opinion in *Hill*, the Petitioner in this case promptly raised the Article II issue both by filing a Motion To Vacate the final decision in the first OIP with the Commission and by filing a petition for rehearing and *en banc* with the D.C. Circuit Court of Appeals in connection with his appeal of the final decision in the 2nd OIP. When the Petition for Rehearing and *En Banc* was denied, Petitioner promptly filed a Motion To Amend Motion To Vacate with the Commission to include both OIP proceedings.

While Petitioner's motions were pending, the Commission issued its opinion *In the Matter of Raymond J. Lucia Companies, Inc. and Raymond J.*

Lucia, Sr., Admin. Proc. File No. 3-15006. In the *Lucia* matter, the Commission, mimicking positions already asserted on its behalf in a variety of federal court proceedings, predictably ruled that the appointment of ALJ Cameron Eliot, (the same ALJ who presided over the Petitioner's second OIP) was not subject to the requirements of the Appointments Clause. The SEC ruling conflicts with this Court's opinion in *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 111 S.Ct. 2631 (1991). Yet, the SEC elected not to follow *Freytag*, opting instead for the reasoning advanced in a D.C. Circuit decision in *Landry v. FDIC*, 204 F.3d 1125 (D.C.Cir. 2000), wherein the court held that FDIC ALJ's were not inferior officers as they were lacking in the power to exercise significant, independent authority. The opinion of the Commission in *Lucia* demonstrates the futility of Petitioner's arguments as advanced in his Motion to Vacate.[1]

Article II of the United States Constitution defines the authority of the Executive Branch and includes the Appointments Clause, which provides that "inferior Officers" may be appointed only by the President, the "Courts of Law," or the "Heads of Departments." U.S. CONST. art. II, § 2, cl. 2.

The district court opinion in *Hill* has opened the floodgates to litigation on the question whether SEC ALJ's are inferior officers subject to the requirements of Article II or employees who are not.

[1] The Motion to Vacate and Motion To Amend Motion To Vacate are still pending before the Commission.

Respondents seeking to enjoin Division administrative proceedings have argued that ALJs are inferior officers, and "since ALJs are not appointed by the SEC Commissioners themselves, *i.e.*, the head of a department, the ALJ appointments scheme is unconstitutional."[2] *Tilton v. SEC*, No. 1:15-cv-02472-RA, slip op. 4 (S.D.N.Y. June 30, 2015). The SEC argues that its ALJs are employees, not inferior officers and, therefore, the Appointments Clause is inapplicable to their appointment. Respondents have relied on the Supreme Court's holding in *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 111 S.Ct. 2631 (1991), in which this Court ruled that special trial judges in the Tax Court were inferior officers under Article II, as they exercised significant authority not unlike "district court clerks, thousands of clerks within the Treasury and Interior Departments, an assistant surgeon and a cadet-engineer, election monitors, federal marshals, military judges, Article I [Tax Court special trial] judges, and the general counsel for the Transportation Department," all of which the Supreme Court has deemed to be "inferior officers." Kent Barnett, *Resolving the ALJ Quandary*, 66 Vand. L. Rev. 797, 812 (2013) (citing *Free Enterprise*, 561 U.S. at 540 (Breyer, J., dissenting) (citing cases)).

To date, two district courts (and four different judges) have considered Article II Appointments

[2] Respondents have also argued that the administrative law system violates Article II because it interferes with the President's constitutional power to remove officers—as ALJs can be removed only for "good cause" by the SEC Commissioners, who themselves may not be removed "except for inefficiency, neglect of duty, or malfeasance in office" *Id.*

Clause challenges to SEC ALJs. Of those, two judges in three cases found the SEC's administrative process likely unconstitutional and agreed to enjoin administrative proceedings; and two ruled that they lacked subject matter jurisdiction and dismissed the suits. The SEC has issued one ruling addressing the constitutionality of the appointments of ALJs under Article II (*In the Matter of Raymond J. Lucia Companies*), in which it reiterates the same arguments it presented in the *Hill* matter. A related matter, *Bebo v. SEC*, is also relevant, insofar as it involves a ruling by a circuit court of appeal denying that district court judges have jurisdiction to hear constitutional challenges to SEC administrative proceedings.

REASONS FOR GRANTING THE PETITION

The within Petition raises the question whether the Commission, by appointing ALJ's in violation of the Appointments Clause, and the D.C. Court of Appeals, by denying Petitioner's request for rehearing and *en banc* consideration, have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers. The Commission's defiant stance on the Appointments Clause issue defeats this Court's decision in *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868 (1998), tramples upon the rights of the Petitioner and others like him, and wreaks havoc upon the system that is already deeply flawed. The Commission is not likely to take any voluntary action to stem the flow of challenges entering the lower and circuit court systems; it has already refused at least one invitation to do so in and

followed that refusal with a results - oriented opinion that simply cannot be reconciled with *Freytag*. The Commission's position and the D.C. Court of Appeals' refusal to consider the matter, leaves the Petitioner without a remedy other than by Writ of Certiorari.

I. THIS PETITION SHOULD BE ALLOWED AS THE D.C. CIRCUIT COURT OF APPEALS, BY REFUSING TO HEAR PETITIONER'S ARTICLE II CHALLENGE TO THE AUTHORITY OF THE ALJ TO PRESIDE OVER THE OIP, SUBORDINATED THE STRONG INTEREST OF THE FEDERAL JUDICIARY IN MAINTAINING THE CONSTITUTIONAL SEPARATION OF POWERS TO NONDISRUPTION OF THE APPELLATE PROCESS.

A. The Proceedings Against Petitioner Violated The Appointments Clause Of Article II Of The Constitution As The ALJ's Who Presided Over Those Proceedings Are Inferior Officers Who Were Not Appointed, As Was Constitutionally Required, By The President, A Court Of Law Or A Department Head.

Inferior officers must be appointed by the President, department heads, or courts of law. U.S. Const. art. II, § 2, cl. 2. Otherwise, their appointment violates the Appointments Clause. *See* U.S. Const. art. II, § 2, cl. 2; *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 880 (1991); *Free*

Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 511-12 (2010) (finding that the SEC Commissioners jointly constitute the "head" of the SEC for appointment purposes). Neither ALJ Foelak nor ALJ Elliot were appointed by an SEC Commissioner, the President, a department head, or the Judiciary, and thus their appointment as an inferior officer is unconstitutional in violation of the Appointments Clause of the U.S. Constitution.

The issue whether SEC ALJs are inferior officers or employee for purposes of the Appointments Clause depends on the authority they have in conducting administrative proceedings. ALJ's Foelak and Elliot are inferior officers because, as SEC ALJ's, they carry out important functions and exercise significant discretion. The Appointments Clause of Article II of the Constitution provides:

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

U.S. Const. art. II, § 2, cl. 2. The Appointments Clause thus creates two classes of officers: principal officers, who are selected by the President with the advice and consent of the Senate, and inferior officers, whom "Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976). The Appointments Clause applies to all agency officers including those whose functions are "predominately quasi judicial and quasi legislative" and regardless of whether the agency officers are "independent of the Executive in their day-to-day operations." *Id.* at 133 (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 625-26 (1935)). In short, "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II]." *Freytag*, 501 U.S. at 881 (quoting *Buckley*, 424 U.S. at 126) (alteration in the original). For example, the Supreme Court has held that, "district court clerks, thousands of clerks within the Treasury and Interior Departments, an assistant surgeon and a cadet-engineer, election monitors, federal marshals, military judges, Article I [Tax Court special trial] judges, and the general counsel for the Transportation Department are inferior officers." Kent Barnett, *Resolving the ALJ Quandary*, 66 Vand. L. Rev. 797, 812 (2013) (citing *Free Enterprise*, 561 U.S. at 540 (Breyer, J., dissenting) (citing cases)).

The Supreme Court's holding in *Freytag* makes clear that SEC ALJs are, as a matter of law, inferior officers. *See also Duka v. U.S. S.E.C.*, 2015

WL 1943245, at *8 ("The Supreme Court's decision in *Freytag v. Comm;r of Internal Revenue*, 501 U.S. 868, 111 (1991), which held that a Special Trial Judge of the Tax Court was an 'inferior officer' under Article II, would appear to support the conclusion that SEC ALJs are also inferior officers").

In *Freytag*, the Supreme Court was asked to decide whether special trial judges ("STJ") in the Tax Court were inferior officers under Article II. 501 U.S. at 880. In rejecting the argument that STJs do "no more than assist the Tax Court judge in taking the evidence and preparing the proposed findings and opinion," and that they "lack authority to enter a final decision," the Supreme Court held that STJs carry out important functions and exercise significant discretion. *Freytag*, 501 U.S. at 881-82.

Like the STJs in *Freytag*, SEC ALJs also exercise "significant authority." The office of an SEC ALJ is established by law, and the "duties, salary, and means of appointment for that office are specified by statute." *Id.*; *see supra* (setting out the ALJ system, to include the establishment of ALJs and their duties, salary, and means of appointment). ALJs are permanent employees - unlike special masters - and they take testimony, conduct trials, rule on the admissibility of evidence, and can issue sanctions, up to and including excluding people (including attorneys) from hearings and entering defaults. 17 C.F.R. §§ 200.14 (powers); 201.180 (sanctions). As a result, SEC ALJs are clearly inferior officers, and ALJ Foelak's and Elliot's failure to be appointed by the appropriate party under Article II renders proceedings they presided over unconstitutional.

On June 8, 2015, a judge in the United States District Court for the Northern District of Georgia found that SEC ALJs are inferior officers within the meaning of Article II and thus must be appointed by the President, the courts of law or a department head. *Hill v. SEC*, No. 1:15-CV-1801-LMM (N.D. Ga. June 8, 2015). In *Hill*, the court granted the Plaintiff's request to enjoin an SEC administrative proceeding against him because the ALJ appointed to preside over the Plaintiff's case was not appointed by the President, the courts of law or a department head, but rather by the SEC's Office of Administrative Law Judges, in violation of Article II. Judge May found that ALJs as permanent employees who take testimony, conduct trials, rule on the admissibility of evidence and issue sanctions, up to and including excluding people (including attorneys) from hearings and entering defaults, are not merely employees but rather inferior officers who exercise the "significant authority" and thus must be appointed in the manner prescribed by Article II. Both the district court and the Eleventh Circuit refused to stay the injunction pending the Commission's appeal from the order.

On August 4, the same judge issued a preliminary injunction in a second case, *Gray Financial Group, Inc. v. SEC*, on the same grounds as *Hill. Gray Financial Group, Inc. v. SEC*, No. 1:15-cv-492-LMM. The ALJ appointed to preside over the administrative proceeding in Gray- ALJ Cameron Elliot- was the same ALJ who presided over this Petitioner's administrative proceeding. The SEC is appealing the *Gray* decision to the Eleventh Circuit Court of Appeals.

The proceedings *In the Matter of Timbervest, LLC et al.,* shed some light on recalcitrance of the SEC on the question of the appointment of the ALJ's. ALJ Cameron Elliot presided over the administrative proceeding against Timbervest. While the petition for review of ALJ Elliot's decision was still pending, the Wall Street Journal published an article challenging the fairness of SEC administrative proceedings, in which one former ALJ is quoted as stating she was pressured to issue rulings in favor of the Division of Enforcement. As a result, Timbervest sought additional discovery on the ALJ hiring process. The SEC then ordered the Division of Enforcement to file an Affidavit setting forth the manner in which ALJ Elliot and his predecessor were appointed. The SEC also issued a second order in which it "invited" ALJ Elliot to provide an affidavit addressing whether he was ever aware of ALJs being subjected to pressures to rule in favor of the Division of Enforcement.

ALJ Elliot declined to provide such an affidavit. The Division of Enforcement also declined to provide an affidavit "setting forth the manner in which ALJ Cameron Elliot and his predecessor were hired, including the method of selection and appointment," and instead provided an affidavit only containing "the factual information the Division believes legally relevant to resolving Respondents' Article II-based constitutional claims." The affidavit, signed by Deputy Chief Operating Officer of the SEC, Jayne Seidman, stated only that "Based on my knowledge of the Commission's ALJ hiring process, ALJ Elliot was not hired through a process involving the approval of the individual members of the Commission." *See Timbervest, LLC et al. v.*

S.E.C., Docket No. 1:15-cv-02106, *Exhibit E to Plaintiffs' Memorandum of Law in Support of their Motion for a Temporary Restraining Order and Preliminary Injunction, Affidavit of Deputy Chief Operating Officer of the Commission Jayne Seidman* (N. D. Ga. 2015). The Division described "the hiring process for Commission ALJs," as administered by OPM, and told the SEC: "It is the Division's understanding that the above process was employed as to ALJ Elliot. Elliot later contradicted that affidavit when he noted in a hearing: "the Division's description of how I was hired was erroneous."[3]

[3] The next day, the parties asked that ALJ Elliot state "what you believe the inaccuracies to be." He explained that the SEC's affidavit assumed he was newly hired as an ALJ by the SEC, but that was not correct because he had been an ALJ in the Social Security Administration. That meant that he was hired "through the process that essentially everyone else goes through," responding to a posting on the federal government's job-posting website. "I saw a posting on USA Jobs when I was at Social Security. I sent in my resume, I had an interview, I got an offer; it's as simple as that. What's described in the Division's notice of filing in Timbervest is if you've never been an ALJ before. And as I said, I did in fact go through that process, just not when I was hired by the SEC." He went on, "I think when I was hired by the SEC, the Office of Personnel Management did have to approve my transfer from Social Security to SEC so OPM does actually get involved in every ALJ's hiring, to my knowledge." When asked with whom he interviewed, he responded: "I interviewed with Judge Murray, with Jayne Seidman, and an attorney with the general counsel's office, whose name escapes me at the moment." He also said "I pulled out one of my forms that I got from HR, and it appears that someone in HR did sign off on my hiring . . . I'm not saying that the person who signed the paper itself was my appointment. . . . Whether that constitutes my appointment or not, I don't know." When asked if he knew who appointed him, or the actual act that constituted his appointment, he responded: "I would have to say no, I don't know. I have an educated guess, but it's really just an educated guess. No, I don't know the answer."

On August 20, 2015, Judge Berman of the United States District Court for the Southern District of New York found that ALJs are inferior officers not appointed by SEC Commissioners in violation of Article II. *Duka v. SEC*, No. 15-cv-00357 (USDC – S.D.N.Y.). In so finding, Judge Berman granted the Plaintiff's Motion for Preliminary Injunction prohibiting the SEC from pursuing an administrative claim against the Plaintiff. In that case the plaintiff cited recent public statements by ALJ Elliot, in which he says he was not appointed by the Commissioners, but rather was hired after submitting his resume and undergoing a round of interviews with three SEC officials. In July, the SEC reassigned the Duka case to a different ALJ for reasons other than the Appointments Clause issue.

On August 3, Judge Berman denied the SEC's Motion to Dismiss, finding that ALJs are inferior officers similar to the special law judges in *Freytag* because they: (1) exercise "significant authority"; (2) hold positions established by law and their duties, salary and means of appointment are specified by statute; and (3) take testimony, conduct trials, rule on the admissibility of evidence and have the power to enforce compliance with discovery orders. Judge Berman held that ALJ Cameron Elliot was not hired properly pursuant to Article II, and cited to an affidavit filed in the *Timbervest* case (*infra*) in which Jayne Seidman, Deputy Chief Operating Officer of the SEC, stated that ALJ Elliot was not appointed through a process involving the approval of the individual members of the Commission. At that

time, Judge Berman reserved judgment on Duka's motion for injunctive relief for seven days "to allow the SEC the opportunity to notify the Court of its intention to cure any violation of the Appointments Clause." The Commission declined to do so, and filed a letter with the court stating its intention to pursue its administrative case against Duka. As a result, Judge Berman issued his order two days later preliminarily enjoining the SEC from proceeding.

On August 27, the SEC filed an interlocutory appeal to the Second Circuit seeking to overturn Judge Berman's decision.

In *Tilton v. SEC*, No. 1:15-cv-02472-RA, slip op. (S.D.N.Y. June 30, 2015) the Commission conceded during oral argument that the ALJ appointed in the *Tilton* matter, ALJ Foelak, was not appointed by the Commissioners. *See Tilton v. SEC*, Docket No. 15-cv-02472, *Transcript of Proceedings Re: Hearing Held On 5/11/2015 Before Judge Ronnie Abrams* ("THE COURT: Can I ask you the factual question that I asked of Mr. Gunther? Who exactly appoints SEC ALJs? Can you tell me more about the appointment process? MS. LIN: Your Honor, those facts are not in the record here, but we acknowledge that the commissioners were not the ones who appointed, in this case, ALJ Foelk [*sic*], who is the ALJ presiding-- THE COURT: There is no factual dispute, okay").

In the Matter of Raymond J. Lucia Cos., Inc., File No. 15006., the respondent argued that ALJ Cameron Elliot, who presided over the matter and issued the initial decision, was not appointed in a manner consistent with the Appointments Clause of

the Constitution. The SEC ruled that its ALJs are employees, not inferior officers, within the meaning of Article II and, therefore, are not subject to the requirements of the Appointments Clause. The SEC stated that "[i]t is undisputed that ALJ Elliot was not appointed by the President, the head of a department or a court of law." *Id.* at 29. The SEC argued that this was irrelevant, however, as ALJs like Elliot do not have the power to issue "final decisions," as ALJ's recommended decisions can be reviewed *de novo* by the Commission upon petition or on the Commission's own initiative, and only become final upon the issuance of an order by the Commission. *Id.* at 30-31. The SEC ruled that *Freytag v. Comm'r of Internal Revenue* is inapposite to the question of whether ALJs are inferior officers or employees, because the special tax court trial judges in *Freytag*: (1) issued decisions that were not reviewed *de novo*, but were reviewed and set aside only if clearly erroneous; (2) were authorized to issue final decisions without further action by the Tax Court; and (3) exercised a portion of the judicial power of the United States because they had the authority to punish contempt by fine or imprisonment.

B. Structural Errors Committed In Violation Of The United States Constitution Are Not Waived By A Petitioner's Failure To Raise The Issue Below.

Existing United States Supreme Court decisions and Circuit Court opinions provide considerable insight into the question of whether

and under what circumstances a petitioner should be deemed to have waived (or alternatively forfeited) his right to challenge the validity of a proceeding based upon an Appointments Clause violation.[4] When addressing the issue of waiver or forfeiture, the Courts have focused on three primary factors: (1) whether the failure to raise the issue was an intentional waiver or an unintentional forfeiture; (2) a weighing of the importance of the constitutional issue against a disruption to sound appellate process; and (3) on the opportunity provided to the agency to correct its own mistake.

Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 111 S.Ct. 2631 (1991), which the Division notes has been on the books for decades, is

[4] As Justice Scalia noted in his dissent in *Freytag v. Comm'r of Internal Revenue*, "Waiver, the 'intentional relinquishment or abandonment of a known right or privilege,' *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), is merely one means by which a forfeiture may occur. Some rights may be forfeited by means short of waiver, *see, e.g., Levine v. United States*, 362 U.S. 610, 619, 80 S.Ct. 1038, 1044, 4 L.Ed.2d 989 (1960) (right to public trial); *United States v. Bascaro*, 742 F.2d 1335, 1365 (CA11 1984) (right against double jeopardy), *cert. denied sub nom. Hobson v. United States*, 472 U.S. 1017, 105 S.Ct. 3476, 87 L.Ed.2d 613 (1985); *United States v. Whitten*, 706 F.2d 1000, 1018 n.7 (CA9 1983) (right to confront adverse witnesses), *cert. denied*, 465 U.S. 1100, 104 S.Ct. 1593, 80 L.Ed.2d 125 (1984), but others may not, *see, e.g., Johnson, supra* (right to counsel); *Patton v. United States*, 281 U.S. 276, 312, 50 S.Ct. 253, 263, 74 L.Ed. 854 (1930) (right to trial by jury). A right that cannot be waived cannot be forfeited by other means (at least in the same proceeding), but the converse is not true." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 895 (1991).

instructive here. In that case, a tax proceeding was initially assigned to a properly appointed judge but later reassigned to a "special trial judge" with the consent of the parties after Congress authorized the Chief Judge of the Tax Court to appoint special trial judges to hear certain proceedings. The Commissioner argued that the petitioners waived their right to challenge the constitutional propriety of [the enabling statute] by failing to raise a timely objection to the assignment to a special trial judge, and by consenting to it. *Id.* at 877. After noting that Appointments Clause objections to judicial officers are in the category of nonjurisdictional, structural, constitutional objections that could be considered on appeal whether or not they were ruled upon below, the Court in *Freytag* held that, even where consent was given, the defect in the appointment of the special trial judge spoke to the validity of the proceeding itself and that the "disruption to sound appellate process entailed by entertaining objections not raised below does not always overcome what Justice Harlan called 'the strong interest of the Federal Judiciary in maintaining the constitutional plan of separation of powers.'" *Id.* at 878-79 (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962). Thus, *Freytag* teaches that although an Appointments Clause challenge may theoretically be waived, such a challenge meets the test of "one of those rare cases in which [the court] should exercise [its] discretion to hear petitioner's challenge." *Id.* at 879. Where, in this case as in *Freytag*, the violation undermines the validity of the proceedings and implicates the important protections envisioned by the separation of powers, form will not prevail over

substance and waiver will not apply.[5] The holding in *Freytag* also suggests that if an intentional waiver (by consent) does not preclude review of a structural error, then an unintentional forfeiture certainly would not.

After *Freytag* the Commission had the obligation to ascertain whether its procedures violated the Appointments Clause and, if so, to appoint its ALJ's in accordance with it. *Freytag* imposed no corresponding obligation on Petitioner. To do so would be to impose an obligation on Petitioner to presume that the Commission was ignoring *Freytag*, was violating the Appointments Clause, was not disclosing the violation to him and that *Freytag* required him to raise the issue below. Such an obligation would be completely inconsistent with the standard for review of structural, constitutional errors as laid out in *Freytag*.

Petitioner had no reason to know that the ALJs assigned to preside over his proceedings were appointed in violation of the Appointments Clause and every right to expect that they were not.[6] Finally, *Freytag* makes clear that an Appointments Clause error, such as that present here, is structural

[5] In *Freytag*, the petitioner consented to the use of the special trial judge. Pierce did not consent to the use of the ALJ in his proceeding.

[6] The manner in which the ALJ's were appointed after *Freytag* seems to have varied. Some SEC ALJ's appear to have been appointed by the SEC while others, like the ALJ who sat on Pierce's matter, appear to have gone through the process set forth in 5 CFR 930.204. (*See* Exhibit A, *Duka v. U.S. Securities and Exchange Commission*, 1:15-cv-00357-RMB (SDNY), Decision & Order filed on August 3, 2015, footnote 1).

and speaks to the very integrity of the proceeding at issue. Particularly where forfeiture, as opposed to waiver is at issue, that error requires that the proceedings be vacated.

In addition to *Freytag*, other long standing Supreme Court jurisprudence holds that the failure to raise an issue, unknown to a party at the time of the earlier proceedings, does not deprive him of the opportunity to raise the issue at this juncture.

In *Nguyen v. United States*, 539 U.S. 69 (2003), the Petitioner failed to object to the inclusion of a non-Article III Judge on a Ninth Circuit Appellate panel before the case was submitted for decision nor did he seek rehearing to challenge the panel's authority after the Court of Appeals rendered judgment. Nonetheless, this Court granted certiorari upon a petition that raised the issue of the panel's authority for the first time to determine whether the Court of Appeals had, "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers." In *Nguyen*, the Court cited to a number of cases wherein the court addressed challenges to the authority of a court even where the defect was not raised in a timely manner. *See, Glidden Co. v. Zdanok*, 370 U.S. 530, 536, 82 S.Ct. 1459 (1962); *American Constr. Co. v. Jacksonville, T & K.W.R. Co.*, 148 U.S. 372, 13 S.Ct. 758 (1893); *William Cramp & Sons Ship & Engine Building Co. v. International Curtiss Marine Turbine Co.*, 228 U.S. 645 33 S.Ct. 722 (1913); *Moran v. Dillingham*, 174 US. 153, 158, 19 S.Ct. 620 (1899). The interest at stake here is no less important than that at stake in *Nguyen*. Indeed, the Commission's adherence to a

process that will render void any proceedings conducted or to be conducted in accordance with that process will have far reaching impact, and has the capacity to bring the OIP system to its knees.

Curtis Pub. Co. v. Butts, 388 U.S. 130, 135-37 (1967) is also helpful on the issue of waiver. *Curtis Pub. Co.* arose from an article published in petitioner's Saturday Evening Post which accused the athletic director of the University of Georgia of conspiring to 'fix' a football game. Butts brought a libel action and tried the case to completion before the Supreme Court handed down its decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), a seminal case setting the standard for libel cases involving public officials, which holds that the First Amendment requires that statements about a public figure like Butts relating to his official conduct be made with "actual malice." The only defense raised by Curtis Pub. Co. during the action was one of substantial truth- Curtis Pub. Co. did not raise any constitutional defenses, even though it was aware of the pending *New York Times Co.* case, and had raised general constitutional defenses in a separate libel action.

Shortly after the case was tried, the Supreme Court rendered its decision in *New York Times Co. v. Sullivan.* The trial judge denied Curtis Pub. Co.'s motion for a new trial that had been filed promptly following the *New York Times Co.* decision. Curtis Pub. Co. appealed this denial and the Court of Appeals affirmed, holding that it had 'clearly waived any right it may have had to challenge the verdict and judgment on any of the constitutional grounds

asserted in Times.' *Curtis Pub. Co. v. Butts*, 351 F.2d 702, 713 (1965).

In *Curtis Pub. Co.*, the Supreme Court rejected the Court of Appeals holding and recognized, as it had done in the past, that the mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground. *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669 (1996); *see Tehan v. United States ex rel. Shott*, 382 U.S. 406, 409 n.3, 86 S.Ct. 459, 461 (1966); *Linkletter v. Walker*, 381 U.S. 618, 622-29, 85 S.Ct. 1731, 1733-39 (1965); *Griffin v. State of California*, 380 U.S. 609, 85 S.Ct. 1229 (1965); *White v. State of Maryland*, 373 U.S. 59, 83 S.Ct. 1050 (1963). For a waiver of a constitutional defense to be effective it must be one of a "known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938).

CONCLUSION

Based upon the foregoing, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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