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Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15006

In the Matter of

RAYMOND J. LUCIA
COMPANIES, INC. and
RAYMOND J. LUCIA, SR,

Respondents.

RESPONDENTS' REPLY TO THE DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENTS' MOTION FOR AN ORDER DISMISSING THE PROCEEDINGS

DATED: December 31, 2018

Respondents, Raymond J. Lucia, Sr. and Raymond J. Lucia Companies, Inc., hereby reply to the Division of Enforcement's Opposition to their Motion for an Order Dismissing the Proceedings.[1]

I. DISCUSSION

A. This ALJ Cannot Avoid Violating Article II of the United States Constitution by Adopting the Division's Statutory Interpretation.

In the hopes of avoiding what it recognizes as a dire Article II problem that makes this proceeding unconstitutional, the Division has ignored the Supreme Court's ruling in this very case and has presented arguments already rejected by the Court. Indeed, the Division relies on two arguments to avoid this "embedded constitutional question," both of which were presented by the Solicitor General to the United States to the Supreme Court. See Lucia v. S.E.C., 138 S. Ct. 2044, 2060 (2018) (Breyer, J., concurring). But neither argument carried the day before the Court, and, as Justice Breyer noted, the Court's opinion in Lucia, merely clarified the constitutional problem underlying this proceeding. See id.

Initially, it must be noted that the Division appears to concede that the tenure protections governing this ALJ violate Article II, at least if they are interpreted in their most natural sense. See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483 (2010) (If "the President cannot remove an officer who enjoys more than one level of good-cause protection," and "[t]hat judgment is instead committed to another officer, who may or may not agree with the

[1] The Division filed and served their Opposition on December 21, 2018. Respondents' Reply is due within three business days of that date. See 17 C.F.R. §§ 201.154(b) (time for reply briefs), 201.250(f)(2) (applying rule 201.154(b)). The Reply would have been due on December 27, 2018. See 17 C.F.R. § 201.160 (exclude date of service and weekends from calculation). However, due to a lapse of appropriations, the Commission ceased normal operation on December 27, 2018. The Reply is now due any time the Commission resumes normal activities. See 17 C.F.R. § 201.160(a) (if "other conditions have caused the Secretary's office or other designated filing location to close the filing deadline shall be extended to the end of the next day that is neither a Saturday, a Sunday, nor a Federal legal holiday").

President's determination, and whom the President cannot remove simply because that officer disagrees with him," then this will contravene the President's "constitutional obligation to ensure the faithful execution of the laws."). This is hardly surprising, as the Solicitor General already identified this issue as "raising serious constitutional concerns," which render these administrative proceedings subject to constitutional infirmity. Brief of Solicitor General for Respondent, Securities and Exchange Commission, Lucia v. S.E.C., 138 S.Ct. 2044, (No. 17-130) at 45, 46. Indeed, the Division's sole line of attack is to rely on "constitutional avoidance principles," to try to salvage the scheme at issue here. (Division Opp. at 14.)

The Division's arguments fail, however, because the scheme cannot be saved through interpretation, particularly by this ALJ. The Division first argues that this ALJ should apply an interpretation of 5 U.S.C. § 7521, which protects this ALJ from removal except upon "good cause," to "avoid[] the constitutional defects at issue in Free Enterprise Fund." (Division Opp. at 14.) The Division says that this language could be interpreted to allow the Commission to remove ALJs "for personal misconduct or for failure to follow lawful agency directives or to perform h[er] duties adequately." (Division Opp. at 14.)

But this ALJ cannot adopt the Division's suggested construction. First, the statute says directly that ALJs may be removed only "for good cause *established* and *determined* by the Merit Systems Protection Board (MSPB)." 5 U.S.C. § 7521(a) (emphasis added). This language "provide[s] tenure" to ALJs and protects them from removal "for political reasons." Ramspeck v. Fed. Trial Examiners Conference, 345 U.S. 128, 142 (1953). Moreover, as Justice Breyer noted in his concurring opinion, this statute does not grant the Commission the power to institute removal proceedings at all, because the MSPB has the independent and *exclusive* power to remove ALJs, and the board itself has its own removal protections. Lucia, 138 S.Ct. at 2016.

Thus, this ALJ cannot adopt the Division's construction. See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); Ithaca College v. NLRB, 623 F.2d 224, 228 (2d Cir. 1980) ("The position of any administrative tribunal whose hearings, findings, conclusions and orders are subject to direct judicial review is much akin to that of the United States district court ... and as must a district court, an agency is bound to follow the law of the circuit.").

More significantly, the Division's proposed construction of Section 7521 still would not address the second level of constitutional infirmity found in the removal protections afforded the *Commissioners*. The Court in Free Enterprise Fund found a constitutional violation in the "multilevel protection from removal" that prevented the removal of the heads of a department. 561 U.S. at 484. But even if "good cause" protection for ALJs means "any cause," the Commissioners are still protected by another layer of unconstitutional protections. See Free Enter. Fund, 561 U.S. at 487 (Commissioners may only be removed for "inefficiency, neglect of duty, or malfeasance in office"); MFS Sec. Corp. v. SEC, 380 F.3d 611, 619-20 (2d Cir. 2004) (same). This ALJ cannot avoid that statutory problem by adopting the Division's limited interpretation.

The Division also argues that this ALJ may avoid the constitutional problem because an ALJ is less like an "executive" officer and more like a "quasijudicial" one. (Division Opp. at 15.) But this distinction did not survive the Lucia decision. The Division rests its argument on a statement by the Court in Free Enterprise Fund, which opined in a footnote that there may be a constitutional distinction between civil servants exercising "adjudicative rather than enforcement or policymaking functions." (Division Opp. at 15 (citing Free Enter. Fund, 561 U.S. at 507 n.

10).) But that footnote was premised on the view that it was "disputed" whether "administrative law judges are necessarily 'Officers of the United States.'" Free Enter. Fund, 561 U.S. at 507 n. 10. The Court in Lucia held, however, that SEC ALJs are most definitely Officers of the United States. 138 S.Ct. at 2049. The Division cannot continue to rely on that distinction, and, as such, this ALJ cannot avoid the constitutional problem presented here.

Finally, this ALJ is not empowered to decide this constitutional question. The Supreme Court in Free Enterprise Fund twice stated that where a party's "constitutional claims are ... outside the [agency's] competence and expertise," district courts have jurisdiction over constitutional questions. 561 U.S. at 478,491; see also Jones Bros, Inc. v. Sec'y of Labor, 898 F. 3d 669, 673 (6th Cir. 2018) ("An administrative agency ... has no authority to entertain a facial constitutional challenge to the validity of a law.") While the Supreme Court in Lucia declined to address that question, it did so in order to await "lower court opinions to guide our analysis of the merits." Lucia, 138 S.Ct. at 2050 n. 1 (citations omitted, emphasis added). Whether the ALJ before whom Respondents have been haled is constitutionally appointed is a question that can only be addressed by an Article III court.

B. The Now-Vacated Proceedings Did Not Discharge the Statutory Deadlines.

After Respondents noted that they were entitled to challenge the allegations against them at a hearing no later than November 2012, the Division audaciously claims that it actually "complied with statutory and regulatory deadlines," as it prepares to litigate this matter at a hearing in 2019. (Division Opp. at 5-7.) Because the order instituting proceedings did actually "fix a hearing date" that would have complied with the 60-day deadline, and a now-voided hearing followed by a now-vacated decision were issued in compliance with the regulatory

deadlines, the Division says that was good enough. (Division Opp. at 5-7.) These arguments cannot survive even passing scrutiny.

The statutory argument would render the applicable text utterly meaningless. The Division says the statutes entitled Respondents only to an order instituting proceedings that "fix[ed] a hearing date" within "60 days after service," but it says, the "OIP in this case, which has not been vacated, complied with that requirement." (Division Opp. at 5-6.) But that view of the statutes assumes wrongly that the hearing never actually need be held. Both Sections 78u-3(a) and 80b-3(k)(1) of Title 15 allow the Commission to issue remedial orders to regulated parties "[i]f the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this subchapter, or any rule or regulation thereunder[.]" And these administrative proceedings shall be commenced by a "notice instituting proceedings," which "shall fix a hearing date not earlier than 30 days nor later than 60 days after service of the notice unless an earlier or a later date is set by the Commission with the consent of any respondent so served." 15 U.S.C. §§ 78u-3 (b), 80b-3(k)(2). While the Commission must, of course, "fix a hearing date," it must also actually hold the hearing if it wants to have the statutory authority to issue an administrative cease-and-desist order. See 15 U.S.C. §§ 78u-3(a), 80b-3(k)(1). Plainly the statute requires the Commission to not only issue a notice fixing the time for the hearing within 60 days, but also actually holding the hearing within the period listed in the notice.

The Division's arguments concerning the rule violations are equally disingenuous. The Supreme Court recognized that all the proceedings to date were invalid, and said that the only way the Commission could remedy the Appointments Clause defect would be to "a new hearing before a *properly appointed* official" and that "another ALJ (or the Commission itself) must hold

the new hearing." Lucia, 138 S.Ct. at 2055 (emphasis added). The Commission agreed and ordered that Respondents "be provided with the opportunity for a new hearing before an ALJ who did not previously participate in the matter," and "vacat[ing] any prior opinions" "issued in this matter." Order, Exchange Act Release No. 83907, at 1 (August 22, 2018). But the Division's argument relies entirely on its view that "the hearing itself did in fact commence within 60 days of when the OIP was served." (Division Opp. at 6.) The Division chose to bring this case in an unconstitutional forum and cannot avoid the Court's clear directive that the original hearing was a legal nullity. The only hearing that matters now is the one pending in 2019, some 7 years after the OIP was issued.

C. The Due Process Clause Requires a Remedy Even if the Statutes Do Not.

The Division also devotes considerable energy to arguing that its failure to abide by the applicable time limits for adjudicating this matter is irrelevant because the statute and the rules all fail to "specify any consequences" for the violations. (Division Opp. at 9, 11.) Indeed, the Division relies extensively on Brock v. Pierce County, 476 U.S. 253, 260 (1986), and other related decisions discussing appropriate discretionary remedies for similar statutory violations. (Division Opp. at 10.)

But this argument ignores the independent constitutional violation at issue in the Accardi doctrine.[2] The constitutional guarantees of due process require "agencies to abide by internal, procedural regulations even when those regulations provide more protection than the Constitution or relevant civil service laws." Lopez v. Fed. Aviation Admin., 318 F.3d 242, 246 (D.C. Cir. 2003); see also United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 268

[2] In any event, as set out more fulling in Respondents' initial filing, this ALJ still would be well within her discretion in dismissing this action because of the *statutory* violation purely as a matter of equity, separate and apart from the Accardi violation. (See Respondent's Mot. to Dismiss at 20.)

(1954) (agency violates "due process" by disregarding rules governing its behavior, regardless of prejudice). These constitutional protections are wholly independent of any statutory penalties that might exist for an agency's noncompliance with deadlines, and the inapplicability of relief on one basis does not affect relief on the other. See Oy v. United States, 61 F.3d 866, 875 (Fed. Cir. 1995) (notwithstanding Brock, agency violation of procedural requirement would be invalid if it caused prejudice to a party under American Farm Lines, 397 U.S. at 538-39); Suntec Indus. Co., v. United States, 951 F. Supp. 2d 1341, 1353 (Ct. Int'l Trade 2013), aff'd by 857 F.3d 1363 (Fed. Cir. 2017) ("First asked is whether the relevant statute or implementing regulation states a remedy for failure to comply. If there is no stated remedy, the second question is whether the rule provides an important procedural benefit. If so, the third question is whether substantial prejudice can be demonstrated."); Garcia v. Johnson, No. 14-CV-01775-YGR, 2014 WL 6657591, at *8 (N.D. Cal. Nov. 21, 2014) (Gonzalez Rodgers, J.) (rejecting an argument based on Brock because Accardi provides that "[p]rocedures in a regulation, or a requirement to act in a regulation, can be enforceable even where the statute preceding the regulation does not create a similar duty"); Int'l Labor Mgmt. Corp. v. Perez, No. 1:14CV231, 2014 WL 1668131, at *8, 10 (M.D. N.C. Apr. 25, 2014) (Osteen, J.) (finding Brock did not impact application of "the Accardi doctrine"). Even if the statutory violations do not warrant a remedy, the *constitutional violation* requires one. Vitarelli v. Seaton, 359 U.S. 535, 539 (1959).

Additionally, the Division's assertion that "Respondents are unable to identify a single case dismissing an agency proceeding based on a failure to comply with a statutory deadline" (Division's Opp. at 10), is only true if one totally ignores the Accardi doctrine. As a *constitutional matter* courts have often considered agency action done beyond a statutory deadline to be void. See, e.g., Reuters Ltd. v. F.C.C., 781 F.2d 946, 947, 952 (D.C. Cir. 1986)

(F.C.C. lacked authority to reconsider licensing grant because it had been issued beyond a period set by the Commission's own rules, even though the Commission had acted to "achieve a fair resolution" of a dispute); Int'l Labor Mgmt. Corp., 2014 WL 1668131, at *10 (agency could not proceed in violation of regulation requiring agency to issue decision within seven days of receipt of application, regardless of prejudice to a petitioner). This was so even when the *statutory* deadline would not have deprived the agency of jurisdiction under the Brock line of cases. See Int'l Labor Mgmt. Corp., 2014 WL 1668131, at *7. Simply, courts will not sit idly by while an agency willfully violates its own rules. Reuters Ltd., 781 F.2d at 951.

Finally, the Division's suggestion that Respondents cannot show prejudice because the Supreme Court remanded this matter for further proceedings after their successful "Appointments Clause challenge," because it would actually deny Respondents of the "relief they obtained from the Supreme Court" (Division Opp. at 12), reads far too much into the Court's decision. To be sure, the Court held that the only way the Commission could cure its original "constitutional error" would be for "another ALJ (or the Commission itself)" to "hold the new hearing to which Lucia is entitled." Lucia, 138 S.Ct. at 2055. But this can hardly be viewed as a view on the merits of any issue not actually presented to the Court, such as whether the proceeding might suffer additional constitutional infirmities. After all, that was precisely why Justice Breyer highlighted the "embedded" Article II problem discussed above. See id. at 2057. And Respondents have suffered prejudice in this proceeding not just based on the expense of the litigation and the now-vacated industry bar, but also because of the unavailability of evidence and faded witness memories. Indeed, the very policies of resolving cases without protracted litigation, and to provide timely adjudication cited by the Division at page 7 of its brief are violated by this renewed, serially constitutionally flawed proceeding. Thus, both prejudice to the

respondent and Congress' own policy considerations warrant dismissal as a sanction for the independent due process violation.

III. CONCLUSION

Administrative proceedings must be brought before a lawfully appointed adjudicator. That did not happen in 2012, nor is it true today. Accordingly, Respondents' motion for a ruling on the pleadings should be granted and this ALJ should issue a preliminary order recommending a dismissal, or in the alternative, recommending trial before the Commission, or issue a stay pending district court review of the constitutional questions.

DATED: December 31, 2018

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CERTIFICATE OF SERVICE

This is to certify that this filing was sent by facsimile transmission, and that, contemporaneously, the original and three copies of the foregoing motion were mailed, first class, postage prepaid on this day to:

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And that one copy of the foregoing motion was mailed first class, postage prepaid on this day to:

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And that the foregoing motion was emailed on this day to:

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