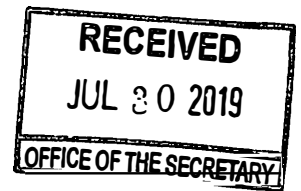


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**UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING
File No. 3-15006**

In the Matter of

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

Respondents.

**Division of Enforcement's Response in Opposition to Respondents' Motion
for Certification for Interlocutory Review**

Respondents Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr. seek an order certifying for interlocutory appeal their constitutional challenge to the dual for-cause restrictions on removal of the Commission's Administrative Law Judges ("ALJs"). Under Rule 400 of the Commission's Rules of Practice, "[p]etitions by parties for interlocutory review are disfavored and will be granted only in extraordinary circumstances." *John Thomas Capital Mgmt. Group LLC*, Exchange Act Release No. 71021, 2013 WL 6384275, at *2 (Dec. 6, 2013) (quotation omitted). Certification for interlocutory appeal must be denied unless the ALJ determines that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and that "immediate review of the order may materially advance the completion of the proceeding." 17 C.F.R. § 201.400(c)(2)(i)-(ii). As discussed further below, the Commission has consistently held that the ALJ removal protections are constitutional, and there is no substantial reason to doubt that the Commission would reaffirm that conclusion in this case. Accordingly, Respondents' motion should be denied.

Respondents argue (Mot. 2-3) that the “combin[ed]” holdings in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), and *Lucia v. SEC*, 138 S. Ct. 2044 (2018), establish that the dual for-cause removal restrictions on ALJs are unconstitutional. The Commission, however, has repeatedly held that *Free Enterprise* does not call into question the constitutionality of the ALJ removal protections. *See, e.g., OptionsXpress, Inc.*, Exchange Act Release No. 78621, 2016 WL 4413227, at *50-52 (Aug. 18, 2016), *abrogated in part on other grounds by Lucia*, 138 S. Ct. 2044; *Timbervest, LLC*, Advisers Act Release No. 4197, 2015 WL 5472520, at *26-28 (Sept. 17, 2015), *vacated on other grounds by Timbervest, LLC et al. v. SEC*, No. 15-1416 (D.C. Cir. Nov. 19, 2018). As the Commission has explained, *Free Enterprise* did not hold that multiple layers of removal protections are always unconstitutional. *OptionsXpress*, 2016 WL 4413227, at *50. Rather, under *Free Enterprise*, the analysis turns on “whether the removal restrictions [at issue] are of such a nature that they impede the President’s ability to perform *his* constitutional duty.” *Id.* (quoting *Morrison v. Olson*, 487 U.S. 654, 691 (1988)). And “ALJs differ from the PCAOB members [considered in *Free Enterprise*] in a number of significant ways” that “obviate any constitutional concerns from the dual for-cause removal restrictions in the context of ALJs.” *Id.*

As Respondents note (Mot. 3), *Lucia*’s holding that the Commission’s ALJs are inferior officers invalidates one of the distinctions upon which the Commission has relied. But the Commission has addressed whether such a holding would alter its conclusion that the removal restrictions are constitutional, and has made clear that it would not. Specifically, the Commission stated that “even if [its] ALJs are considered officers in the constitutional sense,” several other significant differences independently “obviate any

potential concerns about the removal limitations.” *OptionsXpress*, 2016 WL 4413227, at *51. First, the Commission’s ALJs perform “limited adjudicative” functions “dramatically” different from the “core executive” powers exercised by PCAOB members. *Id.*; see also *Free Enterprise*, 561 U.S. at 507 n.10 (distinguishing ALJs from PCAOB members because, “unlike” PCAOB members, ALJs “perform adjudicative rather than enforcement or policymaking functions, or possess purely recommendatory powers”). Second, ALJs are “very different” from PCAOB members in that “they merely take the cases [the Commission] assign[s] to them,” “every one of their decisions can be revisited in the course of [the Commission’s] *de novo* review,” and the Commission is not “even required to delegate functions to ALJs in the first place.” *OptionsXpress*, 2016 WL 4413227, at *51; see also *Free Enterprise*, 561 U.S. at 504-05 (emphasizing, in contrast, that the PCAOB had “significant independence in determining its priorities and intervening in the affairs of regulated firms . . . without Commission preapproval or direction”). And third, the ALJ removal protections are “not novel and ha[ve] been in place for over 70 years.” *OptionsXpress*, 2016 WL 4413227, at *52; see also *Free Enterprise*, 561 U.S. at 496, 505 (emphasizing the PCAOB’s “novel structure” and “lack of historical precedent”).

Respondents claim that *Lucia* “cast[s] substantial doubt” on this analysis (Mot. 4), but point to nothing in the majority opinion to substantiate that assertion. Instead, they rely on Justice Breyer’s concurring opinion. But Justice Breyer makes clear that the distinctions between PCAOB members and ALJs that *Free Enterprise* found critical and upon which the Commission has relied “remain” after *Lucia*, with the exception of officer status. *Lucia*, 138 S. Ct. 2061 (Breyer, J., concurring in part). Contrary to Respondents’ argument (Mot. 4), Justice Breyer’s discussion of the hypothetical consequences of

disregarding the constitutionally relevant distinctions between PCAOB members and ALJs does not prove that there is “substantial disagreement over the continued vitality” of the Commission decisions that take those distinctions seriously.

Respondents’ assertion (Mot. 3, 4) that the Division and the Solicitor General have conceded that the ALJ removal protections are unconstitutional is wrong. The Division argued in opposition to Respondents’ motion to dismiss that “Congress has the latitude to impose removal restrictions to ensure the structural independence necessary for ALJs to properly perform their quasijudicial functions.” Division’s Opp. to Mot. to Dismiss at 15-16 (Dec. 21, 2018) (citing *Timbervest*). The Division also advanced the Solicitor General’s argument that the ALJs’ “good cause” removal protections may be interpreted in a manner that avoids constitutional concerns. *Id.* at 14. The fact that the ALJs’ removal protections could also be upheld on this alternative ground is reason to deny rather than grant interlocutory review.

In short, Respondents fail to identify any new legal authority that might incline, let alone require, the Commission to reconsider the constitutionality of the ALJ removal restrictions. And because there is no substantial reason to believe the Commission will depart from its prior holding on the removal question, it is much more likely that immediate review would simply delay rather than “advance” the completion of this proceeding. Respondents’ motion thus falls short of meeting Rule 400’s strict criteria for interlocutory review.

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For the foregoing reasons, Respondents' motion to certify for interlocutory appeal the constitutionality of the Commission ALJs' removal protections should be denied.

Respectfully submitted,

Dated: July 29, 2019


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CERTIFICATE OF SERVICE

I certify that on July 29, 2019, I caused the foregoing document to be served on the following persons, by electronic mail, facsimile, or by UPS overnight mail as stated:

Vanessa Countryman, Acting Secretary
Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 1090
Washington, DC 20549
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(By Fax and By UPS)
(Original and three copies)

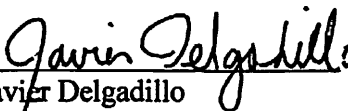
Courtesy Copy to:

Honorable Carol Fox Foelak
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