UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of: **BENNETT GROUP FINANCIAL SERVICES, LLC and DAWN J. BENNETT,** Respondents-Petitioners.	**Administrative Proceeding** **File No. 3-16801**

PETITION FOR REVIEW OF RESPONDENTS-PETITIONERS BENNETT GROUP FINANCIAL SERVICES, LLC AND DAWN J. BENNETT

MORVILLO LLP
500 Fifth Avenue
43rd Floor
New York, New York 10110
212-796-6346

Counsel for Respondents-Petitioners Bennett Group Financial Services, LLC and Dawn J. Bennett

August 1, 2016

Contents

Table of Authorities

Cases

Statutes

Rules

Constitutional Provisions

Other Materials

Pursuant to Rule 410 of the Commission's Rules of Practice, respondents Bennett Group Financial Services, LLC and Dawn J. Bennett (together, "Petitioners") petition for review of the Initial Decision issued by Administrative Law Judge James E. Grimes ("Judge Grimes") on July 11, 2016. Petitioners ask the Commission to reject the Initial Decision and dismiss the Order Instituting Proceedings ("OIP") against Petitioners.

INTRODUCTION

This petition for review explains that the proceeding below was unconstitutional. Ms. Bennett is the founder of Bennett Group, an independent investment firm headquartered in Washington D.C., and for the relevant time period, was a registered representative of Western International Services ("Western"). This case involves allegations that Petitioners violated antifraud provisions of the Securities Act, Exchange Act, Advisers Act, and related rules.[1] Petitioners continue to deny such allegations on the merits, but submit this Petition for Review to the Commission on only one issue: whether the appointment of the presiding Administrative Law Judge ("ALJ") violates the Appointments Clause of the U.S. Constitution. U.S. Const. art. II.

On October 30, 2016, Petitioners filed an action in district court seeking to enjoin the administrative proceeding for this reason. The district court dismissed the action for lack of jurisdiction, and Petitioners appealed. The issue – whether the district court has jurisdiction to hear the constitutional claim – has been briefed and is tentatively scheduled for oral argument in front of the Fourth Circuit Court of Appeals during the October 25-28, 2016 session.

[1] Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, Exchange Act Rule 10b-5, and Section 206(1) and (2) of the Investment Advisers Act of 1940.

Meanwhile, Petitioners filed a motion to have the administrative proceeding declared unconstitutional, which was subsequently denied by Judge Grimes. Petitioners respectfully informed Judge Grimes before the administrative proceeding that Petitioners would not participate, citing their previously-stated objections to the unconstitutional ALJ appointment. On January 27, 2016, Judge Grimes commenced the proceeding without the Petitioners, then ruled against Petitioners in a default judgment on July 11, 2016. Judge Grimes recommended the following sanctions:

1. a cease-and-desist order;
2. a permanent bar of Ms. Bennett from the securities industry;
3. disgorgement by Ms. Bennett and Bennett Group, jointly and severally, of $556,102 plus prejudgment interest; and
4. that Bennett Group pay a civil monetary penalty of $2.9 million and Ms. Bennett pay a civil monetary penalty of $600,000—for total penalties of $3.5 million.

EXCEPTION TAKEN PURSUANT TO RULE OF PRACTICE 410(b)

Petitioners take one exception to the Initial Decision: that the proceeding below was unconstitutional.[2]

Under the Appointments Clause, the ALJ who conducted the proceeding is an "inferior officer" of the United States, not a mere employee. The Appointments Clause requires that "inferior officers" must be appointed directly by the head of their agency, and provides that such officers may be insulated from Presidential removal by no more than one layer of tenure protection. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). But the ALJ was not appointed directly by the Commission, nor does he enjoy only one level of

[2] Consistent with Rule of Practice 410 ("Appeal of Initial Decisions by Hearing Officers"), this petition provides the "supporting reasons for each exception" in relatively "summary form."

protection from Presidential removal. As a result, the proceeding he conducted was unconstitutional. The Commission has disagreed with this view of the Appointments Clause, contending not that its ALJs are appointed by the Commission or that they do not enjoy two or more levels of protection from removal, but that its ALJs are not "officers." *See, e.g., In the Matter of Timbervest, LLC* Release No. 4197, 2015 WL 5472520, at *24 (Sep. 17, 2015).

The Commission's position is wrong as a matter of law. In fact, the Commission stands alone in denying that SEC ALJs are officers. The judicial decisions that have addressed this specific issue have concluded that SEC ALJs are "inferior officers" and that, therefore, proceedings conducted by those ALJs are unconstitutional. *See Gray Financial Group, Inc. v. SEC*, No. 15-cv-00492, slip op. at 35 (N.D. Ga. Aug. 4, 2015) (issuing preliminary injunction), appeal docketed No. 15-13738 (11th Cir. Aug. 20, 2015); *Duka v. SEC*, No. 15-cv-00357, 2015 WL 4940083, at *1 (S.D.N.Y. Aug. 12, 2015) (same), *appeal docketed*, No. 15-2732 (2d Cir. Aug. 27, 2015); *Hill v. SEC*, No. 15-01810-LMM, 2015 WL 4307088, at *19 (N.D. Ga. June 8, 2015) (same), *appeal docketed*, No. 15-12831 (11th Cir. June 25, 2015).

Those courts also agree that the "officer" question is controlled by the Supreme Court's decision in *Freytag v. Commissioner*, which held that Tax-Court special judges are officers for purposes of the Appointments Clause. 501 U.S. 868, 882 (1991). *Freytag* controls in our context because the duties of those special judges are "nearly identical" to those of SEC ALJs. *Hill v. SEC*, 2015 WL 4307088, at *18.

Freytag is part of a wider body of Supreme Court authority holding—without exception—that Executive Branch officials who exercise independent judicial functions are Officers under the Appointments Clause. And on the specific subject of ALJs, a majority of the members of the current Supreme Court have agreed that ALJs are officers under the

Appointments Clause. No Supreme Court justice, past or present, has disagreed.

Against this background, the Commission has staked its "mere employees" position entirely on one divided D.C. Circuit case, *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000). *Landry* addressed ALJs at the FDIC and concluded that they are not "officers." *Id.* at 1134. But *Landry* misread *Freytag*—as evidenced by the fact that, in the 15 years since *Landry* was issued, it has never been relied on as authority about the constitutional status of ALJs. *Landry* itself includes a concurrence (by Judge Randolph) insisting that, under *Freytag,* FDIC ALJs are indeed "officers." And when the Commission has cited *Landry* in recent Appointments-Clause litigation about the Commission's ALJs, courts have refused to follow it.

These recent Appointments Clause challenges to the Commission's ALJs did not come out of the blue. They are the logical result of 40 years of the Supreme Court's renewed attention to this Clause, which the Court considers a critical safeguard of basic constitutional structure. The recent challenges also are the result of the much-increased impact of the SEC administrative process. Because of this increased impact, it is especially important to ensure that the process complies with important constitutional safeguards.

These developments have led courts to scrutinize the constitutional structure of administrative proceedings—and find it wanting. Thus a senior judge from the Southern District of New York recently concluded that "the SEC will not . . . be able to persuade the appellate courts that ALJs are not 'inferior officers.'" *Duka v. SEC*, No. 15-cv-00357, 2015 WL 5547463, *5 (S.D.N.Y. Sep. 17, 2015) (Berman, J.). As this judge advised, the Commission should follow the Supreme Court's ruling in *Freytag* and hold that the underlying proceeding in this case was unconstitutional.

The only appropriate remedy for this constitutional error is for the Commission to dismiss the OIP filed against the Petitioners. If the Division of Enforcement wishes to bring a claim against the Petitioners, it must do so in front of a properly-appointed ALJ or in district court. Only at that time will the Petitioners be subject to a fair and constitutional proceeding, and can properly defend themselves on the merits of the allegations, which the Petitioners continue to deny.

BACKGROUND

I. SEC ALJs Perform A Wide Array Of Adjudicative Duties, And They Exercise Considerable Discretion When Doing So

The office of ALJ was established by the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 3105 ("Appointment of administrative law judges"). Under the APA, agency adjudications must be "presided over" by the agency itself or by an ALJ appointed under the APA. *See* 5 U.S.C. § 556(b). ALJs at the SEC have the broadest authority permitted by the APA. 17 C.F.R. § 201.111.

Consistent with the APA, ALJs perform a wide array of functions that otherwise must be performed by the Commission. *See, e.g.*, 15 U.S.C. § 77u. The breadth of ALJs' responsibility and the importance of their functions is described on the SEC's website. *See* Office of Administrative Law Judges, http://www.sec.gov/alj (last visited July 24, 2016). The website introduces the ALJs as "independent adjudicators." Until last year, it described them as "independent judicial *officers*," but the Commission now has deleted "officer" and replaced it with "adjudicator," presumably to avoid conceding that ALJs are "officers" under the Appointments Clause. *See* Internet Archive: Wayback Machine – Office of Administrative Law Judges, https://web.archive.org/web/20151015181751/http://www.sec.gov/alj (last visited July 24, 2016).

The website goes on to equate ALJ "public hearings" with Article III proceedings, stating that ALJs "conduct" proceedings "in "a manner similar to non-jury trials in the federal district courts." *See* http://www.sec.gov/alj. Like Article III judges, ALJs perform all of the functions that are necessary to "regulate the course of [those] proceedings." 17 C.F.R. § 201.111(d). This includes duties such as ordering the production of evidence (*id.* § 201.230(a)(2)), ruling on subpoenas (*id.* § 201.232(e)), ordering and conducting depositions (*id.* § 201.233, § 201.234), taking judicial notice of facts where they deem it appropriate to do so (*id.* § 201.323), determining the scope of witness examinations (*id.* § 201.326), and generally ruling on the admissibility of evidence (*id.* § 201.111(c)).

Also according to the SEC website, after "the conclusion of the public hearing," the ALJ "prepares an Initial Decision that includes factual findings [and] legal conclusions" and, "if appropriate," the ALJ "orders relief." *See* http://www.sec.gov/alj. The website describes ALJs' power to "order" heavy sanctions against a wide range of institutions and people. *Id.*

II. SEC ALJ Decisions Are Made Public Immediately, And More Than 93% Of Those Decisions Become Final Without Further Review

When an ALJ issues a decision, it is immediately made public. 17 C.F.R. § 201.360(c). As the Commission is aware, the parties have the right to appeal an ALJ decision and, if they do, the Commission will perform a *de novo* review. *Id.* § 201.410, § 201.411. If no party appeals, the Commission will issue an order that the initial decision has become final, *id.* § 201.360(d)(2), and "the action of [the] administrative law judge . . . shall . . . be deemed the action of the Commission," 15 U.S.C. § 78d-1(c); *see also* 5 U.S.C. § 557(b). Through this process, the great majority of SEC administrative enforcement proceedings become final orders without substantive review by the Commission. For the 2014 calendar year, this was true for 93% of ALJ decisions; for the 2015 calendar year, 91%. *See* U.S. Securities and Exchange Commission, *ALJ*

Initial Decisions: Administrative Law Judges, http://www.sec.gov/alj/aljdec/aljdecarchive/aljdecarc2014.shtml (last visited July 24, 2016) and U.S. Securities and Exchange Commission, *ALJ Initial Decisions: Administrative Law Judges*, http://www.sec.gov/alj/aljdec/aljdecarchive/aljdecarc2015.shtml (last visited July 24, 2016), respectively.

ARGUMENT

I. If SEC ALJs Are "Officers" Under The Appointments Clause, They Must Be Appointed By The Commission Itself

The Constitution's Appointment Clause specifies the methods for appointing Executive Branch officers. This clause "is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (quoting *Buckley v. Valeo*, 414 U.S. 1 ,125 (1976)), because it is a "bulwark" that "preserves" the Constitution's "structural integrity" against "the diffusion of the appointment power." *Ryder v. United States*, 515 U.S. 177, 182 (1995) (internal quotations and citations omitted).

The Clause refers to two levels of officer: principal "officers," who must be appointed directly by the President and are subject to Senate confirmation, and "inferior officers," who can be appointed without Senate confirmation as long as Congress has passed legislation authorizing their appointment by the President, the "Head" of a department, or a court of law. U.S. Const., art. II, § 2, cl. 2.

If SEC ALJs are inferior officers for purposes of the Appointments Clause (we do not contend they are primary officers), then they can be appointed only by one of the limited set of officials identified in the Appointments Clause. This set includes the Commission, which is considered the "Head of a Department." *See Free Enterprise* at 512-13. But SEC ALJs have not been appointed by the Commission; rather, they were hired by the Commission's Office of

Administrative Law Judges. *See Timbervest*, 2015 WL 5472520 at *23. It is disputed that the ALJ in this case, Judge Grimes was not appointed by the Commission. It follows that, if the ALJs are "officers" under the Appointments Clause, they have not been properly appointed and the proceedings they conduct are unconstitutional.

II. If SEC ALJs Are "Officers" Under The Appointments Clause, They Must Be Insulated From Presidential Removal By No More Than One Layer of Protection

The Administrative Proceeding is unconstitutional for another reason—because SEC ALJs, as inferior Officers, are protected from removal by at least two-levels of "good-cause" tenure protection. Specifically, the SEC ALJ can be removed by SEC Commissioners only for good cause; and SEC Commissioners can only be removed by the President for neglect of duty or malfeasance. *See MFS Sec. Corp. v. SEC*, 380 F.3d 611, 619-20 (2d Cir. 2004).

The Supreme Court decision in *Free Enterprise* controls here. In *Free Enterprise*, the Supreme Court reviewed the structure of the PCAOB. *Free Enterprise*, 561 U.S. at 484. The members of the PCAOB are appointed and removable by the Commissioners of the SEC only "for good cause shown" and "in accordance with" 15 U.S.C. 7211(e)(6). *Id.* at 486. The Commissioners of the SEC are removable by the President only for "inefficiency, neglect of duty, or malfeasance in office." *See id.* at 487. The Supreme Court held this "multilevel" removal regime unconstitutional because it is "contrary to Article II's vesting of executive power in the President" and "contravenes the President's 'constitutional obligation to ensure faithful execution of the laws.'" *Id.*at 484 (quoting *Morrison v. Olson*, 487 U.S. 654, 693 (1988)).

Free Enterprise is controlling here. Because SEC ALJs enjoy at least two-levels of "good-cause" tenure protection, the regime governing their removal suffers from the same infirmity addressed in *Free Enterprise.* First, SEC ALJs are removable from their position by the

SEC "only" for "good cause," which must be "established and determined" by the Merit Systems Protection Board ("MSPB"). 5 U.S.C. § 7521(a). Second, SEC Commissioners are themselves protected by "good cause" tenure, in that they cannot be removed except for "inefficiency, neglect of duty, or malfeasance in office." *See Free Enterprise*, 561 U.S. at 487. In fact, members of the MSPB, who determine whether "good cause" exists to remove an SEC ALJ, are also protected by tenure, as they can be removed "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d).

Although the facts of *Free Enterprise* did not involve SEC ALJs, (*see Free Enterprise*, 561 U.S. at 507 n.10), as recognized by Justice Breyer in dissent, its ruling logically establishes that it applies to SEC ALJs as well. *See Free Enterprise*, 561 U.S. at 542-43 (Breyer, J., dissenting) (noting "[t]he potential list of those whom today's decision affects is yet larger... [a]s... administrative law judges... are all executive officers...each removable only for good cause...determined by the [MSPB]...[b]ut members of the [MSPB] are themselves protected from removal...absent good cause...") (internal citations and quotations omitted); *see also* Kent Barnett, Resolving the ALJ Quandary, 33 J. Nat'l Admin L. Judiciary 644, 648 (2013) ("if, as five current Supreme Court Justices have now suggested, ALJs are 'inferior Officers' (not mere employees), the manner in which some are currently selected is likely unconstitutional."). Thus, the Administrative Proceeding at issue here violates the Constitution as a matter of law.

There is no real dispute that SEC ALJs are protected from removal by at least two levels of tenure protection, nor that "officers" must be appointed by the Commission itself. [3] Thus the

[3] In *Duka I*, Judge Berman held that the tenure protections of SEC ALJs did not violate Article II because they carry out "solely adjudicatory functions, and are not engaged in policymaking or enforcement." *Duka I*, 2015 WL 1943245, at *10. This view is wrong, and would create an unprecedented category of Article II judicial officers unsupervised by the Executive Branch of government. Nevertheless, Judge Berman ultimately issued a preliminary injunction in *Duka II* because he determined that plaintiff would

only issue is whether the SEC ALJs are "officers' under the Appointments Clause.

III. SEC ALJs Are "Officers" Under The Appointments Clause

A. The Supreme Court's Decision In *Freytag v. Commissioner* Establishes That Executive-Branch Adjudicators Are "Officials" If They Have Certain Substantial Duties

Public officials are "officers" rather than mere employees if they exercise "significant authority pursuant to the laws of the United States." *Freytag*, 501 U.S. at 881 (citing *Buckley*, 424 U.S. at 126). The Supreme Court has issued a series of opinions that identify criteria for determining whether employees who perform judicial functions exercise "significant authority" and, are therefore, officers under the Appointments Clause.

The foundation of those cases is *Freytag*, which addressed the status of Tax Court "special trial judges"—referred to as "STJs." 501 U.S. at 870. The Government had contended that the STJs were not "officers" under the Appointments Clause. *Id.* This was because, the Government argued, with respect to the category of decision at issue in that case, the STJs did not have authority to issue final decisions for their agency. *Id.* at 881. (As we explain below, this "final authority" argument reflects the same position the Commission now takes with respect to its ALJs.)

The Supreme Court rejected the Government's "final authority" argument. *Id.* at 881-82. The Court made it clear that final authority to render final decisions might be a *sufficient* ground to make an official an inferior officer "even if" the official's duties were not otherwise sufficiently significant, but final authority is not a *necessary* ground. *Id.* The Court then held that, whether or not the STJs had the "authority to enter a final decision," they were "officers" because of the "significance of the duties and discretion that [they] possess." *Id.*

---

likely succeed on the merits because the appointment process for SEC ALJs "is likely unconstitutional in violation of the Appointments Clause." *Duka II,* 2015 WL 4940083, at *2.

The Court based this conclusion on three features of the STJ role. First, the office of STJ was "established by Law," *id.*; second, "the duties, salary, and means of appointment for that office are specified by statute," *id.* (quotations and citations omitted); and third, the STJs "perform more than ministerial tasks." The Court stated, "[t]hey take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders" and, in the course of carrying out these duties, they "exercise significant discretion." *Id.*

B. SEC ALJs Satisfy Every Criterion For An "Officer" That The Supreme Court Identified In *Freytag*—As The Courts In The Recent Cases Involving SEC ALJs Have Agreed

The considerations the Supreme Court found determinative in *Freytag* establish that SEC ALJs are inferior officers. First, like the office of Tax-Court STJ, the office of SEC ALJ is established by statute. *See* 5 U.S.C. § 3105 (governing the appointment of ALJs); 15 U.S.C. § 78d-1 (establishing the position of SEC ALJ).

Second, as is true of Tax-Court STJs, the ALJ's "duties, salary, and means of appointment" (*Freytag*, 501 U.S. at 881) are specified by statute. *See* 5 U.S.C. § 556 (listing powers and duties of ALJ), § 557 (identifying the responsibilities of ALJs under the APA); §§ 5311 and 5372 (governing ALJ salaries), § 3105 (means of appointment).

And third, SEC ALJs perform the same judicial duties identified by the *Freytag* Court (*see* 501 U.S. at 882), and they have the same degree of discretion as STJs. ALJs are responsible for the "fair and orderly conduct of proceedings." 17 C.F.R. § 200.14; see also 17 C.F.R. § 200.30-9 ("Delegation of authority to hearing officers"). They take testimony, 5 U.S.C. 556(c)(1), (4); they conduct trials, 17 C.F.R. § 200.14; they rule on the admissibility of evidence, 17 CFR § 201.320; and they oversee discovery, *see, e.g.*, 17 CFR § 201.230—thus performing every one of the functions listed in *Freytag*. And like the STJs in *Freytag*, when SEC ALJs

perform these functions they exercise significant discretion. *See, e.g.*, 17 C.F.R. § 201.111 (each ALJ has "the authority to do all things necessary and appropriate to discharge his or her duties").

Under *Freytag*, then, SEC ALJs are "officers" for purposes of the Appointments Clause. This is the conclusion reached in each of the judicial decisions that have considered the status of SEC ALJs under the Appointments Clause; those decisions have found that the powers of SEC ALJs and Tax-Court STJs were "strikingly similar," *Duka*, 2015 WL 4940083, at *21; and "nearly identical," *Hill.* 2015 WL 4307088, at * 18; *see also See Gray Financial Group*, No. 15-cv-00492, slip op. at 32 (same).

IV. *Freytag* Is The Foundation Of A Line Of Supreme-Court Decisions Holding That Executive-Branch Adjudicators Are "Officers" Under The Appointments Clause

Broadening the subject from ALJs at the SEC to ALJs in general, we see that at least five current Supreme Court justices—a majority of the current Court—have concluded that ALJs appointed under the APA are "inferior officers" under the Appointments Clause. Justice Scalia made the point in a concurrence in *Freytag,* stating that ALJs "are all executive officers." 501 U.S. at 910. He was joined by Justices O'Connor, Kennedy, and Souter. *Id.* at 892. Later, in *Free Enterprise*, Justice Breyer cited Justice Scalia's statement as an accurate account of the law. 561 U.S. at 542. He was joined by Justices Ginsburg and Sotomayor. *Id.* at 514. No Supreme Court justice, current or former, has disagreed or expressed the opposite view.

The view that ALJs are inferior officers pre-dates even *Freytag*; it follows from a general statement about ALJs in in *Butz v. Economou*, one of the first modern Appointments-Clause cases. There the Supreme Court equated ALJs with Article III judges, saying that the role of the modern ALJ "is functionally comparable to that of [an Article III] judge." 438 U.S. 478, 513 (1978). This is, of course, the same comparison still drawn by the current SEC website. The *Butz*

court also explained that ALJs "issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions," and they exercise "independent judgment on the evidence" before them. *Id.* The SEC website repeats this as well. *See* http://www.sec.gov/alj. The *Butz* discussion is one basis of Judge Randolph's concurrence in *Landry,* where Judge Randolph equated the recommended decisions issued by FDIC ALJs with decisions issued by federal magistrate judges. This comparison was significant, he explained, because magistrate judges do not have the authority to issue final decisions, yet they indisputably are officers under Article III. *Landry*, 204 F.3d at 1143 (Randolph, J., concurring in the judgment).

The conclusion that ALJs are "officers" also is in line with the other Supreme Court decisions addressing executive-branch officials who perform adjudicative functions. The Court decided three such cases, and in each one concluded or assumed that the holders of these positions constituted "inferior officers." Each of those cases addressed executive-branch employees whose decisions were subject to further review within their agency—that is, who did not have the authority to issue final decisions for their agency. The first case addressed military judges at the trial level, *Weiss v. United States*, 510 U.S. 163, 169 (1994); the second addressed judges of an intermediate-level Article II court, the Coast Guard court of Military Review, *Ryder*, 515 U.S. at 180, 187-88; and the third addressed judges who were on the same court but had been appointed in a different manner, *Edmond*, 520 U.S. at 661-63, 665. These authorities reinforce the conclusion reached by applying the facts of *Freytag* to SEC ALJs: Like other executive-branch officials who perform independent adjudicative functions, SEC ALJs are "inferior officers" under the Appointments Act.

V. The Commission's Position—That Commission ALJs Are Not "Officers"—Is An Isolated One That Is Contrary To All Of The Above Authorities

A. *Landry v. FDIC* Is A Divided Opinion That Has Never Been Relied On In Another Case

In the face of this consistent case law, the SEC has continued to contend that its ALJs are not "inferior officials" but, rather, mere employees. *See Timbervest*, 2015 WL 5472520, at *26. The Commission bases this position, not on any of the Supreme-Court cases that are widely cited by courts in this area, but entirely on the D.C. Circuit's divided decision in *Landry v. FDIC*. *Landry* addressed ALJs at the FDIC and held that they were not officers for purposes of the Appointments Clause. 204 F.3d at 1134.

In relying on *Landry*, the Commission is all alone: *Landry*'s reading of *Freytag* has never been relied on in another decision. (*Tucker v. Comm'r*, 676 F.3d 1129, 1132 (D.C. Cir. 2012), described *Landry* but did not follow it.) *Landry* has been cited only because *the Commission* has cited it, and done so repeatedly—and courts have repeatedly rejected the Commission's argument. *See Gray Financial Group, Inc. v. SEC*, No. 15-cv-00492, slip op. at 29-31; *Duka v. SEC*, No. 15-cv-00357, 2015 WL 4440057, at *2 (S.D.N.Y. Aug. 3 ,2015); *Hill*, 2015 WL 4307088 at *17-*18.

B. The Majority Opinion In *Landry* Misreads *Freytag*—Which States Clearly That "Final Authority" Is Not A Prerequisite For An Executive-Branch Judge To Be An "Officer"

The Commission embraces *Landry* because, according to the Commission, *Landry* takes the *Freytag* Appointments-Clause analysis and boils it down to a single "touchstone," which is whether adjudicators "have the power to issue 'final decisions.'" *Timbervest,* 2015 WL 5472520, at *24 (citing *Landry, 204 F.3d* at 1133-34). It is not clear that *Landry* actually holds that final authority is a prerequisite for status as an "officer," *see* 204 F.3d at 1134, but to the extent it does, *Landry* is wrongly decided. And this is not a close call: As we explained above, *Freytag* explicitly considered the Government's argument that final authority is a prerequisite to status as

an "officer," and just as explicitly rejected it. 501 U.S. at 881. The "final authority" argument also is refuted by later Supreme Court decisions in *Weiss*, 510 U.S. at 167-69; *Ryder*, 515 U.S. at 186-88; and *Edmond*, 520 U.S. at 653, 665, where none of the judges had final authority but all were "officers" under the Appointments Clause. In *Landry* itself, Judge Randolph wrote his concurrence for the sole purpose of pointing out this error in the majority opinion. 204 F.3d at 1140-44 (Randolph, J., concurring). More recently, *Hill* similarly explained that final authority is not a requirement. *Hill*, 2015 WL 4307088 at *18. The Commission's entire position thus rests on a view of the law that the Supreme Court has considered and expressly rejected, as have the other courts who have considered the issue.

The Commission's legal position also is a reversal of the understanding of the law the Commission expressed before it was faced with the current challenges based on the Appointments Clause. The point came up about six years ago in *Free Enterprise*, where the Government's brief explained why PCAOB Board members were "inferior officers," Brief of the United States, *Free Enter. Fund v. Pub. Accounting Oversight Bd.*, 561 U.S. 477 (2010), No. 08-861, 2009 WL 3290435, at *30-*31 (Oct. 13, 2009). The Government's brief freely acknowledged that these "inferior officers" lacked final authority to issue decisions on behalf of the Executive Branch. *Id.* at *31; *see also id.* at *32 n.10. The brief was signed by the Commission's General Counsel. *Id.* If that brief reflected an accurate statement of the law—which it did—then the very different account of the law in the Commission's opinions in *Timbervest* and *Raymond J. Lucia* is erroneous.

C. The Commission's Opinions On The Appointments Clause Have Not Succeeded In Distinguishing *Freytag* On Its Facts

The Commission's position also depends on distinguishing *Freytag*. To that end, Commission opinions contend that SEC ALJs differ materially from the STJs in *Freytag*—in

fact, the opinions go so far as to contend that Tax-Court STJs hold "far" greater authority than ALJs at the SEC. *Raymond J. Lucia Co.*, Release No. 4190, 2015 WL 5172953, at *23 (Sep. 3, 2015). But the Commission is alone when it contends that the Tax-Court STJs and SEC ALJs differ at all. As we explained above, the courts that have compared the Tax-Court STJs with SEC ALJs have found the two roles—not "far" different, as the Commission maintains—but "strikingly similar," *Duka*, 2015 WL 4940083, at *21, or "nearly identical," *Gray Financial Group*, No. 15-cv-00492, slip op. at 32; *see also Hill.* 2015 WL 4307088, at *18.

To distinguish *Freytag*, the Commission would have to show that SEC ALJs do *not* satisfy the specific criteria that *Freytag* considered determinative, which were, first, that the ALJ position and its main features were "established by law;" second, that ALJs' "duties, salaries, and means of appointment are specified by statute;" and third, that ALJs exercise the functions and the discretion of an independent trial judge. *See Freytag,* 501 U.S. at 881-82. But the Commission's opinions do *not* challenge the one-to-one match between the relevant attributes listed in *Freytag* and the attributes of ALJs at the SEC. *See Timbervest*, 2015 WL 5472520, at *25-*26; *Raymond J. Lucia*, 2015 WL 5172953, at *23. The Commission's opinions, do not, therefore, distinguish *Freytag*.

Instead they change the subject, selecting some *different* points—not relevant in *Freytag*—where the functions of STJs and ALJs allegedly differ. *Timbervest,* 2015 WL 5472520, at *25. But under *Freytag*, every one of these suggested differences is legally irrelevant: Once SEC ALJs meet the criteria in Freytag, which they do, the alleged differences raised by the Commission cannot change the outcome.

Because the Commission opinions place such importance on these alleged differences, however, we will briefly review them. The Commission's opinions first note that the Tax Court

defers to STJ findings unless the findings were clearly erroneous, while the Commission reviews ALJ decisions are reviewed *de novo*. *Id.* But the agency's internal standard of review was not a consideration in *Freytag*, so it is legally irrelevant. Nor is it apparent that much difference exists between Tax Court and SEC. The Commission accepts ALJ credibility determinations "absent overwhelming evidence to the contrary," *In re Clawson*, SEC Release No. 48143, 2003 WL 21539920, at *2 (July 9, 2003), thus giving findings by SEC ALJs deference that is very similar to the deference the Tax Court gives to its SJTs.

Second, the Commission's opinions point out that STJs were authorized to render final decisions, even if only in limited categories of matters. *Timbervest,* 2015 WL 5472520, at *25. But this effort to distinguish *Freytag* is nothing more than the same "final authority" argument that *Freytag* explicitly rejected. 501 U.S. at 881-82.

For the third and final proposed distinction with *Freytag*, the Commission's opinions state that the Tax Court had the authority to punish contempt, but SEC ALJs do not. *See Timbervest,* 2015 WL 5472520, at *25. Yet again, this topic is legally irrelevant because *Freytag* makes no mention of contempt power as a criterion for an "officer" under the Appointments Clause. *See* 501 U.S. at 881-82. Indeed, *Freytag* does not even say that STJs had the power to issue contempt orders; to the contrary, it says only that the Tax Court itself does, thus suggesting that STJs do not. *Id.* And the entire "contempt power" argument has no application to our case anyway, because the SEC itself does not have the power to issue contempt orders—and no one disputes that its Commissioners undisputedly *are* "officers" under the Appointments Clause. See discussion in *Gray Financial* No. 15-civ-00492, slip op. at 34.

The Commission's efforts to distinguish *Freytag*, which fail for the reasons we just described, are part of a broader endeavor in the Commission's recent opinions to downgrade the

status of the its ALJs. This approach would come as a surprise to a member of the public who has read the Commission's website, because the website paints a very different picture of ALJs. The website publishes every decision as soon as an ALJ issues it, including decisions finding wrongdoing by respondents, thus triggering an immediate and devastating impact on respondents who do business in the securities industry. And the vast majority of ALJ decisions—more than nine out of ten of them—become final without Commission review. The narrative on the website confirms this picture, explaining that ALJs have the robust powers of "independent judicial officers" who conduct proceedings just like Article III judges. (The Commission did recently take the trouble to excise the word "officer" from this description.)

By sharp contrast to the website narrative, the Commission's Appointments-Clause opinions cast ALJs as, quite literally, powerless, *see, e.g., Timbervest*, 2015 WL 5472520, at *24-*25, and even downgrade ALJs to the status of mere "aides," *Raymond J. Lucia*, 2015 WL 5172953, at *21 (concluding that SEC ALJs are like FDIC ALJs, who are "aides").

As in many litigation contexts, the better account is the one written before litigation erupted—here, the Commission's website and the Government's *Free Enterprise* brief. As the pre-revision website indicates, SEC ALJs do wield substantial authority that easily brings them under the holding of *Freytag*. And as the *Free Enterprise* brief acknowledged, they do not need final authority to be officers of the United States. They therefore fall within the restrictions of the Appointments Clause.

That is, of course, the conclusion dictated by the imposing line of decisions establishing that Executive-Branch officials who exercise adjudicative functions are "officers": the Supreme Court's statements in *Butz* in 1978, followed by the Court's decisions in *Freytag* in 1991, *Weiss* in 1994, *Ryder* in 1995 and *Edmond* in 1997—and followed in this past year by SEC-specific

district-court decisions in *Hill*, *Duka*, and *Gray Financial.* Also during this time, a majority of the current Supreme Court has indicated that, as a general matter, ALJs are officers under the Appointments Clause.

By contrast to this formidable body of authority, the majority opinion in *Landry* is an outlier, ignored or rejected by later cases. That one opinion is no basis for the Commission to hold a position contrary to the body of law described above. The Commission should end its defense of this untenable position and acknowledge that its ALJs are "officers" for purposes of the Appointments Clause.

CONCLUSION

The administrative proceeding in this case violated the Constitution. To remedy that structural constitutional violation, Petitioners request that the Commission dismiss this proceeding as constitutionally defective. *See Ryder*, 515 U.S. at 188 (reversing and remanding for proceedings consistent with the Appointments Clause).

August 1, 2016

Respectfully submitted,

Andrew Morris
Gregory Morvillo
Eugene Ingoglia
Caitlin Sikes
MORVILLO LLP
500 Fifth Avenue
43rd Floor
New York, New York 10110
212-796-6346

Counsel for Respondents-Petitioners Bennett Group Financial Services, LLC and Dawn J. Bennett

CERTIFICATE OF COMPLIANCE WITH RULE 154(c)

This brief complies with the type-volume limitation set forth in Rule of Practice 154(c) because this petition contains 5,810 words, excluding the parts of the petition exempted by Rule 154(c).

August 1, 2016

Respectfully submitted,

Andrew Morris
Gregory Morvillo
Eugene Ingoglia
Caitlin Sikes
MORVILLO LLP
500 Fifth Avenue
43rd Floor
New York, New York 10110
212-796-6346

Counsel for Respondents-Petitioners Bennett Group Financial Services, LLC and Dawn J. Bennett

CERTIFICATE OF SERVICE

I, Andrew J. Morris, Esq., hereby certify that pursuant to Rule 150 of the Securities and Exchange Commission's Rules of Practice, on August 1, 2016, I caused a true and correct copy of RESPONDENTS-PETITIONERS' PETITION FOR REVIEW to be served upon the following persons according to the method specified for each:

VIA HAND DELIVERY
Office of the Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

VIA EMAIL AND FEDERAL EXPRESS
The Honorable James E. Grimes (ALJ@sec.gov)
Administrative Law Judge
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

VIA E-MAIL
Michael Rinaldi (rinaldim@sec.gov)
Counsel for the Division of Enforcement
United States Securities and Exchange Commission
1617 JFK Boulevard, Suite 520
Philadelphia, PA 19103

August 1, 2016

Respectfully submitted,

Andrew Morris
Gregory Morvillo
Eugene Ingoglia
Caitlin Sikes
MORVILLO LLP
500 Fifth Avenue
43rd Floor
New York, New York 10110
212-796-6346

Counsel for Respondents-Petitioners Bennett Group Financial Services, LLC and Dawn J. Bennett