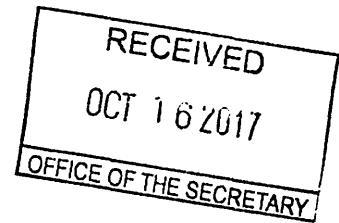


**UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION**



**ADMINISTRATIVE PROCEEDING
File No. 3-17950**

In the Matter of,

David Pruitt, CPA

Respondent.

**RESPONDENT DAVID PRUITT'S MOTION TO CERTIFY FOR INTERLOCUTORY
REVIEW DENIAL OF STAY PENDING SUPREME COURT REVIEW OF
APPOINTMENTS CLAUSE CHALLENGE AND A MOTION FOR A STAY**

Respondent David Pruitt moves this Court for a certification for interlocutory review of its October 5, 2017 Order Denying Motion for Stay (“Oct. 5, 2017 Order”) and a stay of this proceeding pending the Securities and Exchange Commission’s (“SEC” or the “Commission”) interlocutory review.

Pursuant to Rule 400(c) of the Commission’s Rules of Practice, the Court may certify an interlocutory decision for review to the Commission if “[t]he ruling involves a controlling question of law as to which there is substantial ground for difference of opinion,” and “[a]n immediate review of the order may materially advance the completion of the proceeding.” 17 C.F.R. § 201.400(c)(2) (paralleling 28 U.S.C. § 1292(b)).

Those criteria are met here. The Court denied the motion for a stay because “the Commission has repeatedly rejected Appointments Clause arguments concerning its administrative law judges” and the Court is “bound by Commission precedent.” Oct. 5, 2017 Order at 1-2. On this controlling question of law, however, there is a split in the Circuits—the quintessential example of a “substantial ground for difference of opinion.” *Compare Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), *reh’g denied*, 855 F.3d 1128 (10th Cir. 2017) (holding that SEC ALJs are “inferior officers” subject to appointment in accordance with the provisions of the Appointments Clause), *with Raymond J. Lucia Cos., Inc. v. SEC*, 832 F.3d 277 (D.C. Cir. 2006), *reh’g en banc granted, judgment vacated*, (Feb. 16, 2017), *on reh’g en banc*, No. 15-1345, 2017 WL 2727019 (D.C. Cir. June 26, 2017) (mem.) (holding that SEC ALJs are not “inferior officers”). Indeed, the Commission itself concedes that “[t]he courts of appeals are divided over the question whether administrative law judges who act as hearing officers in SEC enforcement proceedings are inferior officers who must be appointed in accordance with the

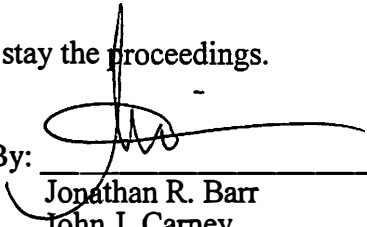
Appointments Clause.” Petition for a Writ of Certiorari, *SEC v. Bandimere*, No. 17-475, 2017 WL 4386877, at *7 (Sept. 29, 2017).

Moreover, immediate review may materially advance the completion of the proceeding. The Supreme Court likely will hear the Appointments Clause issue this term. See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1493 (2008) (the Supreme Court grants approximately 70% of petitions filed by the Solicitor General). And as Mr. Pruitt set forth at length in his motion for a stay, and as articulated in *Bandimere* and *Burgess v. Fed. Deposit Ins. Corp.*, No. 17-60579, 2017 WL 3928326 (5th Cir. Sept. 7, 2017), the Supreme Court of the United States will likely determine that there is a constitutional infirmity with the present appointment process for administrative law judges. Should the Commission hear this appeal and grant the underlying relief for a stay pending Supreme Court review of the Appointments Clause issue, it would avoid litigating the same issues twice since it is highly likely to overrule *Lucia*. This would prevent the litigation from continuing in an unconstitutional forum and lead to the dismissal of this proceeding in its entirety.

Mr. Pruitt further requests that this proceeding be stayed pending interlocutory review. Pursuant to Rule 400(d), “[t]he filing of an application for review or the grant of review shall not stay proceedings before the hearing officer unless he or she, or the Commission, shall so order.” 17 C.F.R. § 201.400(d). The court should stay temporarily these proceedings pending interlocutory review by the Commission. See *Burgess*, 2017 WL 3928326, at **1, 4 (embracing *Bandimere* and staying a Federal Deposit Insurance Corporation (“FDIC”) administrative order assessing a civil penalty because respondent demonstrated a likelihood of success on his claim that the FDIC ALJ in his proceeding was unconstitutionally appointed).

Accordingly, Mr. Pruitt respectfully requests this Court certify Mr. Pruitt's motion for interlocutory review of the Oct. 5, 2017 Order and stay the proceedings.

Dated: October 13, 2017
New York, New York

By: 
Jonathan R. Barr
John J. Carney
Jimmy Fokas
Margaret E. Hirce
Bari R. Nadworny
BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, New York 10111
Telephone: 212.589.4200
Facsimile: 212.589.4201

Attorneys for Respondent David Pruitt