

**ORAL ARGUMENT IS SCHEDULED FOR MAY 24, 2017  
No. 15-1345**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA**

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Raymond J. Lucia Companies, Inc. and Raymond Lucia,

Petitioners,

v.

Securities and Exchange Commission,

Respondent.

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On Petition for Review of an Order of the  
Securities and Exchange Commission

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***EN BANC BRIEF OF AMICI CURIAE TENNESSEE WALKING HORSE NATIONAL  
CELEBRATION AND SHOW INC. IN SUPPORT OF PETITIONERS***

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March 8, 2017

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 26.1(a), The Tennessee Walking Horse National Celebration certifies that it does not have a parent corporation and that no publically held corporation owns more than ten percent of its stock. The Tennessee Walking Horse National Celebration is the parent of SHOW Inc. No publically held corporation owns more than ten percent of SHOW, which is a IRS §501(c)(3) not for profit corporation.

### CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

#### **A. Parties and Amici.**

Petitioners in this Court are Raymond J. Lucia Companies, Inc. and Raymond J. Lucia. Respondent is the Securities and Exchange Commission. Mark Cuban, Ironridge Global IV, Ltd. and Ironridge Global Partners, LLC previously filed briefs *amicus curiae* in support of the petitioners.

#### **B. Ruling Under Review.**

*Amici curiae* adopt the reference to the ruling under review in the *En Banc* Opening Brief for Petitioners.

#### **C. Related Cases.**

*Amici curiae* adopt the reference to related cases in the *En Banc* Opening Brief For Petitioners.

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## GLOSSARY OF ABBREVIATIONS

<b>Abbreviation</b>	<b>Definition</b>
ALJ	Administrative Law Judge
APA	Administrative Procedures Act
APHIS	Animal and Plant Health Inspection Service
AWA	Animal Welfare Act
Celebration Commission (SEC)	Tennessee Walking Horse National Celebration Securities and Exchange Commission
DQP	Designated Qualified Person
FDIC	Federal Deposit Insurance Corporation
HIO	Horse Industry Organization
HPA	Horse Protection Act
JO	Judicial Officer
Lucia SEC	Petitioners R. J. Lucia and Raymond J. Lucia Companies, Inc. Securities and Exchange Commission
SSA	Social Security Administration
STJ	Special Trial Judge
USDA	United States Department of Agriculture
VMO	Veterinary Medical Office



## INTEREST AND IDENTITY OF *AMICI CURIAE*<sup>1</sup>

In *Freytag v. Comm’r*, 501 U.S. 868 (1991), (hereafter *Freytag*), Special Trial Judges assisted the Tax Court Judge by hearing evidence and making recommendations to the Judge, who makes the final decision. In *Landry v. FDIC*, 204 F. 3d 1125 (D.C. Cir. 2000)(hereafter *Landry*), ALJs, under the authority of 5 U.S.C. §557(b), heard evidence and recommended findings and conclusions to the Commission, which made final decisions. In this case and *Bandimere v. Sec. and Exch. Comm’n*, 844 F. 3d 1168 (10<sup>th</sup> Cir. 2016)(hereafter *Bandimere*), the SEC ALJ issued an initial decision, which became final based on the subsequent action of superiors.

Not all ALJs’ administrative roles are like those in the Tax Court, FDIC or SEC. This brief describes a different administrative enforcement system that employs ALJs, illustrating the role USDA ALJs play in enforcing the Horse Protection Act. 15 U.S.C. §1821 *et seq.* USDA ALJs do not hear the evidence as an assistant to a superior who makes the final decision. Unlike FDIC ALJs, USDA ALJs do not issue recommended decisions. While SEC ALJs render initial decisions that become final based on the Commission’s subsequent action, USDA

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<sup>1</sup> Counsel for the *amici* certify that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

ALJs' initial decisions become final with the lapse of time. Also, USDA ALJs enter Consent Decisions that are final when signed, enter Default Decisions that become final, and enter final orders dismissing cases.

Tennessee walking horses are prized for their high kick gait. This gait is achieved by breeding, training and practice. A high kick gait can also result from inhumanely soring the forelimbs of a horse. Soring a horse provides an unfair advantage in competitive events. To eliminate cheating in gaited horse competitions, Congress passed the Horse Protection Act in 1970 and amended the Act in 1976. 15 U.S.C. §1821 *et seq.*

The Tennessee Walking Horse National Celebration annually sponsors the premier event in the walking horse industry. Managers of horse shows, like the Celebration, violate the HPA if they permit sore horses to compete in an event.

USDA Veterinary Medical Officers sometimes examine horses entered into events to diagnose whether they are sore. If a VMO is of the opinion a horse is noncompliant, this is reported to management and management then must disqualify the horse. 15 U.S.C. §1823(a).

Because VMOs attend few events, the USDA adopted regulations under which it certifies private Horse Industry Organizations (HIOs) to license private inspectors, called Designated Qualified Persons (DQPs). SHOW is a certified HIO and licenses DQPs. Managers contract with SHOW to provide inspectors.

Employing DQPs to inspect all entries provides managers “safe harbor” protection against strict liability if a sore horse is shown.

HPA §1825 authorizes the USDA, after notice and hearing, to assess civil penalties against managers who permit sore horses to events. It also authorizes civil penalties to be assessed administratively by the Secretary against participants who attempt to enter, or enter, a sore horse. Section 1825(b) authorizes the Secretary to assess a fine, while §1825(c), under certain circumstances, authorizes the Secretary to disqualify a participant from entering future events for a period of time.

Civil penalties are assessed in USDA administrative proceedings. The Office of General Counsel initiates the proceeding by filing a complaint, which the Hearing Clerk assigns to an ALJ. The agency’s witnesses are usually VMOs employed by the USDA. USDA ALJs make initial decisions, which either party can appeal to the Department Judicial Officer. If there is no appeal, the ALJ’s decision becomes final with no further action, solely with the lapse of time.

Many participants in USDA administrative proceedings hold out scant hope of prevailing. They recognize the complaint against them has been filed by the agency’s General Counsel, that the trial will be assigned to an agency ALJ that the witnesses against them will be agency VMOs, and, even if they prevail, the USDA can appeal the ALJ’s decision to the Department’s JO, who serves at the pleasure

of the Secretary. All involved in prosecuting and deciding the case are employees of the Department. Many respondents perceive the deck is stacked against them, therefore, most proceedings are resolved by the ALJ entering a Consent Decision.<sup>2</sup>

The Celebration is interested in lawful and fair administrative enforcement proceedings since it could be a respondent in a USDA enforcement proceeding. The Celebration is also concerned that participants who enter its event, and are accused of violating the HPA, are not receiving lawful hearings. SHOW's interests in this case arise from having the USDA file an administrative complaint against it and in assuring that those people who pay it to have their horses inspected receive lawful and fair treatment in agency enforcement proceedings.

Respondents in pending USDA administrative proceedings are presently challenging the USDA's use of ALJs, who perform significant functions and make decisions that should only be made by an officer appointed in conformance with the Appointments Clause of the U.S. Constitution, Article II, §2, cl. 2. An opinion from this Court will serve as authority to other courts that will decide Appointment Clause challenges to ALJs' roles in various kinds of administrative proceedings. An en banc decision by this Court will have precedential and persuasive influence

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<sup>2</sup> The USDA HPA Disqualification and Penalty List (as of December 1, 2016), available at <https://www.aphis.usda.gov/ies/downloads/disqual.>, identifies 36 docketed cases naming participants subject to civil penalties. Five proceedings ended with a Decision and Order. Thirty one (86%) resulted from Consent Decisions.

across the nation. *Amici* offer this brief describing the USDA's enforcement proceedings and the role of USDA ALJs in those proceedings to support *amici's* request that the Court avoid issuing an opinion that places all ALJs in the same basket.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners make clear that decisions by ALJs can dramatically affect the lives of people and the fates of businesses. They convincingly demonstrate that the Supreme Court precedent in *Freytag* leads to the conclusion that SEC ALJs are not constitutionally appointed. The SEC defends its ALJ system on the basis that SEC ALJs do make final decisions. The SEC supports its position with a narrative of the origins of the ALJ system.

In its April 13, 2016, SEC Final Br., pages 40-45, the SEC provides its overview of the history of ALJs in administrative enforcement proceedings. The SEC concludes that "Congress left final authority in proceedings conducted under sections 7 and 8 of the APA with the agency and gave ALJs civil service protections to ensure that their actions are not influenced by a desire to curry favor with the ultimate decision-maker." *Id.* at 40. Because of "ALJs circumscribed powers in such hearings, Congress did not require their appointment by the President or an agency head, as would be required if they were inferior officers." *Id.* ALJs have "duties and responsibilities as examiners." *Id.* at 41. Agency ALJs

are a part of “a carefully reticulated scheme, established after years of legislative consideration that was never understood to deem ALJs to be officers of the United States who must be appointed by the head of an agency, and that has served the nation well for seven decades.” *Id.* at 45.

This narrative implies that all ALJs are alike, and that this Court should be wary of upsetting the system. A decision that SEC ALJs are not constitutionally appointed might have unforeseen ramifications. The SEC presented the same narrative to the Tenth Circuit in *Bandimere*. Brief of Securities and Exchange Commission, Respondent, 2016 WL 3035458, at \*27-\*33(C.A.10)(Appellate Brief). In *Bandimere*, the Tenth Circuit held that the SEC’s ALJ was not constitutionally appointed, and set aside the Commission’s opinion. In dissent, Judge McKay began her dissent “by expressing my fears of the probable consequences of today’s decision.” *Bandimere*, 844 F. 3d at 1199, McKay, J. dissenting). She expressed concern that the decision’s “probable consequences are too troublesome to risk.” *Id.* at 1194 (McKay, J. dissenting). She worried about the impact the decision would have on the 1,537 ALJs who hear Social Security disputes. Did the majority opinion mean SSA ALJs were unconstitutionally appointed, effectively invalidating thousands of administrative actions? *Id.* at 1199

(McKay, J. dissenting). *Amici* cannot answer this question. Nor does this Court's decision require it to answer this question.<sup>3</sup>

*Amici* are concerned that the SEC implies that all ALJ systems are like the SEC's. Not all ALJs are like either SEC ALJs or SSA ALJs. The USDA's ALJ system markedly contrasts with the SEC ALJ system. USDA ALJs make final decisions. *Amici* will describe an ALJ system unlike the FDIC's in *Landry* and SEC's in *Bandimere* and this case. By pointing out how all ALJs are not alike, *amici* rebut the SEC's narrative that implies all ALJs are "mere employees" in "a carefully reticulated scheme, established after years of legislative consideration, ...that has served the nation well for seven decades." Mr. Lucia disagrees; so do *amici*.

### **ARGUMENT**

In APA §557(b), Congress provided agencies with several options about the role ALJs would have in enforcement proceedings.

When the agency did not preside at the reception of the evidence ... an employee qualified to preside at hearings pursuant section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be

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<sup>3</sup> With regard to SSA ALJs, as *PHH Corporation v. Consumer Financial Protection Bureau*, No. 15-1177 (panel decision vacated, but reported at 839 F. 3d 1, \*19 and n. 5(D.C. Cir. 2016)), pointed out, the Social Security Administration's Commissioner "does not possess unilateral authority to bring law enforcement actions against private citizens, which is the core of the executive power and the primary threat to individual liberty posed by executive power."

certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceeding unless there is an appeal to, or review on motion of, the agency within the time provided by rule.

The USDA opted to permit ALJ decisions to become final with the lapse of time. Further, the Department's Rules of Practice empower USDA ALJs to issue final Consent Decisions that are effective when signed and not further reviewable. USDA ALJs also enter Default Decisions that become final. Also, they enter final non-appealable Orders of Dismissal.

**A. The position of USDA ALJs is established by law, and their duties, salary and means of appointment are specified by statutes or regulations.**

The Department of Agriculture is one of 15 executive departments established by Congress. 5 U.S.C. §101 and 7 U.S.C. §2201. The Department is “under the control of a Secretary of Agriculture, who shall be appointed by the President, by and with the advice and consent of the Senate.” 7 U.S.C. §2202. The Secretary is one of 14 statutory principal officers in the department who are appointed by the President and subject to Senate confirmation.<sup>4</sup>

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<sup>4</sup> The USDA's principal officers are the Secretary, Deputy Secretary, Assistant Secretary for Congressional Relations, Assistant Secretary for Civil Rights, Undersecretary for Rural Development, Undersecretary for Food, Nutrition and Consumer Services, Undersecretary for Food Safety, Undersecretary for Farm and Foreign Agriculture Services, Undersecretary for Marketing and Regulatory Programs, Undersecretary for Natural Resources and Environment, Undersecretary for Research, Education and Economics, General Counsel and Chief Financial



The Secretary is “authorized and directed to perform all the duties in all the Acts of Congress” that were performed by the former Commissioner of Agriculture, 7 U.S.C. §2205, and vested with “all functions of all agencies, offices, officers and employees of the Department” except “[f]unctions vested by subchapter 5 of Title 5 in the administrative law judges.” 7 U.S.C. §6911(a) and (b)(1). The functions of the USDA ALJs are vested in them by the APA, 5 U.S.C. §§554 and 556-558.

USDA ALJs are employees of the USDA, appointed under 5 U.S.C. §3105, who conduct proceedings under 5 U.S.C. §556 and 557. The Assistant Secretary of Agriculture for Administration is a principal officer whose position is authorized by statute. 7 U.S.C. §6918. The Secretary has delegated to the Assistant Secretary of Agriculture for Administration authority related to the Office of Administrative Law Judge, including providing administrative supervision of the Office. 7 C.F.R. §2.24(a)(10)(ii). The Assistant Secretary certifies that a position to which an ALJ is appointed is necessary for carrying out functions for which the ALJ is responsible, and certifies that the functions of the ALJ are set forth in the Position Description. A Personnel Management Specialist makes the same certification for the person being appointed as an ALJ. The Secretary does not make, authorize or approve the ALJ’s appointment.

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Officer. “Senate Ag faces 18 confirmation hearings,” available at <http://www.thefencepost.com/news/senate-ag-faces-18-confirmation-hearings/>

Congress provided ALJs civil-service employee protections by requiring the agency appoint them consistent with civil-service laws and regulations. The Office of Personnel Management establishes ALJs' qualifications and administers a detailed civil-service system for selecting ALJs that includes examinations of candidates and issuing certificates of qualification. 5 U.S.C. §§3105, 3317, 3318, 5 U.S.C. §5372 and 5 C.F.R. §930.204.

The functions of administrative law judges are designated in APA §§554 and 556-558. A Department regulation has "designated" the scope of their authority by establishing the Office of Administrative Law Judges. 7 C.F.R. §2.27. USDA ALJs are "designated pursuant to 5 U.S.C. §556(b)(3) to hold hearings and perform related duties" and pursuant to §556 and §557 they are designated to "make initial decisions" which "shall become final without further proceedings unless there is an appeal to the Secretary by a party...." *Id.*

The USDA has adopted 12 sets of Rules of Practice governing adjudicatory proceedings by the Department. 7 C.F.R. §2.35. The Rules of Practice applicable to HPA enforcement proceedings are at 7 C.F.R. §1.130 *et seq.* These procedures govern USDA enforcement proceedings under about 50 statutes. *Id.* at §1.131.

The General Counsel's office is created by statute, and the General Counsel is a principal officer appointed by the President with the consent of the Senate. 7 U.S.C. §2214. The General Counsel's duties include advising the Secretary and

providing the Department legal services, including representation in adjudicatory proceedings where the General Counsel will “decide whether initial decisions of the administrative law judges shall be appealed by the Department to the Secretary.” 7 C.F.R. §2.31(a)(6). Formal enforcement proceedings are initiated by the Office of General Counsel filing a complaint with the USDA’s Hearing Clerk. *Id.* at §1.133. In an HPA case, the complainant is APHIS.

The Clerk assigns the complaint a docket number, serves the respondent, and, if a hearing is requested, assigns the proceeding to a USDA ALJ to make an initial decision in accordance with 5 U.S.C. §§556 and 557. *Id.* at §1.132. The ALJ’s written decision is filed with the Hearing Clerk, and “shall become final and effective without further proceedings 35 days after issuance of the decision.” 7 C.F.R. §1.142(c)(4). Either party can appeal the decision to the USDA’s Judicial Officer. 7 C.F.R. §1.145.

**B. The Secretary has delegated his enforcement function to a Judicial Officer.**

The Judicial Officer is “an official of the United States Department of Agriculture delegated authority by the Secretary of Agriculture, pursuant to the Act of April 4, 1940 (7 U.S.C. 450c-450g) and the Reorganization Plan No. 2 of 1953 (5 U.S.C. App. (1988)), to perform the function involved (§2.35(a) of this chapter), or the Secretary of Agriculture if the authority so delegated is exercised by the Secretary.” 7 C.F.R. §1.132. Section 450c(a) defines a “regulatory order” to

include an “order...if it has the force and effect of law, and if it may be made, prescribed, issued, or promulgated only after notice and a hearing or opportunity for hearing have been given.” A “regulatory function” means “making” or “issuing” a “regulatory order,” and includes “determining” whether it is “authorized or required by law.” 7 U.S.C. §450c(b)(1).

Whenever the Secretary deems the delegation of a regulatory function required, authorized, or expeditious, “he is authorized to make such delegation to any officers or employees designated under this section.” 7 U.S.C. §450d. The Secretary decides which employees or officers are designated under this section and gives them titles. *Id.* The Secretary may at any time revoke or rescind “the whole or any part of a delegation or designation made by him.” *Id.* The Secretary has designated the Judicial Officer as one to whom he has delegated the authority to “Act as final deciding officer in adjudicatory proceedings subject to 5 U.S.C. §§556 and 557.” 7 C.F.R. §2.35.

Formal enforcement proceedings filed against participants in Tennessee walking horse events are subject to this requirement in HPA §1825(b)(1): “No penalty shall be assessed unless...such civil penalty shall be assessed by the Secretary by written order.” In HPA enforcement proceedings, any respondent who has been determined to have violated the HPA, and against whom a penalty has been assessed, has not had the penalty assessed by a written order of the Secretary.

Instead, the penalty has been assessed in a written order signed by an ALJ or the JO. Under no circumstance will a written order assessing a penalty for a violation of the HPA be reviewed by, approved by or signed by a constitutionally appointed inferior officer or principal officer, like the Secretary.<sup>5</sup>

**C. USDA ALJs exercise discretion in carrying out significant functions in adjudicatory proceedings.**

Under the authority vested in USDA ALJs by the APA and the Department's Rules of Practice, USDA ALJs exercise significant discretion in carrying out important adjudicatory functions. The table below identifies the authority of USDA ALJs in enforcement proceedings.

<b>An ALJ's Duties and Authority</b>	<b>Authorizing Provision(s)</b>
Administers oaths and affirmations.	5 U.S.C. §556(c)(1) and 7 C.F.R. §1.144(c)(3)
Excludes evidence the Judge finds immaterial, irrelevant or unduly repetitious or which it would not be reasonable to rely on. Any error in the admission or exclusion of evidence shall be overruled by the Judicial Officer only if it is both erroneous and prejudicial.	5 U.S.C. §556(c)(1), 7 C.F.R. §1.140(h)(1)(iv) and 7 C.F.R. §1.140(h)(7) and 7 C.F.R. §1,144§(7)
Determines the scope and form of	7 C.F.R. §1.140

<sup>5</sup> The delegation to the JO of the Secretary's statutory duty to issue orders assessing a penalty is a delegation by a principal officer to an inferior officer of the duty and power to make final enforcement decisions. One issue this Court will address is the distinction between principal officers and inferior officers. Principal officers make final decisions, while inferior officers do not. Authority to make final decisions distinguishes principal officers from inferior officers; it is not what the distinguishes between inferior officers and mere employees.

evidence, rebuttal evidence or cross examination and method of taking evidence and conducting the hearing.	
If a respondent fails to timely answer, upon complainant's motion, the Judge may issue a decision without further procedure or hearing, and such decision shall become final and effective without further proceedings unless appealed to the Judicial Officer.	7 C.F.R. §1.139
Orders that the hearing be conducted by audio-visual telecommunication or by personal attendance of a witness or person.	7 C.F.R. §1.140(b)(3)
Grants extensions of time or stays.	7 C.F.R. §1.140(b)(i)
Conducts prehearing conferences.	7 C.F.R. §1.140(a)
Holds settlement conferences and require parties to attend.	5 U.S.C. §556(c)(6) and §556(c)(8) and 7 C.F.R. §1.140
Invokes the rule requiring witnesses be examined separately from each other.	7 C.F.R. §1.140(h)(1)(ii)
Issues, denies, revokes, quashes or modifies subpoenas for the production of documents or witnesses.	5 U.S.C. §556(c)(2) and 7 C.F.R. §1.144(c)(4) and 7 C.F.R. §1.149
Orders the USDA to provide a witness' prior statement as required by the Jencks Act.	7 C.F.R. §1.140(h)(1)(iii)
Rules on objections to evidence.	7 C.F.R. §1,140(h)(2)(i)
Prepares an initial decision containing factual findings and legal conclusions, along with an appropriate order.	5 U.S.C. §556(c)(10) and
The Judge may take official notice of matters that are judicially noticed in the U.S. courts.	7 C.F.R. §1.140(h)(6)
Regulates the course of the hearing and the conduct of the parties and counsel	5 U.S.C. §556(c)(5) and 7 C.F.R. §140(c)(13)
Informs parties about alternative means of dispute resolution.	5 U.S.C. §556(c)(7)
Examines witnesses and receives evidence at trial.	5 U.S.C. §556(c)(9) and 7 C.F.R. §1.144(c)(5)

Requires parties to exchange documents	7 C.F.R. §1.144(c)(9) and (10)
Takes depositions and orders depositions taken and orders corrections the Judge finds warranted in the transcript and determines the admissibility of deposition testimony.	5 U.S.C. §556(c)(4) and 7 C.F.R. §1.144(c)(6) and 7 C.F.R. §1.148
The Judge's initial decision includes the Judge's findings, conclusions and reasons on issues of law and fact and an order. (These are not described as recommendations.)	7 C.F.R. §1.132
ALJs may sign and approve the parties consent agreements settling a case that consents to an agreed decision without further proceedings, and the Judge shall enter the decision without further proceedings, which decision shall become final upon issuance.	7 C.F.R. §1.138
The Judge may rule on all motions, requests, objections or questions or certify issues to the Judicial Officer, but not both.	5 U.S.C. §556(c)(9) and 7 C.F.R. §1.144(c)(1) and 7 C.F.R. §1.143(a) and (e)
Neither the Judge nor the Judicial Officer shall discuss ex parte the merits of the proceeding with any party or representative of a party to a proceeding.	7 C.F.R. §1.151
The Judge can debar an attorney for misconduct.	7 C.F.R. §1.141(d)
The Judge's authority extends to "dispos[ing] of procedural requests or similar matters."	5 U.S.C. §556(c)(9)
The Judge "may issue a declaratory order to terminate a controversy or remove uncertainty."	5 U.S.C. §554(e)
The Judge makes initial decisions and orders that become final decisions and orders binding on the government and	5 U.S.C. §557(b) and 7 C.F.R. §2.27 and 7 C.F.R. §1.138 and 7 C.F.R. §1.142(c)(4)7 C.F.R. §1.145((a)

respondent with the lapse of time and without mandatory review by the JO.	
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Because USDA ALJs are assigned and exercise these significant functions, they act as officers of the United States, not as mere employees.

**D. USDA ALJs' initial decisions are final and binding without review by the Judicial Officer or Secretary.**

Congress provides agencies several options as to the roles ALJs have in enforcement proceedings. 5 U.S.C. §557(b). Under one option, the agency could require, by specific or general rule, that the ALJ's administrative record be forwarded to a superior officer for final decision. In *Landry*, FDIC ALJs prepared reports with recommended findings and conclusions that were reviewed by the Commission, which entered a final decision and order. In this case and also *Bandimere*, the SEC ALJs issued initial decisions, which were reviewed by the Commission, and became final on the written order of a superior. Under FDIC and SEC rules, the government contends that ALJs perform the functions of mere employees because, ultimately, any binding order is entered by lawfully appointed officers of the United States.

The USDA selected a different option in §557(b), deciding there was, and would be, no general or specific rule requiring a superior officer to review or sign an ALJ's initial decision for the decision to become final. ALJs' initial decisions



could become final with the lapse of time for an appeal. 7 C.F.R. § 2.27(a)(1) and 7 C.F.R. §1.142(c)(4).

*Amici* believe the USDA's decision, in choosing the option authorizing an ALJ's order to become final without mandatory review and in a written order by the Secretary, is inconsistent with the APA requirement that a "sanction may not be imposed ...or order issued except within jurisdiction delegated to the agency and authorized by law." 5 U.S.C. §558(b). HPA §1825(b)(1), provides that no penalty shall be assessed for an HPA violation except on the written order of the Secretary. Further, the APA does not authorize the USDA to adopt a regulation that repeals or contravenes the statutory requirement in HPA §1825(b); the APA provisions "that relate to administrative law judges, do not limit or repeal additional requirements imposed by statute." 5 U.S.C. §559.

Most importantly, *amici* believe that only principal officers have the authority to make final decisions assessing penalties in administrative proceedings. Insofar as USDA ALJs make final decisions, they act as principal officers. Petitioners in this case allude to the fact that SEC ALJs have final decision making powers when the Commission declines review of the initial decision and it becomes the action of the Commission and when SEC ALJs enter default orders. Petitioners also argue that whether a federal adjudicator has final decision-making

authority is relevant to whether the adjudicator is a principal or inferior officer, and is not the distinction between inferior officers and mere employees.

This Court is not called on to decide that all ALJs in all agencies are mere employees, inferior officers or principal officers. The roles of ALJs differ between agencies. Any decision should not imply or hold that all ALJs are created equal.

**E. USDA ALJs' initial decisions become final with the lapse of time.**

USDA ALJs' initial decisions are titled "DECISION AND ORDER," and conclude by informing the parties that the "provisions of this order shall become final and effective, thirty five (35) days after service ... unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding." *In Re: John Allen*, HPA Docket Nos. 13-0348; 15-0063 (Decision and Order Based on Failure to Appear at Hearing, December 15, 2015, at p. 4), available at <https://www.oaljdecisions.dm.usda.gov/sites/default/>.

The Rules of Practice do not require or permit the administrative record in the ALJ proceeding to be certified and transmitted to the JO if there is no timely appeal. 7 C.F.R. §1.145. The Department and JO do not have a discretionary authority of *sua sponte* review of the record or the ALJ's initial decision. Jurisdiction to review an ALJ's initial decision vests in the JO only if a party appeals. An appeal is effectuated by timely filing an appeal petition and brief with the Hearing Clerk. 7 C.F.R. §1.132. Section 1.145(c) provides: "Whenever an

appeal of a Judge's decision is filed and a response thereto has been filed or the time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding.”

The JO has held that jurisdiction is only acquired over the ALJ's initial decision if an appeal petition is timely filed. 7 C.F.R. §1.145. In *In re: Tim Gray*, HPA Docket No. 01-D022, (Order Denying Late Appeal, Oct. 17, 2015, at pp. 3-4, (internal citations omitted)). Available at <http://nationalaglawcenter.org/wp-content/uploads/i>. The JO observed: “The Judicial Officer has continuously held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal filed after an administrative law judge's decision becomes final.” The JO characterized the USDA's Rules of Practice as “consistent with the construction of the Federal Rules of Appellate Procedure,” which require a notice of appeal within 30 days of the district court decision. The JO quoted from an appellate decision from an Article III court holding that FRAP 4 “is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend.” *Id.* at 8. Under USDA's rules, neither the JO nor Department have jurisdiction to review, modify, reject or approve the ALJ's decision before a timely appeal is filed, or after the time for appeal has lapsed.

The implication of the JO's comparison of the USDA's Rules of Practice to the Federal Rules of Appellate Procedure is that USDA ALJs' decisions are like

Article III district court decisions; they are final unless timely appealed. The USDA considers its ALJs to be like independent decision-making Article III district court judges. Just as district court judges are not supervised by circuit court judges, USDA ALJs are not under the supervision of the JO. And, like the Article III courts of appeals, a Judicial Officer only has jurisdiction over a USDA ALJ's decision when the JO's authority is timely invoked.

The Rules of Practice do not authorize interim appeals from ALJs' decisions. *See Robert Raymond Black*, 64 Agric. Dec. 681, 684 (U.S.D.A. 2005). In only four situations can the JO acquire authority to rule on motions during ALJ proceedings. They are: (1) motions to disqualify Judges filed under §1.144 that are certified by the ALJ to the JO for decision; (2) motions filed under §1.143(e) that are certified by the Judge for JO decision; (3) an appeal petition from an ALJ order under §1.141(d) debarring an attorney; and (4) Department appeals filed under §1.139 challenging the ALJ's denial of a default order.

The parties have no right to take an interim appeal from an ALJ's ruling during the proceeding. *In re: All-AirTransport*, 50 Agric. Dec. 420, 421 (U.S.D.A. 1991). The JO cannot reach out and assume jurisdiction over the ALJ's proceeding and adopt, modify or reverse USDA ALJs' decisions. The USDA ALJs are not the JO's assistants; the JO is not their supervisor.

**F. ALJ Consent Decisions are final when issued.**

USDA ALJs regularly sign and enter Consent Decisions as their initial decisions, and they are final without further action. The Rules of Practice provide:

§1.138 Consent decision.

At any time before the Judge files the decision, the parties may agree to the entry of a consent decision. Such agreement shall be filed with the Hearing Clerk in the form of a decision signed by the parties with an appropriate space for signature by the judge, and shall contain an admission of at least the jurisdictional facts, consent to the issuance of the agreed decision without further procedure and such other admissions or statements as may be agreed between the parties. The Judge shall enter such decision without further procedure, unless an error is apparent on the face of the document. Such decision shall have the same force and effect as a decision issued after a full hearing, and shall become final upon issuance to become effective in accordance with the terms of the decision.

ALJs have no authority to modify the Consent Decision after it is issued. *Far West Meats and Michaela A. Serrato*, 55 Agric. Dec. 1045 (U.S.D.A. 1996). The JO has no jurisdiction to review, modify, affirm or reverse an ALJ's Consent Decision. *Velasam Veal Connection et al*, 55 Agric. Dec. 295, 298 (U.S.D.A. 1996).<sup>6</sup>

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<sup>6</sup> The Office of Administrative Law Judges provides links to initial decisions, consent decisions and default orders. From 2014-2016, of the 353 decisions or orders published on these three lists, USDA ALJs issued 263 Consent Decisions, or 74% of the total. Available at <https://www.oaljdecisions.dm.usda.gov/>.

**G. ALJs enter final orders of dismissal.**

USDA ALJs also enter agreed final orders of dismissal, which have the legal effect of barring the USDA from recovering any penalty or sanction from the respondent. These dismissal orders bar the government from filing a complaint seeking penalties for alleged violations that were asserted in the dismissed complaint. *In re: Paige Edwards*, [HPA] Docket No. 14-0008 (DISMISSAL, May 23, 2016) ( The ALJ “order[s] the Complaint as to Respondent Paige Edwards in Docket No. 14-0008 DISMISSED, with prejudice [meaning the case cannot be refiled].”) Available at <https://www.oaljdecisions.dm.usda.gov/sites/default/>. No notice of a right to appeal is provided. This final order determines not only that the USDA is barred from filing another suit, but it also bars the respondent from “seek[ing] reimbursement of attorneys’ fees.” A USDA ALJ’s dismissal for lack of jurisdiction is not appealable to the JO, who lacks appellate jurisdiction, and the ALJ’s order is final. *See In re: Massachusetts Independent Certification, Inc.*, 63 Agric. Dec. 282 (U.S.D.A. 2004). ALJs also enter Final Orders dismissing cases solely at the request of the Office of General Counsel. *See In re: SHOW, INC.*, 74 Agric. Dec. 160 (U.S.D.A. 2015).

## H. Default orders are final orders.

Consent orders and default orders are the primary enforcement orders in USDA enforcement proceedings.<sup>7</sup> Peter M. Davenport, when he was Chief Administrative Law Judge for the USDA, wrote an article “*The Department of Agriculture’s Rules of Practice: Do They Still Serve Both the Department’s and the Public’s Needs?*”<sup>8</sup> The Department, he observed, “has steadfastly and repeatedly resisted even the slightest alignment of its rules with the Federal Civil Rules.” *Id.* at 574. The language in the Rules is “almost invariably strictly construed.” *Id.* at 576, *see In re: William J. Reinhart and Reinhart Stables*, 59 Agric. Dec. 721(U.S.D.A. 2000). According to Davenport, the Department frequently amends the complaint, then, when an amended answer is not filed, the Department will move for a default even when the amendment is minor. *Davenport* at 577. Further the “Department’s reliance upon aggressive use of procedural rules to achieve resolution is generally successful, even where the Department’s administrative law judges have sought to afford a respondent a hearing on the merits where they believed good cause

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<sup>7</sup> The Office of Administrative Law Judges provides links to ALJ initial decisions, consent decisions and default orders. Of the 353 orders listed on these three lists, USDA ALJs made 42 default decisions in 2014, 2015 and 2016, representing 12% of the total orders. See, [https:// www.oaljdecisions.dm.usda.gov/](https://www.oaljdecisions.dm.usda.gov/). As of 2/24/17.

<sup>8</sup> 33 J. Nat’l Ass’n Admin. L. Judiciary Iss.2, 567 (2013), available at <http://digitalcommons.pepperdine.edu/naalj/vol33/iss2/3>.

existed.” *Id.* at 677. The defaults result in final orders, which the JO affirms on appeal under a strict application of the Rules.

### CONCLUSION

There are several kinds of ALJ administrative systems in different agencies. Whether all ALJs perform functions and exercise discretion in adjudicatory proceedings so significant that they act as inferior officers, who must be appointed by the Head of a Department, is beyond the scope of the case before this Court. Whether some ALJs act as principal officers is not before the Court. The issue before this Court begins with one undisputed fact: SEC ALJs are not appointed under the requirements of the Appointments Clause. The issue at hand is whether SEC ALJs perform functions and exercise discretion in adjudicating enforcement proceedings that should only vest in officers of the United States appointed in conformance with the Appointment Clause. This Court’s decision should focus on the facts and law relevant in this case, not on whether the sky will fall if the SEC’s order against Mr. Lucia is vacated.

Dated: March 8, 2017

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B)(i) because it contains 5,686 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).
2. This brief complies with the typeface requirements of Fed. R. Civ. O. 32(a)(5) and typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14-point font.

March 8, 2017

/s/ David Broiles

## CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

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