No. ______

In the
Supreme Court of the United States

KABANI & COMPANY, INC., et al.,

Petitioners,

v.

U.S. SECURITIES & EXCHANGE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

GEORGE W. HICKS, JR.
Counsel of Record
LAUREN N. BEEBE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
george.hicks@kirkland.com

Counsel for Petitioners

February 22, 2019

QUESTION PRESENTED

In *Lucia v. SEC*, this Court held that administrative law judges of the United States Securities and Exchange Commission are "Officers of the United States" subject to the Appointments Clause, and it reaffirmed that "'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief"—specifically, "a new 'hearing before a properly appointed official.'" 138 S. Ct. 2044, 2055 (2018) (quoting *Ryder v. United States*, 515 U.S. 177, 182-83 (1995)). Lower courts, however, have struggled to define the contours of what constitutes a "timely challenge" to the validity of a government official's appointment under the Appointments Clause. In this case, the Ninth Circuit added to the uncertainty by refusing to entertain Petitioners' challenge to the appointment of the Public Company Accounting Oversight Board hearing officer who adjudicated their case, despite Petitioners' having repeatedly contested the constitutional validity of the administrative framework of their proceeding at all stages—including challenging the appointment of that officer—because Petitioners did not specifically invoke "the Appointments Clause" as the basis for their structural constitutional objections.

The question presented is:

Whether petitioners who timely challenge the constitutional validity of the administrative framework, including the appointment of the officer adjudicating their case, are nonetheless ineligible for relief unless they specifically name "the Appointments Clause" as the basis for their constitutional objections.

PARTIES TO THE PROCEEDING

Kabani & Company, Inc., and certified public accountants Hamid Kabani, Michael Deutchman, and Karim Khan Muhammad are Petitioners here and were respondents (before the Public Company Accounting Oversight Board), applicants (before the U.S. Securities and Exchange Commission), and petitioners (before the Ninth Circuit) below. The U.S. Securities and Exchange Commission is Respondent here and was respondent in the Ninth Circuit below.

CORPORATE DISCLOSURE STATEMENT

Kabani & Company, Inc. is an accounting and consulting firm registered with the Public Company Accounting Oversight Board. The Firm was founded by certified public accountant Hamid Kabani, who was also (at all relevant times) the sole shareholder and head of the Firm.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
CORPORATE DISCLOSURE STATEMENT iii
TABLE OF AUTHORITIES vi
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 3
JURISDICTION 3
CONSTITUTIONAL PROVISION INVOLVED 3
STATEMENT OF THE CASE 4
REASONS FOR GRANTING THE PETITION 9
I. This Court Should Grant Certiorari To Clarify The Contours Of *Lucia*'s "Timely Challenge" Requirement 11
   A. Lower Courts Are Divided over How Parties Must "Timely Challenge" Unconstitutionally Appointed Officers 11
   B. The Ninth Circuit Imposes an Inflexible Specific-Verbiage Requirement that Elevates Form over Substance and is Inconsistent with This Court's Precedent 17
II. The Question Presented Is Exceptionally Important And Has Far-Reaching Impact 24
CONCLUSION 28

APPENDIX

Appendix A

Memorandum Disposition, United States Court of Appeals for the Ninth Circuit, *Kabani & Co., Inc. v. SEC*, No. 17-70786 (Aug. 9, 2018) App-1

Appendix B

Order, United States Court of Appeals for the Ninth Circuit, *Kabani & Co., Inc. v. SEC*, No. 17-70786 (Sept. 25, 2018) App-5

Appendix C

Opinion, Securities and Exchange Commission, *In the Matter of the Application of Kabani & Company, Inc. et al. for Review of Disciplinary Action*, Release No. 80201 (Mar. 10, 2017) App-6

TABLE OF AUTHORITIES

Cases

Associated Mortg. Bankers, Inc. v. Carson,
No. 17-75 (ESH), 2019 WL 108882
(D.D.C. Jan. 4, 2019) 16

Bowsher v. Synar,
478 U.S. 714 (1986).. 24

Britt v. Berryhill,
No. 1:18-cv-30-FDW, 2018 WL 6268211
(W.D.N.C. Nov. 30, 2018) 15

Buckley v. Valeo,
424 U.S. 1 (1976)... 5, 18, 24

Davidson v. Comm'r of Soc. Sec.,
No. 2:16-cv-102, 2018 WL 4680327
(M.D. Tenn. Sept. 28, 2018)................................... 15

Davis v. Comm'r of Soc. Sec.,
No. 17-CV-80-LRR, 2018 WL 4300505
(N.D. Iowa Sept. 10, 2018)..................................... 15

Edmond v. United States,
520 U.S. 651 (1997).. 25

Flack v. Comm'r of Soc. Sec.,
No. 2:18-cv-501, 2018 WL 6011147
(S.D. Ohio Nov. 16, 2018) 15

Fortin v. Comm'r of Soc. Sec.,
No. 18-10187, 2019 WL 421071
(E.D. Mich. Feb. 1, 2019)....................................... 16

Freytag v. Comm'r,
501 U.S. 868 (1991).. *passim*

Fry v. Napoleon Cmty. Sch.,
137 S. Ct. 743 (2017).. 22

Garrison v. Berryhill,
No. 1:17-cv-302-FDW, 2018 WL 4924554
(W.D.N.C. Oct. 10, 2018) 15

Glidden Co. v. Zdanok,
370 U.S. 530 (1962)............................... 1, 17, 25, 27

Gregory v. Helvering,
293 U.S. 465 (1935).. 22

In re Grand Jury Investigation,
315 F. Supp. 3d 602 (D.D.C. 2018)........................ 16

Island Creek Coal Co. v. Wilkerson,
910 F.3d 254 (6th Cir. 2018)............................ 11, 12

Iwan v. Comm'r of Soc. Sec.,
No. 17-CV-97-LRR, 2018 WL 4295202
(N.D. Iowa Sept. 10, 2018)..................................... 15

Jones Bros., Inc. v. Sec'y of Labor,
898 F.3d 669 (6th Cir. 2018)........................ 2, 12, 14

Lebron v. Nat'l R.R. Passenger Corp.,
513 U.S. 374 (1995).. 5, 18

Loving v. United States,
517 U.S. 748 (1996)... 25, 26

Lucia v. SEC,
138 S. Ct. 2044 (2018).................................... *passim*

Metro. Wash. Airports Auth.
v. Citizens for Abatement of Aircraft
Noise, Inc.,
501 U.S. 252 (1991).. 24, 25

Mistretta v. United States,
488 U.S. 361 (1989).. 24

N. Pipeline Constr. Co.
v. Marathon Pipe Line Co.,
458 U.S. 50 (1982).. 24

Nickum v. Berryhill,
No. 17-2011-SAC, 2018 WL 6436091
(D. Kan. Dec. 7, 2018) 15

Pearson v. Berryhill,
No. 17-4031-SAC, 2018 WL 6436092
(D. Kan. Dec. 7, 2018) 15

Pedraza v. Berryhill,
No. 17-2152-SAC, 2018 WL 6436093
(D. Kan. Dec. 7, 2018) 15

Pub. Citizen v. U.S. Dep't of Justice,
491 U.S. 440 (1989) 24

Ryder v. United States,
515 U.S. 177 (1995) 1, 9, 26

Shipman v. Berryhill,
No. 1:17-cv-309-MR, 2019 WL 281313
(W.D.N.C. Jan. 22, 2019) 15

Sims v. Apfel,
530 U.S. 103 (2000) 15

Stearns v. Berryhill,
No. C17-2031-LTS, 2018 WL 4380984
(N.D. Iowa Sept. 14, 2018) 14

Thurman v. Comm'r of Soc. Sec.,
No. 17-CV-35-LRR, 2018 WL 4300504
(N.D. Iowa Sept. 10, 2018) 15

Turner Bros., Inc. v. Conley,
No. 17-9545, 2018 WL 6523096
(10th Cir. Dec. 11, 2018) 2, 13

Velasquez on Behalf of Velasquez v. Berryhill,
No. 17-17740, 2018 WL 6920457
(E.D. La. Dec. 17, 2018) 15

Willis v. Comm'r of Soc. Sec.,
No. 1:18-cv-158, 2018 WL 6381066
(S.D. Ohio Dec. 6, 2018) 14

Constitutional Provision

U.S. Const. art. II, §2 .... 3, 26

Statute

28 U.S.C. §1254 3

Other Authorities

1 Annals of Cong.
(Joseph Gales ed., 1834) 24

Rep. & Recommendation,
Muhammad v. Berryhill,
No. 2:18-cv-172-GJP
(E.D. Pa. Nov. 2, 2018), ECF No. 25 16

Rep. & Recommendations,
Godschall v. Comm'r of Soc. Sec.,
No. 2:18-cv-1647-GJP
(E.D. Pa. Nov. 2, 2018), ECF No. 12 16

The Federalist No. 47
(Jacob E. Cooke ed., 1961) 24

Wright & Miller, 5 Fed. Prac. & Proc. Civ.
§1286 (3d ed. Nov. 2018 Update) 22

PETITION FOR WRIT OF CERTIORARI

The Appointments Clause serves important structural and political separation-of-powers interests. It not only guards against the "danger of one branch's aggrandizing its power at the expense of another branch, … but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991). Recognizing these important interests, this Court has "expressly included Appointments Clause objections to judicial officers in the category of nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below." *Id.* at 878-79 (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 535-36 (1962)). And the Court has long held that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred." *Ryder v. United States*, 515 U.S. 177, 182-83 (1995). It recently reaffirmed that holding in *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

But *Lucia* did not define the scope of what constitutes a "timely challenge," as there was no claim in *Lucia* that the petitioner's challenge was untimely. Given this lack of guidance, lower federal courts have divided over when, and to what extent, a party must "timely challenge" the appointment of an administrative officer in order to be entitled to relief. For example, the Sixth Circuit has held that a petitioner need not "mention the Appointments

Clause issue in front of the administrative law judge," as long as it identifies the issue at some later point. *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 673 (6th Cir. 2018). In the Tenth Circuit, however, a petitioner must at least "mention" the constitutional issue "in its filings" during the administrative process. *Turner Bros., Inc. v. Conley*, No. 17-9545, 2018 WL 6523096, at *1 (10th Cir. Dec. 11, 2018). In the decision below, the Ninth Circuit blazed a new and even more extreme trail: Even though petitioners repeatedly contested the constitutional validity of their administrative framework—including challenging the appointment of the officer who adjudicated their case—they were denied relief because they did not specifically name "the Appointments Clause" as the basis for their constitutional objections. Other lower federal courts have come up with their own myriad approaches.

This existing patchwork of law is untenable. Despite the Constitution's uniform applicability, petitioners in certain jurisdictions labor under different burdens for raising challenges to the enforcement of a constitutional provision that is integral to the proper functioning of the separation of powers—and, thus, to our constitutional system. The Ninth Circuit's inflexible verbiage requirement is particularly indefensible. Requiring petitioners to specifically name "the Appointments Clause" imposes an unduly rigid requirement that has no basis in this Court's jurisprudence, particularly in light of the fundamental importance of the Appointments Clause. The Court should grant certiorari to provide much-needed guidance to lower federal courts across the

nation and to ensure robust, not illusory, enforcement of the Appointments Clause.

OPINIONS BELOW

The Ninth Circuit's decision is available at 733 F. App'x 918 (9th Cir. Aug. 13, 2018), and reproduced at App.1-4. The SEC's opinion is available at Exchange Act Release No. 80201, 116 SEC Docket 1095, 2017 WL 947229 (Mar. 10, 2017), and reproduced at App.6-58. The PCAOB's final decision is available at PCAOB File No. 105-2012-002 (Jan. 22, 2015).

JURISDICTION

The Ninth Circuit submitted its decision on August 9, 2018, filed that decision on August 13, 2018, and denied a timely motion for reconsideration, which it also construed as a petition for panel rehearing, on September 25, 2018. On November 5, 2018, Justice Kagan extended the time for filing a petition for certiorari to and including January 23, 2019 and, on December 17, 2018, further extended that time to and including February 22, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law." U.S. Const. art. II, §2, cl. 2.

STATEMENT OF THE CASE

1. On June 2, 2008, the Public Company Accounting Oversight Board (PCAOB or the Board) notified Petitioners (Kabani & Company, Inc. (K&C or the Firm) and certified public accountants Hamid Kabani, Michael Deutchman, and Karim Khan Muhammad) that the PCAOB's Division of Registration and Inspection intended to conduct an inspection of K&C's audit records. App.9. PCAOB inspectors visited the Firm on October 20, 2008. App.12. Approximately one year after that inspection, a disgruntled former K&C employee contacted PCAOB staff about concerns relating to the 2008 inspection. App.13. In April 2010, the PCAOB's Division of Enforcement and Investigation opened an investigation into K&C's recordkeeping, including how the Firm prepared for the 2008 inspection. *Id.* The Firm provided the PCAOB with the requested materials in June 2010. *Id.*

Two years later, on June 15, 2012, the Board issued an Order Instituting Disciplinary Proceedings, alleging that Petitioners had violated various PCAOB rules and auditing standards, including PCAOB Accounting Standard No. 3, by purportedly "adding, deleting, altering, and/or backdating numerous work papers across several audit engagements and … provid[ing] work papers for at least three of those engagements to the PCAOB in connection with its inspection without informing the PCAOB of the alterations." App.19. A hearing officer was selected to oversee Petitioners' proceedings, but on May 7, 2013, without explanation, the Board replaced that officer by appointing David R. Sonnenberg to serve as

the presiding hearing officer who would adjudicate Petitioners' matter. At the time, Sonnenberg was a prosecutor for the Financial Industry Regulatory Authority (FINRA) and was borrowed by the PCAOB to adjudicate Petitioners' case. *See* Appellant's Excerpts of R., Vol. 7, ECF No. 19-7 at 1855 (Notice of Appointment of Replacement Hr'g Officer).

After a hearing, the PCAOB hearing officer issued an initial decision on April 22, 2014. The hearing officer found that Petitioners "violated PCAOB rules by participating in a 'wide-spread and resource-intensive effort' to alter documents in three issuer audit files in an attempt 'to deceive PCAOB inspectors in an upcoming inspection about the deficiencies in the Firm's audit work papers.'" App.20. The hearing officer censured all four Petitioners; permanently revoked the Firm's registration; permanently barred Deutchman, Kabani, and Khan from associating with a registered public accounting firm (with leave for Deutchman and Khan to reapply in 2 years and 18 months, respectively); and imposed civil penalties of $35,000 on Deutchman, $100,000 on Kabani, and $20,000 on Khan. *Id.*

On May 27, 2014, Petitioners moved to recuse the PCAOB. Petitioners argued, *inter alia*, that "[r]ecusal of the PCAOB [wa]s required as a matter of constitutional law" and specifically directed their concerns toward the hearing officer. Appellant's Excerpts of R., Vol. 48, ECF No. 19-48 at 9836 (Kabani Resp'ts' Mot. to Recuse the PCAOB). Petitioners explained that "[t]he PCAOB is 'part of the Government' for constitutional purposes," and that its members are "Officers of the United States" who

"exercis[e] significant authority pursuant to the laws of the United States." *Id.* at 9843 (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995); *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976) (per curiam)) (second alteration in original).

After the PCAOB refused to recuse itself, Petitioners petitioned the PCAOB for review of the hearing officer's decision. On January 22, 2015, the PCAOB summarily affirmed the hearing officer's findings and imposition of sanctions. App.20-21.

2. Petitioners appealed to the U.S. Securities and Exchange Commission (SEC). Petitioners argued that "the administrative forum in which they were forced to defend themselves" was "unconstitutional, and constructed in a manner that violates vested, protected property rights and constitutionally protected, fundamental fairness." Applicants' Br. in Supp. of their Appl. for Review (SEC.Opening.Br.) at 2, available at https://bit.ly/2V8dIlu. And they specifically identified the "improper bias" of the PCAOB hearing officer who adjudicated their case, claiming that, *inter alia*, he "lacked sufficient knowledge and experience in accounting and auditing." *Id.* at 1-2, 41-42. Petitioners urged the SEC to recognize the myriad constitutional deficiencies with the relevant administrative framework—including the appointment of the PCAOB hearing officer—and asked the SEC to reverse on that basis: "The denial of these basic protections militates that the sanctions imposed be vacated and that a new hearing be instituted with consideration of all of the procedural safeguards contemplated under the Constitution." *Id.* at 27-28.

The SEC rejected Petitioners' constitutional (and other) arguments, and sustained the PCAOB's findings of violations and imposition of sanctions. *See* App.1-4.

3. Having exhausted their administrative remedies, Petitioners petitioned the Ninth Circuit for review of the SEC's decision. In their opening brief, Petitioners again maintained that "they were deprived of their due process rights and that the administrative forum in which they were forced to defend themselves was unfairly biased, unconstitutional, and constructed in a manner that violates vested, protected property rights and constitutionally protected, fundamental fairness." Pet'rs' Opening Br. (CA9.Opening.Br.) at 10, ECF No. 31 (Aug. 21, 2017). In their reply brief, Petitioners further emphasized that they "were subjected to sanctions by the PCAOB based on an unconstitutional framework"—*i.e.*, "in establishing the PCAOB, Congress assigned executive power to the Board without sufficient oversight, accountability, or allegiance. This allowed the Board to shield its investigations and hearings from appropriate executive scrutiny." Pet'rs' Reply Br. (CA9.Reply.Br.) at 31-32, ECF No. 49 (Jan. 19, 2018).

After briefing was complete, this Court issued its decision in *Lucia*. Petitioners submitted a prompt Rule 28(j) letter explaining that *Lucia* supported their arguments as to the constitutional invalidity of the PCAOB hearing officer. Petitioners wrote: "The rationale in *Lucia* highlights the view that the PCAOB hearing officer in Petitioners' case was not properly appointed, and therefore the PCAOB's adjudication of

Petitioners' case was constitutionally invalid pursuant to the Appointments Clause." Pet'rs' 28(j) Letter at 2-3, ECF No. 60 (July 11, 2018). Petitioners further maintained that they "complied with the required timely objection to their hearing officer, therefore reserving their rights and entitling them to relief." *Id.* at 3-4.

The Ninth Circuit nonetheless denied the petition for review, affirming the SEC's decision. App.2. It found that "[s]ubstantial evidence support[ed] the SEC's finding that petitioners violated PCAOB Accounting Standard No. 3 [ ] with the requisite scienter" because of various alleged "indications of an attempted cover-up," and determined that "[t]he PCAOB proceedings comported with procedural due process." *Id.* As to Petitioners' arguments regarding the constitutional validity of the construction of the administrative framework—including the appointment of the PCAOB hearing officer who adjudicated their case—the court found that "petitioners forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency." App.4. In support of that conclusion, the court offered only a bare citation to *Lucia*: "'[O]ne who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." *Id.* (quoting *Lucia*, 138 S. Ct. at 2055) (alteration in original).

4. Petitioners moved for reconsideration and again argued that the PCAOB hearing officer who adjudicated their case had not been properly appointed under the Appointments Clause. In particular, Petitioners pointed out that they had

repeatedly challenged the constitutionality of the administrative framework, including the appointment of the PCAOB hearing officer who adjudicated their case. Although Petitioners acknowledged that they had not specifically named "the Appointments Clause" as the basis for their constitutional objections, they maintained that "[t]he lack of exact verbiage" should not preclude them from obtaining relief. Appellants' Mot. for Recons. at 5, ECF No. 67 (Sept. 20, 2018); *see also, e.g.*, *id.* at 7.

The Ninth Circuit denied the motion for reconsideration without explanation. App.5. It also construed the motion as a petition for panel rehearing and stated that no further petitions for rehearing would be accepted. *Id.*

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision warrants certiorari because it widens an entrenched split among the lower courts regarding the proper application of this Court's decision in *Lucia v. SEC*. In that case, the Court reaffirmed that "'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief," and that "the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official." *Lucia*, 138 S. Ct. at 2055 (quoting *Ryder*, 515 U.S. at 182-83). The Court did not articulate the particular contours of its "timely challenge" requirement, however, because there was no dispute in that case that the petitioner's challenge was timely. The Court did not set forth any minimum requirements or otherwise provide any guidance to help lower courts determine whether a

given party has made a "timely challenge" to the unconstitutional appointment of officers like the PCAOB hearing officer who adjudicated Petitioners' proceeding.

In *Lucia*'s wake, and given this lack of guidance, lower federal courts have struggled to apply the "timely challenge" requirement to other proceedings alleging Appointments Clause violations. As a result, courts across the country have applied different standards, imposed different burdens, and reached different conclusions concerning what, precisely, a party must do to raise and preserve an Appointments Clause claim. The Sixth Circuit has staked out a position under which Petitioners' claim would undoubtedly have been preserved. The Tenth Circuit has staked out a middle position. And now the Ninth Circuit has staked out an extreme position at the other end of the spectrum. Reflecting this divide among the courts of appeals, district courts, too, are in disarray over the nature of a "timely challenge" to an administrative officer.

This entrenched split itself warrants certiorari, but this Court's intervention is even more badly needed given the undeniable importance of robust enforcement of the Appointments Clause and the separation-of-powers principles it protects. It is imperative that parties know exactly what is required of them in order to bring such a constitutional challenge that strikes at the heart of fairness and liberty. And it is intolerable for there to be uncertainty and division across the country when it comes to so significant a matter. The Court should grant review to provide clarity to the lower federal

courts and establish a uniform standard that reflects the fundamental significance of the Appointments Clause.

I. This Court Should Grant Certiorari To Clarify The Contours Of *Lucia*'s "Timely Challenge" Requirement.

A. Lower Courts Are Divided over How Parties Must "Timely Challenge" Unconstitutionally Appointed Officers.

The decision below joins a deepening conflict in the federal courts over how to apply *Lucia*'s "timely challenge" requirement. As a result of this widespread division, parties across the nation face different standards for demonstrating their entitlement to relief from an Appointments Clause violation. Three circuits (the Sixth, Ninth, and Tenth) have weighed in, along with numerous federal district courts. None, however, have settled on a consistent standard for the "timely challenge" requirement. This uncertainty plainly warrants review by the Court.

The Sixth Circuit has issued two guidepost decisions. In *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254 (6th Cir. 2018), the court held that the company had forfeited its Appointments Clause argument because it "fail[ed] to raise it in its opening brief" before the Sixth Circuit. *Id.* at 255. The company had identified only "one issue for the court to consider at the outset"—*i.e.*, "[w]hether the administrative law judge 'rationally explained how the conflicting evidence presented carried the burden to establish total disability'"—and "in the rest of that brief, … said nothing about the authority of administrative law judges in this area." *Id.* at 256.

"Only in its reply brief did [the company] raise the Appointments Clause issue," and "[t]hat was one brief too late." *Id.* While the court acknowledged that it could have "look[ed] the other way" and reached the constitutional issue despite the company's failure to raise it in its opening Sixth Circuit brief, it found that the company had failed to "identif[y] any 'exceptional circumstances'" to warrant that treatment. *Id.*

By contrast, in *Jones Brothers, Inc. v. Secretary of Labor*, 898 F.3d 669 (6th Cir. 2018), the Sixth Circuit had held that a party had not forfeited its Appointments Clause argument. Even though the party in that case "did not mention the Appointments Clause issue in front of the administrative law judge," it had at least "identified the constitutional issue" before the Commission. *Id.* at 673. And the court determined that the party did not have to raise the issue before the ALJ: "This administrative agency, like all administrative agencies, has no authority to entertain a facial constitutional challenge to the validity of a law. An administrative agency may not invalidate the statute from which it derives its existence and that it is charged with implementing." *Id.* (collecting cases). Because of this inherent limitation, the court "could not fault a petitioner for failing to raise a facial constitutional challenge in front of an administrative body that could not entertain it." *Id.* at 674. To the extent that the party did forfeit its constitutional claim by merely identifying the issue before the Commission (and "failing to press" it), the court held that any forfeiture was excusable "because of extraordinary circumstances"—namely, "the absence of legal authority addressing whether the Commission could

entertain the claim." *Id.* at 677. The court thus vacated the Commission's decision and remanded for "fresh proceedings." *Id.* at 679. Under the *Jones Brothers* approach, Petitioners plainly preserved their Appointments Clause challenge and would have likewise been entitled to a remand for "fresh" proceedings before a new, constitutionally appointed hearing officer.

The Tenth Circuit addressed the issue in *Turner Brothers, Inc. v. Conley*, No. 17-9545, 2018 WL 6523096 (10th Cir. Dec. 11, 2018). There, the party "concede[d] that it did not raise" the Appointments Clause issue at any point before filing a post-*Lucia* motion to remand (after all of the briefing on the petition for review was completed). *Id.* at *1. The Tenth Circuit noted that "Appointments Clause challenges are nonjurisdictional and may be waived or forfeited," and it distinguished the Sixth Circuit's *Jones Brothers* decision because the party there "had not *waived* its Appointments Clause challenge to the ALJ's authority," and the court had "excused [its] *forfeiture*" because it had identified the issue to the Commission, and its failure to press it was excusable in light of the absence of legal authority addressing whether the Commission could entertain the Appointments Clause claim. *Id.* (emphases added). In contrast, the Tenth Circuit held, "Turner Brothers did not mention this issue in its filings with the ALJ or the Board, and did not raise the issue until after it filed its brief with this court." *Id.*

In the decision below, the Ninth Circuit forged an entirely new, and far more dangerous, path. The court perfunctorily dismissed Petitioners' Appointments

Clause claim, finding that they had forfeited it "by failing to raise it in their briefs or before the agency." App.4. But the Ninth Circuit cited only *Lucia*'s general "timely challenge" language in support of that conclusion, and failed to explain how Petitioners' repeated constitutional challenges—including challenging the appointment of the officer who adjudicated their case—did not satisfy the "timely challenge" requirement. *See id.*; *see also* Appellants' Mot. for Recons.; App.5. And the Ninth Circuit failed to address why, even if Petitioners had forfeited their Appointments Clause argument, it did not find that any forfeiture was excusable in light of, for example, "the absence of legal authority addressing" the issue. *Cf. Jones Bros.*, 898 F.3d at 677.

Reflecting the differing standards in the courts of appeals, district courts across the country have developed their own patchwork of approaches, demonstrating the lack of any consistent law regarding the extent to which parties must go in order to preserve an Appointments Clause challenge and be entitled to relief. For example, in *Willis v. Commissioner of Social Security*, the court suggested that a party may be entitled to relief if they "contest[ed] the validity of the ALJ's appointment" or "even mention[ed] the constitutional issue at the administrative level." No. 1:18-cv-158, 2018 WL 6381066, at *3 (S.D. Ohio Dec. 6, 2018), which would plainly be sufficient to preserve Petitioners' Appointments Clause challenge here. Other courts have indicated that parties must "raise an Appointments Clause issue before or during the ALJ's hearing, or at any time before the ALJ's decision became final," *Stearns v. Berryhill*, No. C17-2031-LTS,

2018 WL 4380984, at *6 (N.D. Iowa Sept. 14, 2018), but have not specified whether "raising" the issue requires specifically naming "the Appointments Clause." *See also, e.g.*, *Shipman v. Berryhill*, No. 1:17-cv-309-MR, 2019 WL 281313 (W.D.N.C. Jan. 22, 2019); *Velasquez on Behalf of Velasquez v. Berryhill*, No. 17-17740, 2018 WL 6920457 (E.D. La. Dec. 17, 2018); *Nickum v. Berryhill*, No. 17-2011-SAC, 2018 WL 6436091 (D. Kan. Dec. 7, 2018); *Pearson v. Berryhill*, No. 17-4031-SAC, 2018 WL 6436092 (D. Kan. Dec. 7, 2018); *Pedraza v. Berryhill*, No. 17-2152-SAC, 2018 WL 6436093 (D. Kan. Dec. 7, 2018); *Britt v. Berryhill*, No. 1:18-cv-30-FDW, 2018 WL 6268211 (W.D.N.C. Nov. 30, 2018); *Flack v. Comm'r of Soc. Sec.*, No. 2:18-cv-501, 2018 WL 6011147 (S.D. Ohio Nov. 16, 2018); *Garrison v. Berryhill*, No. 1:17-cv-302-FDW, 2018 WL 4924554 (W.D.N.C. Oct. 10, 2018); *Davidson v. Comm'r of Soc. Sec.*, No. 2:16-cv-102, 2018 WL 4680327 (M.D. Tenn. Sept. 28, 2018); *Thurman v. Comm'r of Soc. Sec.*, No. 17-CV-35-LRR, 2018 WL 4300504 (N.D. Iowa Sept. 10, 2018), *appeal filed* (8th Cir. Nov. 19, 2018); *Iwan v. Comm'r of Soc. Sec.*, No. 17-CV-97-LRR, 2018 WL 4295202 (N.D. Iowa Sept. 10, 2018), *appeal filed* (8th Cir. Nov. 19, 2018); *Davis v. Comm'r of Soc. Sec.*, No. 17-CV-80-LRR, 2018 WL 4300505 (N.D. Iowa Sept. 10, 2018).

Furthermore, like the Sixth Circuit in *Jones Brothers*, some district courts have found that failing to raise the Appointments Clause issue before the ALJ or other officer is excusable. In *Fortin v. Commissioner of Social Security*, for example, the district court thoroughly surveyed the patchwork post-*Lucia* legal landscape but was ultimately "[c]ompelled by *Sims* [*v. Apfel*, 530 U.S. 103 (2000)] and *Freyta[g]*,"

and (applying well-established principles from those cases) recommended that the case "be remanded to the Commissioner for a *de novo* hearing." No. 18-10187, 2019 WL 421071, at *1-4 (E.D. Mich. Feb. 1, 2019). In reaching that decision, the court found that petitioners were not required to raise the constitutional challenge before the ALJ, since "it makes little sense to require a claimant to raise an issue before an ALJ who is powerless to resolve it." *Id.* at *4 (quoting Rep. & Recommendation, *Muhammad v. Berryhill*, No. 2:18-cv-172-GJP (E.D. Pa. Nov. 2, 2018), ECF No. 25); *see also, e.g.*, Rep. & Recommendations, *Godschall v. Comm'r of Soc. Sec.*, No. 2:18-cv-1647-GJP (E.D. Pa. Nov. 2, 2018), ECF No. 12.

The district court for the District of Columbia has clearly identified the source of this confusion: "*Lucia* did not define the scope of what constitutes a timely challenge, as there was no claim in *Lucia* that the challenge to the appointment of the SEC's administrative law judge—advanced for the first time on appeal to the SEC—was not timely raised." *Associated Mortg. Bankers, Inc. v. Carson*, No. 17-75 (ESH), 2019 WL 108882, at *5 (D.D.C. Jan. 4, 2019). The district court in that case nevertheless opted to "utilize its discretion to reach the Appointments Clause claim." *Id.*; *see also, e.g.*, *In re Grand Jury Investigation*, 315 F. Supp. 3d 602 (D.D.C. 2018), *appeal filed* (D.C. Cir. Aug. 14, 2018) ("The witness presents 'a constitutional challenge that is neither frivolous nor disingenuous,' and that 'goes to the validity of the proceeding that is the basis for this litigation. The Court thus 'exercises its discretion to hear the witness's challenge' … notwithstanding the

witness's failure to raise that challenge in his initial motion.") (quoting *Freytag*, 501 U.S. at 879) (citation omitted) (alterations incorporated). This decision underscores not only that the lower courts are truly in disarray over the question presented, but also that other courts beside the Ninth Circuit would have entertained Petitioners' Appointments Clause challenge, rather than dismissing it out of hand like the decision below.

B. The Ninth Circuit Imposes an Inflexible Specific-Verbiage Requirement that Elevates Form over Substance and is Inconsistent with This Court's Precedent.

Within the patchwork of lower federal court decisions, the Ninth Circuit's decision below stands out as particularly untenable. For more than fifty years, this Court has held that Appointments Clause objections are structural constitutional objections that courts can consider on appeal *even if* they were not ruled on below. *Freytag*, 501 U.S. at 878-79 (citing *Glidden*, 370 U.S. at 535-36). As in *Freytag*, Petitioners in this case presented the Ninth Circuit with a structural constitutional challenge that was "neither frivolous nor disingenuous," and raised important separation-of-powers concerns. 501 U.S. at 878-79. Yet the Ninth Circuit perfunctorily rejected Petitioners' Appointments Clause claim, finding that "petitioners forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency." App.4. The Ninth Circuit's categorical refusal to consider Petitioners' Appointments Clause claim—a well-established structural constitutional

objection—imposes an unprecedentedly rigid exhaustion requirement that is fundamentally at odds with this Court's Appointments Clause precedent.

Making matters worse, the Ninth Circuit failed to even address Petitioners' arguments that they actually *had* raised the Appointments Clause claim before the agency and in their briefs. Petitioners had repeatedly contested the constitutional validity of the administrative framework at all stages of the administrative and appellate process—including challenging the appointment of the officer who adjudicated their case. For example, Petitioners had previously moved to recuse the PCAOB, arguing that "[r]ecusal of the PCAOB [wa]s required as a matter of constitutional law," and explaining that "[t]he PCAOB is 'part of the Government' for constitutional purposes," and that its members are "Officers of the United States" who "exercis[e] significant authority pursuant to the laws of the United States." Appellant's Excerpts of R., Vol. 48, ECF No. 19-48 at 9836, 9843 (quoting *Lebron*, 513 U.S. at 397; *Buckley*, 424 U.S. at 125-26) (last alteration in original).

On appeal to the SEC, Petitioners maintained that "they were deprived of their due process rights and that the administrative forum in which they were forced to defend themselves was unfairly biased, unconstitutional, and constructed in a manner that violates vested, protected property rights and constitutionally protected, fundamental fairness." SEC.Opening.Br.2. Petitioners even specifically identified the "improper bias" of the PCAOB hearing officer who adjudicated their case, claiming that he "lacked sufficient knowledge and experience in

accounting and auditing." *Id.* at 1-2, 41-42. Overall, Petitioners urged the SEC to recognize the myriad constitutional shortcomings of the relevant administrative framework—including the appointment of the PCAOB hearing officer who adjudicated their case—and asked the SEC to reverse: "The denial of these basic protections militates that the sanctions imposed be vacated and that a new hearing be instituted with consideration of all of the procedural safeguards contemplated under the Constitution." *Id.* at 27-28.

Before the Ninth Circuit, Petitioners continued to press these arguments. In their opening brief, Petitioners again argued that "they were deprived of their due process rights and that the administrative forum in which they were forced to defend themselves was unfairly biased, unconstitutional, and constructed in a manner that violates vested, protected property rights and constitutionally protected, fundamental fairness." CA9.Opening.Br.10. They also maintained their objection to the PCAOB hearing officer who adjudicated their case, arguing that he "had no experience in the practice of auditing and accounting," and improperly "relied entirely upon the PCAOB's legal conclusions and the analysis of its expert." *Id.* at 56-57. In their reply brief, Petitioners further emphasized that they "were subjected to sanctions by the PCAOB based on an unconstitutional framework"—*i.e.*, "in establishing the PCAOB, Congress assigned executive power to the Board without sufficient oversight, accountability, or allegiance. This allowed the Board to shield its investigations and hearings from appropriate executive scrutiny." CA9.Reply.Br.31-32.

After this Court's decision in *Lucia*, Petitioners promptly submitted a letter providing the Ninth Circuit with the *Lucia* opinion as supplemental authority. Petitioners explained that *Lucia* confirmed that their arguments as to the constitutional invalidity of the administrative framework, and the PCAOB hearing officer in particular, were correct: "The rationale in *Lucia* highlights the view that the PCAOB hearing officer in Petitioners' case was not properly appointed, and therefore the PCAOB's adjudication of Petitioners' case was constitutionally invalid pursuant to the Appointments Clause." Pet'rs' 28(j) Letter at 2-3. Petitioners further maintained that they "complied with the required timely objection to their hearing officer, therefore reserving their rights and entitling them to relief." *Id.* at 3-4.

In its decision denying Petitioners' petition for review, the Ninth Circuit did not explain how Petitioners' repeated arguments challenging the constitutional validity of the applicable administrative framework—including the appointment of the PCAOB hearing officer who adjudicated their case—were insufficient to satisfy *Lucia*'s "timely challenge" requirement and entitle Petitioners to relief. Instead, the court perfunctorily dismissed Petitioners' arguments as categorically "forfeited" and declined to address it. In support of that decision, the court offered only a bare citation to *Lucia*: "'[O]ne who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." App.4 (quoting *Lucia*, 138 S. Ct. at 2055) (alteration in original).

In light of the clear error of that decision, Petitioners moved for reconsideration. Petitioners pointed out that they had repeatedly challenged the constitutionality of the administrative framework, including the appointment of the PCAOB hearing officer who adjudicated their case. Appellants' Mot. for Recons. at 5 ("The Appellants raised the issue of constitutional validity of the Hearing Officer's appointment to the SEC and this Court numerous times."). As Petitioners explained:

> Appellants in their Opening Brief to the SEC stated that "Appellants contend that they were deprived of their due process rights and that the administrative forum in which they were forced to defend themselves was unfairly biased, unconstitutional, and constructed in a manner that violates vested, protected property rights and constitutionally protected, fundamental fairness, such that a miscarriage of justice resulted so that reversal is not only warranted, but required." During the hearing before the PCAOB, Appellants also made a recusal motion on May 27, 2014 which was denied. Nothing could be more specific and in compliance with *Lucia* in terms of the objection being raised to the Hearing officer's appointment and violation of Appellants constitutional rights.

Id. (quoting SEC.Opening.Br.2-3). Petitioners also pointed out that they had continued to press those issues:

> [T]he Appellants in their reply brief to this Court explicitly challenged the

> "appointments clause" as required under *Lucia*. "Additionally, Appellants were subjected to sanctions by the PCAOB based on an unconstitutional framework. That is, in establishing the PCAOB, Congress assigned executive power to the Board without sufficient executive oversight, accountability, or allegiance. This allowed the Board to shield its investigations and hearings from appropriate executive scrutiny." The above, in essence, raises the question of the appointments clause.

Id. at 6-7 (quoting CA9.Reply.Br.31-32).

Although Petitioners did not specifically name "the Appointments Clause" as the basis for their constitutional objections before *Lucia*, they maintained that "[t]he lack of exact verbiage" should not preclude them from obtaining relief. *Id.* at 5; *see also, e.g.*, *id.* at 7 ("The proper resolution of this case is no more dependent on the exact verbiage than was *Lucia* itself."). This is consistent with general principles of constructing pleadings: "A pleading will be judged by the quality of its substance rather than according to its form or label and, if possible, it will be construed to give effect to all its averments." Wright & Miller, 5 Fed. Prac. & Proc. Civ. §1286 (3d ed. Nov. 2018 Update); *cf. Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 755 (2017) (recognizing that courts "should consider substance, not surface" and rejecting "a 'magic words' approach"); *Gregory v. Helvering*, 293 U.S. 465, 470 (1935) ("To hold otherwise would be to exalt artifice above reality"). But the Ninth Circuit denied Petitioners' motion for reconsideration without

explanation, App.5, thus embracing an unprecedented formalistic (or "magic words") approach.

Such a rigid approach is always problematic, and is completely untenable given that this Court has repeatedly recognized that Appointments Clause objections are important, structural constitutional objections that can be considered on appeal even if they were not ruled on below. Indeed, this Court in *Freytag* expressly *rejected* the Commissioner's argument that the petitioners in that case had waived their constitutional challenge by failing to timely object to the assignment of their cases to the special trial judge and even consenting to the assignment. 501 U.S. at 878. Because petitioners' constitutional argument was "neither frivolous nor disingenuous," and raised an important structural constitutional objection that "goes to the validity of the [administrative] proceeding that is the basis for this litigation," the Court determined that "we should exercise our discretion to hear petitioners' challenge to the constitutional authority of the Special Trial Judge." *Id.* at 879. And in *Lucia* itself, the petitioner raised the Appointments Clause claim for the first time on appeal to the SEC—*not* before the administrative law judge whose appointment he was challenging. 138 S. Ct. at 2050, 2055.

At the very least, the Ninth Circuit should have articulated why (in its view) Petitioners' arguments were insufficient to satisfy *Lucia*'s "timely challenge" requirement, and why—even if Petitioners had forfeited the argument—it was declining to exercise its well-established discretion to nonetheless reach the merits of such an important, structural

constitutional claim. By altogether failing to address either of these points, the Ninth Circuit's decision further divides the lower federal courts and injects needless uncertainty into the post-*Lucia* world.

II. The Question Presented Is Exceptionally Important And Has Far-Reaching Impact.

"[I]f there is a principle in our Constitution … more sacred than another, it is that which separates the Legislative, Executive and Judicial powers." 1 Annals of Cong. 604 (Joseph Gales ed., 1834) (remarks of Madison).[1] "[T]he ultimate purpose of this separation of powers is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth.*, 501 U.S. at 272.[2] As such, the judiciary

---

[1] *See also Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("The structure of our Government as conceived by the Framers of our Constitution disperses the federal power among the three branches—the Legislative, the Executive, and the Judicial—placing both substantive and procedural limitations on each."); *Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("Madison, in writing about the principle of separated powers, said: 'No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty.'" (quoting The Federalist No. 47, at 324 (Jacob E. Cooke ed., 1961))); *Buckley*, 424 U.S. at 119 ("separation of powers … is at the heart of our Constitution").

[2] *See also Loving v. United States*, 517 U.S. 748, 756 (1996) ("Even before the birth of this country, separation of powers was known to be a defense against tyranny."); *Mistretta*, 488 U.S. at 380 ("separation of governmental powers into three coordinate Branches is essential to the preservation of liberty"); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in the judgment) ("When structure fails, liberty is always in peril."); *Bowsher v. Synar*, 478 U.S. 714, 730 (1986) ("The Framers recognized that … structural protections against

in general—and this Court in particular—has a "strong interest … in maintaining the constitutional plan of separation of powers." *Freytag*, 501 U.S. at 879 (quoting *Glidden*, 370 U.S. at 536); *see also Metro. Wash. Airports Auth.*, 501 U.S. at 272 ("Violations of the separation-of-powers principle have been uncommon, … [n]evertheless, the Court has been sensitive to its responsibility to enforce the principle when necessary.").

That interest in preserving the Constitution's core separation of powers is particularly acute in the context of the Appointments Clause, which is "among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997). The Founders recognized the Clause's importance from the very beginning (and long before the advent of the modern administrative state): "Although the debate on the Appointments Clause was brief, the sparse record indicates the Framers' determination to limit the distribution of the power of appointment." *Freytag*, 501 U.S. at 883-84. The Framers understood that, "by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people." *Id.* In other words, the people can remain sovereign only if they know which branch to hold responsible for unpopular or ineffective government action and policies, and only if they are

---

abuse of power [are] critical to preserving liberty."); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982) (plurality) ("To ensure against … tyranny, the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers.").

able to correct those problems through periodic elections. *Cf. Loving*, 517 U.S. at 757-58 ("By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable," because it "allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.").

In short, as this Court has repeatedly recognized, the Appointments Clause thus serves two important purposes: It both (1) "is a bulwark against one branch aggrandizing its power at the expense of another branch," and (2) "preserves … the Constitution's structural integrity by preventing the diffusion of the appointment power." *Ryder*, 515 U.S. at 182 (quoting *Freytag*, 501 U.S. at 878). And given the time-honored importance of the constitutional safeguards enshrined in the Appointments Clause, it necessarily follows that it is likewise important to have a uniform, sufficiently clear (and not unreasonably rigid) rule about how to vindicate that right—*i.e.*, how a party must "timely challenge" an Appointments Clause violation. Accordingly, the need for this Court's review could not be more evident.

Quite apart from implicating fundamental constitutional principles, resolution of the question presented here has substantial real-world consequences far beyond the PCAOB hearing officer who adjudicated Petitioners' case. Because of the Appointments Clause's broad, general applicability to all "Officers of the United States," U.S. Const. art. II, §2, cl. 2, post-*Lucia* Appointments Clause cases have

already arisen in a wide variety of contexts. Lower federal courts across the country continue to struggle with how to determine whether a given petitioner satisfies *Lucia*'s "timely challenge" requirement (and is thus entitled to relief). The division in lower court authority is especially problematic because, in this context, both uniformity and clarity are particularly desirable, since "[t]he structural interests protected by the Appointments Clause are not those of any one branch of Government, *but of the entire Republic*." *Freytag*, 501 U.S. at 880 (emphasis added). As it stands, however, members of the Republic in certain jurisdictions receive fewer constitutional protections—and are less able to vindicate these important structural interests—than members of the Republic in other jurisdictions. Lack of clarity further impairs the ability to enforce the Appointments Clause's longstanding, fundamental objectives.

In addition, and as this Court's precedents make clear, the rule must not be unreasonably rigid. The Court has *already* recognized that Appointments Clause challenges are unique because an Appointments Clause defect "goes to the validity of the [specific] proceeding that is the basis for th[e] litigation." *Id.* at 879. Indeed, even in cases arising from the district courts (not, as here, the administrative system), although "[i]t is true that, as a general matter, a litigant must raise all issues and objections at trial," the "disruption to sound appellate process entailed by entertaining objections not raised below" can be "overcome" by "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." *Id.* (quoting *Glidden*, 370 U.S. at 536). A particularly rigid "timely

challenge" requirement—including the inflexible "magic words" approach endorsed by the Ninth Circuit in the decision below—is a complete misfit with this scheme. Indeed, an overly rigid rule not only undermines the judiciary's "strong interest" in maintaining the separation-of-powers interests underlying the Appointments Clause, but also frustrates the robust enforcement of those interests that the Constitution commands.

The current patchwork scheme is untenable. This Court should grant certiorari to resolve the conflict among the lower courts to which the decision below undesirably adds, and to provide much-needed guidance to help lower courts uniformly adjudicate whether a petitioner has adequately made a "timely challenge" and is entitled to relief for an Appointments Clause violation.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

GEORGE W. HICKS, JR.
Counsel of Record
LAUREN N. BEEBE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
george.hicks@kirkland.com

Counsel for Petitioners

February 22, 2019