No. 17-567

# In the Supreme Court of the United States

G. HARRISON SCOTT, ET AL., PETITIONERS

*v.*

FEDERAL DEPOSIT INSURANCE CORPORATION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION


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## QUESTION PRESENTED

Whether administrative law judges of the Federal Deposit Insurance Corporation are inferior officers under the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not published in the Federal Reporter but is reprinted at 684 Fed. Appx. 391. The opinion of the Federal Deposit Insurance Corporation (Pet. App. 35a-63a) is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on April 4, 2017. A petition for rehearing was denied on June 13, 2017 (Pet. App. 105a-106a). On September 8, 2017, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including October 10, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. The Federal Deposit Insurance Corporation (FDIC) is a United States corporation that insures the deposits of banks and savings associations. 12 U.S.C. 1811(a). Banks whose deposits are insured by the FDIC are subject to regulations designed to maintain the integrity of the banking system. Under "Regulation O," 12 C.F.R. Pt. 215, a bank may not "extend credit to any insider of the bank" unless (i) the extension is made available "on substantially the same terms" as to the general public, and (ii) the extension "[d]oes not involve more than the normal risk of repayment or present other unfavorable features." 12 C.F.R. 215.4(a); see 12 C.F.R. 215.2(h) (defining "Insider"). A loan of more than $100,000 may not be extended to an "executive officer" of the bank to finance or refinance a primary residence unless the loan "is secured by a first lien on the residence." 12 C.F.R. 215.5(c)(2)(i); see 12 C.F.R. 215.2(e) (defining "executive officer"). Regulation O also prohibits a bank, absent certain limited circumstances, from paying the overdraft fees of any "executive officer or director of the bank." 12 C.F.R. 215.4(e)(i).

2. Petitioners are directors of the Bank of Louisiana and members of its Executive Committee. Pet. App. 2a. Following an investigation, the FDIC initiated an action against petitioners in October 2013. *Ibid.* The FDIC alleged that petitioners had violated Regulation O by improperly making loans to two of the Bank's insiders (Director K and Officer P) and by failing to collect overdraft fees from Officer P. *Id.* at 2a-4a.

a. Initial administrative proceedings were conducted before an administrative law judge (ALJ). Following discovery, the ALJ recommended granting the

FDIC's motion for partial summary disposition as to liability, finding no genuine issue of material fact as to whether petitioners had violated Regulation O. Pet. App. 4a. After conducting a one-day evidentiary hearing on the proper remedy, the ALJ issued a "Recommended Decision," which proposed findings regarding liability and recommended that each petitioner be assessed a civil monetary penalty of $10,000. *Ibid.*

b. In November 2014, the FDIC's Board of Directors issued its decision. Pet. App. 35a-63a. The Board found that petitioners had violated Regulation O by approving and permitting the renewal of loans to Director K despite a higher than normal risk that he would not repay. *Id.* at 45a-51a. The Board further determined that petitioners had issued a residential loan to Officer P that was improperly secured by a second mortgage, and that petitioners had failed to charge him overdraft fees when he overdrew his checking account. *Id.* at 51a-53a. The Board also rejected petitioners' argument that Officer P was not an "executive officer" within the meaning of Regulation O. *Id.* at 52a. Finally, the Board held that the civil monetary penalties recommended by the ALJ were appropriate under the circumstances. *Id.* at 53a-56a.

Petitioners moved the Board to set aside its decision based on newly discovered evidence of age discrimination by FDIC employees. Pet. App. 30a-32a. The Board denied the motion, finding that the standard for reopening the record or for reconsidering its decision had not been met. *Id.* at 32a-33a. The Board also determined that petitioners "ha[d] not presented any evidence to substantiate their allegation" of age discrimination. *Id.* at 32a; see *id.* at 32a-34a.

3. Petitioners sought review in the court of appeals, which denied their petition for review. Pet. App. 1a-11a. First, the court upheld the FDIC's conclusion that the loans to Director K violated Regulation O because they presented more than a normal risk that the borrower would fail to repay the loans. *Id.* at 6a-8a. Second, the court determined that Officer P was properly considered an "executive officer" within the meaning of Regulation O. *Id.* at 8a-9a. Third, the court held that the FDIC had not abused its discretion in assessing civil monetary penalties against petitioners. *Id.* at 9a-10a. Fourth, the court rejected petitioners' argument that the ALJ, in granting partial summary disposition against them, had improperly resolved contested factual issues. *Id.* at 10a-11a.[1]

**ARGUMENT**

Petitioners argue (Pet. 6) that a conflict exists among the courts of appeals regarding whether ALJs are inferior officers under the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2. Petitioners contend (Pet. 6-10) that the ALJ who presided over the initial stages of their administrative proceeding and issued a Recommended Decision was properly considered an officer subject to that Clause because he "shape[d] the course" of the proceeding. Pet. 7-8. Petitioners are correct that a division of authority exists with respect to the constitutional status of ALJs of the Securities and Exchange Commission, and two petitions for writs of certiorari raising the issue are currently pending before the

[1] While their appeal was pending, petitioners filed suit in federal district court seeking relief against the FDIC on various statutory and constitutional grounds. See Pet. App. 17a. The district court dismissed the suit for lack of subject-matter jurisdiction. *Id.* at 28a.

Court. See *Lucia* v. *SEC*, No. 17-130 (filed July 21, 2017); *SEC* v. *Bandimere*, No. 17-475 (filed Sept. 29, 2017). This case need not be held for those petitions, however, because petitioners failed to raise an Appointments Clause challenge either before the FDIC or before the court of appeals, and neither of those bodies addressed the issue.

"'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.'" *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). In conjunction with that principle, and mindful that it is a court of "final review and not first view," *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (citations omitted), this Court has routinely declined to "allow a petitioner to assert new substantive arguments" that "were not pressed in the court whose opinion we are reviewing, or at least passed upon by it." *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001); see *Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below."); see also, *e.g.*, *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 108-109 (2001) (per curiam) (dismissing writ as improvidently granted).

The same principles of preservation and waiver apply to constitutional questions of "fundamental national importance." *Adarand*, 534 U.S. at 110. Indeed, "by adhering scrupulously to the customary limitations on [judicial] discretion regardless of the significance of the underlying issue, we promote respect for the Court's adjudicatory process." *Ibid.* (citation and ellipsis omit-

ted). Even structural constitutional rights are accordingly "subject to waiver, just as are other personal constitutional rights." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848-849 (1986); see *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995) (proposition that structural arguments are not waivable "simply does not accord with our cases"); *Peretz* v. *United States*, 501 U.S. 923, 936 (1991) (similar); cf. *Freytag* v. *Commissioner*, 501 U.S. 868, 878-879 (1991) (considering Appointments Clause challenge that was raised in court of appeals but not in trial court).

Adherence to the general rule—that this Court will not decide questions neither raised nor addressed below—is particularly warranted in administrative-law cases such as this one. It is a fundamental tenet of administrative law that courts "should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). In *L. A. Tucker Truck Lines*, for instance, the petitioner sought judicial review of a decision of the Interstate Commerce Commission (ICC), arguing for the first time in court that the ICC hearing examiner who had conducted the initial administrative hearing had not been properly appointed under the Administrative Procedure Act. *Id.* at 35. The district court agreed and set aside the ICC's decision. *Ibid.* This Court reversed, explaining that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." *Id.* at 37.

For a proceeding before the FDIC, the appropriate time for raising all objections is in briefing before the ALJ, whose function is to assemble the record, make a recommendation, and submit the record to the FDIC Board. See 12 C.F.R. 308.37(a)(2) ("Any party who fails to file timely with the administrative law judge any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion."). Petitioners did not raise any Appointments Clause challenge before the ALJ. Instead, they asserted that challenge only after the administrative record had closed, the ALJ had issued a Recommended Decision, the FDIC Board had issued its decision and imposed civil monetary penalties, and the court of appeals had rejected their petition for review.

By failing to present their challenge at the appropriate time, petitioners deprived the FDIC of the opportunity to respond to their argument, including by showing that the particular ALJ who decided petitioners' case had been appointed, in accordance with the Appointments Clause, by the "Head[] of Department[]." U.S. Const. Art. II, § 2, Cl. 2. Even if petitioners' Appointments Clause argument were meritorious, moreover, a timely challenge would have enabled the FDIC to ensure that the proceedings were conducted before a properly appointed decision-maker, such as the Board itself or one of its members. See 5 U.S.C. 556(b)(1) and (2).[2]

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[2] The government waives any further response to the petition unless the Court requests otherwise.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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