No. 15-901

In the Supreme Court of the United States

GORDON BRENT PIERCE, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MARK B. STERN
DANIEL J. AGUILAR
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether administrative law judges of the Securities and Exchange Commission are inferior officers of the United States for purposes of the Constitution's Appointments Clause, Art. II, § 2, Cl. 2.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, and regulation:

In the Supreme Court of the United States

No. 15-901

GORDON BRENT PIERCE, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. Supp. App. 1-23) is reported at 786 F.3d 1027. The opinion of the Securities and Exchange Commission (Pet. Supp. App. 30-96) is reported at 108 SEC Docket 1496.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2015. A petition for rehearing was denied on August 3, 2015 (Pet. App. 1a). The petition for a writ of certiorari was filed on November 2, 2015 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner promoted stock and raised capital for Lexington Resources, Inc., and, in return, received stock shares and stock options that he sold through a personal brokerage account in Liechtenstein in 2004. Pet. Supp. App. 34-37. The Securities and Exchange

Commission (Commission or SEC) investigated the sales and instituted an administrative proceeding against petitioner in July 2008. *Id.* at 38, 40.

The Commission ordered an administrative law judge (ALJ) to conduct a public hearing and issue an initial decision. Pet. Supp. App. 40. The initial decision found that petitioner had violated 15 U.S.C. 77e(a) and (c) by selling 325,000 unregistered shares of Lexington stock, and further found that petitioner had violated 15 U.S.C. 78m(d) and 78p(a) (2006) by failing to report his levels of beneficial ownership in Lexington stock. Pet. Supp. App. 43. The initial decision ordered petitioner to cease and desist from further violations of those securities laws and to disgorge more than $2 million from his sale of unregistered securities. *Id.* at 45. Petitioner did not ask the Commission to review the ALJ's decision, and the Commission—electing not to take up the matter *sua sponte*—adopted that decision as its own in July 2009. *Ibid.* Petitioner did not seek judicial review of that decision.

2. a. In June 2010, the Commission instituted a second proceeding against petitioner based on additional allegations that he had fraudulently concealed his interest in corporate accounts that had received Lexington stock as well as his sales of stock through those accounts. Pet. Supp. App. 45-46. Petitioner did not contest those factual allegations, but contended instead that the second proceeding should be barred by res judicata, equitable estoppel, judicial estoppel, and waiver. *Id.* at 46.

The ALJ determined that the second proceeding was not barred by any of petitioner's legal theories

and found that he had violated 15 U.S.C. 77e(a) and (c). Pet. Supp. App. 47.

b. Petitioner appealed to the Commission, which rejected his objections in a March 2014 opinion. Pet. Supp. App. 30-96. Petitioner moved for reconsideration, but the Commission denied his motion on the ground that it "essentially reiterate[d] claims made during the appeal and addressed in the Opinion." *Id.* at 24, 28.

3. Petitioner sought judicial review in the D.C. Circuit, contending that the Commission's second proceeding should have been barred by res judicata, equitable estoppel, judicial estoppel, and waiver. Pet. Supp. App. 3-4. The court of appeals rejected those contentions. *Id.* at 4. The court noted that petitioner "d[id] not object to the Commission's findings that he lied in his investigative testimony and omitted information requested by the [SEC Enforcement] Division's subpoena." *Id.* at 15. The court found "no merit in [petitioner's] objections" to the application of the fraudulent-concealment exception to res judicata, *id.* at 19, and "no error * * * in the Commission's ruling that [petitioner] could not use res judicata to avoid the consequences of his own misconduct," *id.* at 20. The court further rejected his equitable estoppel, judicial estoppel, and waiver arguments. *Id.* at 20-23.

4. Petitioner sought rehearing en banc. In his petition, he contended that the panel erred in applying the fraudulent-concealment exception to res judicata. C.A. Pet. for Reh'g 6-14. He also contended, for the first time in either the administrative or judicial proceedings, that the Commission's ALJs are inferior officers of the United States who have not been properly appointed under the Constitution's Appoint-

ments Clause. *Id.* at 3-4. The court of appeals denied rehearing without opinion. Pet. App. 1a.[1]

ARGUMENT

Petitioner contends (Pet. 6-15) that the administrative law judges at the Securities and Exchange Commission are inferior officers for purposes of the Appointments Clause. Neither the court of appeals nor the Commission considered the merits of his constitutional argument because he never presented it to the Commission and he raised it in the court of appeals for the first time in a rehearing petition. Although several cases raising a similar constitutional objection are currently pending in the lower courts, no court of appeals has addressed the status of the Commission's ALJs for Appointments Clause purposes. In any event, petitioner's constitutional challenge lacks merit. The Court should deny the petition for a writ of certiorari.

1. a. As the Court often observes, it is "a court of final review and not first view," and it therefore does not ordinarily "decide in the first instance issues not decided below." *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) (citations omitted). That practice carries

---

[1] On July 14, 2015 (*i.e.*, after the court of appeals had rejected his nonconstitutional arguments), petitioner filed with the Commission a motion to vacate its 2009 order in the first administrative proceeding on the ground that the ALJ had not been appointed in conformity with the Appointments Clause. On August 19, 2015, after the court of appeals had denied his rehearing petition, he filed another motion with the Commission seeking to vacate the Commission's 2014 order in the second administrative proceeding on similar grounds. The Enforcement Division has opposed both of petitioner's motions, contending that his constitutional objection is both untimely and meritless. The Commission has not yet ruled on petitioner's motions.

special force in the context of constitutional questions that have not been addressed by the court of appeals. See, *e.g.*, *ibid.*; *Department of Transp.* v. *Association of Am. R.Rs.*, 135 S. Ct. 1225, 1234 (2015); *Bond* v. *United States*, 131 S. Ct. 2355, 2360, 2367 (2011); *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). And the Court is particularly reluctant to address questions that were not timely pressed in the lower courts. See, *e.g.*, *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001) (refusing to "allow a petitioner to assert new substantive arguments attacking * * * the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it"); *Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below.").

b. Petitioner contends (Pet. 15-20) that an alleged violation of the Appointments Clause is a structural error that should be addressed without regard to waiver or forfeiture. But this "Court has never indicated that [Appointments Clause] challenges must be heard regardless of waiver." *In re DBC*, 545 F.3d 1373, 1380 (Fed. Cir. 2008), cert. denied, 558 U.S. 816 (2009); see *Freytag* v. *Commissioner*, 501 U.S. 868, 893-894 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("Appointments Clause claims, and other structural constitutional claims, have no special entitlement to review. A party forfeits the right to advance on appeal a nonjurisdictional claim, structural or otherwise, that he fails to raise at trial."); see also, *e.g.*, *Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Bd.*, 574 F.3d 748, 755 (D.C. Cir.

2009) (finding that the appellant had forfeited its Appointments Clause argument "by failing to raise it in its opening brief").

This case is distinguishable from those "'rare cas[es]'" in which this Court has decided to "'exercise [its] discretion' to hear a waived claim based on the Appointments Clause." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995) (quoting *Freytag*, 501 U.S. at 879). Those rare cases generally involved this Court's supervision and protection of uniquely judicial power, and especially Article III power. For example, in *Nguyen* v. *United States*, 539 U.S. 69 (2003), this Court prevented a non-Article-III judge from exercising Article III jurisdiction in a criminal case. In *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), the Court considered whether certain judges on the Court of Claims and the Court of Customs and Patent Appeals were Article III judges and thus eligible to sit on federal district courts and courts of appeals. In *Freytag*, the Court addressed appointments within the Tax Court, which, in the Court's view, "exercise[d] judicial power to the exclusion of any other function," and was, unlike the SEC, determined by this Court to be "independent of the Executive and Legislative Branches." 501 U.S. at 891. Moreover, the question in *Freytag* was whether the petitioners had forfeited their argument in the Tax Court, not in the court of appeals, where they did indeed—unlike petitioner here—press their constitutional argument. *Id.* at 872. Each of the other cases that petitioner describes (Pet. 19) as involving "challenges to the authority of a court" actually involved arguments that an Article III district judge or circuit judge had acted in violation of a statute. See *Nguyen*, 539 U.S. at 78-79 (discussing *Wil-*

liam Cramp & Sons Ship & Engine Bldg. Co. v. *International Curtiss Marine Turbine Co.*, 228 U.S. 645 (1913); *Moran* v. *Dillingham*, 174 U.S. 153 (1899); and *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372 (1893)).[2]

Unlike the questions in the cases he cites, petitioner's challenge concerns the status of Executive Branch officials and does not affect the authority of any Article III court. See *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 141 (1940) (contrasting the relationship between courts in the unified Article III judicial system with the relationship between a court and an administrative agency). Moreover, the applicable statute provides that, when a court of appeals reviews an order of the Commission, "[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission." 15 U.S.C. 77i(a). The statute thus cuts against petitioner's attempt to avoid the consequences of his forfeiture, which began before the Commission and continued before the court of appeals.

c. Nor does this case involve circumstances in which application of normal principles of forfeiture would preclude this Court from ever considering the merits of an Appointments Clause challenge like peti-

---

[2] Of course, as the Court recently recognized, even an Article III challenge can be forfeited when it is not timely raised in the lower courts. *Wellness Int'l Network, Ltd.* v. *Sharif*, 135 S. Ct. 1932, 1949 (2015) (remanding for determination whether party had forfeited Article III argument); see *ibid.* (Alito, J., concurring in part and concurring in the judgment) (concluding that Article III argument had been forfeited by party's "fail[ure] to present that argument properly in the courts below").

tioner's. To the contrary, as petitioner acknowledges (Pet. 13-14), similar claims have been presented to the Commission and to the lower courts in several still-pending cases. The Commission rejected Appointments Clause challenges to its ALJs in *In re Raymond J. Lucia Cos.*, Exchange Act Release No. 75837, 2015 WL 5172953 (Sept. 3, 2015), and *In re Timbervest LLC*, Investment Company Act Release No. 31830, 2015 WL 5472520 (Sept. 17, 2015). The respondents in those cases have petitioned the D.C. Circuit for review of the Commission's decisions, and both cases have preserved an Appointments Clause challenge for review on the merits. See *Timbervest LLC* v. *SEC*, No. 15-1416 (filed Nov. 13, 2015); *Raymond J. Lucia Cos.* v. *SEC*, No. 15-1345 (filed Oct. 5, 2015). Another respondent has petitioned the Tenth Circuit for review of a Commission decision and presented an Appointments Clause challenge to the Commission's ALJs. See *Bandimere* v. *SEC*, No. 15-9586 (filed Dec. 22, 2015).

As petitioner notes (Pet. 10, 13, 14), respondents in still other Commission proceedings have filed suit in district courts seeking to enjoin the administrative proceedings on the basis of Appointments Clause challenges to the presiding ALJs. The Commission has opposed such requests both on jurisdictional grounds and on the merits, contending that the securities laws deprive the district courts of jurisdiction by channeling judicial review to the courts of appeals. See 15 U.S.C. 77i, 78y(a), 80a–42(a), 80b–13(a). Two courts of appeals have agreed that district courts lack jurisdiction over constitutional challenges to SEC proceedings. *Jarkesy* v. *SEC*, 803 F.3d 9, 17-30 (D.C. Cir. 2015); *Bebo* v. *SEC*, 799 F.3d 765, 768-775 (7th

Cir. 2015), petition for cert. pending, No. 15-997 (filed Feb. 3, 2016). Appeals from other district court decisions are pending before the Second, Fourth, and Eleventh Circuits.[3]

Under the circumstances, no compelling reason exists for excusing petitioner's failure to observe the bedrock procedural rule that a nonjurisdictional argument is forfeited unless timely asserted. See *United States* v. *Olano*, 507 U.S. 725, 731 (1993) ("'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 before a tribunal having jurisdiction to determine it.'") (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)).

d. Petitioner also invokes (Pet. 20-21) this Court's decision in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967). But the plurality opinion in *Curtis Publishing* concluded only that a party does not necessarily waive a constitutional defense by failing to assert it at trial when that defense is substantially created by a subsequent decision of this Court. *Id.* at 142-144 (opinion of Harlan, J.) (involving application, in a libel

---

[3] See, *e.g.*, *Tilton* v. *SEC*, No. 15-cv-2472, 2015 WL 4006165 (S.D.N.Y. June 30, 2015), appeal pending, No. 15-2103 (2d Cir. argued Sept. 16, 2015); *Duka* v. *SEC*, No. 15-cv-357, 2015 WL 4940083 (S.D.N.Y. Aug. 12, 2015), appeal pending, No. 15-2732 (2d Cir. filed Aug. 27, 2015); *Bennett* v. *SEC*, No. 15-cv-3325, 2015 WL 9183445 (D. Md. Dec. 17, 2015), appeal pending, No. 15-2584 (4th Cir. filed Dec. 28, 2015); *Hill* v. *SEC*, No. 15-cv-1801, 2015 WL 4307088 (N.D. Ga. June 8, 2015), appeal pending, No. 15-12831 (11th Cir. argued Feb. 24, 2016); *Gray Fin. Grp., Inc.* v. *SEC*, No. 15-cv-492 (N.D. Ga. Aug. 8, 2015), appeal pending, No. 15-13738 (11th Cir. argued Feb. 24, 2016).

action, of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964)). Here, petitioner's Appointments Clause argument is not based on any intervening decision from this Court (or even from a court of appeals). To the contrary, his constitutional argument relies almost entirely on this Court's 1991 decision in *Freytag*, see Pet. 3, 5-9, and he recognizes that the Commission's response to the same argument when timely raised by other parties has been consistent with a 2000 decision of the D.C. Circuit, see Pet. 3 (citing *Landry* v. *FDIC*, 204 F.3d 1125 (D.C. Cir.), cert. denied, 531 U.S. 924 (2000)). Moreover, *Curtis Publishing* is further distinguishable from this case because, as the plurality observed, the constitutional defenses in that case had been "raised early enough" to give this Court "the benefit of some ventilation of them by the courts below." 388 U.S. at 145; see *id.* at 145-146 (describing conflicting opinions about the merits of the constitutional argument by the district court and the dissenting judge in the court of appeals).

Because petitioner's constitutional challenge was neither timely pressed nor passed upon in the court of appeals, the Court should not grant review to consider that question.

2. In any event, petitioner's Appointments Clause objection lacks merit. Petitioner asserts (Pet. 5-6, 8-9) a conflict with this Court's decision in *Freytag*, *supra*, but there is no conflict.

Freytag held that the special trial judges of the Tax Court were inferior officers under the Appointments Clause. 501 U.S. at 881-882. The special trial judges performed "more than ministerial tasks," "exercise[d] significant discretion" on many trial-level issues, and had "the power to enforce compliance with discovery

orders." *Ibid.* Moreover, the government conceded that they "act[ed] as inferior officers" in certain categories of cases in which they could enter final decisions of the Tax Court. *Id.* at 882. Accordingly, the Court concluded that the special trial judges were inferior officers rather than mere employees. *Ibid.*

The authority of an ALJ at the Commission is not comparable to that of a special trial judge at the Tax Court. For example, a Commission ALJ may issue a subpoena, but the ALJ lacks the power to compel compliance without a federal court order. 15 U.S.C. 78u(e); *SEC* v. *Dresser Indus., Inc.*, 628 F.2d 1368, 1376 (D.C. Cir.) (en banc), cert. denied, 449 U.S. 993 (1980). And unlike special trial judges, ALJs may not issue any final decisions on behalf of the Commission, which retains authority to review any ALJ decision *sua sponte*, 15 U.S.C. 78d–1(b), and must issue an order of finality for the ALJ's initial decision to be adopted as the Commission's own final decision, 17 C.F.R. 201.360(d).

Such distinctions were held to be dispositive in *Landry*, *supra*, which rejected an Appointments Clause challenge to ALJs of the Federal Deposit Insurance Corporation (FDIC). The court distinguished the FDIC's ALJs from the special trial judges at issue in *Freytag*, explaining that the ALJs could not make final decisions for the FDIC and that, unlike the Tax Court in reviewing special-trial-judge rulings, the FDIC's Board was not required to defer to the ALJs' factual and credibility findings under a clearly erroneous standard. 204 F.3d at 1133. Reasoning that the special trial judges' "power of final decision * * * was critical to" *Freytag*, the court of appeals in *Landry* "conclude[d] that [FDIC ALJs] are not inferior

officers." *Id.* at 1134. The same reasoning applies to the Commission's ALJs.[4]

In the quarter century since *Freytag*, no court of appeals has held that any federal agency's ALJs are inferior officers, and only one court of appeals decision (*Landry*) has even addressed such a question. Thus, even if the decision below could be deemed to have implicitly rejected on the merits an Appointments Clause argument that was not presented before the rehearing stage, that decision still would not conflict with any other court of appeals decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MARK B. STERN
DANIEL J. AGUILAR
Attorneys

MARCH 2016

---

[4] Like the FDIC's Board, the Commission makes its own findings of fact, may take additional evidence, and may disregard an ALJ's credibility determinations when the Commission's "de novo review of the record as a whole convinces [it] that a witness's testimony is credible (or not) or that the weight of the evidence warrants a different finding as to the ultimate facts at issue." *In re David F. Bandimere*, Securities Act Release No. 9972, 2015 WL 6575665, at *20 & n.114 (Oct. 29, 2015).