An Appointment with Time: Defining the Scope of a Timely Challenge After *Lucia v. SEC*

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In its Appointments Clause jurisprudence, the Supreme Court has articulated a "timely challenge" requirement for litigants contesting the appointment of Officers of the United States. Most recently, the Court recited this language in Lucia v. SEC*, a case in the October 2017 term, where it granted the petitioner a new hearing before a Securities and Exchange Commission Administrative Law Judge after finding a violation of the Appointments Clause. However, the Court has yet to provide a concrete definition for the phrase.*

This Note seeks to fill this gap by providing a comprehensive framework to assess the timeliness of these constitutional challenges. It begins by tracing the doctrinal evolution from its origin in Ryder v. United States *to its present iteration. Coupled with Court's discretionary approach to nonjurisdictional constitutional issues raised in the first instance on appeal, this Note argues that review by a constitutionally valid officer is necessary to extinguish the timeliness of a challenge. This reasoning draws upon the Court's treatment of the de facto officer and de facto validity doctrines in the Appointments Clause context and tests it in the context of a hypothetical SEC proceeding.*

I. INTRODUCTION

In June of 2018, the U.S. Supreme Court decided *Lucia v. SEC*, holding that the Securities and Exchange Commission's (SEC) Administrative Law Judges (ALJs) are inferior officers and therefore

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subject to the requirements set forth in the Appointments Clause of the Constitution.[1] The SEC's ALJs, however, had not been appointed in accordance with these procedures which meant that, in light of the Supreme Court's holding, they occupied their office in violation of the Constitution.[2] This case arose out of a SEC enforcement action taken against Petitioner Raymond Lucia that began six years prior.[3]

Lucia was charged with violating section 206 of the Investment Advisors Act of 1940 for use of misleading investment presentations.[4] The case was heard before an ALJ who subsequently issued an initial decision finding violation of the act and imposing $300,000 in sanctions and a lifetime ban from the industry.[5] Lucia appealed this decision before the SEC and also challenged the appointment of the presiding ALJ,[6] thereby satisfying the Supreme Court's requirement for a "timely challenge" and entitling himself to relief via a new hearing before a properly appointed officer.[7] Though the *Lucia* holding applies only to the SEC's ALJs, the language used in the decision will likely lend itself to litigation challenging the constitutionality of ALJs and other officers employed by various federal agencies. In deciding *Lucia*, however, the Court did not expand upon the definition of a "timely challenge," leaving the question of who will have proper standing to bring Appointments Clause challenges unresolved.

This Note argues that only litigants who raise the Appointments Clause claim directly before the unconstitutionally appointed officer or on appeal to the first properly appointed officer meet the "timely challenge" requirement. Part II of this Note frames the legal backdrop of the issue, describing the Appointments Clause, ALJs in general, the SEC's administrative proceeding process, and the *Lucia* case. Part III then describes the Supreme Court's limited "timely challenge" jurisprudence and attempts to further develop the doctrine in accordance with the principles of res judicata and waiver, while also using the Court's

1. Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018).
2. *See id.* at 2049, 2051–52.
3. *Id.* at 2049.
4. *Id.*
5. *Id.* at 2050.
6. The SEC ruled against Lucia on his constitutional challenge and the D.C. Circuit affirmed the decision. *Id.* However, the Supreme Court granted certiorari to reconcile the D.C. Circuit's holding with a Tenth Circuit decision finding that SEC ALJs are inferior officers for purposes of the Appointments Clause. *Id.*
7. *Id.* at 2055.

treatment of the de facto officer and de facto validity doctrines in Appointments Clause challenges to guide the doctrinal development. Part III also addresses the applicability of collateral attacks and issue preservation within this framework. Part IV applies the developed concept of a "timely challenge," consistent with both constitutional protections and judicial efficiency, to the SEC's administrative proceeding framework in order to test which factual circumstances satisfy the Supreme Court's requirement. Through application of this doctrine, this Note intends to provide clarity as to which litigants will have proper standing to raise Appointments Clause challenges.

II. BACKGROUND: THE CONSTITUTION, THE CODE, AND THE CASE

Before turning to the Supreme Court's requirement for a "timely challenge" in Appointment Clause claims, it is necessary to first address the legal groundwork that contextualizes the issue. Part II.A begins by describing the requirements for appointment set out in the Constitution before highlighting subsequent Supreme Court caselaw applying those provisions. Given that the *Lucia* decision arose out of a challenge to the SEC's ALJs, Part II.B then describes the statutory foundation of ALJs in the Administrative Procedure Act (APA) while Part II.C details the unique role ALJs play in administering the nation's securities laws. Finally, Part II.D of this Note summarizes the background to the Supreme Court's holding *Lucia v. SEC* and then calls attention to the Court's subtle modification to the "timely challenge" requirement without demarcation of the scope of this expansion.

A. THE APPOINTMENTS CLAUSE

The Appointments Clause [hereinafter "Clause"] of the Constitution prescribes the sole process in which "officers of the United States" shall be appointed.[8] It 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

8. U.S. CONST. art. II, § 2, cl. 2.

> Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the courts of Law, or in the Heads of Departments.[9]

The structure of the Clause divides all officers into one of two classifications, either "inferior officers" or noninferior officers — more commonly referred to as "principal officers."[10] The first provision of the Clause controls appointment of "principal officers," requiring the advice and consent of the Senate.[11] The second provision within the Clause creates a bifurcated path for "inferior officers."[12] Senate confirmation remains the "default manner of appointment for inferior officers,"[13] yet Congress may vest appointment in the President, Courts of Law, or Heads of Departments, thus negating the need for Senate advice and consent.[14] The Supreme Court has provided further substance, holding that "Courts of Law" can include Article I legislative courts[15] and "Departments" are to be defined as a "free-standing, self-contained entity in the Executive Branch."[16]

The Appointments Clause thus creates two relevant distinctions that have resulted in extensive litigation. First is the explicit distinction between "Officers" — typically referred to as Principal Officers — and "Inferior Officers,"[17] while the second is the implicit

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9. *Id.*

10. *See* United States v. Germaine, 99 U.S. 508, 511 (1879).

11. U.S. CONST. art. II, § 2, cl. 2; *see also* Edmond v. United States, 520 U.S. 651, 660 (1997).

12. U.S. CONST. art. II, § 2, cl. 2.

13. *Edmond*, 520 U.S. at 660. The second portion of the Clause indicates that Congress may only deviate from presidential nomination and Senate confirmation "by Law," requiring enacted legislation to change the appointment procedure. U.S. CONST. art. II, § 2, cl. 2. Absent such an enactment, all officer appointments must go through presidential nomination and Senate confirmation.

14. *See Edmond*, 520 U.S. at 660; *see also* U.S. CONST. art. II, § 2, cl. 2.

15. *See* Freytag v. Comm'r, 501 U.S. 868, 888–92 (1991).

16. *See id.* at 886 ("[T]he term 'Heads of Departments' does not embrace 'inferior commissioners and bureau officers.'"); *see also* John T. Plecnik, *Officers Under the Appointments Clause*, 11 PITT. TAX REV. 201, 206 (2014) ("Therefore, the Secretary of the Treasury is a Department Head who may constitutionally appoint 'inferior Officers' with statutory permission, whereas the Commissioner of the IRS is not.").

17. U.S. CONST. art. II, § 2, cl. 2. A substantial portion of the caselaw regarding these distinctions has been dedicated to determining the specific nature of the officer in question. *See, e.g.,* Morrison v. Olson, 487 U.S. 654 (1988); United States v. Eaton, 169 U.S. 331 (1898).

division between "Officers" and other employees.[18] In attempting to clarify the first distinction raised by the Clause, the Supreme Court in *Morrison v. Olson* adopted a four-factor test to discern the dividing line between principal and inferior officers.[19] This test looked at whether the officer was subject to removal by a higher Executive Branch official; whether the officer had broad power or was limited to particular duties; whether the officer was limited in jurisdiction; and the length of tenure for the office.[20] However, Justice Scalia dissented, focusing instead on the similarity between "inferior" and "subordinate," arguing that the independent counsel could not be an inferior officer because she was not subordinate to any other officer and highlighting the fact that inferior Article III courts are subordinate to the Supreme Court as noted in Federalist No. 81.[21]

Then in *Edmond v. United States*, the Court, without explicitly rejecting the test laid out in *Morrison*, later pivoted to this question of subordination by stating: "whether one is an 'inferior' officer depends on whether he has a superior. . . . [W]e think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[22]

As for the second distinction the Clause created, the Court's principal case in resolving the question of officer or employee, *Freytag v. Commissioner*, utilized a different framework.[23] In holding that the Tax Court's Special Trial Judges (STJs) were "inferior officers," the Court looked at whether the office was established by law; whether the "duties, salary, and means of appointment for that office are established by statute"; and whether the officer carried out "important functions" while exercising "significant discretion."[24]

These cases, viewed together, provide the underlying foundation governing whether an individual may be hired, appointed via

18. *See* Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1971) ("'Officers of the United States' does not include all employees of the United States.").

19. *See Morrison*, 487 U.S. at 671–72.

20. *Id.*

21. *See id.* at 720–23 (Scalia, J., dissenting).

22. Edmond v. United States, 520 U.S. 651, 662–63 (1997).

23. *See* Freytag v. Comm'r, 501 U.S. 868, 881–82 (1991).

24. *Id.* The third factor looks to the extent of the power wielded by the individual as instructed by *Buckley*. *See* Buckley v. Valeo, 424 U.S. 1, 126 (1976) ("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' . . . .").

a delegation of Congressional authority, or confirmed exclusively with the advice and consent of the Senate. Failure to abide by the appropriate procedure thus creates a cognizable claim which the litigant may raise — just as the petitioner did in *Lucia v. SEC*. However, the exact procedures required will depend upon the nature of the office in question, specifically the authority exercised and the office's accountability to other Executive Branch officials.

B. THE ORIGIN OF ADMINISTRATIVE LAW JUDGES

In 1946, Congress passed the Administrative Procedure Act (APA), creating the beginnings of the modern administrative state.[25] As this regulatory system has expanded, federal agencies have held an important role in both establishing and enforcing regulations.[26] Most notably, the APA empowers federal agencies with the ability to appoint Administrative Law Judges (ALJs), who are given broad statutory authority.[27] However, one of the primary responsibilities of ALJs is to preside over hearings and issue rulings.[28] In this capacity, ALJs play a critical role in the function of the administrative system.[29]

The Office of Personnel Management (OPM) handles the initial application and hiring process of all ALJs.[30] Though individual agencies choose the specific candidate they wish to hire, the OPM creates the standards and qualifications necessary to become an ALJ and then provides an interested agency with a list of three

25. *See* 5 U.S.C. §§ 551–559 (2018).

26. *See* PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 21–29 (12th ed. 2018).

27. *See generally* 5 U.S.C. §§ 553–57 (tasking ALJs with performing an extensive range of duties in accordance with sections 553 and 554 of the APA); *see also* 5 U.S.C. § 3105 (2018) (requiring that agencies "appoint as many administrative law judges as [ ] necessary").

28. *See* 5 C.F.R. § 2423.31 (2020) (authorizing ALJs with the power to hold hearings, admit evidence, rule on interlocutory appeals, and issue bench decisions).

29. *See* Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 798–99 (2013) (noting that ALJs decide over 250,000 cases per year). Currently, there are over 1,900 ALJs employed within various federal agencies. *See Administrative Law Judges*, OFFICE OF PERS. MGMT. (Mar. 2017), https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency [https://perma.cc/9ZG3-E2Z5] (the majority of these ALJs are employed by the Social Security Administration).

30. *See* 5 C.F.R. § 930.201 (2020). After the conclusion of *Lucia v. SEC*, President Trump issued an Executive Order exempting ALJs from the competitive hiring rules and examinations described above. *See* Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018).

potential candidates,[31] "ranked according to their qualifications and skills."[32] Additionally, to shield ALJs from agency influence, the APA explicitly prohibits ALJs from the "supervision or direction of an employee or agent engaged in the performance of investigating or prosecuting functions of the agency."[33] This prohibition is designed to protect the independence of an ALJ. Lastly, the ALJ position is considered a career appointment,[34] meaning that ALJs are subject to removal or other penalization only for good cause.[35] The APA sets the broad parameters in which ALJs operate, but individual statutes may detail the exact role that the ALJ will play in that particular regulatory scheme, as is the case of the SEC's ALJs. Critically, these statutory powers dictate the ALJ's status under the Appointments Clause and, subsequently, the procedures for a constitutionally valid appointment.

C. THE SECURITIES AND EXCHANGE COMMISSION'S ADMINISTRATIVE LAW JUDGES

The SEC, a federal agency principally charged with enforcing the nation's securities laws,[36] is composed of five commissioners (collectively referred to as the Commission) who are nominated by the President and confirmed by the Senate.[37] In addition to the Commission, the SEC also currently employs five ALJs.[38] These ALJs are not appointed by the Commission, but rather by the SEC's Chief ALJ[39] — a process inadequate for appointing principal or inferior officers.[40] In the event of an administrative proceeding for an alleged securities violation, the Commission may preside over the proceeding.[41] Additionally, the Commission also retains

31. VANESSA K. BURROWS, CONG. RESEARCH SERV., RL34607, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW 2–3 (2010).
32. *Id.*
33. 5 U.S.C. § 554(d)(2) (2018).
34. 5 C.F.R. § 930.204 (2020).
35. *See* 5 C.F.R. § 930.211 (2020); 5 U.S.C. § 7521 (2018) (indicating that ALJs can only be removed by the Merit Systems Protection Board after an opportunity for a hearing).
36. Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018).
37. 15 U.S.C. § 78(d) (2018).
38. *See Administrative Law Judges*, *supra* note 29. This includes the Chief ALJ and four additional ALJs. *Id.*
39. *See* 17 C.F.R. § 200.30-10(a)(2) (2019).
40. *See supra* Part II.A (the SEC's Chief ALJ does not qualify as a "Department Head" or a "Court of Law").
41. *See* 17 C.F.R. § 201.110 (2019).

the ability to delegate this authority to an ALJ.[42] In such a case, a SEC ALJ has the authority to:

> (1) Administer oaths; (2) Issue subpoenas; (3) Rule on offers of proof; (4) Examine witnesses; (5) Regulate the course of a hearing; (6) Hold pre-hearing conferences; (7) Rule upon motions; and (8) Unless waived by the parties, prepare an initial decision containing the conclusions as to the factual and legal issues presented, and issue an appropriate order.[43]

In doing so, a SEC ALJ exercises authority similar to that of a federal district judge conducting a bench trial.[44]

At the conclusion of a hearing, an ALJ issues an "initial decision," which sets out "findings and conclusions" of all "material issues of fact [and] law."[45] This decision also includes the "appropriate order, sanction, relief, or denial thereof."[46] After issuance of this "initial decision," a party has the right to appeal to the Commission within twenty-one days or the Commission may choose to review it sua sponte.[47] In select circumstances, Commission review is mandatory, but in most cases, the Commission exercises discretionary review.[48] In the event of review, the Commission then issues a final ruling, which may "affirm, reverse, modify, set aside [the initial decision] or remand for further proceedings."[49] If the Commission opts not to review the initial decision, it will issue an order stating that the ALJ's decision has become final,[50] and is to be "deemed the action of the Commission."[51] Once a final order has been issued by the Commission, a party has sixty days to appeal said order to the appropriate federal court of appeals.[52] To be eligible for judicial review, the party must first petition the

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42. *See* 15 U.S.C. § 78d-1(a) (2018).
43. 17 C.F.R. § 200.14(a) (2019).
44. *See* Butz v. Economou, 438 U.S. 478, 513 (1978) ("[T]he role of the modern federal hearing examiner or administrative law judge . . . is 'functionally comparable' to that of a judge.").
45. *See* 17 C.F.R. § 201.360(b) (2019).
46. *See id.*
47. *See id.*; 17 C.F.R. § 201.411 (2019).
48. *See* 17 C.F.R. § 201.411 (2019).
49. *See id.*
50. *See* 17 C.F.R. § 201.360(d)(2) (2019).
51. 15 U.S.C. § 78d-1(c) (2018).
52. *See* § 78y(a). The appropriate federal court of appeals consists either of the circuit in which the litigant resides or has his principal place of business or the District of Columbia Circuit. *Id.*

Commission for review of the initial decision.[53] Crucially, the validity of this scheme depends on ALJs being characterized as employees rather than officers[54] — the very question raised in *Lucia v. SEC*.

D. *LUCIA V. SEC*: THE CONSTITUTIONAL CHALLENGE TO THE SEC'S ALJS

In September of 2012, the SEC instituted an administrative proceeding against Raymond Lucia for use of misleading presentations designed to deceive customers,[55] charging him under section 206 of the Investment Advisors Act of 1940.[56] After nine days of hearings, the ALJ presiding over the case issued an initial decision concluding that Lucia violated the Investment Advisors Act and imposing sanctions of $300,000 along with a lifetime ban from the investment industry.[57] Lucia appealed this decision to the Commission, which granted review, and argued in the first instance that the initial administrative proceeding was invalid because the presiding ALJ was an officer whose appointment failed to satisfy the Appointments Clause.[58] The Commission rejected this argument, stating that the SEC's ALJs are "mere employees" because they do not "exercise significant authority independent of [the Commission's] supervision," therefore falling outside the reach of the Appointments Clause.[59]

Lucia then appealed his case to the Court of Appeals for the D.C. Circuit, where the panel, relying largely on its own post-*Freytag* precedent,[60] unanimously affirmed the Commission's decision.[61] Noting first that the SEC's ALJs were "established by law" and that their "duties, salary and means of appointment" were

53. *See* 17 C.F.R. § 201.410(e) (2019) ("[A] petition to the Commission for review of an initial decision is a prerequisite to the seeking of judicial review."); *see also* 5 U.S.C. § 704 (2012).

54. *See supra* Part II.A.

55. *See* Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018); Raymond J. Lucia Cos. Inc., Investment Advisers Act Release No. 495, 2013 WL 3379719 at *2 (ALJ July 8, 2013).

56. Raymond J. Lucia Cos. Inc., Investment Advisers Act Release No. 495, 2013 WL 3379719 at *1 (ALJ July 8, 2013).

57. *See Lucia*, 138 S. Ct. at 2050.

58. *See id.* The SEC's ALJs are appointed by the SEC's Chief ALJs, who is neither a "court of Law" or a head of a department. *Id.*

59. *See id.*

60. *See* Raymond J. Lucia Cos. v. SEC, 832 F.3d. 277, 284 (D.C. Cir. 2016).

61. *See id.* at 280.

specified by statute,[62] the court then turned to the "main criteria" which looked at "(1) the significance of the matters resolved by the individual, (2) the discretion they exercise in reaching their decision, and (3) the finality of those decisions."[63] All three factors are required in order to classify an individual as an officer of the United States.[64] Focused on the third factor, the appellate court found that SEC ALJs retain the authority only to make initial decisions and that all final decisions are made by the Commission, meaning ALJs lacked the finality to qualify as an officer.[65] Lucia then petitioned for rehearing en banc, which resulted in a split five-five per curiam opinion denying the motion.[66]

This very question of SEC ALJ officer status also arose in the Tenth Circuit shortly after the panel decision in *Lucia*.[67] In a divided panel, the court held in *Bandimere v. SEC* that the SEC's ALJs were "inferior officers" under the Constitution and their appointment did not satisfy the necessary requirements.[68] The court relied solely on the Supreme Court's reasoning in *Freytag* and explicitly rejected the D.C. Circuit's reasoning in *Lucia*, stating that "[f]inal decision making power is relevant . . . [b]ut that does not mean *every* inferior officer *must* possess final decision making power."[69] Thus, the panel held that the SEC's ALJs possessed significant discretion while exercising important functions regardless of final decision making power.[70] The Tenth Circuit denied the SEC's subsequent petition for rehearing en banc by a vote of nine to two.[71]

The following year the Supreme Court granted Lucia's petition for certiorari to resolve the circuit split.[72] Writing for the majority, Justice Kagan relied on the Court's framework established in *Germaine* and *Buckley*, and later applied in *Freytag*, to hold that the SEC's ALJs are "inferior officers" and not employees for purposes

62. *See id.* at 284.

63. *See id.* at 284 (quoting Tucker v. Comm'r, 676 F.3d 1129, 1132 (D.C. Cir. 2012)). The court notes that these three factors are the main criteria for drawing the line between inferior officer and employee. *Id.*

64. *See id.* at 284–85.

65. *See id.* at 289.

66. *See* Raymond J. Lucia Co. v. SEC, 868 F.3d 1021 (D.C. Cir. 2017) (resulting, due to an the evenly split vote, in a denial of rehearing per D.C. Cir. Rule 35(d)).

67. *See* Bandimere v. SEC, 844 F.3d 1168, 1170 (10th Cir. 2016).

68. *Id.*

69. *Id.* at 1174, 1183–84 (emphasis in original).

70. *Id.* at 1181.

71. *See* Bandimere v. SEC, 855 F.3d 1128 (10th Cir. 2017).

72. *See* Lucia v. SEC, 138 S. Ct. 736 (2018).

of the Appointments Clause.[73] The Court determined that *Freytag* controlled the outcome in *Lucia* because SEC ALJs are appointed to a position created by statute that specified their "duties, salary, and means of appointment" and these ALJs exercise the same "significant discretion" when carrying out "important functions."[74]

Furthermore, the Court found a significant distinction between the Tax Court's STJs at question in *Freytag* and the ALJs concerned in *Lucia*. For instance, Tax Court judges were required to review an STJ's opinion in a major case,[75] whereas the Commission could decline review and issue an order granting finality to the ALJ's initial decision. The *Lucia* Court reasoned that since the STJs qualified as inferior officers, then the Commission's ALJs, who operate with more autonomy, must also be inferior officers.[76] The Court also dismissed two distinctions made between STJs and ALJs with regard to enforcement of discovery orders and review of factfinding, stating that these differences were not dispositive for determination of officer status.[77]

Finally, the Court turned to the question of remedy. Existing Supreme Court precedent dictates "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.[78] Lucia, having raised this issue on appeal to the Commission, met this requirement of a "timely challenge."[79] The appropriate remedy in such cases is a new "hearing before a properly appointed" official.[80] The Court then added an additional component to this remedy, stating that the "official cannot be [the same officer], even if he has by now received (or receives in the future) a constitutional appointment."[81] However, the Court declined to provide any additional guidance on what constituted a "timely challenge," instead affirming conclusively that the case at hand met this standard.[82] Notably, Lucia did not raise his constitutional claim in the initial ALJ proceeding, instead making his initial Appointments Clause

73. *See Lucia*, 138 S. Ct. at 2049, 2051–52.
74. *See id.* at 2053 (comparing the SEC's ALJs to the Tax Court's STJs).
75. *Id.* at 2053–54.
76. *Id.* at 2054.
77. *See id.*
78. Ryder v. United States, 515 U.S. 177, 182–83 (1995).
79. *Lucia*, 138 S. Ct. at 2055.
80. *Ryder*, 515 U.S. at 183, 188.
81. *Lucia*, 138 S. Ct. at 2055.
82. *See id.*

argument on appeal.[83] This poses the question of when, over the course of litigation, the challenge must be raised in order to be considered "timely."

III. DEFINING A TIMELY CHALLENGE

The *Lucia* Court recites the requirement for a "timely challenge"[84] but provides no further clarification as to what is sufficient to satisfy it. Part III.A begins by exploring the origins of this requirement in *Ryder v. United States*. Similar to *Lucia*, the *Ryder* Court concluded that raising the issue directly to the officer in question met this standard, but did not articulate the boundaries of the requirement. Part III.B tests the outer limit of timeliness by considering whether a challenge brought after the conclusion of the proceeding satisfies the rule, concluding that res judicata bars the claim. Having determined that the case must still be pending, Part III.C analyzes the interaction between the appellate process and Appointments Clause challenge. Here, it is necessary to reconcile two Supreme Court decisions: *Lucia* found "timely" a challenge raised in the first instance on initial appeal before the SEC, while *Freytag* held that a challenge raised before the Supreme Court falls to the discretion of the Court — an outcome far different than the entitlement guaranteed by a "timely challenge." Thus, this Note argues that the challenge must be made before the Supreme Court hears the case. At that stage, an answer on the merits depends on the Court exercising its discretionary authority rather than being dictated by the litigant's entitlement to it. Part III.D applies the Court's treatment of the de facto officer and de facto validity doctrines to determine that a challenge remains timely through the initial review by a constitutional valid officer but expires upon a subsequent review. Finally, Part III.E addresses the impact of a challenge via a collateral attack and the showing necessary to constitute a challenge.

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83. *See* Answer of Respondent Raymond J. Lucia Companies, Inc. at 7–8, *In the Matter of Raymond J. Lucia Companies, Inc. & Raymond J. Lucia, Sr.*, Release No. 495 (Jul. 8, 2013) (No. 3-15006).

84. *Lucia*, 138 S. Ct. at 2055 (quoting *Ryder*, 515 U.S. at 182–83).

A. THE FOUNDATION: *RYDER V. UNITED STATES*

The discussion of timeliness for Appointments Clause challenges necessarily begins with *Ryder v. United States*, a case involving a court-martial of an enlisted member of the United States Coast Guard.[85] The petitioner, convicted by a general court-martial on several drug-related counts, appealed his conviction to the Coast Guard Court of Military Review, which affirmed the decision below.[86] That court then granted a petition for reconsideration and subsequently rejected the petitioner's challenge to the constitutional validity of the affirming panel, which included two civilian judges who had been appointed by the General Counsel of the Department of Transportation.[87] Ryder then appealed his case to the Court of Military Appeals, which also affirmed the initial conviction.[88] The court in this instance, however, found the composition of the three-judge panel below violated the Appointments Clause because appellate military judges were inferior officers and therefore subject to the constitutional requirements for appointment.[89] Yet, the court further found that the actions of the judges below were valid de facto, per *Buckley v. Valeo*,[90] and ultimately upheld the conviction despite the violation to the Appointments Clause.[91]

The Supreme Court reversed the ruling of the Court of Military Appeals, clarifying the scope of *Buckley* and articulating a foundational rule for standing in Appointments Clauses challenges. The Court first drew a distinction between Ryder's case, involving a "trespass upon the executive power of appointment," and previous cases that invoked the de facto officer doctrine, which involved the misapplication of a statute.[92] Next, the Court cabined the similar, yet distinct, de facto validity doctrine utilized in *Buckley*[93] and

85. *Ryder*, 515 U.S. at 179.
86. *Id.*
87. *Id.*
88. *Id.* at 180. Appeals of court martial decisions travel first to the Court of Military Review for the specific service branch and then the Court of Military Appeals (which oversees each service branch's Court of Military Review) and finally the U.S. Supreme Court. *See* Weiss v. United States, 510 U.S. 163, 166–69 (1994).
89. *Id.*
90. Buckley v. Valeo, 424 U.S. 1, 142 (1976) (finding that, while the structure of the Federal Elections Commission violated the Appointments Clause, this did not affect the validity of the Commission's earlier administrative actions). For a more in-depth discussion of the de facto validity doctrine, see *infra* Part III.D.2.
91. *Ryder*, 515 U.S. at 180.
92. *Id.* at 182.
93. *Buckley*, 424 U.S. at 142.

Connors v. Williams[94] to the specific facts of those cases. While the Appointments Clause could be viewed through a solely formalistic lens, the Court ultimately argued that the drafters included the Appointments Clause as a method of preserving the structural integrity of the Constitution: both by "preventing the diffusion of the appointment power" and by guarding against "one branch aggrandizing its power at the expense of another branch."[95] Thus, recognizing the functional importance served by the Clause, the *Ryder* Court noted the need to incentivize challenges and dictated "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."[96]

Ryder provides that a litigant who raises the issue directly to the officer in question is *entitled* to an answer on the merits.[97] This bright-line rule, however, becomes muddled when applying the restriction of a timely challenge. The *Ryder* Court implicitly recognized that not all challenges entitle a litigant to a decision, but the case at hand did not necessitate any further expansion because the petitioner had raised his challenge directly to the officer in question, a scenario that most clearly meets any requirement of timeliness.[98] Thus, the Court left open the possibility that "timely challenge" could be stretched temporally beyond direct confrontation with the alleged constitutional offender.[99] However, in an attempt to draw the outer bounds of this doctrine, it is necessary to first evaluate the Court's general rules on finality and its treatment of nonjurisdictional issues raised on appeal.

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94. Connor v. Williams, 404 U.S. 549, 550–51 (1972) (holding that legislative acts by legislators elected in accordance with an unconstitutional apportionment plan were not void).

95. *Ryder*, 515 U.S. at 182 (quoting Freytag v. Comm'r, 501 U.S. 868, 878 (1991)).

96. *Id.* at 182–83.

97. *Id.* at 182.

98. *Id.* at 179. Because the challenge was raised when the alleged constitutional error occurred, during the proceeding before the officer in question, there is no question whether the petitioner waived his right to argue the issue in the first instance on appeal. *Id.* at 182.

99. The Court in *Lucia* relies on this opening to expand the definition of a timely challenge to encapsulate an issue raised on initial appeal. *See* Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018).

B. DRAWING THE OUTER BOUNDS OF TIMELINESS: RES JUDICATA

If *Ryder* represents the epitome of a timely challenge, i.e., one made during a proceeding before the alleged offending officer, then a challenge raised after final judgment and exhaustion of available appeals represents the opposite extreme. Federal courts generally adhere to the principle of res judicata,[100] a doctrine that bars "the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions that could have been — but was not — raised in the first suit."[101] It is the second prong of that definition, also referred to as "claim preclusion,"[102] that is particularly relevant for considerations of timeliness. An Appointments Clause challenge generally stems from some underlying, and typically adverse, action taken by the official in question, where the constitutional claim represents an additional method to mitigate or nullify the contested action.[103] Thus, after the conclusion of the suit, claim preclusion would bar the litigant from challenging the appointment of the officer, having already possessed — and failed to utilize — the opportunity to do so.

This finality holds true even if the initial decision relied on faulty legal principles or was later overruled by another case.[104] An "erroneous conclusion" by the court may be challenged on direct appeal, but it will not sustain a new suit.[105] Similarly, a judgment by a court of competent jurisdiction is not susceptible to collateral attack, regardless of whether the initial decision was right or wrong.[106] Though flawed, these defects render the judgment voidable rather than void, a critical distinction when it comes to escaping the grasp of res judicata.[107]

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100. Allen v. McCurry, 449 U.S. 90, 94 (1990) ("[F]ederal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel.").

101. *Res Judicata*, BLACK'S LAW DICTIONARY (11th ed. 2019).

102. CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS § 100A, at 722–23 (5th ed. 1994).

103. *See* Tilton v. SEC, 824 F.3d 276, 288 (2d Cir. 2016) (noting that the Appointments Clause claim is a "vehicle by which" the appellants seek to prevail in the proceeding).

104. *See* Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981).

105. *See* Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 325 (1927).

106. *See* Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376 (1940).

107. *See* 47 AM. JUR. 2D JUDGMENTS § 698 (West 2020). A void judgment can always be challenged collaterally, whereas a voidable judgment can only be corrected on direct appeal. *Id.*

In practice, litigants have two avenues to navigate the field of claim preclusion: one that involves a limited number of specific exceptions,[108] and another that enables a collateral attack on the judgment.[109] Since none of aforementioned exceptions expressly lend themselves to an Appointments Clause challenge,[110] the focus is better directed towards the availability of a collateral attack. At the outset, it should be noted that collateral attacks on final judgments are generally disfavored.[111] However, void final decisions, such as those made by a court lacking jurisdiction or inherent power, may be challenged.[112]

Framed in these terms, the question thus becomes whether the improper appointment of an adjudicative officer renders any subsequent decisions void, rather than merely voidable. The Fifth Circuit has held that "a judgment . . . reached without due process of law is without jurisdiction and void, and attackable collaterally . . . because the United States is forbidden by the fundamental law to take either life, liberty or property without due process of law, and its courts are included in this prohibition."[113] The Appointments Clause operates as one of the constitutional safeguards, aimed at preventing the "manipulation of official appointment" and limiting

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108. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 26 (AM. LAW INST. 1982). The exceptions include:

> (a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action; or (c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief; or (d) The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim; or (e) For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of suit, and chooses the latter course; or (f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.

Id. § 26(1)(a)–(f).

109. *See* 47 AM. JUR. 2D JUDGMENTS § 698.

110. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 26.

111. 47 AM. JUR. 2D JUDGMENTS § 699.

112. *See id.* at § 710; FED. R. CIV. P. 60(b).

113. Bass v. Hoagland, 172 F.2d 205, 209 (5th Cir. 1949).

despotism.[114] But while these aims are inherently noble, it seems unlikely that a structural constitutional defect would void the underlying decision without additionally being rooted in due process.

Unlike the Due Process Clause, the Appointments Clause creates an additional structural boundary in the Constitution by mandating a congressional role in officer appointments. In requiring action from both Congress and the President, it strikes towards the separation of powers, rather than shielding civilians from a capricious government. It is a method of diffusing government power rather than protecting litigants through procedural safeguards. Thus, few courts are likely to view an appointment defect through a due process lens.[115] Similarly, a defect in appointment power does not negate the jurisdiction of the adjudicative body itself as evidenced by the fact that the Supreme Court has referred to these claims as nonjurisdictional in nature.[116] Therefore, it appears little weight should be given to the argument that an appointment defect voids the underlying judgment, or stated otherwise, that at a bare minimum, a timely challenge must be raised prior to the conclusion of the litigation.

C. REVIEW DURING THE APPELLATE PROCESS

As *Ryder* illustrates, raising an Appointments Clause challenge directly to the officer in question entitles the litigant to an answer on the merits of the question.[117] Expanding that entitlement temporally, however, requires considering the implications of challenging the appointment on appeal after an adverse ruling by that officer. Appellate litigation generally operates under the principle that parties must raise issues at trial or they lose the opportunity to litigate them on appeal.[118] This rule strikes to:

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114. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 79, 143 (Univ. of N.C. Press 1969).

115. While separation of powers issues ultimately relate to underlying liberty concerns, they focus on the broader mechanisms of government function rather that the specific process due to an individual litigant.

116. Freytag v. Comm'r, 501 U.S. 868, 878 (1991) ("*Glidden* expressly included Appointments Clause challenges to judicial officers in the category of nonjurisdictional structural constitutional objections that could be considered on appeal.") (citing Glidden Co. v. Zdanok, 370 U.S. 530, 536 (1962)).

117. Ryder v. United States, 515 U.S. 177, 182 (1995).

118. *See* Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1023 (1987); *see also* Singleton v. Wulff, 428 U.S. 106, 120 (1976).

> the heart of the common law tradition and the adversary system. It affords an opportunity for correction and avoidance in the trial court in various ways: it gives the adversary the opportunity either to avoid the challenged action or to present a reasoned defense of the trial court's action; and it provides the trial court with the alternative of altering or modifying a decision or of ordering a more fully developed record for review.[119]

This general rule is, however, subject to several exceptions including: a defect in subject matter jurisdiction, which cannot be waived and may be asserted for the first time on appeal;[120] a plain error;[121] and a nonjurisdictional constitutional defect.[122] The treatment of these exceptions varies from one to another. For instance, a jurisdictional defect is always available, and an appellate court is required to raise the issue sua sponte.[123] A plain error is "clear" or "obvious" under current law at the time of appellate review and affects substantial rights, such as impacting the outcome of a trial proceeding.[124] Notably, the plain error rule is generally limited to criminal cases with the exception of jury instruction errors in civil cases.[125]

The exception for nonjurisdictional constitutional claims arises from a different backdrop, anchored in the discretion of the appellate court. The "general rule" is, at best, more of a guideline — true most times but certainly not always.[126] Instead, the Supreme Court has granted appellate courts autonomy, stating: "the matter of what questions may be taken and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule."[127] The Court itself has exercised this discretion

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119. Pfeifer v. Jones & Laughlin Steel Corp., 678 F.2d 453, 457 n.1 (3d Cir. 1982).
120. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE, § 27.5(c) (3d ed. 2007 & Supp. 2009).
121. Johnson v. United States, 520 U.S. 461, 466–67 (1997).
122. Freytag v. Comm'r, 501 U.S. 868, 878 (1991).
123. *See* Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986) ("[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction but also that of the lower courts in a cause under review,' even if the parties are prepared to concede it.") (quoting Mitchell v. Maurer, 293 U.S. 237, 244 (1934)).
124. United States v. Olano, 507 U.S. 725, 732–35 (1993).
125. *See* FED. R. CRIM. P. 52(b); *see also* FED. R. CIV. P. 51(d)(2).
126. *See* Singleton v. Wulff, 428 U.S. 106, 121 (1976).
127. *Id.*

on various occasions to entertain nonjurisdictional constitutional claims not raised below.[128]

In *Freytag*, the Court applied this exception to the hear the petitioners' Appointments Clause challenge after the Commissioner of Internal Revenue argued that the right to challenge had been waived by the failure to make a timely objection and by consenting to the assignment of the STJ.[129] Noting that the Supreme Court in *Glidden Co. v. Zdanok* expressly included this type of challenge in "the category of nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled on below,"[130] the Court weighed "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers"[131] against the disruption to "sound appellate process."[132] The Court concluded that the constitutional challenge present was neither "frivolous or disingenuous" because the defect went to the validity of the proceeding in question and therefore qualified as "one of those rare cases in which we should exercise our discretion to hear [the] challenge."[133]

Though the *Freytag* Court exercised its discretion in hearing the petitioners' claim, it declined to broach the topic of whether the petitioners had indeed waived their claim.[134] When the constitutional question was raised in the first instance before the Fifth Circuit, that court concluded that the petitioners had waived their claim.[135] Pursuant to that decision, the grant of certiorari requested that the parties additionally brief and argue the question of whether "a party's consent to have its case heard by a special trial judge constitutes a waiver of any right to challenge the appointment of that judge on the basis of the Appointments

128. *See, e.g.*, Grosso v. United States, 390 U.S. 62, 71–72 (1968) (considering the waiver of a defendant's Fifth Amendment right against self-incrimination); Glidden Co. v. Zdanok, 370 U.S. 530, 535–36 (1962) (finding that the issue of the authority of judges of Court of Claims and Court of Patent Appeals to hear other cases by designation was not precluded by the parties' failure to raise it before reaching the Supreme Court); Hormel v. Helvering, 312 U.S. 552, 556–60 (1941) (upholding the Circuit Court's decision to consider section 22(a) of the Tax Code with respect to tax liability even though the issue had not been argued before the Board of Tax Appeals).

129. *See* Freytag v. Comm'r, 501 U.S. 868, 878 (1991).

130. *Id.* at 878–79.

131. *Glidden*, 370 U.S. at 536.

132. *Freytag*, 501 U.S. at 879.

133. *Id.*

134. *Id.* at 892 (Scalia, J., concurring in part).

135. *See* Freytag v. Comm'r, 904 F.2d 1011, 1015 n.9 (5th Cir. 1990).

Clause."[136] The petitioners argued for a blanket ruling that structural constitutional claims were non-waivable, therefore entitling litigants to raise them at any point during the litigation.[137] The Court's majority declined to respond to this argument, instead opting for the discretionary approach described above. Justice Scalia's concurrence-in-part, which garnered three additional votes, categorically rejected the general rule urged by the petitioners, instead proposing that "[a] party forfeits the right to advance on appeal a nonjurisdictional claim, structural or otherwise, that he fails to raise at trial."[138] The minority endorsed the discretionary approach of the majority — though emphasizing the need for atypical circumstances to warrant its application — but rejected the view that a structural constitutional claim categorically meets the threshold to warrant such an exercise of discretion.[139]

Comparing *Freytag* to *Ryder* illustrates a key point: if the litigant waits until the Supreme Court to raise the Appointment Clause issue, the "timely challenge" entitlement dissipates into an exercise of discretion by the Court.[140] This reveals two insights: first, a timely challenge *entitles* the litigant to an answer on the merits while an untimely challenge falls to the discretion of the court. Second, the timeliness of the challenge must expire at some stage of the appellate process. *Lucia* provides some clarity in pinpointing the location. There, the Appointments Clause challenge was not raised until the case was appealed to the Commission,[141] but the Court still concluded that Lucia was entitled to relief, citing *Ryder*.[142] It should be noted that Lucia did not raise his challenge before an Article III judge, leaving unanswered the question of whether a timely challenge should always encompass the first instance of judicial review. However, such a proposition begins to morph into the general rule of un-waivable structural challenges that the *Freytag* Court declined to authorize.[143] It is exceedingly rare that these challenges would receive more than one level of judicial review, either through an en banc proceeding or argument before the Supreme Court.

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136. *Freytag*, 501 U.S. at 893 (Scalia, J., concurring in part).
137. *Id.*
138. *Id.* at 893–94.
139. *See id.* at 894.
140. *See Freytag*, 501 U.S. at 879.
141. *See* Lucia v. SEC, 138 S. Ct. 2044, 2050 (2018).
142. *Id.* at 2055.
143. *See Freytag*, 501 at 892 (Scalia, J., concurring in part).

By declining to endorse a general rule that structural constitutional claims are inherently non-waivable, the Court left open the specific question of when a litigant waives an Appointment Clause challenge. In answering that question, it is useful to look back on the Court's treatment of lower court attempts to nullify a timely Appointments Clause challenge by granting the acts de facto validity. In expressly disallowing such an exercise in certain instances, the Court indicated that a challenge may be successfully brought before a reviewing court on appeal. However, it is necessary to trace two related doctrines to determine when such a claim may prevail.

D. LENDING VALIDITY TO PAST ACTIONS OF (UN)OFFICIALS

The judiciary has long valued consistency and predictability in the administration of the legal regime. This is particularly true when government actors serve as the catalyst for enforcement.[144] Typically, an official must satisfy various constitutional and statutory requirements — including specific appointment and election procedures, an oath of office, and the posting of a bond — before she can lawfully exercise governmental power.[145] However, an absolute requirement for perfect title would impede many state actions.[146] Chaos would reign as "multiple and repetitious suits challeng[ed] every action taken by every official whose claim to office could be open to question."[147] Such a regime would all but necessitate conclusive establishment of title, likely through litigation, before the public could rely on the validity of a particular official's actions. Thus, the judicial system developed two distinct but related doctrines to diminish the uncertainty that would otherwise accompany action by state actors: the de facto officer doctrine and the de facto validity doctrine.

144. The doctrine of stare decisis is a prime example of judicial efforts to maintain predictability in the legal regime. Similarly, the vagueness and overbreadth doctrines aim to provide notice for those impacted by government enforcement.

145. *See* Kathryn A. Clokey, The De Facto Officer Doctrine: The Case for Continued Application, 85 COLUM. L. REV. 1121, 1121 (1985).

146. *See* EEOC v. Sears, Roebuck & Co., 650 F.2d 14, 17 (2d Cir. 1981).

147. Ryder v. United States, 515 U.S. 177, 180 (1995) (quoting 63A AM. JUR. 2d, Public Officers and Employees § 578).

1. *The De Facto Officer Doctrine*

The de facto officer doctrine originated in English common law and has existed in the United States since the Founding at both the state and federal level.[148] It "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient."[149] The Connecticut Supreme Court offered the preeminent statement of the doctrine in *State v. Carroll*, offering that "a defect of *qualification* in the officer . . . is not of a character to prevent his acts from being valid as the acts of an officer *de facto.*"[150] At the federal level, the Supreme Court first endorsed the doctrine in *Texas v. White,* stating that "acts necessary to peace and good order among citizens . . . which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government."[151] The Court has subsequently relied on the doctrine in numerous other cases.[152]

In practice, the de facto officer doctrine becomes operative when an officer takes unobstructed possession of a de jure office and exercises the powers of that office under color of authority.[153] The officer must discharge his duties in full view of the public with the acquiescence of the people and authorities to avoid the appearance of an intruder or usurper.[154] Additionally, the official must have made a good faith effort to comply with the legal requirements.[155] A known unlawful claim to the office bars application.[156] Generally, an official is considered a de facto officer when he exercises his powers:

148. ALBERT CONSTANTINEAU, TREATISE ON THE DE FACTO DOCTRINE 9, 14 (1910).

149. *Ryder*, 515 U.S. at 180 (citing Norton v. Shelby County, 118 U.S. 425, 440 (1886)).

150. 38 Conn. 449, 455 (Conn. 1871) (emphasis in original) (holding that the judgment of an acting judge was valid even with a defect in the appointment).

151. 74 U.S. 700, 702 (1868) (addressing an unlawful government rather than a specific officer).

152. *See, e.g.*, United States v. Royer, 268 U.S. 394 (1925) (upholding the de facto appointment of a major in the Medical Reserve Corps); Waite v. Santa Cruz, 184 U.S. 302 (1902) (holding that bonds signed by the de facto mayor were valid); *Ex parte* Ward, 173 U.S. 452 (1899) (denying habeas corpus to a detainee convicted by a judge de facto); Nofire v. United States, 164 U.S. 657 (1897) (validating the signing of a marriage license by an officer de facto).

153. *See* 63C AM. JUR. 2d Public Officers and Employees § 23.

154. *See id.*

155. *See* Johnson v. Manhattan Ry., 61 F.2d 934, 938 (2d Cir. 1932).

156. *See* CONSTANTINEAU, *supra* note 148, at 137.

> (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his or her action, supposing him or her to be the officer he or she assumed to be; (2) under color of a known and valid appointment or election, but where the officer failed to conform to some precedent, requirement, or condition; (3) under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; or (4) under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such.[157]

When the above requirements are satisfied, the actions of the official are considered valid and binding upon the recipients.[158] A finding of de facto officer status forecloses a collateral attack on the legality of the office,[159] instead requiring a direct attack via a writ of quo warranto.[160] There are limitations on who can institute this civil action and it is generally restricted to an individual with a claim to the office or the United States Attorney General, in the case of federal officers.[161]

When considered against the backdrop of the Appointments Clause, both the third and fourth factors of the description above are applicable.[162] However, the Supreme Court has limited usage of the de facto officer doctrine to cases where there is a technical defect in the judge's statutory authority,[163] such as the assignment of a district judge to another district[164] or an appointment during

157. State v. Carroll, 38 Conn. 449, 449 (Conn. 1871).

158. McDowell v. United States, 159 U.S. 596, 601 (1895) ("Judge Seymour must be held to have been a judge de facto, if not a judge de jure, and his actions as such, so far as they affect third persons, are not open to question.").

159. Ball v. United States, 140 U.S. 118, 128–29 (1891).

160. Johnson v. Manhattan Ry. Co., 289 U.S. 479, 502 (1933). A quo warranto is "[a] common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed." *Quo Warranto*, BLACK'S LAW DICTIONARY (10th ed. 2014).

161. *See* Clokey, *supra* note 145, at 1124.

162. *See* CONSTANTINEAU, *supra* note 148, at 137 (under color of a known appointment, void because of want of power in the appointing body, or under color of an appointment pursuant to a public, unconstitutional law, before it is held to be such).

163. Glidden Co. v. Zdanok, 370 U.S. 530, 535–36 (1962).

164. *See, e.g.*, McDowell v. United States, 159 U.S. 596 (1895); Ball v. United States, 140 U.S. 118 (1895).

Senate recess.[165] The Court observed that these claims involve statutory construction rather than a trespass upon the executive's appointment power.[166] When confronted with the question of whether the de facto officer doctrine could cure an Appointments Clause defect, the Court used this distinction, a trespass on appointment power, to cabin its earlier precedent and reach the merits of the question.[167]

It is perhaps unclear whether a nonfrivolous constitutional claim completely bars the application of the de facto officer doctrine or if it merely removes the limitation on collateral attacks.[168] The D.C. Circuit in *Andrade v. Lauer* removed the ban on collateral attacks where the plaintiff brings "his action at or around the time that the challenged government action is taken . . . [and] show[s] that the agency or department involved has had reasonable notice under all the circumstances of the claimed defect."[169] This can be seen as leaving the doctrine operative despite removing one of its key protections. Alternatively, a timely challenge simply nullifies the operation of the de facto officer doctrine in order to incentivize Appointments Clause challenges.[170] This distinction, however, is more academic in nature as the effect on the litigant is identical, opening the door for a challenge as well as an opportunity for relief.

2. *The De Facto Validity Doctrine*

The Supreme Court in *Ryder* acknowledged the existence of a distinct, although similar, doctrine, known as de facto validity.[171] This doctrine, as articulated in *Buckley v. Valeo*, functions analogously to the de facto officer doctrine, conferring legitimacy upon past actions, despite the presence of defects in title.[172] In *Buckley*, the Court found an Appointments Clause violation in the composition of the Federal Election Commission, the majority of whose

165. *See Ex parte* Ward, 173 U.S. 452 (1899).
166. *McDowell*, 159 U.S. at 598.
167. *See* Ryder v. United States, 515 U.S. 177, 182–83 (1995).
168. *See Glidden*, 370 U.S. at 536 (noting that when the alleged defect of authority relates to basic constitutional protections for litigants, it should at least be examinable on direct review).
169. Andrade v. Lauer, 729 F.2d 1475, 1499 (D.C. Cir. 1984).
170. *See Ryder*, 515 U.S. at 182–83.
171. *See id.* at 183. Some scholars contend that the de facto officer doctrine and de facto validity doctrine are one in the same. *See* Deepak Gupta, *Reactions to* Noel Canning v. NLRB*: The Consumer Protection Bureau and the Constitution*, 65 ADMIN. L. REV. 945, 965–66 (2013).
172. *See Ryder*, 515 U.S. at 183.

commissioners could be appointed solely by Congress, without input of the President.[173] However, the Court went on to find that:

> the Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date, including its administration of those provisions, upheld today, authorizing the public financing of federal elections. The past acts of the Commission are therefore accorded de facto validity.[174]

The Court reasoned that this validity followed in the vein of *Connors v. Williams*, which granted legitimacy to legislative acts performed by legislators elected in accordance with an unconstitutional apportionment plan.[175] As previously noted, the Court of Military Appeals in *Ryder* relied on *Buckley* to preserve the petitioner's conviction despite finding a constitutional defect in the first reviewing panel.[176] The *Ryder* Court, however, drew a sharp contrast between the case at hand, a de facto officer scenario, and *Buckley*, a de facto validity case that did not "explicitly rely on the de facto officer doctrine."[177] The Court went further and minimized the idea that *Buckley* implicitly applied the de facto officer doctrine.[178] In this regard, the Court has been clear that the de facto validity doctrine stands independently from the de facto officer doctrine.

In the context of Appointments Clause challenges, these two doctrines yield different outcomes: the de facto officer doctrine folds to a timely constitutional challenge,[179] while the de facto validity doctrine legitimizes past acts regardless of a valid

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173. *See* Buckley v. Valeo, 424 U.S. 1, 127 (1976).
174. *Id.* at 142.
175. 404 U.S. 549, 550–51 (1972).
176. *See supra* Part II.A.
177. *Ryder*, 515 U.S. at 183; *see* Jason W. Parsont, *Why* Buckley v. Valeo *May Solve the CFPB's Most Pressing Dilemma*, CLS BLUE SKY BLOG (Feb. 20, 2013), http://clsbluesky.law.columbia.edu/2013/02/20/why-buckley-v-valeo-may-solve-the-cfpbs-most-pressing-dilemma/comment-page-1 [https://perma.cc/ZCZ7-LDPA].
178. *See* Parsont, *supra* note 177; *see also Ryder*, 515 U.S. at 184 ("To the extent these civil cases may be thought to have implicitly applied a form of the *de facto* officer doctrine, we are not inclined to extend them beyond their facts.").
179. *See supra* Part II.D.1.

constitutional claim.[180] Thus, it is necessary to distinguish the factual scenarios in which they respectively apply.

De facto validity cases possess two unique characteristics when compared to de facto officer doctrine cases. First, both the acts given validity and the class of recipients are broader in nature. One can compare past legislative acts by an entire legislative body[181] or past acts of a six-member commission[182] to the preservation of a defendant's conviction by a judge with a statutorily improper appointment.[183] The de facto validity doctrine is applicable to regulations passed by an administrative agency,[184] while the de facto officer doctrine is individualized, aimed at minimizing the defects in the appointment or election of an individual.[185] This distinction hinges upon the difference between the government engaging in a specific action against a particular individual and the government establishing laws and regulations of general applicability or widespread supervision of an industry.[186] Second, the *Ryder* Court noted that the *Buckley* plaintiffs prevailed on their constitutional challenge, receiving injunctive and declaratory relief.[187] Thus, the de facto validity doctrine operates to minimize uncertainty in the aftermath of an judicial decision against the government, whereas the de facto officer doctrine, as applied in *Ball v. United States* and *McDowell v. United States*,[188] prevents litigants from taking the proverbial "second bite at the apple" after an adverse decision. Finally, the *Ryder* Court, perhaps noting the potential for conflation between these two doctrines, explicitly cabined the de facto validity doctrine to the facts present in *Buckley* and *Connors*.[189]

The above discussion finds its relevance in two distinct contexts. First, the details of the de facto officer doctrine, and, in particular, its inapplicability in the face of a timely challenge proves insightful during the analysis of SEC proceedings.[190] Indeed, the

180. *See* Buckley v. Valeo, 424 U.S. 1, 142 (1976).
181. *See* Connors v. Williams, 404 U.S. 549, 550–51 (1972).
182. *See Buckley*, 424 U.S. at 142.
183. *See, e.g.*, McDowell v. United States, 159 U.S. 596 (1895); Ball v. United States, 140 U.S. 118 (1891); *Ex parte* Ward, 173 U.S. 452 (1899).
184. *See* Parsont, *supra* note 177.
185. 63C AM. JUR. 2d Public Officers and Employees § 23.
186. *See* Gupta, *supra* note 171, at 969.
187. *See* Ryder v. United States, 515 U.S. 177, 183 (1995).
188. *See id.* at 181.
189. *See id.* at 184.
190. *See infra* Part IV.

Court's treatment of both doctrines in the *Ryder* case is illuminating. While there are many circumstances where it is sound judicial practice to "paper over" minor technical defects in title,[191] *Ryder* stands for the proposition that the Court will not lend validity to past actions against an individual in the face of an Appointments Clause challenge.[192] Thus, it is an "individual['s] interest in having the government act against them only through lawfully appointed agents"[193] that indicates litigants should be able to raise their constitutional challenges even after the initial proceeding before an improperly appointed officer.

However, more broadly, this extends the window of a timely challenge beyond a direct challenge and encompasses the initial review by a properly appointed official. Intuitively, this extension makes sense: an improperly appointed officer attempts to exercise power beyond constitutional safeguards. Allowing a challenge to expire at the conclusion of the initial proceeding — one that is overseen by an officer operating with defective authority — would lend validity to that very proceeding. In this regard, *Lucia* stays true to the spirit of *Ryder* and further incentivizes litigants to bring their Appointments Clause challenges.[194] This extension thus guarantees the litigant an opportunity to argue their claim before a constitutionally valid officer. However, that reasoning is inapplicable in the case of further reviews by properly appointed officers. Coupled with *Freytag*'s indication that the claim must expire eventually, the conclusion of the first valid officer's review marks the appropriate balance and should define the outer limit of a timely challenge.

E. PREMATURE AND INADEQUATE CHALLENGES: COMPLETING THE FRAMEWORK

Finally, this subpart completes the doctrinal framework by considering two scenarios not previously addressed. First, it addresses the challenge raised prior to the completion of the initial hearing in the form of a collateral attack. Second, it evaluates the showing necessary to constitute a challenge for standing purposes.

191. *See* Freytag v. Comm'r, 501 U.S. 868, 879 (1991).
192. *See Ryder*, 515 U.S. at 182–83.
193. Andrade v. Lauer, 729 F.2d 1475, 1497 (D.C. Cir. 1984).
194. *See Ryder*, 515 U.S. at 182–83.

1. *Collateral Challenges: Too Early to be Timely*

While a challenge's timeliness can fail due to a tardy appearance, a premature challenge can suffer the same fate. The primary vehicle in which a litigant raises a preliminary — and potentially premature — Appointments Clause claim is with a collateral attack.[195] A collateral attack is "an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective."[196] In some instances, particularly in case of habeas corpus, a collateral attack originates at the conclusion of the original proceeding.[197] However, in the context relevant to this discussion, a collateral attack is created when a litigant, already engaged in one proceeding — typically an administrative proceeding — opens a suit in a federal district court directly attacking the appointment of the officer in the administrative proceeding. Yet, before the court can consider the Appointments Clause question, the litigant must establish subject matter jurisdiction. In the case of SEC proceedings, the authorizing statute provides exclusive remedies to parties engaged in proceedings with the Commission.[198] Thus, the court must determine whether it can resolve the claim prior to the exhaustion of administrative remedies.[199]

The Supreme Court in *Thunder Basin Coal Co. v. Reich* provided guidance in answering the question of whether a litigant could initiate a collateral constitutional attack prior to the conclusion of administrative proceedings.[200] The Court further distilled this guidance into three distinct factors: allowing jurisdiction if "'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and

195. An interlocutory appeal does not create a risk of a "premature" challenge since a litigant must first raise the issue at trial before moving for an interlocutory appeal, thus satisfying the timeliness requirement. *See* 28 U.S.C. § 1292 (2012).

196. *Collateral Attack*, BLACK'S LAW DICTIONARY (10th ed. 2014). Fans of *Making a Murderer* will recognize that a writ of habeas corpus is another common type of collateral attack.

197. *See* 28 U.S.C. § 2241(d) (2018) (stating that an application for the writ of habeas corpus may be made by a person in custody under sentence and judgement of a state court).

198. *See* 15 U.S.C. § 78y(a)(1) (2018) ("A person aggrieved by a *final* order of the Commission entered pursuant to this chapter may obtain review in the United States Court of Appeals.") (emphasis added).

199. *See* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938).

200. Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207 (1994).

if the claims are 'outside the agency's expertise.'"[201] The Second, Fourth, and Eleventh Circuits have applied the *Thunder Basin* factors to collateral Appointments Clause challenges raised against the SEC's ALJs and all have held that the litigant may not bypass the administrative process.[202]

In each case, the respective appellate court found that the collateral attack failed to satisfy any of the *Thunder Basin* factors. First, because the litigants were entitled to appeal a final Commission order to the appropriate court of appeals, preclusion of federal jurisdiction over the collateral challenge did not deny the opportunity for meaningful judicial review.[203] Second, the challenge functioned as a device for reversing an ALJ's adverse findings against the litigant and thus, could not be construed as "wholly collateral"[204] because a successful challenge would entitle the litigant to a new hearing and nullify the outcome of the original proceeding. Lastly, the courts reasoned that, because the Commission could conclude that the claims against the litigant were meritless and entirely avoid the constitutional question, the issue resided within the agency's expertise.[205] In this context, a collateral attack fails to meet the definition of a "timely" challenge because it is premature — so premature, in fact, that no federal court possesses jurisdiction to even hear the claim.

2. *Raising an Adequate Challenge*

Much of the preceding discussion has focused on the temporal aspect of a timely challenge, but it is also necessary to consider what exactly constitutes a valid challenge. At one end of the spectrum, an issue litigated through the adversarial process clearly represents a challenge.[206] More challenging is an issue raised in the answer to the complaint that receives no further attention

201. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 489 (2010) (quoting *Thunder Basin*, 510 U.S. at 212–13).

202. *See generally* Tilton v. SEC, 824 F.3d 276 (2d Cir. 2016); Bennett v. SEC, 844 F.3d 174 (4th Cir. 2016); Hill v. SEC, 825 F.3d 1236 (11th Cir. 2016).

203. *See Tilton*, 824 F.3d at 286–87; *Bennett*, 844 F.3d at 186; *Hill* 825 F.3d at 1250.

204. *See Tilton*, 824 F.3d at 287; *Bennett*, 844 F.3d at 187; *Hill*, 825 F.3d at 1252–53. The court in *Hill* noted that this distinction was meritless because the SEC retained the ability to pursue an enforcement action in Federal court, thus contesting the ALJs constitutionality did not provide an avenue to prevail on the merits. *Hill*, 825 F.3d at 1253.

205. *See Tilton*, 824 F.3d at 290; *Bennett*, 844 F.3d at 187–88; *Hill*, 825 F.3d at 1250–51.

206. *See, e.g.*, Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018); Ryder v. United States, 515 U.S. 177, 179 (1995).

during the trial phase. Under the Federal Rules of Civil Procedure, parties must raise all affirmative defenses in the first responsive pleading or risk waiving them.[207] Fundamentally, an affirmative defense is an "assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true."[208] In this regard, an Appointments Clause challenge functions as an affirmative defense because it attacks the validity of the underlying proceeding.[209] Thus, it should be expected that many Appointments Clause challenges will be found in the text of the first responsive pleading.[210]

The relevant question in this context is whether merely including the challenge in a pleading is sufficient to *entitle* a litigant to an answer on the merits of the challenge. The response to this proposition, simply put, is no. In the adversary system, courts rely on the principle of party presentation.[211] The parties must frame the issues for decision with the court acting as a neutral arbiter of the matters presented.[212] For the court to reach an informed decision, the issues and claims must be tested through the adversarial process to further refine and define the facts and law in dispute.[213] So, until the Appointments Clause issue receives additional attention, it fails to rise to the level of a "challenge" as used by the Court in *Ryder*. However, including this affirmative defense in a responsive pleading is not without benefit, because a party's pleadings directly impact the appellate process. In fact, "[f]ailure to plead an affirmative defense below results in a waiver and the issue cannot be raised for the first time on appeal."[214] The pleading, while not

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207. *See* Morrison v. Mahoney, 399 F.3d 1042, 1046 (9th Cir. 2005); *see also* FED. R. CIV. P. 8(c). Agencies typically use procedural guidelines that closely resemble the Federal Rules of Civil Procedure. *See, e.g.*, 17 C.F.R. § 201.220 (2016) ("A respondent must affirmatively state in the answer any avoidance or affirmative defense . . . [f]ailure to do so may be deemed a waiver.").

208. *Defense*, BLACK'S LAW DICTIONARY (10th ed. 2014).

209. *See* Tilton v. SEC, 824 F.3d 276, 288 (2d Cir. 2016).

210. The requirement that all affirmative defenses be contained in the first responsive pleading is subject to exceptions. *Morrison*, 399 F.3d at 1046. Lucia successfully raised his challenge before the Commission in the first instance and did not include the Appointments Clause challenge as an affirmative defense in his answer to the complaint. *See Lucia*, 138 S. Ct. 2044, 2055 (2018); Answer of Respondent Raymond J. Lucia Companies, Inc. at 7–8, *In the Matter of Raymond J. Lucia Companies, Inc. & Raymond J. Lucia, Sr.*, Release No. 495 (July 8, 2013) (No. 3-15006).

211. Greenlaw v. United States, 554 U.S. 237, 243 (2008).

212. *Id.*

213. Tory A. Weigand, *Raise or Lose: Appellate Discretion and Principled Decision-Making*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 179, 184 (2012).

214. Kelson v. City of Springfield, 767 F.2d 651, 657 (9th Cir. 1985).

constituting a challenge itself, impacts the timeliness of a later challenge brought forward on appeal.

As discussed earlier, the appellate system generally functions around the principle of "raise it or waive it."[215] Thus, in this context, the pleading is sufficient to "raise" the issue, even if no further litigation addresses that specific aspect during the trial. It satisfies the temporal requirement of a timely challenge and validates any future challenge under the Appointments Clause. It is worth noting that this premise incentivizes litigants to include any and all — no matter how far-fetched — affirmative defenses in their responsive pleadings. Indeed, this is the very approach that Lucia himself took in the case at the heart of this note.[216] In fact, the Federal Rules of Civil Procedure require a party to "state in short plain terms its defenses to each claim asserted against it."[217] Consequently, there is much debate as to whether this language brings affirmative defenses into the sphere controlled by the Court's rulings in *Twombly* and *Iqbal*, which requires the pleading of facts that, if accepted as true, state a plausible claim for relief.[218] Taken together, this section has attempted to define and sketch the outbounds of the "timely challenge" framework. This analytical tool can then be applied in the context of a hypothetical Appointments Clause challenge.

IV. APPLICATION OF THE TIMELY CHALLENGE DOCTRINE TO SEC PROCEEDINGS

Having developed a framework for analyzing a "timely challenge," this Part of the Note applies it in the context of a SEC proceeding — the background from which the *Lucia* case arose. Part IV.A details the administrative process and highlights the instances where such a challenge could be raised. Two scenarios, as detailed below, where the challenge is first raised in an appellate court requires application of this new framework. Part IV.B

215. *See supra* Part III.C.

216. *See, e.g.*, Answer of Respondent Raymond J. Lucia Companies, Inc. at 7–8, *In the Matter of Raymond J. Lucia Companies, Inc. & Raymond J. Lucia, Sr.*, Release No. 495 (July 8, 2013) (No. 3-15006) (alleging eight different affirmative defenses).

217. FED. R. CIV. P. 8(c).

218. *See generally* Melanie A. Goff & Richard A. Bales, *A Plausible Defense: Applying* Twombly *and* Iqbal *to Affirmative Defenses*, 34 AM. J. TRIAL ADVOC. 603 (2011); Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). However, the discussion of specificity needed to satisfy those rulings in the context of an Appointments Clause affirmative defense is beyond the scope of this Note.

considers both an ALJ order adopted by the Commission that is then appealed to the circuit court as well as a case argued before the Commission and subsequently appealed.

A. THE FRAMEWORK OF A SEC PROCEEDING

Since the *Lucia* case directly implicates the SEC's ALJs, it is relevant to consider how the timely challenge constraint will impact those seeking to capitalize on the decision. The framework of a SEC administrative proceeding provides a useful tool for testing the bounds of a timely challenge. When the SEC initiates an administrative proceeding against a litigant, either the Commission presides over the case or it may be delegated to one of the Commission's ALJs.[219] Because the Commission itself is not the subject of the Appointments Clause violation, it is only relevant to consider proceedings over which an ALJ presides. At the conclusion of the hearing, the ALJ will issue an initial decision,[220] which may be appealed to the Commission.[221] The Commission may then grant or deny the petition for appeal or choose to review a decision sua sponte.[222] In instances where the Commission reviews the initial decision, it will issue its own decision, either affirming, reversing, or modifying the initial decision.[223] However, when the Commission declines review, it will issue an order deeming the initial decision final and an act of the Commission.[224] An aggrieved party then has sixty days to appeal the final Commission decision to the appropriate court of appeals.[225]

This framework results in five different occasions in which a litigant may raise an Appointments Clause challenge in the first instance. Specifically, the challenge may be raised: directly before the ALJ, before the Commission on appeal, in front of a federal appellate court during judicial review of the agency action, before the Supreme Court (should a writ of certiorari be granted), or with a collateral attack in federal district court. Of these five variations, four of them may be dealt with swiftly. Challenges raised directly

219. *See* 17 C.F.R. § 201.110 (2019); 15 U.S.C. § 78d-1(a) (2018).
220. *See* 17 C.F.R. § 201.360.
221. *See id.*
222. *See* 17 C.F.R. § 201.411; 17 C.F.R. § 201.360.
223. *See* 17 C.F.R. § 201.411.
224. *See* 17 C.F.R. § 201.360(d)(2); 5 U.S.C. § 78d-1(c).
225. *See* 5 U.S.C. § 78y(a). The final decision is only eligible for judicial review if the party appealed the decision to the Commission. *See* 17 C.F.R. § 201.410(e).

to the officer in question — the ALJ in this case — fall under the domain of *Ryder* and are timely.[226] *Lucia* governs a challenge raised directly before the Commission, also finding such a challenge as timely.[227] Waiting to raise the issue until the Supreme Court results in a loss of entitlement as dictated by *Freytag*.[228] Finally, a challenge in the form of a collateral attack is premature, and thus falls outside the jurisdiction of a federal district court.[229] This leaves only one scenario left to address, a challenge raised in the first instance on appeal in federal court. However, the decision being appealed can originate from two different sources: it can be a decision issued by the Commission after review, or it can be the initial decision of the ALJ accompanied by a Commission order granting it finality.[230]

B. APPOINTMENTS CLAUSE CHALLENGES RAISED IN FIRST INSTANCE AT THE APPELLATE LEVEL

1. *Orders Adopted by the Commission*

In instances where the Commission declines review and adopts the initial decision of the ALJ, the litigant's appearance at the federal appellate level operates as the first, and likely only, opportunity for substantive review.[231] Thus, the justification for classifying a challenge at this stage as timely is strong. Such a classification would stay true to the spirit of *Ryder*, both incentivizing Appointments Clause challenges and giving teeth to the text.[232] However, there are countervailing considerations, such as waiver and mootness, that require examination. To start, it is necessary to cabin the analysis to scenarios in which the Appointments Clause challenge is not raised as an affirmative defense. As noted above, including the claim in a responsive pleading, while not qualifying as a challenge, preserves the timeliness for when the issue is later

226. Ryder v. United States, 515 U.S. 177, 182–83 (1995) (holding that a challenge to the appointment of judges on the Coast Guard Court of Military Review raised directly to said judges is timely).
227. Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018).
228. Freytag v. Comm'r, 501 U.S. 868, 879 (1991).
229. *See supra* Part III.E.1.
230. *See* 17 C.F.R. § 201.411; 17 C.F.R. § 201.360(d)(2).
231. *See supra* Part IV.A.
232. *See Ryder*, 515 U.S. at 182–83.

litigated.[233] Thus, this Note argues that when the issue is properly raised as an affirmative defense, any subsequent challenge is timely.

The first question that must be resolved before turning to the question of a timely challenge is whether the Commission order adopting the initial ALJ decision renders the Appointments Clause challenge moot. The Commission is a constitutionally valid body, with each member appointed by the President and confirmed by the Senate.[234] The Commission order explicitly deems the ALJ decision "an action of the Commission."[235] Therefore, the argument is that, while the underlying decision may have been rendered in a manner contrary to the Constitution, the Commission order has cured any defect by effectively issuing its own identical decision. However, the Court's treatment of the de facto officer doctrine in *Ryder* demonstrates that this reasoning is flawed.

Although the Commission purports to adopt the initial decision as its own action, in practice, it functions similarly to a summary affirmation of that decision. The Commission order acts analogous to an appellate court invoking the de facto officer doctrine, lending validity to the findings of an underlying officer. But in this instance, the alleged violation does not stem from statutory interpretation, rather it is a trespass on the Executive's appointment power — a distinction that renders the de facto officer doctrine inapplicable.[236] Nor does this scenario fit into the narrow realm of the de facto validity doctrine.[237] Therefore, lending validity to an ALJ's decision runs contrary to the Court's reasoning in *Ryder*. Furthermore, the Commission exercises discretionary review of the initial decision. Allowing a Commission final order to cure the constitutional defect would enable the Commission to foreclose opportunities to raise the challenge by simply denying review. Such an incentive structure would allow Appointments Clause violations to permeate throughout the administrative proceeding.

The second question that this Note seeks to answer is whether the failure to raise the issue until reaching the appellate court

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233. *See supra* Part III.E.2. Notably, Lucia failed to include his Appointments Clause challenge as an affirmative defense. *See* Answer of Respondent Raymond J. Lucia Companies, Inc. at 7–8, *In the Matter of Raymond J. Lucia Companies, Inc. & Raymond J. Lucia, Sr.*, Release No. 495 (July 8, 2013) (No. 3-15006).

234. 15 U.S.C. § 78(d).

235. 5 U.S.C. § 78d-1(c).

236. *See* Ryder v. United States, 515 U.S. 177, 182–83 (1995).

237. *See supra* Part III.D.2.

constitutes a waiver. One of the key take-aways from *Freytag* is that litigants lose their entitlement to an answer on the merits if they delay too long in bringing the challenge.[238] However, *Lucia* provides a counter, demonstrating that a challenge raised in the first instance before the Commission is timely.[239] These two decisions can be reconciled with the following observation: a challenge raised during the first review by a constitutionally valid officer is per se timely, but becomes untimely on second review by a constitutionally valid officer.[240] This rule stems from several considerations. One being that allowing the challenge to expire during a proceeding orchestrated in violation of the Constitution undermines the legitimacy of the Appointments Clause and grants unwarranted validity to the officer in question. It effectuates the very harm the *Ryder* Court attempted to minimize by barring the de facto officer doctrine.

The challenge, however, cannot remain available indefinitely. The *Freytag* Court disregarded the proposition of an un-waivable structural challenge.[241] Allowing the issue to be raised at the litigant's leisure throughout the appellate process places an additional burden upon the appellate court. Instead of requiring the court to consider facts and claims not captured in the record, judicial efficiency is better served by removing the specter that new issues may arise and allowing the court to exercise its discretion in opening the door.[242] In this regard, limiting a timely challenge to the initial review by a valid officer strikes an appropriate balance between these two considerations. Thus, by declining to review the ALJ decision, the Commission preserves the Appointments Clause challenge for consideration by the circuit court.

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238. *See supra* Part III.C. In *Freytag*, the Court held that a challenge to the appointment of the STJ raised in the first instance on appeal before the Fifth Circuit was subject to discretionary review by the Supreme Court. Notably, the decision case had been heard by a STJ whose opinion was later adopted by the Tax Court thought the Supreme Court disavowed any inclination that the Tax Court simply "rubber stamped" the STJ opinion. *See* Freytag v. Comm'r, 501 U.S. 868, 871–72, 872 n.2 (1991).

239. Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018).

240. In *Freytag*, the first constitutional body was the Tax Court whose validity was not challenged in the case. *Freytag*, 501 U.S. at 872.

241. *See id.* at 893 (Scalia, J., concurring in part).

242. *See* Singleton v. Wulff, 428 U.S. 106, 121 (1976).

2. *ALJ Initial Decisions Litigated Before the Commission*

Given the conclusion above, it follows that a scenario in which the initial ALJ decision is reviewed by the Commission and the Commission decision is subsequently appealed to federal court, an Appointments Clause challenge is no longer timely. Here, the litigant received the opportunity to argue her case before a constitutionally-valid body with the ability to submit additional evidence.[243] Unlike an order granting finality to an ALJ decision, the decision issued after the Commission review supplants the initial decision, standing on its own reasoning.[244] In this regard, the harm inflicted by constitutional violation is mitigated. Rather than lending validity to the decision below by merely adopting it, the Commission conducts meaningful review and delivers a finding imbued with its own statutory and constitutional power.

Similarly, this result remains true to the Court's treatment of the Appointments Clause challenge in *Freytag*. Upon the second review, litigants lose their entitlement to receive an answer on the merits of the question.[245] They may still receive that answer, but it is at the discretion of the court. This follows the general principle of "raise it or waive it" as used in federal appellate system. Additionally, by allowing the appellate court to exercise discretion, the court can consider any broader implications that may result from granting relief. In the context of a post-*Lucia* case, the court could consider both the benefit a litigant would receive from rehearing a case that has already been reviewed by the Commission as well as the additional burden this would place upon the administrative agency.

V. CONCLUSION

The impact of the *Lucia* decision on the SEC is unclear. At the time the Supreme Court granted certiorari, the SEC identified 104

243. *See* 17 C.F.R. § 201.452 (2019).

244. *See* 17 C.F.R. § 201.411 ("The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record.").

245. The second review in *Freytag* occurred at the Fifth Circuit after the Chief Judge of the Tax Court adopted the Special Trial Judge's opinion as that of the Tax Court. *See Freytag*, 501 U.S. at 871–72. However, the Supreme Court reversed the Fifth Circuits ruling that the issue could be raised for the first time on appeal and adopted the discretionary approach. *Id*. at 879.

cases that had received an initial decision from an ALJ and were pending on review.[246] After the decision was handed down, the SEC suspended the proceedings for these at-risk decisions and has since properly appointed all of its ALJs.[247]

In early 2019, the SEC began working through the backlog cases,[248] but the impact outside of the SEC will likely be much larger. Of the nearly 1,900 ALJs in existence, the SEC only employs five.[249] Litigants who are able to timely and successfully challenge these ALJs will be entitled to a new hearing before a properly appointed officer. It is in this context that a timely challenge becomes critically important, not only for ensuring that litigants are afforded their constitutional protections, but also to ensure orderly and effective administration of various regulations. *Lucia* opened the door for further constitutional challenge to these various ALJs.

This Note has attempted to determine just how far the door has been opened. In adopting this framework of a "timely challenge," litigants will likely be afforded greater opportunity to challenge administrative proceedings on appeal. Furthermore, this may result in a general trend towards nullification of constitutional waivers before ALJs.

246. In re: Pending Admin. Proceedings, Securities Act Release No. 10440, Exchange Act Release No. 82178, Investment Advisers Act Release No. 4816, Investment Company Act Release No. 32929 (Nov. 30, 2017), https://www.sec.gov/litigation/opinions/2017/33-10440.pdf [https://perma.cc/LP3F-C29T].

247. In re: Pending Admin. Proceedings, Securities Act Release No. 10536, Exchange Act Release No. 83907, Investment Advisers Act Release No. 4993, Investment Company Act Release No. 33211 (Aug. 22, 2018), https://www.sec.gov/litigation/opinions/2018/33-10536.pdf [https://perma.cc/Y38F-KNW6].

248. Thomas Gorman, *This Week in Securities Litigation*, JD SUPRA (Jan. 7, 2019), https://www.jdsupra.com/legalnews/this-week-in-securities-litigation-2018-65725 [https://perma.cc/T6AC-3VN2].

249. *See Administrative Law Judges*, OFFICE OF PERS. MGMT. (Mar. 2017), https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency [https://perma.cc/T6AC-3VN2].