

[Securities Regulation Daily Wrap Up, ENFORCEMENT—U.S.: Government says Justice Gorsuch is one reason to prefer D.C. Circuit case to mull SEC's law judges, \(Sept. 29, 2017\)](#)

Securities Regulation Daily Wrap Up

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By [Mark S. Nelson, J.D.](#)

The government filed its long-awaited petition for certiorari in a case originating in the Tenth Circuit that challenges the constitutionality of the SEC's administrative law judges. A divided Tenth Circuit had granted SEC respondent David Bandimere's petition for review and held that the mode of appointing the ALJ in Bandimere's in-house proceeding violated the U.S. Constitution's Appointments Clause. The government's petition urged the Supreme Court to eventually consider the question presented by Bandimere's case but instead to select a case from the D.C. Circuit that presents fewer vehicle issues (*Bandimere v. SEC*, September 29, 2017).

Among the reasons the government cited for waiting was the presence of Justice Gorsuch as a circuit judge on the Tenth Circuit at the time of the government's request that that court review Bandimere's case en banc. The Tenth Circuit denied the government's request for the full court to rehear the case, although several judges dissented from the denial of a rehearing.

Both the [Tenth Circuit \(rehearing denied\)](#) case and the D.C. Circuit case (*Lucia v. SEC*; petition for review [denied](#) by equally divided court) turned on interpretations of the Supreme Court's *Freytag* opinion, which held that Tax Court special trial judges are inferior officers. Previously, the D.C. Circuit in *Landry* upheld the FDIC's ALJs because it found their decisions were not final. One judge concurred in *Landry* to emphasize his view that *Freytag* did not turn on finality and that ALJs exercising less than final powers could fall within the meaning of inferior officer because of the significance of those duties. The Tenth Circuit majority substantially adopted the concurring view in *Landry*.

The government's *Bandimere* petition summed up its view: "We therefore respectfully request that the Court hold this petition pending its consideration of the petition in *Lucia*. If the Court grants the petition in *Lucia*, the government suggests that the Court hold the petition in this case pending the final disposition of *Lucia*. If the Court denies the petition in *Lucia*, it should deny the petition in this case as well."

The government also promised a more fulsome explanation of why the court should decide the ALJ question when it replies to the *Lucia* petition in late October. The question of whether ALJs are inferior officers was a remnant of the Supreme Court's *Free Enterprise* opinion regarding the PCAOB, in which the court said in a footnote that it was not yet ready to consider the issue while noting that the D.C. Circuit's *Landry* opinion was disputed.

The case is [No. 17-475](#).

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