

## [Securities Regulation Daily Wrap Up, ENFORCEMENT—U.S.: Justices invite O'Melveny's Metlitsky to defend lower court Lucia ALJ judgment, \(Jan. 23, 2018\)](#)

Securities Regulation Daily Wrap Up

[Click to open document in a browser](#)

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

The Supreme Court has invited O'Melveny & Myers LLP partner Anton Metlitsky to serve as amicus curiae in *Lucia v. SEC* to defend the judgment below in which the D.C. Circuit Court held that the SEC's administrative law judges are employees rather than inferior officers who must be appointed in conformance with the U.S. Constitution's Appointments Clause. The justices recently agreed to hear Raymond Lucia's appeal regarding the constitutional status of the SEC's ALJs (Lucia argues the ALJs are officers); a decision in the case also may impact other federal agencies. The appointment of an amicus became necessary when the government confessed error in its certiorari-stage brief by ceasing to defend the SEC's view that its ALJs are employees and instead conceded that the SEC's ALJs are officers ([Lucia v. SEC](#), January 18, 2018).

Although *Lucia* would be Metlitsky's first argument before the Supreme Court, he does have significant prior experience in securities cases before the justices. His [law firm biography](#), for example, indicates that he drafted the certiorari petition (recently granted) in [China Agritech, Inc. v. Resh](#), which asks the court to decide if *American Pipe* tolling applies regarding an absent class member who later brought a class action beyond the limitations period. This case will give the justices an opportunity to extend or limit principles the court developed last term in [CalPERS v. ANZ Securities, Inc.](#) (2017), holding that *American Pipe*'s equitable tolling rule was unavailable to save an individual suit filed outside the three-year repose period contained in Securities Act Section 13.

Metlitsky's biography also lists several other Supreme Court writing credits in securities cases. In [Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning](#) (2016), the court held that Exchange Act Section 27 confers exclusive federal jurisdiction by incorporating the "arising under" test used for other federal laws under 28 U.S.C. §1331. O'Melveny represented the petitioner, Merrill Lynch. O'Melveny likewise represented the petitioner Chadbourne & Parke LLP in [Chadbourne & Parke LLP v. Troice](#) (2014) where the court interpreted the Securities Litigation Uniform Standards Act in the context of certificates of deposit that were at the heart of the Allen Stanford Ponzi scheme. The court concluded that SLUSA did not preclude state law-based class actions where Stanford had misled investors by telling them that their uncovered securities were backed by covered securities.

Metlitsky also has co-authored amicus briefs in a variety of matters. As an example, Metlitsky has dealt extensively with the Alien Tort Statute, including as co-author of an amicus brief for Rio Tinto Group in support of respondent Royal Dutch Petroleum Co. in the Supreme Court case *Kiobel v. Royal Dutch Petroleum* (2013). Metlitsky also has authored several academic pieces and blog posts on the ATS. Early in his career, Metlitsky clerked for both the Hon. Merrick Garland, currently Chief Judge of the D.C. Circuit, and for Supreme Court Chief Justice John Roberts.

The *Lucia* case will turn, in part, on how the justices read their prior decision in *Freytag*, a case finding that the Tax Court's special trial judges are officers for purposes of the Appointments Clause. The D.C. Circuit in [Lucia](#) held that the SEC's ALJs are employees because they lack finality in that an ALJ's initial order must be made final by Commission action. The *Lucia* panel relied on the majority opinion in *Landry v. FDIC*, in which the D.C. Circuit reached a similar conclusion regarding the FDIC's ALJs. But a concurrence in *Landry* cast doubt on the majority's "finality" conclusion. Ultimately, an equally-divided en banc D.C. Circuit [denied](#) Lucia's petition for review.

The Supreme Court's invitation for Metlitsky to defend the judgment below answers one question about the justices' decision to hear *Lucia*'s case. Both the government and *Lucia* had agreed that appointment of an amicus would be appropriate.

But several more [unanswered questions](#) remain at this stage of the case; for example: (1) what will become of *Bandimere*, a Tenth Circuit case raising the same question as *Lucia* and that was distributed for the same conference at which the justices granted certiorari in *Lucia* but which the court has not yet addressed via order; and (2) will the justices hear the removal question urged by the government in *Lucia*. The removal issue concerns the number of layers of tenure protection available to the SEC's ALJs; if the justices consider this issue, they will likely be called upon to mull their decision in *Free Enterprise*, where a majority of the justices held that the Public Company Accounting Oversight Board's board members enjoyed too many layers of good cause removal protection.

The case is [No. 17-130](#).

Attorneys: Anton Metlitsky (O'Melveny & Myers LLP).

Companies: Raymond J. Lucia Companies, Inc.

LitigationEnforcement: DoddFrankAct Enforcement FedTracker Securities SupremeCtNews