UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Plaintiff, v. ORACLE AMERICA, INC., Defendant.	OALJ Case No. 2017-OFC-00006 OFCCP No. R00192699 **DEFENDANT'S PARTIAL OPPOSITION TO OFCCP'S MOTION TO REASSIGN; DEFENDANT'S MOTION TO RECONSIDER ORDER GRANTING OFCCP'S MOTION TO REASSIGN; DEFENDANT'S MOTION TO DISMISS OR TO HOLD IN ABEYANCE**

Oracle files this response in partial opposition to OFCCP's motion to reassign this case to a different administrative law judge. To the extent Plaintiff's motion was granted by Judge Larsen on October 15, 2018, Oracle moves for reconsideration of that ruling, to dismiss without prejudice, and in the alternative, to stay. Oracle's motion, like its partial opposition, is supported by the memorandum of points and authorities below.

Oracle directs this response and this motion at your Honor, the Chief Judge, District Office, because (1) OFCCP directed its motion to this Court, (2) Judge Larsen indicated that this Court directed it to transfer the case; and (3) because Oracle does not believe Judge Larsen has the authority to rule on OFCCP's motion. Oracle has provided a copy of this motion and the accompanying memorandum of points and authorities to Judge Clark, as well as to OFCCP.

I. INTRODUCTION

All parties agree that the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), dictates that Judge Larsen can no longer preside over OFCCP's case against Oracle. Where Oracle and OFCCP part ways is their proposal for how the constitutional defect can be

remedied. OFCCP contends that the problem can be solved simply by transferring the case from Judge Larsen to another Department of Labor administrative law judge (ALJ). But merely reassigning this matter to a different ALJ does not resolve Oracle's constitutional challenge because there is not currently an ALJ in the Department that can constitutionally preside over this matter. There are currently no ALJs in the Department who have been appointed in the manner required by the Appointments Clause. Nor are those ALJs subject to removal without regard for statutory constraints that unduly limit the circumstances in which they can be removed from office and which render their involvement in this case as unconstitutional as any Appointments Clause violation. In short, reassigning the case to another ALJ simply means substituting one unconstitutional proceeding for another, resulting in Oracle (and OFCCP) spending significant additional time and resources relitigating this matter just to have it start again once the constitutional questions are resolved.

Given Oracle's remaining constitutional objections to a currently serving ALJ presiding over this matter, there is no need for this Court to permit further proceedings before Judge Clark[1] or any other unconstitutionally appointed ALJ. Instead, this Court should dismiss OFCCP's administrative complaint without prejudice so that OFCCP can refile a complaint once these constitutional difficulties are resolved. At a minimum, the Chief Judge should hold this case in abeyance and stay any further proceedings until these issues have been resolved.

II. ARGUMENT

A. Under *Lucia*, Judge Larsen cannot continue to preside over this matter.

The Appointments Clause provides that all "inferior Officers" may be appointed by the "President," "Courts of Law," or "Heads of Departments." U.S. Const. art. II, § 2, cl. 2. After the Supreme Court's decision in *Lucia*, 138 S. Ct. 2044, there can be no doubt that the Department's ALJs—including Judge Larsen—are inferior officers that must be appointed in this

[1] Oracle understands that your Honor, the Chief Judge, District Office, already directed Judge Larsen to transfer the matter to Judge Clark. Oracle now directs this response to this Court because Judge Larsen claims to have made the transfer at this your Honor's direction, and because Oracle does not believe that Judge Larsen can rule on this motion to reassign given *Lucia*. *See infra* n.3.

manner. The Supreme Court held that the SEC's ALJs are "inferior officers" that are subject to the Appointments Clause's restrictions on who may appoint them. *Id.* at 2054-55. In light of *Lucia*, OFCCP has conceded that the Department's ALJs are likewise inferior officers subject to the Appointments Clause. *See* Mem. in Supp. of Pl.'s Mot. to Reassign ("OFCCP Memo") at 2 n.4; *see also* Brief for Respondent at 14 n.6, *Big Horn Coal Co. v. Sadler*, No. 17-9558 (10th Cir. July 20, 2018) ("The Director concedes that DOL ALJs are inferior officers ....").

Even without that concession, it would be plain to see that Department ALJs are inferior officers. They exercise authority indistinguishable from the SEC ALJs addressed in *Lucia*. They have "the authority needed to ensure fair and orderly adversarial hearings," including the authority to (1) "receive evidence" and examine witnesses," (2) "conduct trials," (3) "rule on the admissibility of evidence," (4) "enforce compliance with discovery orders," and (5) issue "decisions containing factual findings, legal conclusions, and appropriate remedies." *Lucia*, 138 S. Ct. at 2053 (alterations omitted); *compare id. with* 41 C.F.R. § 60-30.15, 60-30.27 (governing authority of Department ALJs).

OFCCP has also conceded that Judge Larsen (as well as the Department's other ALJs) was not always appointed in the manner required for inferior officers. OFCCP Memo 3 ("Prior to December 21, 2017, DOL ALJs, including ALJ Larsen, did not all have Constitutionally ratified judicial appointments.").[2] Because, as OFCCP concedes, Oracle timely objected to this problem with Judge Larsen's appointment, Oracle is entitled to relief, OFCCP Memo 2-3 & n.3. *See Lucia*, 138 S. Ct. at 2055.

The "'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official." *Lucia*, 138 S. Ct. at 2055 (quoting *Ryder v. United States*, 515 U.S. 177, 183, 188 (1995)). As OFCCP explained in its motion, because Judge Larsen "has adjudicated proceedings in this case, including potentially dispositive motions, without having been constitutionally appointed," *Lucia* "obliges th[is] Court" to remove

[2] OFCCP contends that the Secretary's ratification of the appointment of Department ALJs cured any problem with their appointment going forward. Oracle disagrees. *See infra* § II.B.

him from this case. OFCCP Memo at 2-3.

Even if Judge Larsen has since been properly appointed—which he has not, *see infra* § II.B—he can no longer preside over this matter. Judge Larsen adjudicated potentially dispositive issues, and, as the Supreme Court said in *Lucia*, an ALJ in Judge Larsen's position "cannot be expected to consider the matter as though he had not adjudicated it before," and thus, "[t]o cure the constitutional error, another ALJ ... must hold the new hearing to which [Oracle] is entitled." *Lucia*, 138 S. Ct. at 2055; *see* Respondent's Brief at 14 n.6, *Big Horn Coal* ("[T]he Director does not contend that the Secretary's subsequent ratification of the ALJ's prior appointment ... retroactively validated his prior actions.").[3] And so, at a minimum, Oracle is entitled to new proceedings before a properly appointed ALJ. Moreover, because an Appointments Clause defect "goes to the validity" of the administration proceedings, any matter over which Judge Larsen did preside is rendered invalid.[4] *See Freytag v. Comm'r*, 501 U.S. 868, 879 (1991); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("[D]efect in ... appointment ... invalidate[s] a resulting order" and renders it a "nullity.").

For these reasons, Oracle and OFCCP are largely in agreement about what to do with the proceedings Judge Larsen has already adjudicated.[5] Oracle agrees that ALJ Larsen has adjudicated "potentially dispositive motions, without having been constitutionally appointed." OFCCP Memo 3. Oracle agrees that Judge Larsen can no longer be involved in the case. *Id.* And it agrees with OFCCP that "*Lucia* invites invalidation of the motions and pleadings ALJ Larsen has adjudicated in this case." *Id.* Had OFCCP limited its request as such, Oracle would have been in complete agreement, and, to be clear, Oracle does not object to those aspects of

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[3] For that same reason, Oracle resists Judge Larsen's authority to rule even on this motion to reassign. The Supreme Court made it clear that the impermissibly appointed ALJ was to have no further role in the case. And so, Oracle has directed its motion to the Chief Judge, District Office.

[4] This includes all substantive matters on which Judge Larsen ruled, including but not limited to (1) Oracle's motion for judgment on the pleadings relating to the temporal scope of claims in the litigation; (2) Oracle's motion on OFCCP's failure to conciliate claims; (3) OFCCP's motion relating to the temporal scope of discovery (and Oracle's subsequent request that Judge Larsen certify the issue for immediate appeal); and (4) discovery motions filed by both parties. Following *Lucia*, each of these decisions must be viewed as invalid.

[5] Indeed, even Judge Larsen agrees he took "significant action in this case" without being constitutionally appointed and, in light of *Lucia*, should have granted Oracle's initial motion to disqualify him on the grounds of his unconstitutional "appointment." *See* Order Granting Mot. to Reassign (Oct. 15, 2018).

OFCCP's request. But OFCCP's motion also seeks to have the case "reassigned to a different and *properly appointed ALJ*." OFCCP Memo at 2 (emphasis added); *accord id.* at 2. And while Oracle would have no objection there too if there were any properly appointed ALJs within the Department, there are not. And because there are not, Oracle cannot join OFCCP's request to have the case reassigned.

B. The Department's ALJs are not properly appointed under the Appointments Clause.

It is not possible for the Department to comply with its constitutional obligation to cure the unconstitutionality of the initial proceedings in this matter simply by reassigning the case to another of its ALJs because at present, there are no constitutionally appointed ALJs in the Department of Labor. Instead, this Court should dismiss without prejudice OFCCP's administrative complaint, or, alternatively, stay any proceedings until these constitutional questions can be resolved.

Ratification cannot and did not cure improper appointment. In contending there are ALJs available to hear Oracle's case, OFCCP points to Secretary Acosta's December 21, 2017 letters "ratifying the appointments of all existing DOL ALJs." OFCCP Memo 3.[6] But these "ratification" letters bear none of the necessary hallmarks for a proper appointment. To be sure, the Secretary, as a Head of Department under the Appointments Clause, probably *could* appoint its ALJs. But if he did so, it would come with formalities befitting the significance of vesting the sovereign authority of the United States with that individual; there would be the necessary administration of the "oath or affirmation," U.S. Const. art. VI, cl. 3, and the signing and delivery of a commission, *see id.* art. II, § 3; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 157 (1803) (delivery of commission is "*evidence* of an appointment"). These requirements are not "mere wall ornament[s]," but are instead crucial markers to eliminate any "question" of "whether someone is an officer of the United States." *See Dep't of Transp. v. Ass'n of Am.*

[6] Judge Clark, who Judge Larsen transferred this case to at this Court's direction, similarly had his employment ratified in this set of ratification orders.

R.R.s, 135 S. Ct. 1225, 1235 (2015) (Alito, J., dissenting). Consistent with the Constitution's requirements, these fixtures are necessary to ensure "accountability" by "identify[ing] the source" of an appointment. *Id.* at 1234-35; *Edmond v. United States*, 520 U.S. 651, 660 (1997) ("[T]he Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one.").

Secretary Acosta's ratification orders merely rubber stamp some other official's determination that these ALJs should be appointed. *See, e.g.*, Letter From Sec'y Acosta to Judge Larsen (Dec. 21, 2017), https://tinyurl.com/yb3qayqe ("I hereby ratify the Department's *prior appointment* of you as an Administrative Law Judge."). In fact, the ratification orders were prepared by Chief Judge Stephen R. Henley, who transmitted the "draft letters of appointment" just *one day* before the letters issued by the Secretary. Memo from Chief Judge Henley to Secretary at 1 (Dec. 20, 2017), https://tinyurl.com/ycfn5rub. That is hardly the decision-making process of a Secretary giving due consideration to his appointment of tenure-protected adjudicative officers. If anything, then, these ratification orders illustrate the Secretary still considers the Appointments Clause a mere "matter of 'etiquette or protocol,'" and not the critical safeguard it is meant to be. *See Edmond*, 520 U.S. at 659 (citation omitted).

Moreover, the ratification orders themselves make clear the Secretary did not consider what he was doing to be an *appointment*. The order uses both "ratification" and "appointment," and the Secretary distinguishes between them. That distinction carries constitutional significance; they are both used in the Constitution to mean different things and they no doubt carry different meanings. *Compare* U.S. Const. art. II, § 2, cl. 2 (referring to "Appointment of such inferior Officers" by the actual decision makers), *with* U.S. Const. art. VII ("The Ratification of the Conventions of nine states[] shall be sufficient for the establishment of this Constitution between the States so ratifying the same."). Had the Secretary wished to *appoint* these ALJs, he could have used that word instead. Indeed, the SEC has declined to rely on any ratification order, and has instead made clear that it is *appointing* its ALJs in its own right. *See Pending Admin. Proc.*, Securities Act of 1933 Release No. 10536, https://tinyurl.com/y6wz2zsj

(Aug. 22, 2018) ("we today reiterate our approval of their appointments *as our own* under the Constitution."). Secretary Acosta has done nothing similar, and the difference matters.

There is no other basis for saving these ALJs on a ratification theory. There is simply no "prior appointment" to ratify; the ALJs were not "appointed" in the manner required by the Constitution, but instead were hired as regular employees. Because that "hiring" did not satisfy the Appointments Clause, the "ratification" of that same "hiring" does not satisfy the Appointments Clause. Rather, ratification can work only to give effect to a prior action "as though authority to do the act *had been previously given*." *Cook v. Tullis*, 85 U.S. (18 Wall.) 332, 338 (1874) (emphasis added). Although a principal can ratify a "prior act ... which was done ... on his account" but without his authorization, Restatement (Second) of Agency § 82 (2017), a principal cannot ratify an act that would have been invalid even *with* his authorization, *see id.* § 86; *see also Newman v. Schiff*, 778 F.2d 460, 467 (8th Cir. 1985) ("Ratification cannot, however, give legal significance to an act which was a nullity from the start."). And so, for an appointment by someone other than the Secretary to have been constitutionally effective, such that the Secretary could ratify the decision, the person making the hiring would have needed constitutionally significant power to appoint in the first place.

But there is no mechanism by which the Secretary could delegate his authority to appoint ALJs. The constitutional defect found in *Lucia* was not simply that whomever originally hired the SEC ALJs could have "hired" or even "appointed" other ALJs but simply lacked permission from the Commissioners. Rather, the Constitution forbids anyone but the "President," "Courts of Law," or "Heads of Departments" from making the critical appointment, and then, only where Congress authorizes that mechanism "by Law." U.S. Const. art. II, § 2, cl. 2. These are the "exclusive method[s] by which those charged with executing the laws of the United States may be chosen." *See Buckley v. Valeo*, 424 U.S. 1, 118 (1976). Neither the Constitution (nor Congress, for that matter)[7] has indicated that the Secretary or other Heads of Department can

[7] It was on the basis of the SEC's absence of *statutory* authority to delegate appointment responsibilities that Justice Breyer concurred in the result reached by the Court. He reasoned that, even without reaching the constitutional question, there was no "statutory provision that would permit the Commission to delegate the power to appoint its

delegate that authority to anyone else. Indeed, the very point of the Appointments Clause was to prevent the "diffusion of the appointment power." *Freytag*, 501 U.S. 878; *see also Delegation of Power*, 21 Op. Att'y Gen. 355, 356 (1896) ("The power to appoint ... can not be delegated."). Because the Secretary had no authority to delegate his appointment power, and the person who hired the ALJs was not in one of the constitutionally mandated positions, Secretary Acosta's later ratification must be ineffective. To rule otherwise would be to "confer[] validity" upon the acts of an unconstitutional actor in violation of the Appointments Clause. *Ryder*, 515 U.S. at 180.

OFCCP has suggested that *Wilkes-Barre Hospital Co. v. NLRB*, 857 F.3d 364 (D.C. Cir. 2017), supports its ratification theory. It does not. As the D.C. Circuit explained, that case involved a situation where the Board later "expressly authorized [the official's] appointment." *Id.* at 371; *Wilkes-Barre Hosp. Co.*, 362 N.L.R.B. No. 148, at *5 (July 14, 2015) ("[T]he Board expressly authorized Walsh's selection as Region 4 Regional Director."). So, it is not clear that ratification principles were involved at all. But to the extent the D.C. Circuit spoke in ratification terms, it spoke directly to the agency principles of ratification discussed above. *See* 857 F.3d at 371 ("[R]atification occurs when a principal sanctions the prior actions of its purported agent."). Indeed, it makes sense that "a properly constituted Board" could ratify the decisions of an improperly constituted Board. The NLRB—whether properly constituted or not—is vested with the constitutional power to make appointments, and the only feature the improperly constituted NLRB would be missing is the authorization to exercise that power—i.e., a quorum of its members. *Id.* The properly constituted board can thus supply the missing authorization and "remed[y] any defect arising from the quorum violation." *Id.* For the reasons discussed above, the same is not true here where the Secretary has sought to ratify the appointment decisions of an official who never could have exercised that power in the first place

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administrative law judges to its staff." *See Lucia*, 138 S. Ct. at 2058 (Breyer, J., concurring). Of course, there is no suggestion that the Secretary of Labor has been granted any greater authority to delegate his appointment power to his staff.

even if the Secretary had made the necessary authorization.[8]

Competitive service unlawfully constraints appointments. Even if the Secretary's December 15, 2017 ratification orders were appointments by the Secretary, those appointments would still not suffice under the Constitution. At the time the Secretary issued the ratification orders, he was bound by federal regulations requiring him to appoint individuals based on competitive examination and competitive service selection procedures. *See Excepting Administrative Law Judges from Competitive Service (*Exec. Order No. 13843), 83 Fed. Reg. 32,755, 32,755 (July 10, 2018). Such limitations on whom a Head of Department can appoint are incompatible with the Constitution. The Constitution makes clear that "Heads of Departments" are meant to make an appointment of inferior officers for whatever reasons "they think proper." U.S. Const. art. II, § 2, cl. 2. Indeed, the President has emphasized that *Lucia* may "raise questions about ... whether competitive examination and competitive service selection procedures are compatible with the discretion an agency head must possess under the Appointments Clause in selecting ALJs." Exec. Order No. 13843, 83 Fed. Reg. at 32,755. To resolve any potential constitutional challenge, the President issued an executive order that exempted the appointment of administrative law judges going forward from these requirements. *Id.* And the Secretary recently adopted a process for appointments of ALJs pursuant to the Executive Order. *Secretary's Order* 07-2018, 83 Fed. Reg. 44307 (Aug. 30, 2018). Because the current Department ALJs were first hired prior to the implementation of this executive order and their "appointments" were "ratified" prior to the implementation of these orders, there are serious questions about whether the current slate of ALJs have been constitutionally appointed.

C. The manner of supervision of Department ALJs, including limitations on their removal, renders them constitutionally unfit.

In addition to the considerable Appointments Clause problems discussed above, two

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[8] Separately, ratification is appropriate only where it can be said that "a properly appointed official has the power to conduct an independent evaluation of the merits *and does so*." *Wilkes-Barre*, 857 F.3d at 371 (emphasis added) (quoting *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 117-21, 124 (D.C. Cir. 2015). Here, there is no indication that the Secretary conducted the necessary "independent evaluation" on the merits of appointing the Department ALJs, rather than just ratifying the currently presiding ALJs, and so the ratification is inappropriate. It appears he took only one day to consider whether every single appointment was appropriate.

additional structural concerns relating to how Department ALJs are supervised and removed preclude them from presiding over Oracle's case.

First, inferior officers, like the Department's ALJs must be "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663. That is, for an entity to be an appropriate inferior officer, they must be supervised by a principal officer. *See id.* at 663, 665. That is not the case here. The Secretary has formally delegated the supervisory function over ALJs to the Administrative Review Board. *See Delegation of Authority and Assignment of Responsibility to the Administrative Review Board*, 77 Fed. Reg. 69,378, 69,379 (Nov. 16, 2012). That body has been deemed to be composed of "inferior," not principal, officers. *See Varnadore v. Sec'y of Labor*, 141 F.3d 625, 631 (6th Cir. 1998); *see also Willy v. Admin. Review Bd.*, 423 F.3d 483, 490-91 (5th Cir. 2005) ("The Secretary does not contest that ARB members are 'inferior officers,' so, for purposes of this appeal, we assume that they are."). Accordingly, the structure of supervision of ALJs is fundamentally flawed. This problem can be remedied by action by the Secretary. The Secretary must retain power to hear administrative appeals or vest the authority with another principal officer, such as the Deputy Secretary, as was the Department's practice until 1996. *See Varnadore,* 141 F.3d at 629-30.

Second, the conclusion that Department ALJs wield the authority of an inferior officer also means the statutory constraints placed on their removal unconstitutionally impair the President's ability to faithfully execute the laws. By vesting the President with "[t]he executive Power" of the United States, U.S. Const. art. II, § 1, cl. 1, and charging him with the duty to "take Care that the Laws be faithfully executed," *id.* § 3, the Constitution "confers on the President 'the general administrative control of those executing the laws.'" *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 492 (2010). The "ability to execute the laws" requires being able to "hold[] his subordinates accountable for their conduct." *Id.* at 496. And the "traditional" way of doing so is through the "power to oversee executive officers through removal." *Id.* at 492. Indeed, the "power of removing" is just as important "to the execution of the laws" as the

"selection of administrative officers." *Myers v United States*, 272 U.S. 52, 117 (1926). Without that authority, the President could plausibly "escape responsibility for his choices by pretending that they are not his own." *Free Enter. Fund*, 561 U.S. at 497. And so, just like failures to abide by the requirements set out in the Appointments Clause, limitations on removal likewise threaten to render government unaccountable to the People. *Id.* at 499.

In light of this concern, the Supreme Court has upheld only "limited restrictions on the President's removal power"—i.e., "only one level of protected tenure separat[ing] the President from an officer exercising executive power." *Id.* at 495. And it has invalidated schemes where there are two levels of tenure protection between the President and the officer exercising executive power, because, "[w]ithout the ability to oversee the [lower-level officer,] or to attribute [that officer's] failings to those whom he *can* oversee, the President is no longer the judge of the [lower-level officer's] conduct." *Id.* at 496. Such schemes undermine executive authority and political accountability. *See id.* at 506.

Such an impermissible two-level scheme of tenure protection exists here. An ALJ may be removed by an agency head "only for good cause established and determined by the Merit System Protection Board," 5 U.S.C. § 7521(a), whose members are themselves removable "only for inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. § 1202(d). Indeed, the Administrative Procedure Act was passed, in part, to ensure that hearing examiners were independent from their employing agency. *See Ramspeck v. Fed. Trial Exam'rs Conference*, 345 U.S. 128, 131-32 (1953). In this way, "[n]either the President, nor anyone directly responsible to him, ... has full control." *Free Enter. Fund.*, 561 U.S. at 496. Because the President's authority to control the Department ALJ's exercise of constitutionally significant authority is thus circumscribed, the rule announced in *Free Enterprise* must apply, and the multiple layers of tenure protection provided to ALJs must be found unconstitutional. As a result, those officers are unable to lawfully perform their duties as inferior officers so long as the offending provision

remained in place.[9]

D. The appropriate remedy is to dismiss without prejudice or to stay the matter until such time as there is a Department ALJ who can lawfully preside over this matter.

For all these reasons, transferring OFCCP's case against Oracle to another of the Department's ALJs is inappropriate. But there are other ways—besides reassignment to another ALJ—to remedy such separation of powers violations. The Supreme Court has made clear that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to … *whatever relief may be appropriate* if a violation indeed occurred." *Ryder*, 515 U.S. at 182-83 (emphasis added); *Waller v. Georgia*, 467 U.S. 39, 50 (1984) (remedy for a structural error must be "appropriate to the violation"). An appropriate remedy can be fashioned to create the proper incentives for entities like Oracle to raise Appointments Clause violations in the first place. *See Ryder*, 515 U.S. at 182-83; *see also Lucia*, 138 S. Ct. at 2055 n.5 ("Appointments Clause remedies are designed not only to advance [the structural purposes of the clause] directly, but also to create '[]incentive[s] to raise Appointments Clause challenges.'" (second and third alterations in original) (quoting *Ryder*, 515 U.S. at 183)). Ensuring that the Appointments Clause violations are carefully policed by parties and respected by government actors is necessary to ensure that the Clause is "more than a matter of 'etiquette or protocol'; it is among the significant structure safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659 (citing *Buckley*, 424 U.S. at 125). For example, in setting out Executive Order 13843, the administration explained that it was necessary to provide safeguards beyond what *Lucia* specifically required because there are still "sound policy reasons to take steps to *eliminate doubt* regarding the constitutionality of the method of appointing officials who discharge significant duties and exercise such significant discretion." Exec. Order No. 13843, 83 Fed. Reg. at 32,755 (emphasis added).

[9] Indeed, even the Solicitor General of the United States has explained that this tenure protection is constitutionally suspect. In its briefing before the Supreme Court in *Lucia*, the Solicitor General took the position that unless the tenure protection provision of § 7521(a) were interpreted by the Court to essentially eliminate "for cause" protection for ALJs, Brief of U.S. 45-52, then "the limitations that the provision imposes on removal of the Commission's ALJs would be unconstitutional." *Id.* at 53.

This Court should do the same. To provide Oracle meaningful relief for the Appointments Clause violation it has brought to light, this Court should dismiss OFCCP's complaint without prejudice. OFCCP will be left in exactly the same place—it can refile its complaint if and when the Secretary *appoints* ALJs (as opposed to ratifying their prior unconstitutional "appointments"), and if and when he does so in a manner devoid of civil service limitations that cloud the appointment and exercise of authority by the current set of Department ALJs.[10] In the meantime, Oracle will not be required to participate in constitutionally subject proceedings. That sort of relief also incentivizes entities like Oracle to shed light on violations like those occurring here.[11]

Granting OFCCP's request for reassignment renders hollow vindication of the Appointment Clause problem. Oracle already has incurred significant expense during these two years of proceedings, yet it has maintained its Appointments Clause challenge throughout so that someday it might obtain a constitutional proceeding in the Department. To that end, there have been numerous filings required since April 21, 2017, the time at which Oracle first alerted OFCCP and Judge Larsen of the Appointments Clause problem. OFCCP's approach would render Oracle's diligence in raising these constitutional challenges all for naught, and it would subject Oracle (and OFCCP) to a further waste of resources; the same issues would need to be adjudicated once again, and it may be several additional years of proceedings before the Administrative Review Board or a federal court determines again that the proceedings were invalid and must be started anew for the third time. Such a regime obviously will discourage entities like Oracle from bringing important Appointments Clause challenges, challenges necessary for safeguarding separation of powers. OFCCP should not invite future proceedings it

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[10] Dismissal, of course, would also resolve—for the time being—any challenge by Oracle to the limitations placed on the authority to remove Department ALJs. While the statutory flaw could be addressed only by a court ruling on the constitutionality of the offending provision, dismissing or staying the case would provide a temporary remedy in this case as the ALJ would not be exercising the responsibilities of an "Officer[] of the United States." *See Free Enter. Fund*, 561 U.S. at 508-09.

[11] In the event this Court declines to dismiss the complaint, Oracle requests that this Court stay proceedings until there is a properly appointed ALJ to adjudicate this dispute. That would also serve to protect both Oracle and OFCCP from needless expense, while also permitting OFCCP to continue its case at an appropriate time.

knows may very well be subject to constitutional invalidation when the Secretary might instead appoint new ALJs in a manner consistent with the Appointments Clause.

III. CONCLUSION

For the above reasons, this Court should deny the portion of OFCCP's motion that requests reassignment to another Department ALJ. Instead, this Court should dismiss this action without prejudice so that OFCCP can refile its administrative complaint once the Secretary properly appoints a constitutionally appropriate adjudicator who can lawfully preside over this matter. In the alternative, this Court should hold this matter in abeyance and stay proceedings until those issues are resolved and a properly appointed adjudicator can lawfully preside over this matter.

Respectfully submitted,

October 23, 2018

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I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, The Orrick Building, 405 Howard Street, San Francisco, California 94105-2669. My electronic service address is jkaddah@orrick.com.

On October 23, 2018, I served the interested parties in this action with the following document(s):

DEFENDANT'S PARTIAL OPPOSITION TO OFCCP'S MOTION TO REASSIGN; DEFENDANT'S MOTION TO RECONSIDER ORDER GRANTING OFCCP'S MOTION TO REASSIGN; DEFENDANT'S MOTION TO DISMISS OR TO HOLD IN ABEYANCE

by serving true copies of these documents via electronic mail in Adobe PDF format the documents listed above to the electronic addresses set forth below:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 23, 2018, at San Francisco, California.

Jacqueline D.Kaddah

PROOF OF SERVICE BY PERSONAL DELIVERY

I am over the age of eighteen years and not a party to the within-entitled action. My business address is Specialized Legal Services, 1112 Bryant Street, Suite 200, San Francisco, California 94103.

On October 23, 2018, I served the following document(s):

DEFENDANT'S PARTIAL OPPOSITION TO OFCCP'S MOTION TO REASSIGN; DEFENDANT'S MOTION TO RECONSIDER ORDER GRANTING OFCCP'S MOTION TO REASSIGN; DEFENDANT'S MOTION TO DISMISS OR TO HOLD IN ABEYANCE

by hand-delivering true and correct copies of said documents and leaving the package with a clerk or other person in charge of the office at the following address:

Administrative Law Judge Richard Manuel Clark
U.S. Department of Labor
Office of Administrative Law Judges|
90 Seventh Street, Suite 4-800|
San Francisco, CA 94103-1516

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 23, 2018, at San Francisco, California.

RECEIVED

OCT 23 2018

Office of Administrative Law Judges
San Francisco, Ca