ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

IN THE MATTER OF:	)	
GREGG BECKER,	)	
Complainant,	)	ARB Case Nos. 2017-0005, 2017-0006
v.	)	
	)	ALJ Case No. 2014-SOX-00044
COMMUNITY HEALTH SYSTEMS, INC. and ROCKWOOD CLINIC, P.S.,	)	
Respondents.	)	

BRIEF FOR THE SOLICITOR OF LABOR AS AMICUS CURIAE

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The Solicitor of Labor (Solicitor) submits this brief as amicus curiae in response to the October 15, 2019 invitation from the Administrative Review Board (Board or ARB).

STATEMENT OF INTEREST

The Solicitor submits this brief to address whether Respondents Community Health Systems, Inc. and Rockwood Clinic, P.S. (collectively, CHS) have waived any objection under the Constitution's Appointments Clause to the appointment of the Department of Labor Administrative Law Judge (ALJ) who decided this case. CHS did not raise the objection during the ALJ proceedings or in its petition for review or opening brief to the Board. Twenty months after this appeal was fully

briefed, CHS filed a supplemental brief with the Board raising for the first time an Appointments Clause objection.[1] The Solicitor has a substantial interest in the adjudication of this issue and has previously filed briefs with the Board addressing this issue.[2] For the reasons set forth below, the Solicitor respectfully submits that CHS has waived any Appointments Clause objection by failing to raise it in a timely manner and the Board should not exercise discretion to excuse CHS' failure.

STATEMENT OF THE ISSUE

Whether CHS' Appointments Clause objection is properly before the Board.

STATEMENT OF THE CASE

This case arises under the anti-retaliation provision of the Sarbanes-Oxley Act (SOX). Section 806 of SOX protects an employee who provides information to his employer or the federal government regarding conduct that he reasonably believes constitutes certain types of fraud or a violation of certain rules, regulations, or provisions of federal law. *See* 18 U.S.C. 1514A(a). Section 806 prohibits employers from discharging, demoting, suspending, threatening,

[1] Notably, the Board did not solicit briefing on this issue, and CHS did not seek leave from the Board before filing the supplemental brief.

[2] The Solicitor filed briefs with the Board on April 8, 2019 in *Riddell v. CSX Transportation, Inc.* (No. 2019-0016) and on September 24, 2018 in *Leiva v. Union Pacific Railroad Co.* (No. 2018-0051). The Board decided *Leiva* without addressing whether the Appointments Clause objection had been waived. *See* 2019 WL 3293936, at *3 n.3 (May 17, 2019). *Riddell* is pending before the Board.

harassing, or in any other manner discriminating against an employee in the terms and conditions of employment because of such protected activity. *See id*.

Complainant Gregg Becker alleges that he engaged in protected activity and that CHS retaliated against him in violation of SOX. In November 2016, following a six-day trial-like hearing, the ALJ issued a decision finding that CHS retaliated against Becker in violation of SOX and awarding him certain damages. CHS and Becker each filed a petition for review with the Board, and by February 2017, the appeal was fully briefed. CHS filed an opening brief, a response brief, and a reply brief with the Board in addition to the petition for review.

As explained below, parties have been litigating for years whether agency ALJs are "inferior Officers" for purposes of the requirements of the Appointments Clause and whether agencies satisfied the requirements. *See* U.S. Const. art. II, sec. 2 ("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"). In December 2017, the Secretary of Labor (Secretary) ratified the appointments of the Department's ALJs, including the ALJ in this case.[3] In

[3] *See* https://www.oalj.dol.gov/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Memorandum_on_Ratification_of_Appointment_of_USDOL_ALJs_(Dec_20_2017).pdf (the Secretary's letter to the ALJ in this case ratifying his appointment is at page 25). The ratification was reported in the legal press. *See US Labor Department, Eyeing SCOTUS Case, Moves to Shield In-House Judges*, Nat'l Law Journal (Jan. 22, 2018). The requirements for appointing ALJs were later changed by Executive Order 13843, 83 Fed. Reg. 32755 (Jul. 10, 2018)

November 2017 and February 2018, the Department of Justice filed briefs with the Supreme Court taking the position that agency ALJs are constitutional officers subject to the Appointments Clause.[4] In June 2018, the Supreme Court decided *Lucia v. S.E.C.*, holding that the ALJs at the Securities and Exchange Commission (SEC) are "officers of the United States" and therefore must be appointed in accordance with the requirements of the Appointments Clause. *See* 138 S. Ct. 2044, 2051-54. The Court stated 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." *Id.* at 2055 (emphasis added).

CHS did not raise an objection to the ALJ under the Appointments Clause at any time during the ALJ proceedings or in its petition for review, opening brief, response brief, or reply brief filed with the Board. Twenty months later, in October 2018, CHS filed a supplemental brief with the Board raising the objection for the first time. CHS argues that the objection was not available to it until the Secretary's ratification of the Department's ALJs and the *Lucia* decision. On

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(excepting ALJs from competitive service). The Department has revised its process for appointing ALJs consistent with Executive Order 13843. *See* Secretary's Order 07-2018 (Aug. 16, 2018), 83 Fed. Reg. 44307 (Aug. 30, 2018) (Procedures for Appointment of Administrative Law Judges for the Department of Labor).

[4] *See* Brief for the Respondent in *Lucia v. S.E.C.*, No. 17-130, 2017 WL 5899983 (Nov. 29, 2017) (arguing that petition for certiorari should be granted); Brief for Respondent Supporting Petitioners in *Lucia v. S.E.C.*, No. 17-130, 2018 WL 1251862 (Feb. 21, 2018) (merits brief).

October 15, 2019, the Board issued a show cause order to Becker for not responding to the supplemental brief and an invitation to the Solicitor to file a brief addressing whether CHS waived the objection.

ARGUMENT

1. CHS Waived Any Appointments Clause Objection.

The ordinary principles of waiver and forfeiture apply to Appointments Clause challenges. *See Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009). Applying these principles, the Board typically does not consider an issue raised for the first time on appeal when that issue could have been raised before the ALJ. *See Nagel v. Unified Turbines, Inc.*, No. 13-010, 2013 WL 4928254, at *3 (ARB Aug. 8, 2013) ("[T]o the extent that this is an issue that Nagle should have raised before the ALJ, we will not consider arguments a party did not, but could have, presented to the ALJ."); *Mancinelli v. E. Air Ctr., Inc.*, No. 06-085, 2008 WL 592807, at *3 (ARB Feb. 29, 2008) ("We will not consider arguments a party did not but could have presented to the ALJ. Our function is to review ALJ recommended decisions for error; it is not to provide litigants with a forum where they can retry their cases with new theories.") (citation omitted); *Schlagel v. Dow Corning Corp.*, No. 02-092, 2004 WL

1004875, at *6 (ARB Apr. 30, 2004) (argument not raised before ALJ is waived on appeal).

Even if a party could not have raised an objection before the ALJ, the party typically waives the objection by not raising it in the petition for review filed with the Board. The Department's regulations applicable to SOX whistleblower cases state that "parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived." 29 C.F.R. 1980.110(a). Under whistleblower statutes generally, the Board has not hesitated to regard as waived objections that could have been raised in the petition for review. *See, e.g.*, *Jenkins v. U.S. E.P.A.*, No. 15-046, 2018 WL 2927663, at *10 n.49 (ARB Mar. 31, 2018) (Because the EPA did not assert that a ruling was "legal error on the part of the ALJ in its Petition for Review, the error is deemed to have been waived."); *Majali v. AirTran Airlines*, No. 04-163, 2007 WL 3286329, at *7 (ARB Oct. 31, 2007) ("[Complainant] did not raise this argument in his petition for review and thus it is waived."); *Talukdar v. U.S. Dep't of Veteran Affairs*, No. 04-100, 2007 WL 352434, at *6, 10 (ARB Jan. 31, 2007) ("The Board reviews only those aspects of the ALJ decision that are specified in the petition for review and listed in the Board's notice of review" and holding that party had forfeited argument not raised in petition for review.); *Bauer v. U.S. Enrichment Corp.*, No. 01-056, 2003 WL 21269143, at *3 n.3 (ARB May 30, 2003) (declining

to consider argument raised for first time in rebuttal brief and neither raised to ALJ nor included in petition for review).[5]

Accordingly, because CHS did not raise the Appointments Clause objection during the ALJ proceedings or (not that it would have necessarily mattered) in its petition for review, opening brief, or any other brief filed with the Board prior to its supplemental brief, CHS waived the objection.

2. The Board Should Not Exercise Discretion to Consider CHS' Belated Appointments Clause Objection.

Although an appellate tribunal like the Board has discretion to consider non-jurisdictional constitutional claims – such as an Appointments Clause challenge – that were not raised at trial, such discretion is exercised only in rare or exceptional cases. *See In re DBC*, 545 F.3d 1373, 1379-80 (Fed. Cir. 2008) (noting that "[t]he

[5] The Board's repeated rulings that a party waives any argument not raised in its petition for review are consistent with rulings from the Department's Benefits Review Board and the well-settled rule in the federal courts of appeals that a party waives any argument not included in its opening brief. *See*, *e.g.*, *Osborne v. Whitaker Coal Corp.*, Nos. 17-0404 BLA & 17-0405 BLA, 2018 WL 3727412, at *1 n.4 (BRB Jul. 31, 2018) ("Because employer did not raise the Appointments Clause argument in its opening brief, it waived the issue."); *Higgins v. Elkhorn Eagle Mining Co.*, No. 17-0475 BLA, 2018 WL 3727423, at *1 n.3 (BRB Jul. 30, 2018) (same); *Wilkerson*, 910 F.3d at 256 ("Only in its reply brief did it raise the Appointments Clause issue. That was one brief too late."); *Intercollegiate Broad. Sys.*, 574 F.3d at 755 (party forfeited Appointments Clause argument made for the first time in a supplemental brief by failing to raise the argument in its opening brief); *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008) ("We need not consider this argument because plaintiffs have forfeited it on appeal, having raised it for the first time in their reply brief."); *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived.").

Supreme Court itself has, in 'rare cases,' exercised its discretion to review a constitutional challenge not timely raised before the lower tribunal," but finding that "the circumstances of this case [do not] warrant such an exceptional measure") (quoting *Freytag v. C.I.R.*, 501 U.S. 868, 879 (1991)).

For example, the Board may "exercise discretion to consider waived arguments when it is necessary to avoid manifest injustice or where the argument presents a question of law and there is no need for additional fact finding." *See Avlon v. Am. Express Co.*, No. 09-089, 2011 WL 4915756, at *4 (ARB Sept. 14, 2011) (citations and internal quotation marks omitted). The Board exercises this discretion sparingly and has most often exercised it where refusal to consider an argument would result in a manifest injustice by for example prejudicing a *pro se* party who was diligent in pursuing the argument before the ALJ. *See id.* ("not reviewing [the waived argument] would render a manifest injustice as it would possibly cause [the *pro se* complainant's] entire case to be dismissed as it is the central issue on which the ALJ's decision rests"); *see also Gonzales v. J.C. Penney Corp., Inc.*, No. 10-148, 2012 WL 4753923, at *5 (ARB Sept. 28, 2012) ("While Gonzales does not raise this issue on appeal in her brief, this issue, which was addressed by the ALJ in his decision below, raises legitimate concerns as to OSHA's approval process that could invalidate the finality of the Secretary's order.").

a. There Would Be No Manifest Injustice Here.

No exceptional circumstances or injustice exist here, however. CHS will have every opportunity before the Board and a federal court of appeals (if it loses before the Board) to make any properly-preserved challenge to the ALJ's decision. Nothing about an Appointments Clause challenge, even if valid, goes to the ALJ's fairness, impartiality, or competence in deciding this case.

b. The Board Can Provide the Remedy Sought by CHS.

CHS suggests that it is unclear whether the Board, rather than an Article III court, can consider its Appointments Clause challenge and that, as a result, the challenge cannot be waived. *See* Supp. Br., 13-14. CHS' suggestion, however, is incorrect given that the remedy that it seeks from the Board – vacating the ALJ's decision and remanding the case to the Department's Office of ALJs for "new proceedings" before a "properly appointed" ALJ (*id.* at 17) – can be provided by the Board. *See In the Matter of Convergys Customer Mgmt. Grp., Inc.*, No. 16-013, 2019 WL 3293912, at *1 (ARB Jan. 31, 2019) (remanding case to Department's Office of ALJs for appointment of ALJ after having stayed case in light of *Lucia*); *see also Energy West Mining Co. v. Lyle*, 929 F.3d 1202, 1206 (10th Cir. 2019) (rejecting similar argument to the authority of the Department's Benefits Review Board because that "Board could have remedied a violation of the Appointments Clause by vacating the [ALJ's] decision and remanding for

reconsideration by a constitutionally appointed officer"). In light of this authority, CHS' reliance (*see* Supp. Br., 13) on *Associated Mortgage Bankers Inc. v. Carson*, No. 17-0075 (ESH), 2017 WL 6001733, at *6 (D.D.C. Dec. 1, 2017) – which involved a different agency's administrative judge and no reviewing board instead of a Department ALJ and an administrative board with the ability to review, vacate, and remand ALJ decisions – is unavailing.

CHS' reliance on *Jones Brothers, Inc. v. Secretary of Labor*, 898 F.3d 669 (6th Cir. 2018), is similarly misplaced. In *Jones Brothers*, the court found that "extraordinary circumstances" excused the forfeiture of an Appointments Clause claim because it was unclear under the Mine Act and the "agency dispute-resolution scheme of limited scope" that it established whether the Mine Safety and Health Review Commission (MSHRC) could entertain such a claim. *Id.* at 674, 677-78. Here, however and as explained above, the Board can clearly provide the remedy that CHS belatedly seeks. Furthermore, outside of the limited context of the Mine Act, the Sixth Circuit has rejected the "extraordinary circumstances" excuse that succeeded in *Jones Brothers* as cabined to the Mine Act's unique statutory text, not present here, which explicitly limits MSHRC's consideration of certain issues. *See Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 752-54 (6th Cir. 2019) (in case involving Black Lung Benefits Act proceeding before the Benefits Review Board, finding no extraordinary circumstances meriting consideration of

forfeited Appointments Clause argument and noting that "*Jones Brothers*' 'extraordinary circumstances' exception originates with the Mine Act's *statutory text*") (emphasis in original); *Swanigan v. FCA US LLC*, 938 F.3d 779, 788-89 (6th Cir. 2019) (in Labor-Management Relations Act case, refusing to consider waived argument and distinguishing *Jones Brothers* because *Jones Brothers* relied on MSHRC's legal authority and "specific statutory authority" in the Mine Act); *see also Energy West Mining*, 929 F.3d at 1206 n.3 (refusing to consider Appointments Clause challenge to Department ALJ and rejecting comparison to *Jones Brothers* because that case "addressed a provision specific to the Federal Mine Safety and Health Amendments Act of 1977" and "[o]ur case does not concern that statute").

Contrary to CHS' argument, it is clear that the Board would have had authority to consider and remedy an Appointments Clause objection had it been timely raised, thus providing no excuse for CHS' failure to raise the objection in its petition for review or opening brief to the Board.

c. The Appointments Clause Objection Was Readily Available, and CHS Had the Information to Timely Raise the Objection.

In addition, the Appointments Clause objection was readily available to CHS and its attorneys throughout the ALJ proceedings and when it filed its petition for review with the Board. The Supreme Court's *Lucia* decision relied on its decision in *Freytag* from 27 years prior, which addressed a similar Appointments Clause objection. *See* 138 S. Ct. at 2052-53 ("*Freytag* says everything necessary to decide

this case."). The first Appointments Clause challenge to an agency ALJ was decided almost 20 years ago in *Landry v. F.D.I.C*, 204 F.3d 1125, 1130 (D.C. Cir. 2000). Parties continued to challenge agency ALJs under the Appointments Clause successfully and unsuccessfully. For example, the D.C. Circuit issued a decision rejecting the objection in *Lucia* in August 2016, *see* 832 F.3d 277, and the Tenth Circuit issued a decision accepting the objection in December 2016, *see Bandimere v. S.E.C.*, 844 F.3d 1168.[6] Of course, the parties in *Lucia* and *Bandimere* made the Appointments Clause objection in their respective proceedings prior to 2016. *See In re Lucia*, S.E.C. Release No. 4190, 2015 WL 5172953, at *20-23 (Sept. 3, 2015); *In re Bandimere*, S.E.C. Release No. 9972, 2015 WL 6575665, at *19-21 (Oct. 29, 2015).[7]

Thus, CHS' argument that the objection was unavailable prior to the Secretary's ratification of the Department's ALJs in December 2017 and the *Lucia* decision in June 2018 is without merit. Indeed, the Sixth Circuit squarely rebutted

[6] *See also Burgess v. F.D.I.C.*, 871 F.3d 297, 300-03 (5th Cir. 2017) (party likely to succeed on argument that appointment of agency ALJ violated Appointments Clause).

[7] Around that same time, other parties raised their objections in federal court and sought injunctions to halt the administrative proceedings on grounds that the ALJs were not validly appointed under the Appointments Clause. *See*, *e.g.*, *Tilton v. S.E.C.*, No. 15-CV-2472 (RA), 2015 WL 4006165 (S.D.N.Y. Jun. 30, 2015) (denying motion for preliminary injunction), *aff'd*, 824 F.3d 276 (2d Cir. 2016); *Bennett v. S.E.C.*, 151 F. Supp. 3d. 632 (D. Md. 2015) (dismissing case for lack of jurisdiction), *aff'd*, 844 F.3d 174 (4th Cir. 2016).

a similar argument in a case rejecting the objection to a Department ALJ and finding no exceptional circumstances for excusing the waiver:

> Island Creek also cannot hold the line on the ground that its Appointments Clause challenge lacked merit until the Supreme Court decided [*Lucia*]. No precedent prevented the company from bringing the constitutional claim before then. *Lucia* itself noted that existing case law "says everything necessary to decide this case." The Tenth Circuit, before *Lucia*, held that administrative law judges were inferior officers. *Bandimere*[, 844 F.3d at 1188]. And many other litigants pressed the issue before *Lucia*. *See, e.g.*, *Tilton*[, 824 F.3d at 281]; *Bennett*[, 844 F.3d at 177-78]; *Burgess*[, 871 F.3d at 299]. That the Supreme Court once denied certiorari in a similar Appointments Clause case adds nothing because such decisions carry no precedential value. All in all, Island Creek forfeited this Appointments Clause challenge, and we see no reasoned basis for forgiving the forfeiture.

Wilkerson, 910 F.3d at 256-57 (some citations omitted). The availability of an Appointments Clause challenge should have been readily apparent to CHS much earlier in these proceedings.

Likewise, CHS had the information necessary to make an Appointments Clause objection to the Department ALJ in this case. As CHS explains, the ALJ is an "inferior officer" under the Appointments Clause if: (1) the ALJ's position is established by law; (2) the ALJ's duties, salary, and means of appointment are specified by statute; and (3) the ALJ exercises significant discretion in carrying out important functions. *See* Supp. Br., 7 (citing *Freytag*, 501 U.S. at 881-82). CHS argues that the first two criteria are "easily" satisfied by citing to various statutes and regulations – none of which are new. *Id.* at 7-8. And regarding the third criteria, the Department's regulations, including 29 C.F.R. 18.10 & 18.12, make

clear that the ALJ exercises significant discretion. *See id.* at 8-9. Were the significant discretion exercised by the ALJ not clear to CHS, the six-day trial on the merits in which CHS participated before the ALJ should have made the extent of the ALJ's discretion crystal clear.

Finally, there was no authority prior to the Secretary's ratification of the Department's ALJs in December 2017 to suggest that the ALJ was appointed by a "Head[] of Department[]" as the Appointments Clause requires. As CHS acknowledges, the Department hires ALJs by following a publicly-available process set forth by the Office of Personnel Management. *See id.* at 9-10. CHS further acknowledges that the Department's process is "not unique" and is "essentially the same" as the process used by "all agencies that hire ALJs, including the SEC." *Id.* at 9. CHS nonetheless asserts that, before it raised the Appointments Clause objection, it needed to conduct an investigation and send a FOIA request to the Department. *See id.* at 10-12. However, those efforts produced (unsurprisingly) nothing that was not already publicly-available. CHS' reliance on these efforts in its supplemental brief is merely an attempt to distract attention from its failure to raise the objection in a timely manner. CHS could have – like many other parties in similar proceedings – raised an Appointments Clause objection much earlier in the proceedings.

d. Allowing CHS to Pursue Such an Untimely Appointments Clause Objection Would Encourage "Sandbagging."

Raising the Appointments Clause objection so late in the administrative proceedings suggests that CHS is engaging in "sandbagging." Permitting an Appointments Clause objection to be raised for the first time twenty months after briefing a case on appeal to the Board "would encourage what Justice Scalia has referred to as sandbagging, i.e., 'suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later—if the outcome is unfavorable—claiming that the course followed was reversible error.'" *DBC*, 545 F.3d at 1380 (quoting *Freytag*, 501 U.S. at 895 (Scalia, J., concurring in part and concurring in the judgment)). Here, CHS did not raise the Appointments Clause challenge at any point during the ALJ proceedings. It was only after receiving a mostly adverse ALJ decision and twenty months after fully briefing the matter before the Board that CHS challenged the ALJ's appointment. Under these circumstances, the Board should not reward "sandbagging" by exercising discretion to consider an objection that has been waived.

Finally, if the Board were to consider CHS' late Appointments Clause objection, it could open the floodgates to such challenges, and any and every losing party to a Board proceeding involving an ALJ decision would be able to raise the objection at any stage. The result could be a disruptive re-do of years' worth of

administrative proceedings based on Appointments Clause claims raised for the first time late in those proceedings.

CONCLUSION

For the foregoing reasons, the Solicitor respectfully submits that CHS has waived any Appointments Clause objection by failing to raise it in a timely manner and that the Board should not exercise discretion to excuse CHS' failure. Accordingly, the Board should disregard the supplemental brief filed by CHS.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Solicitor of Labor as Amicus Curiae was served this 12th day of November, 2019, by email, on each of the following:

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