No. 18-70184

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REBECCA DOMINGUEZ,
Successor of Mary Ellen Rubi, Widow of Joh F. Rubi,

Petitioner,

v.

BETHLEHEM STEEL CORPORATION
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT

KATE O'SCANNLAIN
Solicitor of Labor

KEVIN LYSKOWSKI
Acting Associate Solicitor

MARK REINHALTER
Counsel for Longshore

GARY K. STEARMAN
Counsel for Appellate Litigation

MATTHEW W. BOYLE
Attorney
U. S. Department of Labor
Office of the Solicitor
Suite N2117, 200 Constitution Ave. NW
Washington, D.C. 20210
(202) 693-5660
Attorneys for the Director, Office of Workers' Compensation Programs

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JURISDICTIONAL STATEMENT

This appeal arises from a claim filed by Mary Ellen Rubi against Bethlehem Steel Corporation, former Employer of her deceased husband John F. Rubi, for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (Longshore Act or Act).[1] The

[1] Mrs. Rubi is deceased. Her granddaughter, Rebecca Dominguez (Petitioner), is pursuing the claim as personal representative of Mrs. Rubi's estate.

Administrative Law Judge William J. King (ALJ) had jurisdiction to hear the claim under 33 U.S.C. §§ 919(c), (d). He issued a decision dated December 1, 2016, which became effective on December 5, 2016, when it was filed in the office of the district director. Excerpts of Record (ER) 11; 33 U.S.C. § 921(a).

Petitioner appealed the ALJ's order to the Benefits Review Board (Board) on December 21, 2016. Because the appeal was filed within the thirty-day period provided by 33 U.S.C. § 921(a), it invoked the Board's review jurisdiction under 33 U.S.C. § 921(b)(3). On December 6, 2017, the Board issued a final Decision and Order, affirming the ALJ's decision. ER 1.

Petitioner was aggrieved by the Board's decision, and filed a petition for review with this Court on January 22, 2018, within the sixty days allowed under 33 U.S.C. § 921(c). Mr. Rubi's alleged injuries, as well as his death, occurred in the State of California, within this Court's territorial jurisdiction. Consequently, under § 921(c) of the Longshore Act, this Court has jurisdiction over this appeal.

STATEMENT OF THE ISSUES

The Appointments Clause provides that inferior officers are to be appointed by "the President," the "Heads of Departments," or the "Courts of

Law." Petitioner argues in her opening brief that the ALJ's decision denying her claim should be vacated, *inter alia*, because he was not properly appointed.[2] The question presented is:

Did the Petitioner forfeit her Appointments Clause claim by failing to raise it before the administrative agency?

STATEMENT OF THE CASE

In his December 1, 2016 decision, the ALJ denied Mrs. Rubi's claim for death benefits, finding that Mr. Rubi's exposure to asbestos did not cause or contribute to his gastric cancer or hasten his death. ER 11. In a Decision and Order dated December 6, 2017, the Board affirmed. ER 1. At no point during the administrative proceedings—before either the ALJ or the Board—did Petitioner challenge the ALJ's authority under the Appointments Clause.

After appealing to this Court, Petitioner filed a motion for summary vacatur, arguing for the first time that the ALJ's decision should be vacated because he was not properly appointed under the Appointments Clause, U.S. Const. Art. II, sec. 2, cl. 2. A motions panel denied the request on October 17, 2018.

[2] Petitioner also challenges the ALJ's decision on the merits. Opening Brief at 23-65. This brief does not address those arguments.

SUMMARY OF THE ARGUMENT

The Court correctly rejected Petitioner's Appointments Clause challenge in denying her motion for summary vacatur. Petitioner forfeited her Appointments Clause claim by failing to raise it before the administrative agency.

ARGUMENT

Petitioner's argument for vacatur of the ALJ's decision because he was not appointed in accordance with the Appointments Clause should be rejected.

I. Petitioner forfeited her Appointments Clause challenge by failing to raise the issue before the agency.

Petitioner's failure to preserve her Appointments Clause claim results in its forfeiture before this Court. Under longstanding principles that govern judicial review of administrative decisions, this Court should not reach a claim that could and should have been preserved before the agency, but was not.

The Appointments Clause provides that inferior officers are to be appointed by "the President," the "Heads of Departments," or the "Courts of Law." U.S. Const. Art. II, sec. 2, cl. 2. In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court held that Security Exchange Commission ALJs are inferior officers who must be appointed consistent with the

Constitution's Appointments Clause.[3] In so holding, the Supreme Court explained that it "has held 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," and that Lucia was entitled to relief because he "made just such a *timely* challenge" by raising the issue "before the Commission." *Id.* at 2055 (emphasis added, quotation marks omitted). To support that conclusion, the Court cited *Ryder v. United States*, 515 U.S. 177 (1995), which held that the petitioner was entitled to relief on his Appointments Clause claim because he—unlike other litigants—had "raised his objection to the judges' titles before those very judges and prior to their action on his case." *Ryder*, 515 U.S. at 181-83. And forfeiture and preservations concerns had been raised in *Lucia's* merits briefing, as amici the National Black Lung Association urged the Supreme Court to "make clear that where the losing party failed to properly and timely object, the challenge to an ALJ's appointment cannot succeed." Amici Br. 15, *Lucia v. SEC*, No. 17-130, 2018 WL 1733141 (U.S. Apr. 2, 2018).

[3] On the merits of the Appointments Clause challenge, the Director agrees that ALJs who preside over Longshore Act proceedings are inferior officers, and that the ALJ below was not properly appointed when he adjudicated the case. In December 2017, the Secretary of Labor ratified the appointments of Department of Labor ALJs, but Judge King had retired by that point.

Unlike the challenger in *Lucia*, Petitioner failed to timely raise and preserve her Appointments Clause challenge before the agency. For over three years, from October 2014, when Mrs. Rubi requested an ALJ hearing, through December 2017, when the Board issued its decision affirming the denial of benefits, Petitioner never raised the Appointments Clause issue. Instead, Petitioner waited until after she had lost before both the ALJ and the Board before raising her challenge.

Under longstanding principles of administrative law, Petitioner may not now raise in court an argument she failed to preserve before the agency. In *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 35 (1952), a litigant argued for the first time in court that the agency's hearing examiner had not been properly appointed under the Administrative Procedure Act. Based on the improper appointment, the district court invalidated the agency's order. *Id.* The Supreme Court reversed, holding that the litigant forfeited this claim by failing to raise it before the agency, and explained that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made" during the agency's proceedings "while it has opportunity for correction." *Id.* at 36-37. Although the Court recognized that a timely challenge would have rendered the agency's decision "a nullity," *id.* at 38, it refused to entertain the

forfeited claim based on the "general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice," *id.* at 37.

This Court has consistently applied these normal principles of forfeiture, *see NLRB v. Southeast Ass'n for Retarded Citizens, Inc*., 666 F.2d 428, 432 (9th Cir. 1982) (quoting *L.A. Tucker Truck Lines, Inc.*, 344 U.S. at 37), and emphasized that "[a]ll issues which a party contests on appeal must be raised at the appropriate time under the agency practice." *Inter-Tribal Council of Nevada v. U.S. Dept. of Labor*, 701 F.2d 770, 771 (9th Cir. 1983) (holding that, because petitioner failed to raise the issue of the Secretary's authority to recoup allegedly misspent funds in either its pre-hearing statement or at the hearing before the ALJ, the Court could not consider the issue on appeal). And in cases under the Longshore Act, the Court will not consider issues that were not raised and preserved before the Board.[4] *Parker v. Motor Boat Sales, Inc*., 314 U.S. 244, 251 (1942) (failure

[4] Petitioner did not raise her Appointments Clause challenge to either the ALJ or the Board. Although she arguably was required to apprise both tribunals, *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989) (issue raised for first time in appeal to the Board waived), the Court need not reach the question because Petitioner failed to meet even the bare minimum obligation of raising the issue to the Board. *See Motton v. Huntington, Ingalls Indus., Inc.*, 52 BRBS 69, 2018 WL 6303734 *1, n.1 (BRB Nov. 14,

to raise issue of widow's capacity to file claim below waived);[5] *Kamala Serv. v. Director, OWCP*, 354 F.3d 1085, 1094 (9th Cir. 2004); *Duncanson-Harrelson Co. v. Director, OWCP*, 644 F.2d 827 (9th Cir. 1981) (employer could not contest situs element of coverage under the Longshore Act where it had not raised the issue before the ALJ or challenged it on appeal to the Board); *accord Aetna Cas. & Sur. Co. v. Director, OWCP*, 97 F.3d 815 (5th Cir. 1996) (argument not raised before the Board, and raised for the first time on appeal, was waived); *General Dynamics Corp. v. Sacchetti*, 681 F.2d 37 (1st Cir. 1982) (argument that worker had a pre-existing permanent total disability was not raised before the Board and was therefore waived).[6]

2018) (Appointments Clause challenge forfeited when not raised until post-briefing motion); *Luckern v. Richard Brady & Assoc*., BRBS 65, 66 n.3 (BRB 2018) (challenge forfeited when not raised until reply brief).

[5] When *Parker* was decided, deputy commissioners, rather than ALJs, conducted hearing in Longshore Act cases, and any party aggrieved by the deputy commissioner's decision could seek review in the U.S. district court. The underlying principle, however—that issues must be raised before the agency—remains the same.

[6] The courts of appeals apply this same principle when reviewing Board decisions issued under the Black Lung Benefits Act, which incorporates the Longshore Act's judicial review provision, 30 U.S.C. §932(a) (incorporating 33 U.S.C. § 921). *See McConnell v. Director, OWCP,* 993 F.2d 1454, 1460 n.8 (10th Cir. 1993) (refusing to consider argument not raised before Board); *see also Micheli v. Director, OWCP,* 846 F.2d 632, 635 (10th Cir. 1988) (refusing to review ALJ's finding that was not appealed to Board); *accord Hix v. Director, OWCP,* 824 F.2d 526, 527 (6th Cir. 1987); *Arch Mineral Corp. v. Director, OWCP*, 798 F.2d 215, 220 (7th Cir. 1986); *Director, OWCP v. North American Coal Corp.,* 626 F.2d 1137, 1143-44 (3d Cir. 1980).

These principles apply with full force to Appointments Clause challenges. The courts of appeals have consistently held that Appointments Clause challenges are "nonjurisdictional" and receive no special entitlement to review. *E.g.*, *GGNSC Springfield LLC*, 721 F.3d 403, 406 (6th Cir. 2013) ("Errors regarding the appointment of officers under Article II are 'nonjurisdictional.'") (quoting *Freytag v. C.I.R.*, 501 U.S. 868, 878-79 (1991)). Thus, even after *Lucia*, this Court, as well as the Tenth and Sixth Circuits, have all held that Appointments Clause claims may be forfeited when a petitioner fails to preserve them before the agency. *Kabani & Co., Inc. v. SEC*, 733 F. App'x 918 (Mem.), 2018 WL 3828524 at *1 (unpub.) (9th Cir. Aug. 13, 2018) ("[P]etitioners forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency."); *Turner Bros., Inc. v. Conley*,___F. App'x___, 2018 WL 6523096, *1 (10th Cir. 2018) (agreeing that "Turner Brothers' failure to raise [Appointments Clause] issue to the agency is fatal."); *Jones Bros. v. Secretary of Labor,* 898 F.3d 669, 677 (6th Cir. 2018) (finding Appointments Clause challenge forfeited when litigant failed to press issue before agency, but excusing the forfeiture in light of the unique circumstances of the case). Likewise, the

Eighth and Federal Circuits reached the same result before *Lucia*. *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 798 (8th Cir. 2013) (holding party waived Appointments Clause challenge by failing to raise the issue before the agency); *In re DBC*, 545 F.3d 1373, 1377-81 (Fed. Cir. 2008) (finding litigant forfeited Appointments Clause argument by failing to raise it before agency). Similarly, this Court, and the Sixth and D.C. Circuits, have found Appointments Clause challenges forfeited when the petitioner failed to raise it in its opening brief before the court. *Kabani & Co.*, *supra*; *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018); *Intercollegiate Broadcast Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2013).

The Federal Circuit has explained that a timeliness requirement for Appointments Clause challenges serves the same basic purposes as those underlying administrative exhaustion: "First, it gives [the] agency an opportunity to correct its own mistakes . . . before it is haled into federal court, and [thus] discourages disregard of [the agency's] procedures." *In re DBC*, 545 F.3d at 1378 (internal quotations omitted). Second, "it promotes judicial efficiency, as [c]laims generally can be resolved much more quickly and economically in proceedings before [the] agency than in litigation in federal court." *Id.* at 1379 (quoting *Woodford v. Ngo*, 548 U.S. 81, 89

(2006)). Both of those reasons apply here. If Petitioner had raised the Appointments Clause challenge during the administrative proceedings, the Secretary of Labor, or the Board could well have provided an appropriate remedy.

In fact, both the Department of Labor and the Board have taken appropriate remedial actions: the Secretary of Labor ratified the prior appointments of all then-incumbent agency ALJs "to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution." *Available at* https://www.oalj.dol.gov/Proactive_disclosures_ALJ_appointments.html. And the Board has held that where an ALJ was not properly appointed, the "parties are entitled to a new hearing before a new, constitutionally appointed administrative law judge," and accordingly remanded the case for that to occur. *Miller v. Pine Branch Coal Sales, Inc.,* --- Black Lung Rep. (MB) ---, BRB No. 18-325 BLA (Oct. 22, 2018) (en banc) (*available at* https://www.dol.gov/brb/decisions/blklung/published/18-0323.pdf); *Billiter v. J&S Collieries*, BRB No. 18-0256 (Aug. 9, 2018) (remanding for Appointments Clause remedy); *Crum v. Amber Coal*, BRB No. 17-0387 (Feb. 26, 2018) (same). But because Petitioner never raised the issue,

neither the Secretary nor the Board was given an opportunity to consider and resolve it during the normal course of administrative proceedings.

Finally, considering Appointments Clause arguments raised for the first time on appeal "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.'" *In re DBC*, 545 F.3d at 1379 (quoting *Freytag*, 501 U.S. at 895 (Scalia, J., concurring in part and concurring in the judgment)); *see also Stern v. Marshall*, 564 U.S. 462, 481-82 (2011) (explaining that "[w]e have recognized the value of waiver and forfeiture rules in complex cases," because "the consequences of a litigant sandbagging the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor—can be particularly severe" (internal quotation marks, alterations, and citations omitted)); *First-Citizens Bank & Trust Co. v. Camp*, 409 F.2d 1086, 1088-89 (4th Cir. 1969) ("[O]rdinarily, a litigant is not entitled to remain mute and await the outcome of an agency's decision and, if it is unfavorable, attack it on the ground of asserted procedural defects not called to the agency's attention when, if in fact they were defects, they would have been correctable at the administrative level."); *cf.*

Jones Bros., 898 F.3d at 677 (observing that "it's not as if Jones Brothers sandbagged the Commission or strategically slept on its rights"). Here, Petitioner's conduct suggests strategic handling of her constitutional claim—she waited to see if the Board would grant her appeal and then, only after losing, appealed and filed a motion for summary vacatur based on the Appointments Clause with this Court.

In sum, Petitioner's failure to present any Appointments Clause objection to the Benefits Review Board is quintessential forfeiture. There is no reason that she could not have timely raised a constitutional challenge during the administrative proceedings.

II. There are no grounds to excuse Petitioner's failure to raise the Appointments Clause before the Benefits Review Board.

Petitioner argues that her Appointments Clause challenge should be considered timely under *Lucia*, because Lucia's challenge was found timely despite not having been raised before the SEC ALJ. But this ignores the fact that, while Lucia did not raise the issue before the ALJ, he *did* raise it before the administrative agency—when it was on appeal to the Commission. 138 S.Ct. at 2047. Here, by contrast, Petitioner failed to raise the issue before either the ALJ or the Board. Her failure to raise her objection at any point while the case was before the administrative agency

distinguishes this case from *Lucia*, and renders her Appointments Clause challenge untimely. *See also supra* at 7 note 4 (arguable that claimant had to raise issue before ALJ).

Freytag does not change that outcome. Although the Supreme Court chose to exercise its discretion to consider an Appointments Clause issue that had not been raised before the Tax Court, it emphasized that *Freytag* was a "rare case," and did not purport categorically to excuse petitioners from abiding by ordinary principles of appellate review in Appointments Clause cases. *Freytag*, 501 U.S. at 879 (noting that Appointments Clause challenges are "nonjurisdictional"); *id*. at 893-94 (Scalia, J., concurring) ("Appointments Clause claims, and other structural constitutional claims, have no special entitlement to review.").[7]

Since it decided *Freytag*, the Supreme Court has emphasized that litigants are entitled to a remedy for an Appointments Clause violation when they have raised a "timely challenge." *Lucia*, 138 S.Ct. at 2055. *Lucia's* "timely challenge" prerequisite must be seen as cabining the discretion referred to in *Freytag* and highlighting the exceptionality of the Court's

[7] Petitioner's lengthy quotation from *Freytag* omits the Court's conclusion that *Freytag* is the "rare case." Opening Brief at 19-21. Petitioner also disregards *Lucia's* emphasis on a timely challenge and how that constrains *Freytag*.

review there.[8] Moreover, the courts of appeals—including this Court—have often refused to consider post-*Freytag* Appointments Clause challenges that were never presented to an agency. *See supra* at 10.

Petitioner's argument that her forfeiture should be excused because there was a change in law while the case was pending on appeal must also be rejected. The Appointments Clause was adopted in 1789. *Freytag* was decided in 1991, 501 U.S. 868, and "said everything necessary to decide" *Lucia*. *Lucia*, 138 S.Ct. at 2053. The Tenth Circuit's decision in *Bandimere*, which reached the same conclusion as the Supreme Court in *Lucia*, was decided in December 2016, just three weeks after the ALJ's decision and nearly a year before the Board's 2017 decision here. Put simply, nothing prevented Petitioner from raising a challenge to the ALJ's authority before *Lucia* was decided. *Island Creek Coal*, 910 F.3d at 257 (explaining that "[n]o precedent prevented the company from bringing the

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[8] Even if *Lucia's* repeated references to timeliness could be considered dicta, "this court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements." *Newdow v. U.S. Congress*, 328 F.3d 466, 480 n.17 (9th Cir. 2003), rev'd on other grounds *Elk Grove Unified School Dist. v. Newdow*, 524 U.S. 1 (2004) (quoting *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996)); *see also U.S. v. Baird,* 85 F.3d 450, 453 (9th Cir. 1996) (court treats Supreme Court dicta with due deference); *Kabani & Co.,* 733 F. App'x 918, 2018 WL 3828524, at *1 (citing *Lucia* in holding that "petitioners forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency").

constitutional claim before [*Lucia*].").[9]

Petitioner's reliance on *Ackerman v. Western Electric Co*., 860 F.2d 1514 (9th Cir. 1988), is also misplaced, as *Ackerman* makes clear that an issue raised for the first time on appeal—even a purely legal issue—is ordinarily waived. *Id*. at 1517; *see also In re Howell*, 731 F.2d 624, 627 (9th Cir. 1984) ("In most circumstances, a federal appellate court will not consider an issue not passed upon below."); *United States v. Patrin*, 575 F.2d 708, 713 (9th Cir. 1978) (refusing to consider on appeal a challenge that "could have been raised and explored" below). The Court in *Ackerman*

[9] By the time Petitioner filed her opening Board brief in April 2017, there had been eleven different reported court opinions that discussed Appointments Clause challenges to Security Exchange Commission ALJs. *Bandimere v. SEC*, 844 F.3d 1168, 1170 (10th Cir. Dec. 27, 2016); *Bennett v. SEC*, 844 F.3d 174, 177-78 (4th Cir. Dec. 16, 2016); *Lucia v. SEC*, 832 F.3d 277, 283 (D.C. Cir. Aug. 9, 2016), *affirmed by an equally divided en banc court*, 868 F.3d 1021 (D.C. Cir. June 26, 2017); *Hill v. SEC*, 825 F.3d 1236, 1240 (11th Cir. June 17, 2016); *Tilton v. SEC*, 824 F.3d 276, 279-80 (2d Cir. June 1, 2016); *Bennett v. SEC*, 151 F. Supp. 3d 632, 633 (D. Md. Dec. 17, 2015); *Ironridge Global IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294, 1312 (N.D. Ga. Nov. 17, 2015); *Duka v. SEC*, 124 F. Supp. 3d 287, 289 (S.D.N.Y. Aug. 12, 2015); *Gray Fin. Grp. v. SEC*, 166 F. Supp. 3d 1335, 1350 (N.D. Ga. Aug. 4, 2015); *Tilton v. SEC*, 2015 WL 4006165, at *1 (S.D.N.Y. June 30, 2015); *Hill v. SEC*, 114 F. Supp. 3d 1297, 1316 (N.D. Ga. June 8, 2015). In some of these cases, the courts did not reach the merits of the Appointments Clause claim because the litigants had not completed their administrative proceedings, and the courts lacked jurisdiction until those proceedings were completed. *See, e.g.*, *Hill*, 825 F.3d at 1252.

exercised its discretion to hear the previously unraised issue only because "[t]he issue has been thoroughly briefed and argued here, *and Ackerman has not objected to our consideration of it.*" 860 F.2d at 1517 (emphasis added). That is obviously not the case here, as both the Director and Mr. Rubi's former employer object to the Court hearing the Appointments Clause issue at this late stage.

Finally, Petitioner argues that her failure to timely raise the Appointments Clause issue should be excused under *Jones Brothers,* but *Jones Brothers* confirms that the Appointments Clause claim here has been forfeited, as this case lacks the special distinguishing features that led the Sixth Circuit to excuse the forfeiture in that case. In *Jones Brothers*, the court held that a petitioner had forfeited its Appointments Clause claim by failing to argue it before the Mine Safety and Health Review Commission, but that this forfeiture was excusable for two reasons. First, it was not clear whether the Commission could have entertained an Appointments Clause challenge, given the statutory limits on the Commission's review authority. *Jones Bros.*, 898 F.3d at 673-77, 678 ("We understand why *that* question may have confused Jones Brothers"). Second, Jones Brothers' timely identification of the Appointments Clause issue for the Commission's consideration was reasonable in light of the uncertainty surrounding the

Commission's authority to address the issue. *Id.* at 677-78 (merely identifying the issue was a "reasonable" course for a "petitioner who wished to alert the Commission of a constitutional issue but is unsure (quite understandably) just what the Commission can do about it."). Given these circumstances, the court exercised its discretion to excuse petitioner's forfeiture, but explained that this was an exceptional outcome: "We generally expect parties like Jones Brothers to raise their as-applied or constitutional-avoidance challenges before the Commission and courts to hold them responsible for failing to do so." *Id.* at 677.

No similar exceptional circumstances exist here. Unlike Jones Brothers, Petitioner did not timely identify the Appointments Clause issue to the Board. Moreover, Petitioner does not argue that the Board lacked the authority to address his Appointments Clause challenge. Nor could she have reasonably believed that the Board would have refused to entertain such a challenge. The Board has repeatedly provided remedies for Appointments Clause violations, *see supra* at 11, and has broadly interpreted its authority to decide substantive questions of law, including certain other constitutional issues. *See Shaw v. Bath Iron Works*, 22 BRBS 73 (1989) (addressing the constitutionality of the 1984 amendments to the Longshore Act);*Herrington*

v. Savannah Machine & Shipyard, 17 BRBS 194 (1985) (addressing constitutional validity of statutes and regulations within its jurisdiction); *Smith v. Aerojet General Shipyards,* 16 BRBS 49 (1983) (addressing due process issue). *Jones Brothers* is simply inapposite.

If the Court were to excuse Petitioner's forfeiture, there would be real world consequences. To the best of our knowledge, there are nearly six hundred cases currently pending before the Board. But in over five hundred of these cases, no Appointments Clause claim has been raised. Should the Court excuse Petitioner's forfeiture here—where she failed to raise the claim to the agency—it would be inviting every losing party at the Board to seek a re-do of years' worth of administrative proceedings based on an Appointments Clause claim raised for the first time before a court of appeals.[10] For the Longshore program, whose very purpose is to provide timely and certain relief to disabled workers and their dependent survivors, that is precisely the kind of disruption that forfeiture seeks to avoid. *See L.A. Tucker*, 344 U.S. at 37 (cautioning against overturning administrative decisions where objections are untimely under agency practice).

[10] In addition to this case, there are two appeals under the Longshore Act currently pending before this Court in which the Petitioner has raised an Appointments Clause challenge. *Bussanich v. Ports America*, No. 18-71189; and *Zumwalt v. NASSCO,* No. 18-72257.

CONCLUSION

The basic tenets of administrative law required Petitioner to raise her Appointments Clause challenge before the agency. Her proffered reasons for not doing so are meritless. The Court should hold that Petitioner forfeited her right to challenge the ALJ's authority under the Appointments Clause.

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

KEVIN LYSKOWSKI
Acting Associate Solicitor

MARK A. REINHALTER
Counsel for Longshore

GARY K. STEARMAN
Counsel for Appellate Litigation

/s/ Matthew W. Boyle
MATTHEW W. BOYLE
Attorney
U.S. Department of Labor
200 Constitution Ave., N.W.
Room N-2117
Washington, D.C. 20210
(202) 693-5658

STATEMENT OF RELATED CASES
Pursuant to Ninth Circuit Rule 28-2.6

The Appointments Clause issue is also raised in *Zumwalt v. National Steel & Shipbuilding Co.*, Case No. 18-72257; and *Bussanich v. Ports America et al*, No. 18-71189.

/s/ Matthew W. Boyle
MATTHEW W. BOYLE

CERTIFICATE OF COMPLIANCE
Pursuant to Fed. R. App. P. 32(a)(7)(C)
and Ninth Circuit Rule 32-1

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief for the Federal Respondent is proportionally spaced, has a typeface of 14 points, and contains 4,375 words.

/s/ Matthew W. Boyle
MATTHEW W. BOYLE

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2019, I electronically filed the foregoing Response through the appellate CM/ECF system, and that all participants in the case are registered users of, and will be served through, the CM/ECF system.

/s/ Matthew W. Boyle
MATTHEW W. BOYLE