ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

IN THE MATTER OF:	)	
JOHNNY S. PEREZ,	)	
Complainant,	)	ARB Case Nos. 2017-0014, 2017-0040
v.	)	
BNSF RAILWAY COMPANY,	)	ALJ Case No. 2014-FRS-00043
Respondent.	)	

BRIEF FOR THE SOLICITOR OF LABOR AS AMICUS CURIAE

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v.	)	
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BRIEF FOR THE SOLICITOR OF LABOR AS AMICUS CURIAE

The Solicitor of Labor (Solicitor) submits this brief as amicus curiae in response to the April 16, 2020 invitation from the Administrative Review Board (Board or ARB).

STATEMENT OF INTEREST

The Solicitor submits this brief to address whether Respondent BNSF Railway Company (BNSF) has 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.

BNSF did not raise the objection during the ALJ proceedings, petition for review, or opening brief to the Board. Nearly two years after this appeal was fully

briefed, BNSF filed a supplemental brief with the Board raising for the first time an Appointments Clause objection.

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

STATEMENT OF THE ISSUE

Whether BNSF's Appointments Clause objection is properly before the Board.

STATEMENT OF THE CASE

1. Statutory Background

This case arises under the anti-retaliation provisions of the Federal Railroad Safety Act of 1982 (FRSA), 49 U.S.C. 20109, which prohibits railroad carriers from discriminating against, or taking an unfavorable personnel action against, an employee because the employee reported a work-related injury or unsafe

[1] The Solicitor filed briefs with the Board on November, 12, 2019, in *Becker v. Community Health Systems, Inc.* (2017-005 & 006), 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). *Becker* was ultimately settled. *See* 2020 WL 1819967 at *1 (Mar. 30, 2020). 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* remains pending before the Board.

conditions or engaged in other protected activity. 49 U.S.C. 20109(a); *see* 29 C.F.R. 1982.102(b). FRSA proceedings are governed by the rules and procedures set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121(b), which have been expressly incorporated or are reflected in the whistleblower provisions of numerous statutes administered by the Department of Labor (Department or DOL). *See* 49 U.S.C. 20109(d)(2).

An employee who believes that he or she has been retaliated against in violation of FRSA may file a complaint alleging such retaliation with the Occupational Safety and Health Administration (OSHA). *See* 49 U.S.C. 20109(d)(1); 29 C.F.R. 1982.103. After an investigation, OSHA either dismisses the complaint or finds reasonable cause to believe that retaliation occurred and orders appropriate relief. *See* 49 U.S.C. 20109(d)(2)(A); 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1982.105. Either the employer or the employee may object to OSHA's findings and request a hearing before an ALJ. 29 C.F.R. 1982.106, 1982.107. The ALJ's decision is subject to review by the Board and either party may seek the Board's review by filing a timely petition for review. 29 C.F.R. 1982.110; Sec'y of Labor's Order No. 01-2020 (Feb. 21, 2020), 85 Fed. Reg. 13,186, 13,186 (Mar. 6, 2020).

2. Procedural Background

Complainant Johnny Perez alleged that BNSF retaliated against him in violation of the FRSA after he reported a workplace injury and requested time off to undergo surgery. Mr. Perez filed a complaint with OSHA, which conducted an investigation and determined that there was no reasonable cause to believe that BNSF had violated the FRSA. Mr. Perez then requested a hearing before the Office of Administrative Law Judges. A hearing was held on March 1 and 2, 2016, before a Department ALJ. In a decision published December 14, 2016, the ALJ found that Mr. Perez had engaged in protected activity and that the activity was a contributing factor in BNSF's decision to discipline him, in violation of the FRSA. BNSF filed a petition for review with the Board on December 28, 2016, and completed briefing on the merits in April 2017.[2]

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

[2] BNSF also timely appealed a second determination awarding Mr. Perez costs and fees. Briefing on the assignment of costs and fees was completed in July 2017.

appointments of the Department's ALJs, including the ALJ in this case.[3] In November 2017 and February 2018, the Department of Justice filed briefs with the Supreme Court taking the position that ALJs at the Securities and Exchange Commission (SEC) are constitutional officers subject to the Appointments Clause.[4] In June 2018, the Supreme Court decided *Lucia v. S.E.C.*, holding that the SEC ALJs are "officers of the United States" and therefore must be appointed in accordance with the requirements of the Appointments Clause. *See* 585 U.S. ___, 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).

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[3] *See* Secretary's Ratification of Department's ALJs, https://www.oalj.dol.gov/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Memorandum_on_Ratification_of_Appointment_of_USDOL_ALJs_(Dec_20_2017).pdf (last visited Apr. 24, 2020) (the Secretary's letter to the ALJ in this case, Judge Jonathan Calianos, ratifying his appointment, is at page 8). 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) (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).

BNSF did not raise an objection to the ALJ under the Appointments Clause at any time during the ALJ proceedings, in its petition for review, or in its merits briefs filed with the Board.

On November 8, 2018, nearly two full years following its petition for review of the ALJ's decision, BNSF filed a supplemental brief, raising an Appointments Clause objection for the first time. On April 16, 2020, the Board issued a decision accepting BNSF's supplemental brief and inviting the Solicitor to file an amicus brief addressing whether BNSF waived the objection. BNSF argues that the objection was not available to it until the Secretary's ratification of the Department's ALJs and the *Lucia* decision. For the reasons set forth below, the Solicitor disagrees and submits that BNSF waived the objection.

ARGUMENT

1. BNSF 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); *see also Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009); *see also Bussanich v. Ports America*, 787 F. App'x. 405, 406 (Mem) (9th Cir. 2019). 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 FRSA 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. 1982.110(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. 1, 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]

[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.").

Federal courts have ruled likewise. For instance, in *Island Creek Coal Co. v. Young*, the Sixth Circuit held that a claimant had waived his Appointments Clause objection to an ALJ's decision appealable to the Benefits Review Board (BRB) because he had not raised the issue before the ALJ or in his petition for review by the BRB. 947 F.3d 399, 402 (6th Cir. 2020). The Ninth Circuit reached the same conclusion in *Bussanich*. 787 F. App'x. at 406 (holding that claimant had waived his Appointments Clause objection to a BRB ALJ because he had not raised the issue before the ALJ or in his appeal to the BRB). The Third Circuit has also explicitly held that, with respect to the DOL, where an Appointments Clause challenge is raised after the parties have filed their briefs on appeal, it is forfeited. *See David Stanley Consultants v. Dir., OWCP*, 800 F. App'x. 123 (3d Cir. 2019) (Where a mine operator raised an Appointments Clause issue by motion, after appellate briefs had been filed with the BRB, the objection was forfeited).[6]

[6] While the Third Circuit has held that exhaustion is not required to bring an Appointments Clause challenge in the Social Security Administration (SSA) context, the court noted that the SSA is unique among agencies because, for among other reasons, SSA adjudications lack any statutory or regulatory issue-exhaustion requirements. In distinguishing the SSA context from other administrative adjudications, the court specifically noted the case law holding that waiver applied to Appointments Clause challenges to DOL ALJ decisions. *See Cirko v. Comm'r of Soc. Sec.*, 948 F.3d 148, 155 n.5 (3d Cir. 2020) (distinguishing *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 746, 749 (6th Cir. 2019)).

Accordingly, because BNSF did not raise the Appointments Clause objection during the ALJ proceedings or in its petition for review, opening brief, or any other brief filed with the Board prior to its supplemental brief, BNSF waived the objection.

2. The Board Should Not Exercise Discretion to Consider BNSF's 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 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 but failed to explicitly raise it in the petition for review. *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.").

No exceptional circumstances or injustice exist here, however. BNSF 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.

In addition, the Appointments Clause objection was readily available to BNSF 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 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.[7] 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).[8]

Thus, BNSF's 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

[7] *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).

[8] 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 Second Circuit recently reached the same conclusion in *Gonnella v. S.E.C.*, a case in which the petitioner raised his Appointments Clause challenge to a decision by an SEC ALJ for the first time in the court of appeals. 954 F.3d 536, 543-46 (2d Cir. 2020). In holding that the Appointments Clause challenge was waived, the court rejected many of the same arguments that BNSF raises here. In particular, the court explained that it refused to hear the challenge because "[d]espite having constructive notice of the argument and relevant Supreme Court precedent – which was ultimately heavily relied upon by the Supreme Court in *Lucia* –Gonnella failed to raise such a claim." *Id.* at 545 (citing *Malouf v. SEC*, 933 F.3d 1248, 1258 (10th Cir. 2019) ("In the SEC proceedings, Mr. Malouf could have invoked *Freytag*, just as the petitioners in *Bandimere* and *Lucia* had done.")

and *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 257 (6th Cir. 2018) (highlighting that *Lucia* stated that *Freytag* established "everything necessary to decide this case," and ultimately finding forfeiture because appellants failed to raise the argument in their opening briefs (quoting *Lucia*, 138 S. Ct. at 2053))).

The availability of an Appointments Clause challenge should have been readily apparent to BNSF much earlier in these proceedings. Per the Supreme Court in *Freytag,* an ALJ is an "inferior Officer" under the Appointments Clause if the ALJ's position is established by law, the ALJ's duties, salary, and means of appointment are specified by statute, and the ALJ exercises significant discretion in carrying out important functions. 501 U.S. at 881-82. Various statutes and regulations, none of which post-date these proceedings, detail the Department ALJs' role, duties, salary, means of appointment, and discretion.[9] Additionally, the Office of Personnel and Management makes publicly available its process for hiring ALJs. 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. *See Bandimere*,

[9] 5 U.S.C. 556 & 557 describe the circumstances under which hearings should be conducted by federal agencies and details their procedure and the powers and duties of presiding employees; 5 U.S.C. 3105 details the appointment of ALJs to preside over hearings; 5 U.S.C. 5372 establishes a pay scale. Numerous regulations, including those at 5 C.F.R. 930.201 *et seq.*, describe the ALJ program. 29 C.F.R. 18.10 & 18.12 in particular describe the discretion of Department ALJs.

844 F.3d at 1181-82. BNSF could have—like many other parties in similar proceedings—raised an Appointments Clause objection much earlier in the proceedings.

Raising the Appointments Clause objection so late in the administrative proceedings suggests that BNSF is engaging in "sandbagging." Permitting an Appointments Clause objection to be raised for the first time over twenty-two months after filing a petition for review with the Board, and more than eighteen months after briefing on the merits concluded, "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, BNSF did not raise the Appointments Clause challenge at any point during the ALJ proceedings. It was only after receiving an adverse ALJ decision and over eighteen months after fully briefing the merits of the matter before the Board that BNSF 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 BNSF's late Appointments Clause objection, losing parties to a proceeding involving an ALJ decision issued prior to

December 2017 would be able to raise the objection at any stage. The result could be a disruptive re-do of a number of administrative proceedings based on Appointments Clause claims raised for the first time late in those proceedings.

3. If the Board Elects to Exercise Discretion to Consider BNSF's Belated Appointments Clause Objection, It Should Hold that the Secretary's Ratification of ALJs is Valid and Remand the Case.

If the Board determines that the Appointments Clause challenge is properly before it, it should hold, as a matter of law, that the Secretary's ratification of ALJs was valid. It should then remand the case for new proceedings in front of a different ALJ.

On December 15 and 17, 2017, in accord with the Appointments Clause, the Secretary of Labor ratified DOL's prior appointment of all of its ALJs. *See* Secretary's Proactive Disclosures on ALJ Appointments, https://www.oalj.dol.gov/Proactive_disclosures_ALJ_appointments.html (last visited Apr. 24, 2020). In effect, as of December 21, 2017, all of the Department ALJs have been appointed as inferior officers under the Constitution.

Per the Supreme Court, the appointment of an officer need only be "evidenced by an open, unequivocal act." *Marbury v. Madison*, 5 U.S. 137, 157 (1803); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512 n.13 (2010) ("we have previously found that the department head's approval satisfies the Appointments Clause"); *see also United States v. Hartwell*,

73 U.S. 385, 288 (1867) (finding that an appointment was valid where an inferior officer was hired by an assistant treasurer "with the approbation" of the department head). The Secretary has acted openly and unequivocally here by issuing signed letters memorializing the appointment of DOL ALJs, which are publicly available. *See* Secretary's Ratification of the Department's ALJs, https://www.oalj.dol.gov/PUBLIC/FOIA/Frequently_Requested_Records /ALJ_Appointments/Secretarys_Ratification_of_ALJ_Appointments_12_21_2017.pdf (last visited Apr. 24, 2020). The Secretary's ratification of the ALJ's appointment is presumptively valid. *See Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 604 (3d. Cir. 2016) (an agency action is presumed valid under presumption of regularity; the burden is on a challenger to demonstrate otherwise).

BNSF argues that a prior appointment of an ALJ under unconstitutional procedures cannot be cured by a Secretarial ratification.[10] Pet'r's Br. 4. But that is both illogical and plainly incorrect. As the Tenth Circuit stated, the remedy for

[10] In support of this contention, BNSF suggests that the SEC has "abandon[ed] its own purported ratification." This is rather a selective read of the order BNSF cites, which states that "[the SEC] ratified the appointments of [SEC ALJs] to the office of administrative law judges in the Securities and Exchange Commission. In an abundance of caution and for avoidance of doubt, we today reiterate our approval of their appointments as our own under the Constitution." Order, Exchange Act Release No. 83907, 2018 WL 4003609 (Aug. 22, 2018). Far from "abandoning" its ratification, the SEC reaffirmed it in order to dispel any lingering confusion about the appointment of its ALJs.

improper seating of inferior officers is that they "be appointed as the Constitution commands"—*i.e.*, by the "Head[] of [a] Department." *Bandimere v. SEC*, 844 F.3d 1169, 1181-82 (10th Cir. 2016). That is precisely what occurred here.

In short, as explained above, it is the Solicitor's position that BNSF has waived its Appointments Clause arguments in this case and that the Board should not exercise discretion to consider that argument. However, should the Board reach the Appointments Clause challenge that BNSF now raises, it should remand the case. All of the DOL's ALJs' appointments now satisfy the Appointments Clause, and, therefore, the proper remedy under *Lucia* is remand for a new hearing in front of an ALJ other than Judge Calianos, the ALJ who originally heard the case. *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… To cure the Constitutional error, another ALJ (or the Commission itself) must hold the new hearing.").[11]

CONCLUSION

For the foregoing reasons, the Solicitor respectfully submits that BNSF 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 BNSF's failure. Should

[11] BNSF evidently agrees, arguing that it is "entitled to a new hearing in this matter before a constitutionally appointed ALJ." Pet'r's Br. 2.

the Board elect to exercise its discretion to excuse BNSF's failure to timely raise the objection, the proper remedy is remand, as the Secretary's ratification was effective and Department ALJs are now properly appointed.

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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 May 14, 2020 by email and EFSR, on each of the following:

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