No. 15-1345

ORAL ARGUMENTS SET FOR MAY 24, 2017

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RAYMOND J. LUCIA COMPANIES, INC. AND RAYMOND J. LUCIA,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for Review of an Order of
the Securities & Exchange Commission

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF PETITIONERS

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COMBINED CERTIFICATES

Certificate as to Parties, Rulings, and Related Cases

As required by Circuit Rule 28(a)(1), counsel for *amicus curiae* Cato Institute certify as follows: Except for the Cato Institute, all parties, intervenors, and *amici* that have appeared in this Court are listed in the Petitioners' Brief. The rulings at issue and related cases also appear in the Petitioners' Brief.

Certificate of Counsel under Circuit Rules 29(c)(4) and 29(c)(5)

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward those ends, Cato publishes books and studies, conducts conferences, issues the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts. Cato files this brief to show the history of the removal power in informing the Appointments Clause and to emphasize that executive offices must be accountable to the public—issues that no other *amicus* brief covers.

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, the Cato Institute certifies that it has no parent corporation, and no publicly held company has 10 percent or greater ownership in the Cato Institute. All parties have consented to the filing of this brief.

/s/ Ilya Shapiro
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GLOSSARY

ALJ – Administrative Law Judge

MSPB – Merit Systems Protection Board

STJ – Special Trial Judge

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Cato's Center for Monetary and Financial Alternatives was established in 2014 to reveal the shortcomings of today's monetary and financial regulatory systems and to identify and promote alternatives more conducive to a stable, flourishing, and free society. Toward those ends, Cato publishes books and studies, conducts conferences, issues the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts.

This case is important to Cato because it regards core separation-of-powers issues and the democratic accountability of executive officers.

SUMMARY OF ARGUMENT

The Constitution created three branches of government. The legislative and executive branches are controlled by the electorate. The president is vested with all executive power, and therefore controls the executive branch. 1 Annals of Cong. 481 (James Madison, June 16, 1789) ("[I]f any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and *controlling* those who

[1] No one other than the *amicus* and its counsel wrote this brief in whole or in part. The cost of its preparation was paid solely by *amicus*.

execute the laws.") (emphasis added). The president has a duty to see that the law is faithfully executed. To do this he must be able to remove those officers who fail in their respective duties.

And yet, the SEC's administrative law judges ("ALJs") are protected from control by the electorate. The president lacks the ability to remove ALJs should they abuse their powers or fail to use their discretion to act intelligently or wisely.

In a prior hearing, this court ruled that ALJs need not be subject to presidential removal power because they are not executive officers. However, ALJs' duties are very similar to Special Trial Judges (STJs) and court clerks, positions the Supreme Court has previously determined to be officers. If anything, ALJs have more power and exercise their duties with greater discretion and independence than STJs or court clerks.

The similarities between ALJs and court clerks and STJs is sufficient evidence to show, contrary to this court's prior holding, that ALJs are officers. Still, it is worth further noting that ALJs also fit definitions of an officer established by important legal and historical precedents.

Chief Justice John Marshall delineated a test for distinguishing an officer from an employee. In deciding *United States v. Maurice*, 26 F. Cas. 1211 (C.C.D. Va. 1823), he explained that if a position did not require a contract for its holders because the government had prescribed the position's duties independent of a

specific position-holder and that the duties of successive position-holders would not change, then that position should be classified as an office. The Supreme Court later expanded on Marshall's initial criterion by setting parameters for the tenure, duration, emolument, and duties of an officer, parameters that distinguish an officer from an employee. Evaluating the ALJ position against these parameters demonstrates that ALJs are officers, not employees. Most importantly, ALJs have significant discretion and perform more than ministerial duties, which, based on the Supreme Court's definitions, should clearly make ALJs officers.

Both Congress and the SEC have recognized that ALJs are officers. Considering how much more closely the ALJ position aligns with the definition of an officer than the definition of an employee, this should not be a surprise.

Some have suggested that, regardless of whether ALJs fit the description of an officer, ALJs need not be subject to the president's control because of their quasi-judicial role. The Supreme Court directly refuted that proposition 90 years ago. It held that even for a quasi-judicial executive officer, the president "may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised." *Myers v. United States*, 272 U.S. 52, 135 (1926). Precedent going back to the Founding also refutes suggestions that SEC ALJs need not be subject to executive oversight. The Comptroller of the

Treasury was then considered quasi-judicial for the same reasons an ALJ could be considered such today, yet could still be removed by the president. The president has also removed territorial judges, demonstrating that the judicial character of an executive-branch officer does not change the president's removal authority.

ARGUMENT

I. SEC ALJS ARE EXECUTIVE OFFICERS BECAUSE OF THEIR DISCRETION AND POWER

ALJs are officers, not employees, because of the discretion they wield and the power they exercise. The close similarities between ALJs and Special Trial Judges and court clerks, positions that the Supreme Court has deemed are offices, are sufficient proof to show that ALJs are officers. In addition, ALJs clearly fit important legal and historical definitions of officers.

A. ALJs Have Similar Duties and Powers to Other Quasi-Judicial Positions That the Court Has Ruled Are Offices

In *Freytag v. C.I.R.*, the Supreme Court determined that Special Trial Judges are executive officers because of the discretion and power they exercise. 501 U.S. 868, 881-82 (1991). There is no material difference in terms of discretion and power exercised between STJs and SEC ALJs. Like the *Freytag* STJs, SEC ALJs "perform more than ministerial tasks." *Id.* at 881. They also "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." *Id.* at 881-82; 17 C.F.R. §201.111. And, like STJs, ALJs "exercise significant discretion in the course of carrying out their

duties." *Freytag*, 501 U.S. at 881-82; 17 C.F.R. §201.111. ALJs notably use their discretion to make findings as to the credibility of witnesses and the SEC defers to ALJs' "credibility finding, absent overwhelming evidence to the contrary." *In re Clawson*, Exchange Act Release No. 48143, 2003 WL 21539920, at *2 (July 9, 2003); *In re Pelosi*, Securities Act Release No. 3805, 2014 WL 1247415, at *2 (Mar. 27, 2014) ("The Commission gives considerable weight to the credibility determination of a law judge since it is based on hearing the witnesses' testimony and observing their demeanor. Such determinations can be overcome only where the record contains substantial evidence for doing so."); *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496 (1951). Moreover, the opinions ALJs issue are final unless appealed and *Freytag* emphasized the importance of STJs' power to issue opinions. 5 U.S.C. § 557(b); *Freytag*, 501 U.S. at 882 (noting that the fact that the STJ can "render the decisions of the Tax Court" in some cases is enough to be considered an officer).

The ALJs' authority also mirrors that of the court clerks, which, under the Supreme Court's determination, rendered them officers. *See Ex parte Hennen*, 38 U.S. 230, 260 (1839) ("These clerks fall under that class of inferior officers, the appointment of which the Constitution authorizes Congress to vest in the head of the department."). This despite the fact that clerks have no power to make final decisions for the court outside of default judgments (which can be rescinded by the

court). FRCP 77(2); FRCP 55(b)(1). As do ALJs, 17 C.F.R. § 201.155, and reject deficient filings as some clerks can, 17 C.F.R. § 201.180 (b), (c). Clerks can administer oaths and affirmations, 28 U.S.C. § 953, as can ALJs. 17 C.F.R 201.111(a). There is no power or discretion that such clerks have that an ALJ does not. Since a clerk is an "officer of the United States" due to these powers, an ALJ must also be an officer.

The panel ruled that SEC ALJs are not officers because their decisions are not final (because appealable to the Commission). *Raymond J. Lucia Cos., Inc. v. SEC*, 832 F. 3d 277, 285 (D.C. Cir. 2016). This argument must not be taken too far since no one would suggest that district court judges, whose opinions are appealable to the circuit court, are not officers. But even given limited application, it fails in the face of respondents' actual experience appearing before SEC ALJs. Although ALJs' rulings on questions of law are appealable, their findings of fact are nearly unassailable and are given great deference by the Commission. This is, of course, assuming that a respondent proceeds so far as to obtain an appealable decision. As many as half of SEC enforcement actions result in settlement with up to 80 percent of those settlements brought in administrative proceedings. Urska Velikonja, *Securities Settlements in the Shadows*, 126 Yale L.J. Forum 124 (2016). The tenor of administrative proceedings, set in the SEC almost exclusively by the ALJs, inform both respondents' decisions and their counsels' admonitions

regarding the wisdom of settlement. If most respondents never make their case before the Commission and if those who do are almost unfailingly bound by the factual determinations of the ALJs, it is difficult to see how the existence of such limited appeal can be controlling. If it is true that "[w]ise observers have long understood that the appearance of justice is as important as its reality," it must also be true that appearance of justice does not trump actual injustice in practice. *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 161 n.3 (1994) (Scalia, J., joined by Rehnquist, C. J., and Thomas, J., dissenting).

B. SEC ALJs Fit Legal Precedents and Definitions of Officers

There are also important historical precedents for considering SEC ALJs to be officers. At the Founding, jurists understood that a position must be an office and its holder an officer if executing the duties of that position entailed exercising coercive authority over others. "It is a rule, that where one man hath to do with another's affairs against his will, without his leave, that is an office, and he who is in it, an officer." Giles Jacob, A New Law Dictionary 641 (10th ed. 1773). It is unlikely that respondents hand the SEC penalties of their own free will, so ALJs exercise the type of authority that Jacob described. 17 C.F.R. § 201.155.

The first Supreme Court justice to consider what distinguishes officers from employees was Chief Justice John Marshall in *United States v. Maurice*, 26 F. Cas. 1211 (C.C.D. Va. 1823). That case required Marshall to determine if an agent for

fortifications was an officer of the United States. Marshall established general criteria for determining whether a position is an office:

> An office is defined to be "a public charge or employment," and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States. Although an office is "an employment," it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer.

Id. at 1214. To Marshall, it was the lack of a contract to perform a service in which different people may consecutively hold the same position that distinguishes an "office" from employment. *Maurice*, 26 F. Cas. at 1214. The Supreme Court cited Marshall's definition of an office in a later case regarding the status of a merchant appraiser. *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890). Marshall's definition applies to an SEC ALJ, who is not under contract to perform a service but "enters on the duties appertaining to his [or her] station" and that "those duties continue, though the person be changed." The criteria that Marshall delineated and that the Court applied in *Auffmordt* provide further support for classifying SEC ALJs as officers. *See id.;* 5 U.S.C. § 3105.

The Supreme Court issued another, more comprehensive definition of an office in *United States v. Hartwell*, 73 U.S. 385 (1867), a definition ALJs fit. The Court held that "an office is a public station, or employment, conferred by the appointment of government" and that "[t]he term embraces the ideas of tenure, duration, emolument, and duties." *Id.* at 393. The Court applied each of these requirements to its definition of an officer. An officer is someone "appointed pursuant to law, and his compensation was fixed by law." *Id.* An ALJ is likewise appointed pursuant to law and their compensation is fixed by law. 5 U.S.C. § 3105; 5 U.S.C. § 5372. The Court then noted that "[v]acating the office of his superior would not have affected the tenure of his place," *Hartwell*, 73 U.S. at 393, which shows the independent nature of an office. An ALJ's tenure is likewise unaffected by the removal of any other person from office. The Court finally recognized the "duties were continuing and permanent, not occasional or temporary," *id.*, which accurately describes an ALJ's duties, 5 U.S.C. § 7521.

In more recent cases, the Court expanded on that definition to require that a position holder must be "exercising significant authority" to be considered an officer. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). This expansion was not meant to challenge prior understandings of an officer's status, but rather affirmed and crystalized the reasoning that led the Court to determine that district court clerks and postmasters first class are inferior officers. *Id. Buckley's* definition of an

officer included "all appointed officials exercising responsibility under the public laws of the Nation." *Id.* at 131. ALJs easily fit this definition.

In *Buckley*, the Supreme Court distinguished employees from officers by describing them as "lesser functionaries subordinate to officers of the United States." *Id.* The Court's decision in *Freytag* reflected this distinction, as it determined that special trial judges are officers because they "perform more than ministerial tasks" and exercise "significant discretion." *Freytag*, 501 U.S. at 881-82. *Buckley's* emphasis on the relative independence of a position and its organizational relationship to other officers closely pertains to SEC ALJs also. The statutory framework governing the authority of ALJs ensures that they are not directly controlled by any other officer. 5 U.S.C. § 7521(a).

Considering the independence of and discretion wielded by the SEC's ALJs in the context of relevant historical and legal precedents, it is no wonder that Congress considers ALJs to be officers. The SEC's enabling statute states that ALJs' authority to hold hearings is predicated upon their status as officers. 15 U.S.C. § 77u ("All hearings shall be public and may be held before the Commission or an *officer or officers* of the Commission designated by it.") (emphasis added); *see also* 17 C.F.R. § 201.111 (SEC regulation referring to an ALJ as a "hearing officer").

II. ADMINISTRATIVE LAW JUDGES' PROTECTION FROM REMOVAL IS UNCONSTITUTIONAL UNDER THE APPOINTMENTS CLAUSE

The U.S. Constitution guarantees that even officers that are appointed (and not elected) are nonetheless accountable to the people. Although the Constitution offers no explicit guidance on removals, jurists have understood that removals "empower the President to keep these officers accountable" including through the removal of the officers if necessary. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010).

A. ALJs Must Be Removable by the President to Ensure Democratic Accountability for Executive Officers

Since the Founding, jurists have understood that the president, to fulfill his constitutional duty to ensure that the laws be faithfully executed, must have the power to remove executive officers. The Constitution does not specify how an officer can be removed (other than impeachment), and so a debate occurred in the First Congress over the presidential power to remove officers. Some felt that impeachment was the only proper method of removal because it was the only one specifically mentioned. James Madison disagreed, declaring that "it is absolutely necessary that the President should have the power of removing from office; it will make him, in a peculiar manner, responsible for their conduct, and subject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct,

so as to check their excesses." 1 Annals of Congress 387 (1789). Such a power to remove officers was seen at the time as "incident to the power of appointment." *Myers*, 272 U.S. at 110 (1926).

Madison did not consider this power to remove to be absolute, but "because Congress may establish offices by law," Congress could decide if the officer's tenure was "either during good behavior or during pleasure." 1 Annals of Congress 389 (1789). In the end of the debate, the First Congress by a "considerable majority" resolved "the power of removal to be in the President." *Id.* at 399.

Despite Congress's authority to grant tenure for good behavior, as of 1903 "no civil officer [had] ever held office by a life tenure since the foundation of the government" with the exception of Article III judges. *Shurtleff v. United States*, 189 U.S. 311, 316 (1903). When Congress attempted to condition the removal of a postmaster on congressional approval, the Supreme Court held that to be an unconstitutional limitation on the power of the president. *Myers*, 272 U.S. at 176.

If a limitation on the president's removal power is unconstitutional, it is immaterial which entity exercises the limitation. If it is unconstitutional to condition the president's removal power on the consent of the Senate, it is equally as unconstitutional to condition the removal power on the consent of the Merit Systems Protection Board (MSPB). As Madison said, if the executive officer "shall not be displaced but by and with the advice and consent of the senate, the President

is no longer answerable for the conduct of the officer; all will depend on the senate. You here destroy a real responsibility without obtaining even the shadow." 1 Annals of Congress 394-95. Likewise, the president is not fully answerable for the conduct of ALJs if they cannot be removed without the advice and consent of the MSPB (which also cannot be removed but for cause). When an ALJ goes beyond the powers of that office, but the MSPB refuses exercise its removal power, which elected official are the American people to blame?

B. SEC ALJs Are Not Democratically Accountable, Because Their Removal Involves Two Layers of Protection.

SEC ALJs are inferior officers that are protected from presidential removal by at least two layers of for-cause removal protection. Permitting an executive officer to enjoy such insulation from removal unconstitutionally prevents the president from exercising the necessary control to be politically accountable for the actions of the officer. *Free Enter. Fund*, 561 U.S. at 477.

The first layer of protection exists at the SEC level. The SEC can only remove an ALJ "for cause." 5 U.S.C. § 7521(a). Second, that determination of cause must be confirmed by the MSPB. MSPB members themselves can only be removed "for cause." *Id.*; 5 U.S.C. § 1202. Therefore, the judgment that an SEC ALJ should be removed for cause is "committed to another officer, who may or may not agree with the president's determination, and whom the President cannot remove simply because that officer disagrees with him." *Free Enter. Fund*, 561

U.S. at 484. Moreover, *Free Enterprise Fund* established that SEC commissioners themselves are only removable for cause. *Id.* at 487. Assuming that the Court was correct in *Free Enterprise Fund,* there exist in fact three layers of protection between SEC ALJs and the president because SEC commissioners themselves must initiate the removal proceedings against ALJs. 5 U.S.C. § 7521(a).

C. Even Officers in Quasi-Judicial Roles Like ALJs Must Be Removable By the President

Historical precedent going back to the Founding and directly on-point Supreme Court rulings show that even federal officials serving "quasi-judicial" roles like the ALJ position must be removable by the president. The Court has held that even executive officers with a quasi-judicial role (such as ALJs) must not be beyond the president's power to remove any officer who fails to exercise the discretion required of the office intelligently or wisely. As it said in *Myers*:

> Then there may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.

272 U.S. at 135.

The president's power to remove quasi-judicial officers is not absolute as is the power to remove purely executive officers; Congress can limit the removal of

such quasi-judicial executive officers to "for-cause" reasons. *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935). The removal for-cause still allows the president to see that the laws "be faithfully executed" but only so long as the president exercises direct authority to remove the officer for cause, or the power is exercised by an individual the President can remove without cause. *Free Enter. Fund*, 561 U.S. at 495-96.

Precedent also shows that quasi-judicial executive officers must be subject to presidential removal power. The first discussion of a quasi-judicial executive officer's removal occurred during the First Congress when considering the removal of the Comptroller of the Treasury. The Comptroller of the Treasury, due to his authority to decide claims between the United States and individual citizens, exercised power that was "not purely executive" but also included a "judicial quality." 1 Annals of Congress 635-36 (1789). Because of the quasi-judicial character of the office, Madison proposed that the tenure of the office be for "good behavior," but even so "the Comptroller would be dependent upon the President, because he can be removed by him." *Id.* Tenure based only on "good behavior" was necessary to "secure his impartiality," but even the need for impartiality was not sufficient to shield the officer entirely from the president's removal power. *Id.* This for cause protection was too much for many of the other members of the First Congress and Madison eventually withdrew his motion. *Id.* at 637-39. The Court

revived Madison's position in *Humphrey's Executor*, implementing his idea of limiting the removal of quasi-judicial executive officers. Still, the president retained the power to remove the quasi-judicial officer for cause.

ALJs fulfill a more purely judicial function than either a member of the Federal Trade Commission or the Comptroller of the Treasury. Their function may be more properly analogous to other non-Article III federal judges. While no president has ever removed an Article III judge—the Constitution insulates them from such action—presidents have removed many Article I judges (like territorial judges) without even giving cause and without congressional authorization. The power to remove these judges has been viewed as essential to the president's ability to fulfill his duty. Before the Civil War, Attorney General John J. Crittenden was specifically asked about the presidential power to remove territorial judges, even without specific congressional authorization. He concluded:

> The President of the United States is not only invested with authority to remove the Chief Justice of the Territory of Minnesota from office, but it is his duty to do so if it appear that he is incompetent and unfit for the place. . . . Being civil officers, appointed by the President, by and with the advice and consent of the Senate, and commissioned by the President, they are not exempted from that executive power which, by the constitution, is vested in the President of the United States over all civil officers appointed by him.

5 U.S. Op. Atty. Gen. 288, 290 (1851). This removal power "has been long since settled, and . . . has ceased to be a subject of controversy or doubt." *Id.*

In *McAllister v. United States* the Supreme Court interpreted the general statutory provisions for removal and replacement of "any civil officer . . . except judges of the courts of the United States" by the president as allowing the president to remove territorial judges. 141 U.S. 174 (1891). The quasi-judicial character of the office did not change the president's removal power over such officers.

When considering Congress's removal of the Comptroller General, the Court stated that "[i]nterpreting a law enacted by Congress to implement the legislative mandate" and "exercis[ing] judgment concerning facts that affect the application of the Act" are "[d]ecisions of that kind are typically made by officers charged with executing a statute." *Bowsher v. Synar*, 478 U.S. 714, 733 (1986).

This Court, in *Kuretski v. C.I.R*, also considered the presidential removal of tax judges. In that case, the Court held: "A tribunal may be considered a 'Court of Law' for purposes of the Appointments Clause notwithstanding that its officers may be removed by the President. The *Freytag* Court's treatment of territorial courts confirms the point." *Kuretski v. C.I.R.*, 755 F.3d 929, 941 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 2309 (2015).

These examples include executive officers' exercising quasi-judicial functions as well as Article I judges that preside over a "court of law." ALJs sit somewhere in the middle of this continuum. That it is well-settled that the president must have the power to remove officers sitting at both ends of this

spectrum confirms that he must have the power to remove for cause officers sitting in the middle of it.

CONCLUSION

Our Constitution requires that our government remain democratically accountable, so *amicus* asks the Court to determine that SEC ALJs are officers of the United States and therefore removable by the president.

Respectfully submitted this 10th day of March, 2017,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,345 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. Rule 32(a)1.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman, 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that, on March 10, 2017, I filed the foregoing brief with this Court by causing a true digital copy to be electronically uploaded to the Court's CM/ECF system and by causing thirty true and correct copies to be delivered by FedEx next business day delivery to the Court. Service on counsel was achieved via the CM/ECF system.

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