NO. 17-130

In the Supreme Court of the United States

RAYMOND J. LUCIA,
and RAYMOND J. LUCIA COMPANIES, INC.,

Petitioners,

–v–

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE THE FORUM OF UNITED STATES ADMINISTRATIVE LAW JUDGES IN SUPPORT OF NEITHER PARTY

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FEBRUARY 27, 2018

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether administrative law judges of the Securities and Exchange Commission are Officers of the United States within the meaning of the Appointments Clause.

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STATEMENT OF INTEREST[1]

A federal Administrative Law Judge (ALJ) presided over the Securities and Exchange Commission (SEC) hearing at issue in this case.

The Forum of United States Administrative Law Judges (FORUM) is a professional organization of federal ALJs founded in 1983. Similar to the SEC ALJ in this case, FORUM members preside over formal, adversarial, administrative hearings. FORUM ALJs provide independent adjudication for multiple agencies, including the Federal Energy Regulatory Commission, the International Trade Commission, the Department of Transportation, the Occupational Safety and Health Review Commission, and many others.

This court has stated that the role of ALJs in such formal administrative proceedings "is similar to that of an Article III judge." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 756 (2002). Approximately 185 federal ALJs in approximately thirty federal agencies preside over such adversarial proceedings.[2]

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[1] This brief is filed pursuant to Blanket Consents filed by Petitioners and Respondent on January 16, 2018, and February 7, 2018, respectively. No person other than amicus and its counsel have authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

[2] Adversarial administrative proceedings constitute only a small fraction of the total number of proceedings over which federal ALJs preside. The majority of federal ALJs—some 1,500—are employed by the Social Security Administration (SSA) to oversee single-party hearings concerning disability benefits. In SSA

As would be expected, the scores of judges that comprise FORUM do not all view the issues before the Court in this case the same way. The FORUM ALJ members are united, however, in their hope that the context provided by this brief will be helpful to the Court. The views expressed here are the views of individual citizens; they are not the views of any agency that employs FORUM members.

SUMMARY OF THE ARGUMENT

The question before the Court in this case is limited to whether the Appointments Clause under Article II, section 2, clause 2 of the United States Constitution applies to ALJs employed by the SEC. The answer to that question may or may not require a change to the way some federal ALJs are appointed, but it should not change what ALJs do, nor should it allow politics to influence formal adversarial adjudication by ALJs. Congress has expressed, and this Court has recognized, a clear intent that federal ALJs render initial determinations independently, based on the law and the facts and not on political pressure. The statutes that establish and maintain that independence are not at issue in this case and should not be disturbed.

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hearings, which are closed to the public, a claimant testifies in support of a request for benefits. No government representative or other adversary cross-examines the claimant or presents contradictory evidence. While a minority of FORUM members preside over single-party benefits proceedings, the focus of the organization is on the formal adversarial administrative process.

Federal ALJs perform independent initial adjudication under the Administrative Procedure Act (APA), a rare feat of unanimous legislation enacted in 1946. The APA appropriately balances constitutional interests in due process and integrity in public service against respect for the separation of powers among the branches of government. The APA also maintains political and judicial accountability for final agency action. This Court has upheld the constitutionality of the APA and the federal administrative adjudication system for more than 70 years. It should not depart from that established precedent in this case.

ARGUMENT

I. REGARDLESS OF WHETHER FEDERAL ALJS ARE INFERIOR OFFICERS, THEY MUST CONTINUE TO FUNCTION AS INDEPENDENT ADJUDICATORS

While the petitioner's argument about the Appointments Clause presents a somewhat novel question, the petitioner's objective is unoriginal: he seeks to open a new front in an old war against the federal administrative adjudication system and the established independence of federal ALJs. Such attacks are as old as the system itself. Because those who cannot remember the past are condemned to repeat it, it is worthwhile to briefly review the state of affairs before the creation of the federal ALJ system, how that system came to be, and why this Court has rejected previous assaults on the constitutionality of the APA.

A. The Remarkable History of the APA Shows Clear Congressional Intent for Independent Initial Adjudication

For more than 200 years, administrative law has played a vital role in the United States. In 1789, the first Congress established a customs service and a disability pension board for Revolutionary War veterans. *See* Act of July 4, 1789, ch. 2, 1 Stat. 24; Act of July 31, 1789, ch. 5, 1 Stat. 29; Act of Sept. 29, 1789, ch. 24, 1 Stat. 95. Congress specified the administrative procedures for these and other early agencies on an agency-by-agency basis; there was no uniform body of federal administrative procedure. As the nation's population and economy grew, however, so also grew the complexity of agency administration. Congress dealt with these complexities by granting agencies more authority to work out their own procedures.

By the early twentieth century, the disparate practices among agencies caused disappointment in some quarters. One incident relayed by Louis G. Caldwell illustrated the concern. In 1928, Caldwell took a leave of absence as a partner at Kirkland & Ellis to serve as the first general counsel of the Federal Radio Commission (FRC). He returned to private practice within a few months but over the next few years he watched with growing dismay as party politicians converted the FRC into a political dispensary. The award of radio licenses had become "a form of patronage," he complained. *See* Daniel R. Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America*, 1900-1940, at 119, Oxford University Press (2014). He also viewed other federal administrative tribunals as framing their findings of

fact "with an eye not so much to the evidence as to justify an a priori decision." *Id.*

In 1932, convinced that practitioners before other federal agencies shared his concern, Caldwell urged the American Bar Association (ABA) to appoint a committee to address administrative law and procedure throughout the federal government. *Id.* In 1933, the ABA organized a Special Committee on Administrative Law, with Caldwell as chair. *See* Daniel R. Ernst, *Dicey's Disciple on the D.C. Circuit: Judge Harold Stephens and Administrative Law Reform, 1933-1940*, 90 Geo. L.J. 787, 790 (2002). In 1936, the ABA's committee condemned "the fact that the tenure of administrative judges is insecure," which could make their decisions subject to political influence. *See* R. Terrence Harders, *Striking a Balance: Administrative Law Judge Independence and Accountability*, 19 J. Nat'l Ass'n Admin. L. Judges (1999) (citing 61 A.B.A.R. 720 (1936)). After Roscoe Pound stepped down as dean of Harvard Law School in 1936, he became chair of the Special Committee. *See* Matthew D. McCubbins et al., *The Political Origins of the Administrative Procedure Act*, 15 J.L. Econ. & Org. 180, 196 (1999). Under Pound's leadership, the ABA committee reported in 1938 that administrative officials had a tendency to decide cases "on evidence not produced," such as off-the-record consultations with other agency officials. *See* McCubbins at 196; Harders at 1-2.

While the ABA committee continued its investigation and reporting, at least nine bills were introduced in Congress to reform the administrative system. *See* McCubbins at 196. None passed. A tenth bill, known as the Walter–Logan bill, proposed the crea-

tion of a new Article III court to hear appeals arising from federal agencies. The Walter-Logan bill managed to gather majorities in both houses of Congress, but President Franklin Roosevelt vetoed it in December 1941. *See* McCubbins at 197.

Simultaneously with the ABA's work, Roosevelt tasked the Attorney General with preparing recommendations for improving the federal administrative process. The Attorney General's report, issued in 1941, proposed a corps of highly responsible hearing officers to replace the agency hearing examiners of the New Deal era, who had earned a reputation for political favoritism. *See* Ralph F. Fuchs, *The Hearing Examiner Fiasco under the Administrative Procedure Act*, 63 Harv. L. Rev. 737, 739 (1950).

World War II interrupted efforts at administrative reform. In 1944 and 1945, however, seven new bills were introduced. *See* McCubbins at 197. One, the McCarran-Sumners bill, would become the APA. *See generally Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950) (discussing the history of the McCarran-Sumners bill). It drew upon the Attorney General's report (*see* Fuchs at 739; McCubbins at 197), and all administrative agencies were invited to submit their views on the bill in writing (*see Wong Yang Sung* at 40). A tentative revised bill was then prepared, and interested parties again were invited to submit criticisms. *See id.* The revised bill struck the right balance of independent adjudication, political accountability, and judicial review. It passed both Houses unanimously and was signed by President Truman on June 11, 1946. *Id.* The House report about the APA aptly described the final legislation as the product of

a ten-year period of "painstaking and detailed study and drafting." H.R. Rep. No. 79-1980 (1946), *as reprinted in* Administrative Procedure Act Legislative History 241.

The APA established uniform standards to maintain due process in administrative adjudication. Under the new system, the Civil Service Commission would select, by competition and merit, a corps of independent hearing examiners to be employed across various agencies. Those hearing examiners were the forerunners of today's federal ALJs. In section 11, the APA safeguarded the tenure of hearing examiners. *See* Pub. L. No. 79-404, 60 Stat. 237, § 11 (1946). Specifically, hearing examiners could only be removed for good cause after an on-the-record hearing before the Civil Service Commission; they could not be removed by their employing agency alone. *Id.* Additionally, the agency employing a hearing examiner could not influence the hearing examiner's pay. *Id.*

The Senate report noted the intent of section 11 of the Act was "to render examiners independent and secure in their tenure and compensation." S. Rep. No. 79-752 (1945), *as reprinted in* Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess. 185, 215 (1946). The report also noted that the tenure and compensation protections in the Act would lead "agencies to secure the highest type of examiners." *Id.* The legislative history's extensive discussion of adjudicative independence demonstrates how crucial that objective was to the Congress that passed the Act. *Id.*; *see also* H.R. Rep. No. 79-1980, *as reprinted in* Administrative Procedure Act Legislative History 280-81.

The APA also maintained separation of powers. The Act provided judicial review to any person adversely affected by a final agency adjudication. *See* Pub. L. No. 79-404, 60 Stat. 237, § 10 (1946). The Senate report noted that without meaningful judicial review, administrative statutes would give agencies "blank checks" with little accountability. S. Doc. No. 248 at 212. Therefore, it would be "the duty of the courts to determine in the final analysis and in the exercise of their independent judgment" whether the record supported an agency's action. *Id.* at 216.

The legislative history of the APA also emphasizes another point relevant to the separation of powers. Even though that Act established a corps of independent adjudicators for making initial determinations, the agency itself was still "ultimately responsible for all functions committed to it." S. Doc. No. 248 at 204. Agency heads maintained accountability to the chief executive and were subject to congressional oversight.

In early 1978, Congress amended the APA "to provide that hearing examiners shall be known as administrative law judges." Pub. L. No. 95-251, 92 Stat. 183 (1978). Later the same year Congress passed the Civil Service Reform Act of 1978 (CSRA), which preserved and strengthened the APA's design for independent initial adjudication. *See* Pub. L. No. 95-454, 92 Stat. 1111 (1978). Under the CSRA, functions that were combined under the old Civil Service Commission were divided among three new independent agencies: the Federal Labor Relations Authority, the Office of Personnel Management (OPM), and the Merit Systems Protection Board (MSPB). Congress divided responsibility for ALJ hiring and removal between

the latter two agencies, respectively, and the same system continues today.

OPM oversees the qualification of all new ALJs through a competitive examination. *See* 5 U.S.C. §§ 1104, 3304, 5372(b)(2); 5 C.F.R. § 930.204. The MSPB, an organization independent from all other federal agencies, is the only tribunal that may determine whether an ALJ should be removed. *See* 5 U.S.C. § 7521(a). The CSRA also prohibits agencies that employ ALJs from influencing an ALJ's compensation. *See* 5 U.S.C. § 5372; 5 C.F.R. § 930.206.

B. For Decades, This Court Has Recognized That ALJs Have Independent Adjudication Authority

Within a few years of the passage of the APA, this Court had occasion to review the history of the Act's passage in two cases: *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950) and *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128 (1953). The Court noted that before the APA, hearing examiners were viewed as "mere tools of the agency," but with the Act's passage "Congress provided that hearing examiners should be given independence and tenure within the existing Civil Service system." *Ramspeck* at 131-32. By protecting hearing examiners from being "discharged at the whim or caprice of the agency or for political reasons" (*Ramspeck* at 142), Congress sought to "guarantee the impartiality of the administrative process" (*Wong Yang Sung* at 52).

In the decades after *Wong Yang Sung* and *Ramspeck*, the Court has consistently reiterated the Congressional intent for ALJ independence embodied in the APA. *See Butz v. Economou*, 438 U.S. 478, 513

(1978) ("the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners."); *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. at 756 ("the role of the ALJ, the impartial officer designated to hear a case . . . is similar to that of an Article III judge").

The Court has also emphasized the primacy of the will of Congress in the regulation of federal ALJs. The position of an ALJ is "not a constitutionally protected position" but is instead "a creature of congressional enactment." *Ramspeck* at 133. Accordingly, ALJs "may be regulated completely by Congress." *Id.* The Court has noted that the APA's unique history should influence its interpretation by courts. Protection of ALJ independence and other reforms in the APA came only after "a long period of study and strife." *Wong Yang Sung* at 40. Thus, when interpreting the Act, this Court has advised that "it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear." *Id.* at 41.

The intent of Congress in creating a system of independent adjudicators under the APA should be respected in this case, no matter its outcome. Even if the Court determines that the manner in which some ALJs are appointed should be changed, the Court should refrain from any pronouncements that would disturb the statutes Congress enacted to preserve ALJ independence. Those statutes prevent ALJs from

becoming "tools" of political influence at the expense of due process. *See Ramspeck* at 131.

C. Independent ALJ Adjudication Balances Several Constitutional Interests

Much has been and will be written in this case about the implications of ALJ independence on the constitutional separation of powers. The petitioner and the government argue that ALJs must be accountable to the Chief Executive they serve. Although accountability is admittedly an important consideration for any public servant in the executive branch, it is not the only constitutional concern. Other equally important interests include due process and public confidence in the integrity of government. As described below, the APA appropriately balances all of these interests.

1. Independent ALJ Adjudication Promotes Due Process

When agency action affects property interests, the Due Process Clause of the Fifth Amendment must be honored. *Opp Cotton Mills v. Adm'r*, 312 U.S. 126, 152, 153 (1941). This Court has long recognized the relationship between independent adjudication and due process. When the Constitution requires a hearing, it requires a fair one, held before a tribunal that meets currently prevailing standards of impartiality. *Wong Yang Sung* at 50; *In re Murchison*, 349 U.S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as to courts. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). Due process prohibits not only actual bias by a decision maker but also systems in which "the probability of actual bias on the part of the judge or decisionmaker is too high to

be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Murchison* at 136; *cf. Tumey v. Ohio*, 273 U.S. 510, 532 (1927) ("[e]very procedure which would offer a possible temptation" of bias by a judge denies due process).

The safeguards on ALJ independence provided by the APA reduce the risk of bias in administrative adjudication and promote due process. As the Court has noted, adjudication under the APA is "conducted before a trier of fact insulated from political influence." *Butz* at 513; *see* 5 U.S.C. § 554(d). An ALJ exercises independent judgment based on the evidence in the record, "free from pressures by the parties or other officials within the agency." *Butz* at 479. The Court has observed that federal administrative law "requires" these protections. *Id.* at 513.

The Court also has recognized that the role of an administrative law judge is "'functionally comparable' to that of a judge." *Butz* at 513-14. An ALJ may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. 5 U.S.C. § 556(c). An ALJ is prohibited from consulting any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. 5 U.S.C. § 554. Thus, APA adjudication includes "many of the same safeguards as are available in the judicial process." *Butz* at 513.

The provisions establishing ALJ independence in the APA and CSRA are appropriate not only because the ALJ system "may be regulated completely by Congress" (*see Ramspeck* at 133), but also because

they ensure due process consistent with the Constitution.

2. Impartial Public Service Is a Constitutional Concern

Judicial integrity is "a state interest of the highest order." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 889 (2009) (*quoting Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)). That interest is no less "constitutional" than the separation of powers doctrine or the Due Process Clause. Our form of government derives its authority from the respect of the people. *See Caperton* at 889; *see also United States v. Miss. Valley Generating Co.*, 364 U.S. 520 (1961) ("a democracy is effective only if the people have faith in those who govern" and that faith is "shattered" when public servants fail to maintain impartiality). The system requires "absolute probity" from judges to maintain that respect. *See Caperton* at 899 (*quoting Republican Party of Minn. v. White*, 536 U.S. at 793 (Kennedy, J., concurring)). When this Court considers the constitutionality of the ALJ system, it must weigh the importance of impartial adjudication against other constitutional concerns.

The Court has given determinative weight to the importance of impartiality in several constitutional contexts. For example, in *Caperton v. A.T. Massey Coal Co., Inc.*, the Court found that the state's interest in judicial impartiality outweighed First Amendment protections on judicial campaign contributions. *See id.* at 889.

A similar balancing can be seen in the Court's review of the Hatch Act—legislation that restricts the political activity of federal officers and employees. *See generally* 5 U.S.C. §§ 1501–08, 7321–26. Congress passed the Hatch Act in 1939, against a background of allegations that federal employees were inappropriately utilized by the Democratic Party in the 1938 campaigns. Scott J. Block, *The Judgment of History, Faction, Political Machines, and the Hatch Act*, 7 U. Pa. J. Lab. & Emp. L., 225, 231 (2005). As passed, the Act prohibited "officers and employees in the executive branch of the Federal Government, with exceptions," from taking any active part in political management or in political campaigns. *See United Pub. Workers v. Mitchell*, 330 U.S. 75, 82 (1947); 5 U.S.C. §§ 7323, 7324 (2018). Public workers have challenged Hatch Act restrictions as violating the First Amendment guarantee of free speech on many occasions, but this Court has upheld the Act. *See United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *United Pub. Workers v. Mitchell*, 330 U.S. 75. The Court has stated that it "must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government." *United Pub. Workers* at 99. Impartiality in public service carried determinative weight.

As in the cases above, the Court here should give great weight to the importance of impartial adjudication when it considers the competing constitutional concerns raised in this case. If Congress can restrict the political activity of federal officers and employees—in tension with the First Amendment—surely it also retains

the power to insulate ALJs from undue political or partisan influence in making initial factual and legal determinations.

3. Independent ALJ Adjudication Does Not Shield Agencies from Political or Judicial Accountability

As discussed above, the APA honors the separation of powers. Political and judicial accountability for final agency action resides with agency heads, not ALJs. Without exception, federal agencies that employ ALJs have authority to review, modify, and vacate an ALJ initial decision made under the APA before it becomes the agency's final action. *See* S. Doc. No. 248 at 207 (the agency itself "must ultimately either decide the case, or consider reviewing it, or hear appeals from the examiner's decision"). Thus, no matter the ALJ's decision, the head of the agency remains politically accountable to the Chief Executive for final agency action. Additionally, unless Congress has carved out an exception, any final agency action under the APA is subject to judicial review. *See* 5 U.S.C. §§ 701-702. These mechanisms maintain accountability and the separation of powers.

Independent initial ALJ adjudication is also part of the APA constitutional balancing act. As described above, such independence promotes due process, protects democratic ideals, and increases public confidence in government. By balancing impartiality with accountability, the APA "settles long continued and hard fought contentions, and enacts a formula upon which opposing social and political forces have come to rest." *Wong Yang Sung* at 40. The system has continued successfully for more than seventy years. No

matter the outcome of this case, the role of ALJs as independent initial adjudicators should not be disrupted.

II. THE COURT SHOULD NOT DISTURB THE ALJ TENURE PROTECTIONS ESTABLISHED BY CONGRESS

The government has raised the issue of ALJ tenure protection in its brief even though the Court did not grant certiorari on that issue and even though the petitioner concedes that tenure protection "has no bearing" on the issue presented. *See* Pet. Br. at 38. Out of an abundance of caution, we explain below why the Court should not disturb the ALJ tenure protections established by Congress.

A. The Court Lacks Jurisdiction to Address ALJ Tenure Protections Because There Is No Case or Controversy About That Issue Here

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). There is no case or controversy about ALJ removal here. The statutes governing ALJ removal were not applied to the SEC ALJ that decided this case. Neither the government nor the petitioners asked that they be applied, and no government actor prohibited the statutes from being applied. Moreover, the record contains no facts that would support an inference that the ALJ needed to be removed. If there was no reason to remove the ALJ, there can be no case or controversy as to the correct process for removal. Any

opinion by the Court on that issue would be purely advisory.

This Court should also decline to address ALJ tenure protections because the issue is not ripe for judicial review. The ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57, n.18 (1993) (citations omitted). It prevents courts from entangling themselves in "premature adjudication." *Abbott Lab.'s v. Gardner*, 387 U.S. 136, 148 (1967).

The government has not addressed this Court's ripeness jurisprudence when urging review of the ALJ tenure statutes. Instead, the government argues more generally that if the Court fails to decide how ALJs can be removed, it would "leave significant uncertainty" surrounding all administrative proceedings over which ALJs preside. Gov. Br. at 39. This Court has rejected similar generalized arguments of "uncertainty" as a ground for ripeness, and it should do so here. *See, e.g.*, *Nat'l Park Hospitality Ass'n. v. Dep't of the Interior*, 538 U.S. 803, 811-12 (2003) ("mere uncertainty as to the validity of a legal rule" does not make an issue ripe for review).

The government's request that the Court address ALJ tenure protections in this case also is not fit for adjudication on the present record. Neither the petitioner nor the government raised the issue of ALJ tenure protection in the litigation below, so no record has been developed on the issue for this Court to review. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will

not ordinarily consider them." *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970); *see Irvine v. California*, 347 U.S. 128, 129 (1954) ("We disapprove the practice of smuggling additional questions into a case after we grant certiorari."); *Husty v. United States*, 282 U.S. 694, 701-02 (1931). This presumption has frequently been applied even when the novel issue is a constitutional question. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 n.2 (1989) (declining to address due process claim made for the first time in petitioner's brief to this Court); *Dothard v. Rawlinson*, 433 U.S. 321, 323, n.1 (1977) (declining to address constitutional challenges to Title VII of the Civil Rights Act of 1964 not raised below); *Duignan v. United States*, 274 U.S. 195, 200 (1927) (declining to address constitutional challenges to the National Prohibition Act where the petitioner "made no mention of the constitutional question" in the proceedings below).

Additionally, there is no disagreement among the courts of appeal on the issue. In fact, it appears that no court has ever found the statutes governing ALJ removal are unconstitutional. When there is a "lack of any guidance on th[e] issue from the lower federal courts," this Court has declined to take the matter up in the first instance. *See Youngberg v. Romeo*, 457 U.S. 307, 316 n.19 (1982).

The government's brief also presents new facts that weigh against the ripeness of the ALJ removal issue in this case. The government asserts for the first time in its merits brief that the SEC and certain other unidentified agencies have taken "steps" to ensure that future proceedings are overseen by ALJs

"properly appointed" as inferior officers under the Appointments Clause. Gov. Br. at 45-46. The claim is difficult to assess with no record. But assuming it is accurate, the government must acknowledge that the appointment of ALJs has not been uniform across the various agencies employing them. Under the government's theory, that matters. Specifically, the government argues that the manner of an ALJ's appointment is "consequential" to the proper procedures for removing that ALJ. *See id.* at 39-40 n.7; 41. Yet the government admits that the recent appointments allegedly made by some agencies are beyond the reviewable record of this case. *Id.* at 3 n.2. It is unclear how this Court could decide the proper standard for removing a given ALJ under the government's theory without a record about how the ALJ in question was appointed.

The last line of the government's brief is even more quizzical. After questioning the constitutionality of provisions that guarantee an ALJ a pre-removal hearing and that protect ALJ compensation, the government admits that such issues should not be addressed in this case but rather in future "appropriate cases between employing agencies and their ALJs." Gov. Br. at 55. The government attempts to distinguish the hearing and compensation measures by asserting they have no effect on private litigants. *See id.* But the purpose of those provisions is to promote decisional independence, and the point of decisional independence is due process for litigants. The government's distinction does not hold. The better conclusion is that all of these issues "should await a concrete dispute" before review by this Court. *See Nat'l Park Hospitality Assoc.*, 538 U.S. at 812.

B. Eliminating ALJ Independence Would Cause—Not Solve—Constitutional Problems

The Court should refrain in this case from interfering with tenure provisions that protect ALJ independence for the host of jurisdictional and prudential reasons discussed above. But more than that, invalidating those tenure protections would be wrong on the merits.

First, judicial undoing of the legislative provisions that promote ALJ independence would violate the democratic will of the people, as expressed by a rarely unanimous Congress. As detailed above and as repeatedly recognized by this Court, protection of independent adjudicators was critical to the design and passage of the APA. It is not at all clear that ALJ protections are severable from the federal administrative adjudication scheme as a whole. To allow political influence to infect the factual and legal adjudication performed by ALJs would be to strike a very different bargain than the "formula upon which opposing social and political forces" agreed in 1946 (*see Wong Yang Sung* at 40) and which was reaffirmed in the CSRA of 1978. It is doubtful that Congress would ever have approved such a scheme. *See* S. Doc. No. 248 at 189 (quoting report that political influences "properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights.").

Second, striking ALJ removal protections undermines due process for citizens subject to agency action. This makes the APA system less—not more—constitutional. Fewer protections will lead to more

political pressure on ALJs, and more political pressure will lead to bias in ALJ decisions. As this Court has explained, the Constitution prohibits systems in which "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow* at 47. Administrative adjudication without independent ALJs would exceed constitutional tolerance.[3]

C. This Case Is Readily Distinguished from *Free Enterprise Fund*

The so-called two-level removal protections for ALJs are readily distinguishable from the removal scheme found to be unconstitutional in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). In that case, the Court was confronted with a scheme in which members of the Public Company Accounting Oversight Board could only be removed upon an order of the SEC. The Court found that given the executive nature of the Board's duties, two levels of protection for Board member tenure violated the separation of powers. The Court reiterated, however, a century-long distinction between constitutional oversight of officers performing "purely executive" functions and the oversight of public servants

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[3] Petitioners rely on a three-year old Wall Street Journal article to suggest the SEC's ALJs are biased. Pet. Br. at 3. But the methodology and conclusion of the cited article have been refuted, repeatedly. *See* Urska Velikonja, *Are the SEC's Administrative Law Judges Biased?*, 92 Wash. L. Rev. 315, 367-68 (2017); David Zaring, *Enforcement Discretion at the SEC*, 94 Tex. L. Rev. 1155, 1182-83 (2016); Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 Fordham L. Rev. 1143, 1178 (2016).

performing "quasi-judicial" functions. *See Free Enter. Fund*, 561 U.S. at 493 (analyzing *Myers v. United States*, 272 U.S. 52 (1926)); *see also id.* at 507 n.10. If the Court's jurisprudence in this area is distinguishable for "quasi-judicial" functionaries, it is even more distinguishable for ALJs. This Court has described ALJs in terms that exceed a merely "quasi" judicial function; the Court has said ALJs perform a role of impartial adjudication "similar to that of an Article III judge." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. at 756. *Free Enterprise Fund* is distinguishable for at least that reason.

Free Enterprise Fund is also distinguishable on other grounds. First, when *Free Enterprise Fund* was decided, there had never been any actual attempt to remove a member of the Public Company Accounting Oversight Board. The Court's inferences about the restraints imposed by two-level protection were entirely theoretical. Not so with ALJ removal. Dozens of ALJs have been successfully disciplined or removed for a variety of reasons, notwithstanding the two-level scheme at work in the APA and CSRA. ALJs have been removed for being absent for extended periods, declining to set hearing dates, and having a high rate of significant adjudicatory errors. *See* Kent H. Barnett, *Resolving the ALJ Quandary*, 66 Vand. L. Rev. 797, 807 (2013); *Soc. Sec. Admin. v. Anyel*, 58 M.S.P.R. 261, 269 (1993). ALJs also have been disciplined for deciding too few cases and for over-granting benefits. *See id.*; *Shapiro v. Soc. Sec. Admin.*, 800 F.3d 1332 (Fed. Cir. 2015). The government acknowledges these cases, as it must. Gov. Br. at 46-47, 54-55. The fact of successful (and recent) ALJ removal strongly cuts against any argument that ALJs are immune from oversight.

Additionally, in *Free Enterprise Fund*, the SEC commissioners were "not responsible for the Board's actions." *Free Enter. Fund* at 496. But in APA adjudication, politically appointed agency heads are entirely responsible for final decisions. ALJ initial decisions are not final agency action unless the head of the agency acquiesces to the decision. *See Block v. U.S. Int'l Trade Comm'n*, 777 F.2d 1568, 1571 (Fed. Cir. 1985). Final action by the agency head is also subject to judicial review. *See id.*; 5 U.S.C. §§ 701-702. Thus, adjudication under the APA is always subject to political and judicial oversight. These structural distinctions alleviate the concerns cited by the Court in *Free Enterprise Fund*.

CONCLUSION

Because our Constitution was designed to balance competing interests, it is not surprising that laws passed under the Constitution often require a similar balancing act. The provisions of the APA relating to the independence of ALJs reflect the proper balance between congressional delegation and executive control. But those are not the only constitutional interests at issue. The ALJ system also balances political accountability and integrity in decision-making. No matter how the Court resolves the question in this case, it should confirm and maintain the fundamental protections of federal ALJ independence that promote and ensure impartial adjudication in formal, adversarial, administrative proceedings.

Respectfully submitted,

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FEBRUARY 27, 2018