No. 22-859

In the Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

GEORGE R. JARKESY, JR., ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

This brief is presented on behalf of the Federal Administrative Law Judges Conference (FALJC). FALJC is a voluntary professional association founded in 1947 that represents and serves Administrative Law Judges (ALJs) employed throughout the federal government. The government employs more than 1930 ALJs in more than 30 agencies to adjudicate a wide variety of cases. Amicus.App.1a.[2]

FALJC membership includes ALJs from virtually every Federal agency that appoints ALJs. (Amicus.App. 3a, *FALJC Mission Statement and Leadership*). A primary FALJC mission is to promote due process and impartiality in administrative adjudication through maintenance of ALJ decisional independence under the Administrative Procedure Act (APA), ch. 324, 60 Stat. 237 (5 U.S.C. §§ 551 *et seq.*, 701 *et seq.*), codified at 5 U.S.C. §§ 551-559.

This Court granted certiorari on three separate issues. This brief addresses the third issue, holding that

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[1] Per Sup. Ct. R. 37.6, No person other than the FALJC and its counsel has authored this brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of the brief.

[2] ALJs adjudicate cases involving, among other things, advertising, antitrust, banking, communications, energy, environmental protection, food and drugs, health and safety, housing, interstate commerce including the United States mail, international trade, labor management relations, securities and commodities markets, transportation, social security disability, Medicare, and other benefits claims.

statutory restrictions on the removal of the Security and Exchange Commission's (SEC) ALJ violated Article II of the U.S. Constitution. Although the structure for administrative appeals in the agencies that use ALJs will be different, all ALJs appointed by agencies under 5 U.S.C. § 3105 could be impacted by this decision. FALJC agrees with the government's position as to the first two issues before the Court but has decided to focus on the third issue that speaks to "for-cause" protection for ALJs.

Resolution of the question presented is important to FALJC for two principal reasons: (1) to preserve ALJ decisional independence created by Congress in the APA for the benefit of providing fair due process in agency proceedings for the public; and (2) to clarify that 5 U.S.C. § 7521 is constitutional, both under this Court's precedents, and because the process of review by principal officers who are responsible to the President for application of the law satisfies Article II clause 3 of the Constitution.

SUMMARY OF ARGUMENT

In *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), the court below found that the "for cause" removal extended to SEC ALJs violated Article II of the Constitution, requiring that the President have the ability to "take Care that the Laws be faithfully executed." *Id*. at 463 (citing U.S. Const. art. II, § 3). At its core, the *Jarkesy* decision is reductive and overly formulistic.

In citing *Free Enterprise v. Public Co. Acc. Oversight Bd*., 561 U.S. 477 (2010), the court implied that inferior officers cannot have more than one layer of removal protection under the Take Care Clause. *Jarkesy,* 34 F.4th at 463. Then, in relying on *Lucia v. SEC*, 138 S.Ct. 2044 (2018), the court emphasized that SEC ALJs are inferior officers. *Id.* at 464. On the heels of these decisions, the court concluded that SEC ALJs possessing more than one layer of "for cause" removal protection violated Article II of the Constitution. *Id*. This conclusion, however, turns a blind eye to the decisional independence commanded of ALJs under the APA.

The *Jarkesy* decision also overlooks the two exceptions recognized by this Court, under which Congress may limit the President's power to remove executive officers. Specifically, limits on removal are permitted where the function of an inferior officer is quasi-judicial in nature, and where removal restrictions over an inferior officer do not unduly interfere with the functioning of the Executive Branch. *See*, *Seila Law LLC v. Consumer Fin. Prot. Bureau,* 140 S.Ct. 2183, 2199 (2020). Equally important, the *Jarkesy*

decision fails to consider that the President's ability to ensure the faithful execution of the laws relies on the decisional independence that follows the President's inability to act to remove ALJs. The *Jarkesy* court also failed to address that the President retains significant influence and power over principal officers, referred to as "alter egos", who oversee administrative agencies and review findings of fact and recommendations put forward by ALJs. Finally, the *Jarkesy* decision omits discussion of the consequences that follow the elimination of ALJ "for cause" removal protections and the end of ALJ decisional independence.

ARGUMENT

I. *FREE ENTERPRISE* AND CONGRESSIONAL LIMITS ON THE PRESIDENT'S POWER TO REMOVE INFERIOR OFFICERS

This Court first considered the constitutionality of multi-layer removal protection in *Free Enterprise*. Before the Court was the Public Company Accounting Oversight Board (PCAOB); a five-member board that regulated the accounting industry under the Sarbanes-Oxley Act. *Free Enterprise*, 561 U.S. at 477. The members, who were removable only for a heightened "good cause" standard, "in accordance with" specified procedures, 15 U.S.C. §§ 7211(e)(6) and 7217(d)(3), were appointed and removable only by SEC Commissioners; who in turn, the Court noted were only removeable by the President for "inefficiency, neglect of duty, or

malfeasance in office."[3] [4] *Id.* at 484-87. The Court found the Board's structure violated Article II of the Constitution, framing the issue as clearly limited to policy-making inferior officers, indicating: "[t]he question is whether these separate layers of protection must be combined. May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, *even though that inferior officer determines the policy and enforces the laws of the United States?*" *Id.* at 483-84 (emphasis added).

Declining to extend the holding to ALJs, the Court took great care to emphasize that the functioning of ALJs is different than the members of the PCAOB, as ALJs perform adjudicatory rather than enforcement or policymaking functions. *Id.* at 507 n.10. This is a distinction that Justice Kavanaugh recognized before the *Free Enterprise* case was before this Court. *Free Enterprise v. Public Co. Acc. Oversight Bd.*, 537 F.3d 677, 699 n.8 (D.C. Cir. 2008) *aff'd in part and rev'd in part*, 561 U.S. 477 (2010) (Kavanaugh, J., dissenting).

This Court's and Justice Kavanaugh's distinction between inferior officers that engage in purely adjudicatory functions, specifically, ALJs, from inferior

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[3] FALJC agrees with the Solicitor General's position that the "for cause" removal protections provided to ALJs are less stringent than those provided to the PCAOB in *Free Enterprise*. *See*, Petition, 18-19 (noting that PCAOB members were removable only for willful violations of the Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance) (citing *Free Enterprise*, 561 U.S. at 503).

[4] SEC Commissioners do not possess removal protection from the President, and this is discussed in greater detail below. *See*, *infra* 27.

officers that engage in purely executive actions, is the reason that Congressional multi-layer removal protections are constitutional for the former, but not so for the latter.

"ALJs perform only adjudicatory functions that are subject to review by agency officials and that arguably would not be considered central to the functioning of the Executive Branch for purposes of Article II removal precedents." *Id*. This means that, unlike the PCAOB, ALJs make no policy. *See*, 5 U.S.C. § 553; *see also*, 5 U.S.C. § 3105 (requiring that administrative law judges do not perform duties or engage in activities that are inconsistent with their adjudicatory functions); 5 U.S.C. § 554(d)(1)-(2).[5] [6] [7] Rather, ALJs may only hold hearings and apply the regulations created by agency policymakers to issue decisions on specific facts in conformity with law and regulatory policy. *Id*. If the President resolves to change the result of an ALJ decision, the solution is not to remove the ALJ. That resolution is fulfilled by the President removing

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[5] Ronald M. Levin, *Administrative Judges and Agency Policy Development: The Koch Way*, 22 WM. & MARY BILL RTS. J. 407, 423 (2013), https://scholarship.law.wm.edu/wmborj/vol22/iss2/9 (noting the ALJs' insulation from consultation with knowledgeable staff members within an agency, pursuant to 5 U.S.C. § 554(d), bolsters the thesis that ALJs should not be regarded as policy-makers).

[6] ABA Section of Admin. L. & Reg. Practice, A Guide to Federal Agency Adjudication 156–58 (JEFFREY B. LITWAK ED., 2D ED. 2012).

[7] Charles H. Koch Jr., *Policymaking by the Administrative Judiciary*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES, at 62 (2005), https://digitalcommons.pepperdine.edu/naalj/vol25/iss1/2 (noting that ALJs cannot decide individual cases without finding and applying administrative policy).

the *policymaker* that creates the regulatory policy the ALJ is bound to apply by installing a *policymaker* to create a policy that the President desires. Removal of the *policymaker*—not the adjudicator—ensures the President has the ability to take care that Congress's laws are faithfully executed. And it is the President's ability to remove the *policymaker* that ensures "the buck stops with the President." *Free Enterprise*, 561 U.S. at 493.

Additional support lies with the lengthy history of the ALJ position. For the better part of seventy years, ALJs and their tenure protections have remained an integral part of administrative adjudication. The PCAOB, on the other hand, was devoid of precedent, decidedly weighing against multi-layer removal protection from the President. *Free Enterprise*, 537 F.3d. at 699 (Kavanaugh, J., dissenting) (finding "[t]he lack of precedent for the PCAOB counsels great restraint by the Judiciary before approving this additional incursion on the President's Article II powers").

Further consider the Court's historical precedent upholding the removal protection of inferior officers performing adjudicatory functions, who are not central to the Executive Branch. Cases like, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) and *Wiener v. United States*, 357 U.S. 349 (1958), persuasively highlight the reasons Congress codified the APA and provided removal protections to ALJs.

Take note of the principal officers, referred to as "alter egos", that oversee the agencies that employ ALJs, and who review the findings of fact and recommendations that ALJs put forward. *See, e.g.*, 5 U.S.C. § 557; *see also*, *Free Enterprise*, 537 F.3d at 699 n.8 (Kavanaugh, J., dissenting).

As important, look toward the future and consider the consequences of eliminating "for cause" removal under the APA; the weight of which further separates the removal protections provided to ALJs from those provided to the PCAOB in *Free Enterprise*.

Congress codified the APA and protected ALJs from removal by the President constitutionally and for good reason—and it did so unanimously.

II. CONGRESS ENACTED THE APA AND CREATED THE ALJ POSITION TO PROVIDE INDEPENDENT AND FAIR DUE PROCESS IN ADMINISTRATIVE ADJUDICATION

Prior to the adoption of the APA, Congress delegated the resolution of cases and controversies arising under complex statutory schemes to administrative agencies. *See*, *Ramspeck v. Fed. Trial Exam'rs Conference*, 345 U.S. 128, 130 (1953). Each agency was tasked with assigning trial examiners, and those examiners received testimony and evidence by way of adversarial hearings. *Id.* By all accounts, these trial examiners served as adjudicatory officers; however, they lacked the removal protections provided to their judicial counterparts. *Id.* Instead, a trial examiner's appointment was in a "dependent status," where their tenure, compensation, and promotions were reliant on agency ratings under the Classification Act of 1923 (as amended). *Id.* This provisional status led many litigants to complain that trial examiners "were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations." *Id.* at 131.

Public outcry led to extensive executive branch committee studies and reports,[8] as well as congressional hearings; the culmination of which moved Congress to unanimously codify the APA. *Id*. and n.2 (citing Administrative Procedure Act—Legislative History, S.Doc. No. 248, 79th Cong., 2d Sess., p. 215). Through the APA, Congress sought to promote fairness in the administrative process by addressing two types of agency action: adjudication and rulemaking. *See*, Ralph F., Fuchs, *Attorney General's Manual on the Administrative Procedure Act, Prepared by the United States Department of Justice; The Federal Administrative Procedure Act and the Administrative Agencies, Vol. VII of the New York University School of Law Institute Proceedings*, INDIANA LAW JOURNAL: VOL. 23: ISSUE 3, ARTICLE 16, at 364 (1948).

On the adjudication front, the APA provided trial examiners (eventually renamed Administrative Law Judges) "for cause" removal protection to ensure they conducted agency hearings fairly, with independent decision-making. *See*, 5 U.S.C. § 556(b). For instance, Section 11 provides that: "[e]xaminers shall be removable by the agency in which they are employed only for 'good cause'" and their "compensation is provided independent of the agency recommendations or ratings." *See*, Sections 5 and 11 of the APA and the *Attorney General's Manual on the APA* at pp. 54-56, 72; *Ramspeck*, 345 U.S. at 132-33. The APA also set forth statutory requirements on ALJ compensation, removing past performance bonuses that unfairly

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[8] Dean Acheson, et al., *Letter of Submittal*: *Attorney General's Committee on Administrative Procedure* (1941), https://www.regulationwriters.com/downloads/apa1941.pdf.

colored the administrative process. *See*, 5 C.F.R. §§ 5.930.205 and 930.206.

Rulemaking, on the other hand, was assigned *exclusively* to agency members and Commissioners. *See*, *supra* 6-7. These members and Commissioners were also tasked with reviewing ALJ findings of fact and recommendations following an agency hearing. *See*, 5 U.S.C. § 557(b). The reviewing member or Commissioner then adopts, or disregards, the ALJ findings and recommendations. *Id*. ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule"); *see also*, *United States v. Arthrex*, 141 S.Ct. 1970, 1985 (2021) (holding that a presidentially appointed principal officer must have the ability to review a decision made by an inferior officer); 17 C.F.R. § 201.360(d) (finality of an SEC ALJ decision is subject to review by SEC Commissioners).

Dating back to the APA's origins in 1946, ALJs have used their "for cause" removal protection to conduct fair and impartial administrative hearings, submitting findings of fact and recommendations to members and Commissioners for review. At present, the *Jarkesy* decision threatens this decisional independence, and the accompanying due process provided to parties, by eliminating ALJ "for cause" removal.

III. ALJ PROTECTIONS AND INDEPENDENCE UNDER THE APA ARE ROOTED IN HISTORY AND THIS COURT'S HISTORICAL PRECEDENT

The court below noted that U.S. Const. art. II, § 3 provides the President with a certain degree of control over executive officers. *Jarkesy*, 51 F.4th at 463. This

is because, under Article II, the President must possess a suitable amount of power over his officers' appointment and removal to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. This Court, however, has recognized two exceptions under which Congress may limit the President's removal power over executive officers. Under the first exception, Congress may protect an executive officer from removal by the President if that officer is tasked with quasi-judicial duties. *Seila Law LLC,* 140 S.Ct. at 2198. Under the second exception, Congress may limit the President's power to remove inferior officers where such limits do not unduly interfere with the functioning of the Executive Branch. *Id.* at 2199; *Morrison v. Olsen;* 487 U.S. 654, 691-92 (1988).

The "for cause" removal provided to ALJs by the APA is constitutional and does not violate Article II under the exceptions recognized by this Court because ALJs are inferior officers that perform adjudicatory functions.

A. ALJs Are "Functionally Comparable" to Article III Judges and Their Quasi-Judicial Functions and Removal Protections Are Firmly Rooted in History

The Court defined the scope of the first exception for limiting the President's removal power in *Humphrey's Ex'r*. There, President Roosevelt sought removal of William E. Humphrey, a member of the Federal Trade Commission (FTC). 295 U.S. at 618-19. In a letter addressed to Humphrey, President Roosevelt *suggested* that he resign because Roosevelt believed "the work of the Commission can be carried out most effectively with personnel of [] [his] own

selection[]". *Id.* Humphrey declined but was shortly thereafter sent another letter from Roosevelt, forcibly removing him from his post. *Id.*

The Court found that the President could not exercise political pressure to remove Humphrey, an executive officer tasked with primarily quasi-judicial and quasi-legislative duties. *Id.* at 628-29. In so doing, the Court emphasized the fundamental necessity of preserving the independence of each of the three general branches of government so that one branch does not control or coerce another. *Id.* at 629-30. Because the FTC, and its members, were tasked with legislative and judicial duties, the Court found Congress created the FTC "as a means of carrying into operation legislative and judicial powers," albeit by way of the executive branch. *Id.*; *see*, *City of Arlington v. FCC*, 569 U.S. 290, 305 n.4 (2013) (noting that "[agency] activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they must be exercises of—the 'executive Power'" (citing U.S. Const. art. II, § 1, cl. 1)).

In *Wiener*, the Court again decided whether limiting the President's removal power violated Article II of the Constitution; this time for members of the War Claims Commission. 357 U.S. at 350-54. The Court found that the most reliable factor to determine whether such limits were constitutional was the function that Congress vested to the Commission. *Id.* at 354. In relying on the legislative history behind the War Claims Commission, the Court found that it was established as "an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof, with finality of determination . . . " *Id.* Given the quasi-judicial role of the Commission and

its members, the Court, once again, found that Congress was permitted to limit the President's power of removal. *Id*. at 355-56.

Both *Humphrey's Ex'r* and *Wiener* affirm that the APA may limit the President's ability to remove SEC ALJs, as well as ALJs generally. To be sure, this Court has found that ALJs are "functionally comparable" to that of Federal district court judges. *Butz v. Economou*, 438 U.S. 478, 513 (1978) ("More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency"); *see*, *Federal Maritime Commission v. S.C. State Ports Authority*, 535 U.S. 743, 757-759 (2002) (describing the similarities between FMC proceedings and civil litigation); *see also*, *Lucia*, 138 S.Ct. at 2049 (affirming SEC ALJs exercise authority comparable to that of a federal district judge conducting a bench trial).[9] Even so, the court below mistakenly found, in a footnote, that the exception identified in *Humphrey's Ex'r* and *Wiener* was inapplicable because the Court's more recent decision in *Seila Law* narrowed that exception. *Jarkesy*, 34 F.4th at 464 n.19. According to the lower court, that exception now only applies "to a multimember body of experts, balanced along partisan lines, that perform[] legislative and judicial functions and [are] said not to exercise any executive power[]". *Id*. (citations omitted).

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[9] In fact, similar to Federal district court judges, ALJs are only permitted to receive the compensation set by statute and do not receive bonuses. *See*, 5 U.S.C. § 5372; 5 C.F.R. §§ 5.930.205 and 930.206.

The lower court's framing of *Seila Law* is misplaced. While this Court recognized that the first exception applied to the multimember expert agencies in both *Humphrey's Ex'r* and *Wiener*, it based this narrower point on its broader finding that Congress may limit the President's power of removal over executive officers who perform "specified duties as a legislative or as a judicial aid." *Seila Law*, 140 S.Ct. at 2198-99 (adding the Court identified several organizational features that helped explain the characterization of non-executive, including that the board of each commission was designed to be "non-partisan" and to "act with entire impartiality." (citations omitted)); *see*, *Arthrex*, 141 S.Ct. at 1995 (Gorsuch, J., dissenting) (advocating "for a 'functional approach,' [] that would take account of, and place weight on, why Congress enacted a particular statutory limitation"); *see also*, *Jarkesy*, 34 F.4th at 478 n.113 (Davis, J., dissenting) (finding the majority supports its opinion by citing dicta from *Myers v. United States*, 272 U.S. 52 (1926), disregarding the exception identified in *Humphrey's Ex'r*).

ALJs are tasked with strictly adjudicatory duties and are prohibited from engaging in activities that are inconsistent with their adjudicatory functions, such as policymaking decisions. *See*, *supra* 6-7. Instead, like the board members in *Humphrey's Ex'r* and *Wiener*, ALJs serve as independent, non-partisan impartial triers of fact who exercise independent judgment and are "insulated from political interference". *See*, *Butz,* 438 U.S. at 513.[10] The "for cause"

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[10] In finding that this exception does not apply to SEC ALJs, nor ALJs generally, the Fifth Circuit also relied on a footnote from the Court's decision in *City of Arlington*, 569 U.S. at 305

removal provided to ALJs by the APA therefore falls under the *Humphrey's Ex'r* and *Wiener* exception identified by this Court. *See*, *Jarkesy*, 34 F.4th at 478 (Davis, J., dissenting) (finding "the majority applies what is essentially a rigid, categorical standard, not the functional analysis required by the Supreme Court's precedents").

The lower court's interpretation of *Selia Law* is also far afield from this Court's decision in *Free Enterprise*, 561 U.S. at 483-84. Discussed earlier, the Court found the structure of the PCAOB, whose members were removable, only by the SEC, for a heightened "good cause" standard, "in accordance with" specified procedures, 15 U.S.C. §§ 7211(e)(6) and 7217 (d)(3), violated Article II of the Constitution. *Id.* at 484-87, 498. The Court, however, took great care to emphasize that the role of ALJs is different than the members of the PCAOB, as ALJs perform adjudicatory rather than enforcement or policymaking functions. *Id.* at 507 n.10; *see*, *Jarkesy*, 34 F.4th at 477 (Davis, J., dissenting) (noting the *Free Enterprise* decision was premised on the "significant executive

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n.4. *See*, *Jarkesy,* 34 F.4th at 464 n.19. According to the Fifth Circuit, this exception does not apply to SEC ALJs because they necessarily exercise executive power when performing their duties. *Id.* (citing *City of Arlington*, 569 U.S. at 305 n.4) (noting that "[agency] activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they must be exercises of—the 'executive Power'" (citing U.S. Const. art. II, § 1, cl. 1)). Yet, this is why the Court found the exception applies to *quasi*-judicial and *quasi*-legislative officers because, no matter how disconnected an officer's duties are from the executive branch, they remain an officer under the President. The first exception therefore still applies to ALJs, and Congress may limit the President's removal power by providing "for cause" removal under the APA.

power" the PCAOB exercised). As Justice Kavanaugh recognized: "ALJs perform only adjudicatory functions that are subject to review by agency officials and that arguably would not be considered central to the functioning of the Executive Branch for purposes of Article II removal precedents." *Free Enterprise*, 537 F.3d at 699 n.8.

For the better part of seventy years, ALJs have performed these adjudicatory functions with tenure protection under the APA. This long-standing historical footing, as well as the history of concerns with trial examiners prior to the APA, clearly separates the PCAOB in *Free Enterprise* and ALJs. *Id.* (Kavanaugh, J., dissenting) ("But there are good reasons the Board and the United States did not cite ALJs as a precedent"). As Justice Kavanaugh found: " . . . the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity. Neither the majority opinion nor the PCAOB nor the United States as intervenor has located any historical analogues for this novel structure. They have not identified any independent agency other than the PCAOB that is appointed by and removable only 'for cause' by another independent agency." *Id.* at 699 (adding "[t]he lack of precedent for the PCAOB counsels great restraint by the Judiciary before approving this additional incursion on the President's Article II powers"). In fact, it was this lack of historical precedent in *Seila Law* that drove this Court to find that the single-Director structure of the Consumer Financial Protection Bureau (CFPB) violated the Constitution. 140 S.Ct. at 2201-02 (finding "[t]he CFPB's single-Director structure is an innovation with no foothold in history or tradition"); *see also*,

Arthrex, 141 S.Ct. at 1983 (returning to history and finding that "[h]istory reinforces the conclusion that the unreviewable executive power exercised by APJs is incompatible with their status as inferior officers").

The wealth of historical precedent behind the adjudicatory functions of ALJs, and their "for cause" removal, teaches that Congress prescribed removal protections under the APA to address the shortcomings of past administrative adjudication, *Ramspeck*, 345 U.S. at 131, allowing for independent and fair agency adjudication for more than seventy years. We stand on the shoulders of those who witnessed the pitfalls of agency adjudication prior to the APA. There is no reason to believe that the due process insults inflicted on past litigants prior to adoption of the APA would be less destructive today. It would be a mistake to overlook the lessons of the past because we find ourselves removed from the destruction above which we teeter.

B. ALJs are Inferior Officers Under the Appointment Clause and the Limits Placed on the President's Removal Power Do Not Unduly Interfere with the Functioning of the Executive Branch

The Court clarified the scope of the second exception for limiting the President's power of removal over inferior officers in *Morrison*, 487 U.S. at 685-96.[11] There, the Court found the "good cause" protection

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[11] The Court first recognized this second exception for inferior officers in *United States v. Perkins*, 116 U.S. 483, 484-85 (1886) (upholding tenure protections that Congress provided to a naval cadet-engineer, an inferior officer of the executive branch).

provided to an appointed "independent counsel" did not violate Article II even though the counsel's duties fell "purely" within the executive sphere. *Id*. at 688-91 ("There is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch"). Significant to the Court's decision was that the "independent counsel" was an inferior officer under the Appointments Clause, with limited jurisdiction and tenure, also lacking policy-making or significant administrative authority. *Id*. Thus, while the Court observed "the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act," the Court found that the President's need to control the "independent counsel" was not central to the functioning of the Executive Branch. *Id*. at 691-92.

As in *Morrison,* SEC ALJs were found to be inferior officers under the Appointment Clause in *Lucia,* 138 S.Ct. at 2055. Further, like the "independent counsel" in *Morrison,* SEC ALJs exercise no small amount of discretion when carrying out important functions. *Id*. at 2053-54. Indeed, SEC ALJs have nearly all the tools of federal trial judges to ensure fair and orderly adversarial hearings. *Id*. (emphasizing that SEC ALJs have the power to "take testimony," "conduct trials," "rule on the admissibility of evidence," and "have the power to enforce compliance with discovery orders"). SEC ALJs also issue decisions containing factual findings, legal conclusions, and appropriate remedies. *Id*. Yet, these are initial decisions which only become final agency action when the SEC issues an order of finality under 17 C.F.R. § 201.360(d).

Id. Furthermore, as in *Morrison,* SEC ALJs are not principal officers, their jurisdiction is limited to cases arising in their respective agency, and they do not engage in policymaking decisions; instead, SEC ALJs impartially preside over adversarial hearings in which the SEC is a contesting party, in keeping with the rules and regulations of their agency. *See*, *supra* 6-7; *Free Enterprise*, 561 U.S. at 507 n.10 (emphasizing "many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions . . . or possess purely recommendatory powers"). This means that SEC ALJs only perform adjudicatory functions, and therefore the President's need to control SEC ALJs, and ALJs generally, is not central to the functioning of the Executive Branch. *See*, *Jarkesy*, 34 F.4th at 478 (Davis, J., dissenting) (noting that the majority fails to explain how ALJ tenure protections under the APA interfere with the President's ability to execute the laws).

To be sure, this Court's precedents have repeatedly drawn a clear dividing line between executive officers tasked with policymaking actions versus officers vested with quasi-judicial duties.[12] In *Free Enterprise*, for

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[12] *See*, *Free Enterprise*, 561 U.S. at 507 n. 10 (noting "unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, *see*, §§ 554(d), 3105, or possess purely recommendatory powers"); *Free Enterprise*, 537 F.3d at 699 n.8 (Kavanaugh, J., dissenting) (noting that administrative law judges "perform only adjudicatory functions that are subject to review by agency officials and that arguably would not be considered 'central to the functioning of the Executive Branch' for purposes of the Article II removal precedents," and stating that "[n]othing in this dissenting opinion is intended to or would affect the status of . . . administrative law judges" (citation omitted)); *Humphrey's Ex'r*, 295 U.S. at 629-30 (finding the President could not exer-

instance, the Court stressed that preventing the President from removing a member of the FTC did not interfere with the functioning of the Executive Branch because the FTC was designed to be "independent in character," "free from 'political domination or control,'" and not "'subject to anybody in the government'" or "'to the orders of the President.'" 561 U.S. at 502 (citing *Humphrey's Ex'r*, 295 U.S. at 619). Like the FTC, the ALJ position was designed to assure ALJs exercise independent judgment that is free from political pressure and partisan interests. *See*, *Butz*, 438 U.S. at 513-14. In fact, this independence from "political domination or control" was so essential that Congress unanimously codified it in the APA. *Id*. Both Congress and this Court have therefore determined that the President's need to control SEC ALJs, and ALJs generally, is not central to the functioning of the Executive Branch.

Accordingly, the "for cause" removal protection provided to SEC ALJs, and ALJs generally, falls within both exceptions recognized by this Court. The APA may therefore limit the President's power to remove these quasi-judicial inferior officers.

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cise political pressure to remove quasi-judicial officers because this would infringe on the separation of powers between the three general branches of government); *Wiener*, 357 U.S. at 354-56 (holding Congress could limit the President's removal power over the War Claims Commission, "an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof . . . ").

IV. THE DECISIONAL INDEPENDENCE PROVIDED UNDER THE APA DOES NOT IMPEDE THE PRESIDENT'S POWER UNDER ARTICLE II

"[I]t is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Ex'r*, 295 U.S. at 629. The Court's concern about the potential for the tyrannical influence of undue political pressure was vital to its decisions in *Humphrey's Ex'r* and *Wiener*. Both cases involved the President seeking removal of quasi-judicial and quasi-legislative officers for reasons tied to political fidelity. *See*, *Wiener,* 357 U.S. at 354 (finding the President "wanted these Commissioners to be their men").

Congress forecasted the magisterial effect of having removal by the President looming over ALJs. It therefore unanimously passed the APA, recognizing that the President's ability to take care that the laws be faithfully executed is as much a function of his inability to act as it is his ability to effect removal. *See*, *Morrison,* 487 U.S. at 688 ("Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing"). Specifically, by placing limits on the President's removal power over ALJs, the APA sheathed the Damocles' sword, and ALJs were provided the decisional independence necessary to preside over fair and competent hearings. *See*, *Butz*, 438 U.S. at 1978 ("Since the securing of fair and competent hearing personnel was viewed as 'the heart of formal administrative adjudication,' Final Report of the Attorney General's Committee on Admin-

istrative Procedure 46 (1941), the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners").

At the same time, the President is not detached from the ALJ selection process. In *Lucia,* this Court found that SEC ALJs, as well as ALJs generally, were inferior officers who must be appointed through the procedures listed in Article II of the Constitution. *Lucia*, 138 S.Ct. at 2051, 2055. This means that, under the Appointment Clause, ALJs may only be appointed by the President, a court of law, or a head of department. *Id*. The *Lucia* decision has therefore brought to the forefront the President's power to exert significant influence on the hiring of ALJs.

To be sure, until the *Lucia* decision, the hiring of ALJs was largely informed by the criteria and merit selection standards set forth in the Office of Personnel Management (OPM) which required a minimum of seven years of experience and completion of a competitive examination and interview process.[13] Following *Lucia*, however, the President issued Executive Order 13843 on July 10, 2018; 83 Fed. Reg. 32755, eliminating the OPM experience requirements and examination process and requiring that ALJ candidates be hired based on considerations "such as work ethic, judgment, and ability to meet the particular needs of the agency."[14] These new hiring standards have allowed the President to color the selection of ALJs; for instance, by having agency heads hire ALJs that

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[13] Spencer Davenport, *Resolving ALJ Removal Protections Problem Following Lucia,* 53 U. MICH. J.L. REFORM 693 (2020).

[14] *Id*. at 700-01.

"meet the particular needs of [] [their] agency", as understood by the current administration.[15] [16]

Lucia has effectively eliminated the viability of the previous constraints the executive had placed on itself regarding the President's power to appoint ALJs. That power is now used by the President to shape agency precedent by appointing as many ALJs as the President deems necessary to provide for the faithful execution of the laws under Article II.[17] [18]

The President also exercises control over "alter egos" who oversee the agencies that ALJs are a part of and who either approve of, or disregard, findings of fact and recommendations submitted by ALJs. For instance, in *Decker Coal Co. v. Pehringer*, 8 F.4th 1123 (9th Cir. 2021), the Ninth Circuit found the President could, at any time, order the Secretary of Labor to replace members of the Benefits Review Board ("BRB"); even for simply approving a Department of Labor ALJ's decision with which the President disagreed. *Id*. at 1135 (adding the President could remove a BRB member if he "disobeyed commands or was negligent or inefficient; if the member had different policy views or was of a different political party; or if the

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[15] *Id*.

[16] *Id*. (finding that Executive Order 13843 also appears to give agency heads discretion over the need to hire additional ALJs, conceivably allowing them to pack their respective agency with ALJs that are in line with the current administration's policies).

[17] *See*, *supra* note 17.

[18] *See*, 5 U.S.C. § 3105 (providing that each agency shall appoint as many ALJs as necessary to proceedings to be conducted in accordance with sections 556 and 557 of this title).

President 'has simply lost confidence' in the BRB member" (citations omitted)).

SEC ALJ decisions are reviewed and approved or modified by SEC Commissioners. 17 C.F.R. § 201.360(d)(2); 15 U.S.C. § 78d-1(c). There is no statutory authority that these Commissioners are insulated from removal by the President absent "good cause".[19] Instead, the Commission's organic statute, 15 U.S.C. § 78d, contains no explicit tenure protections.[20] [21] This is important because Congress would have provided "clear congressional authorization" if it intended to impose a "for cause" limitation on the President's authority to remove an SEC Commissioner. *See*, *Collins v. Yellen,* 141 S.Ct. 1761, 1782-83 (2020) ("we generally presume that the President holds the power to remove at will executive officers and that a statute must contain plain language to take that power away") (quotation marks, brackets, and citation omitted); *see also*, Amicus Brief of Andrew N. Vollmer, pp. 3-4 (noting the five year statutory term of SEC Commissioners and stressing that setting a limited time period for the term of a principal officer does not restrict the President's removal authority, as it certainly did not in *Myers*, *Free Enterprise*, or *Seila Law*); *cf. Free Enterprise,* 561 U.S. at 550-92 (finding Congress pro-

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19 Jameson M. Payne, *Taken for Granted? SEC Implied For-Cause Removal Protection and Its Implications*, YALE J. ON REGUL. (Jun. 24, 2022), https://www.yalejreg.com/nc/sec-for-cause-removal-protection/.

20 *Id.*

21 This means that the President may remove an SEC Commissioner if they approve an SEC ALJ decision with which he disagrees.

vided "clear congressional authorization" for twenty-four stand-alone federal agencies whose heads are removeable by the President only "for cause").

The President's limitless control over these "alter egos" unveils the careful balance Congress struck in codifying the APA. *See*, *Free Enterprise*, 537 F.3d at 687 (Kavanaugh, J., dissenting) (emphasizing "[t]he Supreme Court allowed for-cause removal of the independent counsel in *Morrison* only because the President through his alter ego (the Attorney General) still retained the authority to remove the independent counsel"). On the one hand, Congress drew on the lessons learned from cases like *Humphrey's Ex'r*, where the President exercised political pressure to remove a quasi-judicial and quasi-legislative officer. On the other hand, Congress made sure the President could exert control over the removal of ALJs through principal officers under 5 U.S.C. § 7521.[22] In fact, removal of ALJs for a wide range of reasons have been found to satisfy the "for cause" standard. *See*, *e.g.*, *In the matter of Chocallo*, 2 M.S.P.R. 20 (1980) ("for cause" removal of ALJ for misconduct upheld); *Social Security Administration v. Davis*, 19 M.S.P.R. (1984) ("for cause" removal of ALJ for lewd and lascivious behavior in the workplace upheld); *Social Security Administration v. Burris*, 39 M.S.P.R. 51 (1988) ("for cause" removal of ALJ for abusive and offensive conduct upheld); *Social Security Administration v. Angel*, 58 M.S.P.R. 261 (1993) ("for cause"

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[22] As noted in *Social Security Administration v. Levinson,* 2023 WL 4496927 (M.S.P.B. 2023) the MSPB makes the determination of whether "good cause" exists for removal but only the principal officer is authorized to take the final action. *See also*, *supra* note 20.

removal of ALJ for incompetence upheld); *Social Security Administration v. Long*, 113 M.S.P.R. 190 (2010); *Abrams v. Social Security Administration*, 703 F.3d 538 (Fed. Cir. 2012) ("for cause" removal of ALJ for his inability to comply with reasonable instructions upheld), *aff'd* 635 F.3d 526 (Fed. Cir. 2011) ("for cause" removal of ALJ for domestic violence upheld); *Shapiro v. Social Security Administration*, 800 F.3d 1332 (Fed. Cir. 2015) ("for cause" removal of ALJ for failure to adequately manage his caseload upheld); *Social Security Administration v. Levinson*, 2023 WL 4496927 (M.S.P.B. 2023) ("for cause" removal for neglect of duty, failure to follow directives and conduct unbecoming an ALJ upheld).

This balance is also reflected in how Congress structured administrative agencies, having ALJs independently review facts and submit recommendations for review and approval, while members and Commissioners at the head of agencies, directly removeable by the President, participate in policy-making decisions and either approve of, or disregard, the recommendations put forward by ALJs. *See*, *Arthrex*, 141 S.Ct. at 1982, 1985 (restoring the careful balance Congress intended where it was found that principal officers, removeable by the President, could not review the Patent Trial and Appeal Board's decisions).

Accordingly, the APA does not impede the President's power under Article II of the Constitution. Instead, the "for cause" removal protection extended to ALJs helps to ensure that the laws are faithfully executed by providing ALJs with decisional independence. Even with these removal protections, however, the President maintains power over the selection of

ALJs across federal agencies while retaining broad removal power over "alter egos".

V. THE CONSEQUENCES OF ELIMINATING THE INDEPENDENCE PROVIDED TO ALJS ARE SIGNIFICANT AND DESTRUCTIVE

Today, there are more than 1930 ALJs employed by more than 30 agencies in the federal government, as compared to 870 authorized Article III federal judgeships.[23] These ALJs are often thought of as the workhorses of administrative adjudication, and each year they decide millions of cases.[24] Upending the administrative process will carry with it significant consequences.

Following *Lucia*, for instance, the SEC rushed to obviate the constitutional concerns of the appointment of its ALJs by issuing an order ratifying all existing ALJ appointments (which were made by SEC staff).[25] To further mitigate constitutional infirmity, the SEC also ordered all ALJs to reconsider the record in pro-

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[23] Jack Beermann, *The Future of Administrative Law Judge Selection,* THE REGULATORY REVIEW (Oct. 29, 2019), https://www.theregreview.org/2019/10/29/beermann-administrative-law-judge-selection/.

[24] Adam B. Cox & Emma Kaufman, *The Adjudicative State,* 132 YALE L.J 1771 (2023), https://www.yalelawjournal.org/feature/the-adjudicative-state (reporting "[j]udges in administrative tribunals decide millions of cases each year, often with extraordinarily high stakes").

[25] *See*, *In re: Pending Administrative Proceedings, Securities Act,* Release No. 10,440, Exchange Act Release No. 82,178, Investment Advisers Act Release No. 4,816, Investment Company Act Release No. 32,929 (Nov. 30, 2017), https://www.sec.gov/litigation/opinions/2017/33-10440.pdf.

ceedings that remained ongoing and in which no initial decision had issued.[26] The SEC also ordered that respondents in proceedings pending before an ALJ or the Commission "be provided with the opportunity for a new hearing before an ALJ who did not previously participate in the matter."[27] Finally, the SEC remanded all proceedings pending before the Commission, vacated prior opinions issued in those matters, and ordered the newly assigned ALJs to reconsider the record without giving weight to or presuming the correctness of prior opinions or rulings issued.[28]

Putting aside the disruption internally within the SEC, it was Executive Order 13843 that was most worrying following *Lucia*.[29] That Order fundamentally transformed the hiring standards and criteria for ALJs, replacing the competitive merit selection with nebulous hiring criteria that can fairly be considered politically driven. *See*, *supra* 22-23. Still, it was the fact that Executive Order 13843 was issued on July 10, 2018, nineteen days following the *Lucia* decision, dated June 21, 2018, that was most telling: The President puts their thumb on the scale where permitted. *See*, *e.g.*, *Humphrey's Ex'r*, 295 U.S. at 618-19; *see also*, *Wiener*, 357 U.S. at 354; *Jarkesy*,

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[26] *Id.* at 1.

[27] In re: Pending Administrative Proceedings, Securities Act Release No. 10,536, Exchange Act Release No. 83,907, Investment Advisers Act Release No. 4,993, Investment Company Act Release No. 33,211, at 1 (Aug. 22, 2018), https://www.sec.gov/litigation/opinions/2018/33-10536.pdf.

[28] *Id.* at 1–2.

[29] Executive Order No. 13843, 83 Fed. Reg. 32755 (July 10, 2018).

34 F.4th at 478 (Davis, J., dissenting) (raising that the elimination of the "for cause" removal enjoyed by SEC ALJs will only undermine ALJs' clear adjudicatory role and their ability to exercise independent judgment).

If the lower court's decision stands, history has taught that disruption within the SEC is likely to ensue, followed by swift, if not immediate, action from the President. *See*, *supra* 28-29. Still, even if the President exercised restraint, opting to not act, the threat of removal will infringe on the decisional independence provided to ALJs under the APA, while simultaneously depriving parties of due process, and causing the public to, once again, think of ALJs as mere tools of the heads of their agency; or worse, as a political tool of the President. *See*, *e.g.*, *Ramspeck*, 345 U.S. at 131. The lessons of history should not be lost on us. *See*, *Free Enterprise*, 537 F.3d at 699 (Kavanaugh, J., dissenting) (quoting "a page of history is worth a volume of logic" (citation omitted)).

The Court should also consider that, looking forward, the threat of removal by the President for nothing more than political fidelity carries with it a culling of prospective ALJ candidates, causing an overall decline in the quality of ALJs. Of course, a corresponding concern in ALJ turnover will surface, and as soon as ALJs acquire the necessary experience and familiarity with the subject-matter covered by their respective agency, removal may be on the horizon as an incoming President opts to replace existing ALJs with "their men." *See*, *Wiener,* 357 U.S. at 354.

Finally, the impact the *Jarkesy* decision will have on pending ALJ decisions warrants consideration. In the wake of *Lucia*, recall the SEC issued a host of orders, including an order that remanded all pending

SEC proceedings, requiring a newly assigned ALJ to reconsider the existing record, without giving weight to, or presuming, the correctness of prior opinions or rulings issued. *See*, *supra* 28. The consequences of a remedial order like this one for an agency like the Social Security Administration (SSA), which conducts more than 650,000 hearings per year, are unthinkable.[30] Even if such an enterprise was possible, as pending cases are re-decided, there will be a massive sway in agency precedent as ALJs perform their adjudicatory duties under the peering eyes of the President.

The corners of constitutional inquiry must fold inward to not exceed the practical limits of humanity. For the reasons raised above, the Court should leave intact the "for cause" removal protection Congress provided to ALJs under the APA.

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[30] Soc. Sec. Admin., *Information About SSA's Hearings and Appeals Operations*, https://www.ssa.gov/appeals/about_us.html.

CONCLUSION

The "for cause" protection Congress provided to ALJs under the APA is constitutional and does not impede the President's authority under Article II of the Constitution.

Respectfully submitted,

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