No. 22-859

In The
Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,
v.
GEORGE R. JARKESY, JR. AND PATRIOT28, L.L.C.,
Respondents.

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

BRIEF OF ASSOCIATION OF ADMINISTRATIVE LAW JUDGES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Association of Administrative Law Judges (AALJ) represents the interests of over 1,000 non-supervising ALJs employed by the Social Security Administration (SSA)—accounting for about three-quarters of all ALJs serving across the federal government. Founded in 1971 as a professional association, AALJ has affiliated since 1999 with the International Federation of Professional and Technical Engineers, AFL-CIO. AALJ has a keen interest in this case.[2]

AALJ aims to preserve the integrity and independence of the administrative judiciary. Its objectives include securing the guarantees of the U.S. Constitution, the Administrative Procedure Act (APA), the Social Security Act, and all other federal laws; supporting the professional growth of ALJs; and improving the working conditions of ALJs through collective bargaining, political action, and other means, such as participating in important court cases like this one, that implicate judicial independence.

All of AALJ's activities, including the filing of this brief, further the Association's goal of protecting judicial independence and preserving due process in

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

[2] In 2022, roughly 1,205 ALJs were serving at SSA, according to the most recent data available. U.S. Office of Personnel Mgmt., *Federal Workforce Data*, https://tinyurl.com/m79m3hea (results of database query for position "administrative law judge") ("Federal Workforce Data").

administrative adjudication. AALJ agrees with the United States that the APA's tenure protections for ALJs are fully constitutional and essential for adjudicative impartiality. Although this is so for all ALJs, AALJ writes separately to caution against an overly broad holding that assumes all ALJs are the same.

ALJs perform vastly different functions across the many different agencies that employ them. Because, under this Court's precedents, separation-of-powers questions require a function-specific analysis, the constitutionality of ALJ tenure protections within agencies headed by for-cause-protected officers cannot be judged for all ALJs at once. Rather, the analysis must be sensitive to the variations in agency structure and ALJ duties.

Social Security ALJs, in particular—who represent the lion's share of ALJs—perform no policymaking or enforcement roles and are subject to extensive executive supervision through robust intra-agency review. Given their purely adjudicative function, Congress's decision to provide SSA ALJs for-cause removal protection stands on a particularly strong constitutional footing.

A decision that (rightly) upholds the tenure protections for SEC ALJs would apply *a fortiori* to SSA ALJs, who are quintessential adjudicators. But the converse is not true: if this Court were to declare the long-established removal limits for SEC ALJs unconstitutional, it by no means follows that the same would hold for SSA ALJs, given the vast differences in ALJ duties, and nature and degree of agency supervision.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Founders, this Court, and Congress have long recognized that adjudicators, including those working within the Executive Branch, have a different relationship to the executive power than do executive officials engaged in policymaking and enforcement. Because quasi-judicial officials like ALJs are bound to apply policies made by others who are subject to more direct presidential control, less executive control is needed to satisfy the Take Care clause. Simultaneously, a greater degree of insulation from arbitrary removals from office is needed to protect fair and just adjudications.

A quasi-judicial decision-maker, like all adjudicators, must be impartial. That impartiality is placed at risk when decision-makers are beholden to one of the parties for their livelihood, as occurs when agencies can remove their adjudicators at will. That is why—responding to a well-documented history of biased administrative decisions by adjudicators without tenure protection—Congress created ALJs as impartial and independent fact-finders. ALJ decisions are subject to the plenary control of agency policymakers, satisfying the demands of accountability and transparency under the Take Care clause. But to preserve needed judicial independence, they may not be removed from their positions without good cause, as proved to a neutral reviewer (the Merit Systems Protection Board (MSPB)).

Far from being a recent and unprecedented innovation, this practice has a settled historical

pedigree. And it falls comfortably within a long line of precedents recognizing the authority of Congress to limit removal authority for quasi-judicial officials. Such tenure protections pose no constitutional concerns and foster the adjudicative impartiality that Congress and this Court have judged critical to the public interest.

Good cause removal, coupled with plenary agency control over ALJ decisions, safeguards the Executive's authority to faithfully execute not only the laws governing the matters under decision, but also the APA's guarantees of an impartial hearing officer and procedural fairness. The clear division between neutral arbiter fact-finding and an agency's policy-based decision ensures "a transparent decision for which a politically accountable officer must take responsibility," so that the public knows "'on whom the blame or the punishment of a pernicious measure … ought really to fall.'" *United States v. Arthrex, Inc.,* 141 S. Ct. 1970, 1982 (2021) (quoting The Federalist No. 70, at 476 (A. Hamilton)).

Because all ALJs are adjudicators whose decisions are subject to plenary control by policymakers through pre-decision rules and post-decision review, their tenure protections are constitutional across the board. And if the Court holds that tenure protections are constitutional for SEC ALJs, then they must also be constitutional for ALJs who do not preside over adversarial hearings, like SSA ALJs.

But the converse is not true: even if tenure protections are held unconstitutional for SEC ALJs, that does not settle the question for all ALJs, and

particularly for SSA ALJs, who are flatly barred from policymaking and do not preside over enforcement proceedings like SEC ALJs do. The Court should be careful not to paint with too broad a brush when every agency's organic statute and internal deployment of ALJs is distinct.

SSA ALJs are paradigmatic adjudicators who collectively decide hundreds of thousands of non-adversarial benefits applications each year, applying detailed and rigid policy guidance in decisions subject to plenary control by at-will executive branch officials. Responding to well-documented concerns about bias in agency adjudications, Congress decided to shield such adjudicators from at-will removal, while maintaining political control over agency policy. That careful balance should not be cast aside in a decision about an entirely distinct agency and ALJs with different authorities.

ARGUMENT

I. Long-Established Tenure Protections for ALJs Are Constitutional and Necessary.

A. Any Constitutional Concerns Raised by Removal Barriers for Policymaking Officials Don't Apply to Adjudicators.

Woven into our constitutional fabric is the understanding that adjudicative functions and policymaking functions stand on a different footing vis-à-vis the exercise of executive power, presenting distinct separation of power concerns. In the first

Congress, James Madison explained that an officer whose duties "partake[] strongly of the judicial character" "should not hold his office at the pleasure of the [E]xecutive branch." 1 Annals of Cong. 636 (1789) (Joseph Gales ed., 1834).

This Court has thus repeatedly taken pains to distinguish between policymaking and adjudication when assessing structural constitutional limits on removal of executive officers. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court held that the President's at-will removal power did not extend to "quasi-judicial" officers. *Id.* at 629. And in *Wiener v. United States*, 357 U.S. 349 (1958), the Court again stressed that the President's removal power over an "adjudicatory body" was more limited because of "the intrinsic judicial character of the task with which [it] was charged." *Id.* at 355-356. Thirty years later, this Court again confirmed that tenure protection may be "necessary to the proper functioning" of "an official performing 'quasijudicial' functions." *Morrison v. Olson*, 487 U.S. 654, 691 n.30 (1988).

Like the adjudicatory body in *Wiener*, ALJs do not make policy, but rather address issues "to be 'adjudicated according to law,' that is, on the merits of each claim, supported by evidence and governing legal considerations," *Wiener*, 357 U.S. at 355. This is why, in *Free Enterprise Fund*, this Court specifically excepted ALJs from its holding that the stringent removal constraints for the policymaking officials of the Public Company Accounting Oversight Board violated the Constitution. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 507 n.10 (2010).

"[M]any administrative law judges," the Court explained, "of course perform adjudicative rather than enforcement or policymaking functions." *Id.* And the APA expressly bars ALJs from performing duties inconsistent with that adjudicative role. 5 U.S.C. § 3105 ("Administrative law judges … may not perform duties and responsibilities inconsistent with their duties and responsibilities as administrative law judges.").

This critical distinction between adjudication and policymaking for removal purposes not only has historical and legal precedent, it comports with the constitutional source of the removal power. Purely "adjudicatory functions…would not be considered 'central to the functioning of the Executive Branch.'" *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 699 n.8 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (quoting *Morrison*, 487 U.S. at 691-92). Tenure protections for agency adjudicators (who are tasked with applying agency directives to resolve specific factual disputes) allow for quasi-judicial independence through changing administrations. But they are not "of such a nature that they impede the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 691. Because agency adjudicators "lack[] policymaking or significant administrative authority," a limitation on the President's removal ability does not "unduly trammel[] on executive authority." *Id.* at 689-92.

For an inferior officer who "determines the policy" of the United States, *Free Enter. Fund*, 561 U.S. at 483-84, two layers of removal protection might be impermissible. But for adjudicators like ALJs,

Congress is free to "choose whether to shield officers from the President's at-will removal authority" because "the officers' delegated functions do not include the economic, social, and political policymaking that Article II leaves to the President to manage." Harold J. Krent, *Limits on the Unitary Executive: The Special Case of Adjudicative Function*, 46 VT. L. REV. 86, 88-89 (2021).[3]

Put simply, administrative law judges do not make policy. Instead, ALJs apply the regulations created by agency policymakers in an even-handed way. ALJs must follow previously established rules, policies, and interpretations thereof by agency policymakers. *See* Admin. Conf. of the U.S., Recommendation 92-7, The Federal Administrative Judiciary, 57 Fed. Reg. 61,760, 61,763 (Dec. 29, 1992) ("Where the agency has made its policies known in an appropriate fashion, ALJs … are bound to apply them in individual cases."). The APA makes clear, too, the agency's—rather than the ALJ's—control over agency policy, even in the context of analyzing the facts of a specific case. Agency policymakers are authorized to review every adjudication to determine whether it is

[3] Because the scope of ALJ authority varies substantially between agencies, the Court's holding that SEC ALJs are inferior officers, *Lucia v. SEC*, 138 S. Ct. 2044 (2018), does not establish that all ALJs are inferior officers. Given their more constrained authority, *see* Part II, *infra*, the question whether SSA ALJs are inferior officers itself raises substantial questions. *See* Br. for AALJ as Amicus Curiae, *Lucia v. SEC*, No. 17-130, at 12-28 (S. Ct. Apr. 2, 2018). But the Court need not (and should not) address that question here, because the APA's removal protections are constitutional regardless of whether SSA ALJs are employees or inferior officers.

compliant with agency policy before it is adopted as the decision of the agency. 5 U.S.C. § 557(b). Moreover, as described in Part II, constraints on policymaking are especially strong for Social Security ALJs, who are explicitly barred by the agency from making policy.

In contrast, for the agency policymakers who create the rules that an ALJ is bound to apply, there is a constitutional imperative to ensure that executive control is not too attenuated by removal constraints. It has long been established that one level of tenure protection is not too attenuated; Congress may constitutionally limit the President's ability to remove certain principal officers for cause. *Free Enter. Fund*, 561 U.S. at 483. But if the tenure-protected officer's subordinates themselves exercise policymaking authority, then a second level of tenure protection for those subordinates goes too far, because the President cannot hold those subordinates accountable for their policy choices. *Id.* at 484.

This two-level accountability problem does not arise when the subordinate officials are adjudicators, because there is no second level of policy choices for which the President needs to exercise accountability. The President can secure executive prerogatives and take care that the law is faithfully executed by controlling, and as necessary removing, the policymaker who sets the rules *ex ante* and who can reverse any decision *ex post*.

As this Court has explained, "the President is accountable to the people" for agency action and policy. *Free Enter. Fund*, 561 U.S. at 513. The public needs to be able "to pass judgment on [the President's] efforts" to "ensure that the laws are faithfully

executed." *Id.* at 498. But for agency adjudication, the opposite is true: "private parties would not want the President to be involved in finding facts in their disputes with the government." Krent, *Limits*, *supra*, at 121. The very purpose, and benefit, of independent and neutral ALJs is that "the public has assurance the facts are found in the first instance by an official not subject to agency coercion." 2 Paul R. Verkuil et al., Admin. Conf. of the U.S., Recommendations and Reports, *The Federal Administrative Judiciary* 803 (1992), *available at* https://tinyurl.com/474m6eat.

Ultimately, invalidating the "good cause" restriction upon the removal of ALJs would undermine, not further, the faithful execution of the laws. Even if, counterfactually, the "good cause" restriction was constitutionally flawed when applied to agencies headed by officers who are tenure-protected, there is no need to invalidate the essential tenure protections for ALJs. As the Court explained in *Arthrex*, where there are alternative ways to resolve a separation-of-powers problem, the proper remedy is the one that does least damage to Congress's enactment and best "reflects the structure of supervision within the [agency] and the nature of [the officials'] duties." *Arthrex*, 141 S. Ct. at 1987. Although the question is not presented here, and therefore the Court need not and should not reach it, if the Court were to hold that tenure protections are unconstitutional for all ALJs, the solution for SSA is not to eliminate tenure protection for SSA ALJs, but rather to remove the SSA Commissioner's tenure protection, to the extent it still exists. *See Collins v. Yellen*, 141 S. Ct. 1761, 1802 (2021) (Kagan, J.,

concurring in part) (predicting based on the Court's analysis that the SSA Commissioner's for-cause removal protection will be "next on the chopping block"). The Office of Legal Counsel has already concluded that the President may remove the SSA Commissioner at will. *See* Constitutionality of the Comm'r of Soc. Sec.'s Tenure Prot., 45 Op. O.L.C., at 1 (July 8, 2021) (slip op.).[4]

Jettisoning removal protections that preserve core criteria of neutrality and independence would not further the transparency and accountability aims of the Take Care clause, but would impair ALJs' basic duty and role in the Executive Branch: to "exercise[] … independent judgment on the evidence before [them], free from pressures by the parties or other officials within the agency." *Butz v. Economou*, 438 U.S. 478, 513 (1978).

B. Longstanding Removal Protections Guard ALJ Impartiality while Permitting Sufficient Supervision.

In enacting the APA, Congress made the well-studied decision that ALJs could not act with sufficient impartiality if the "Damocles' sword of removal" without cause hung over their heads. *See Wiener,* 357 U.S. at 356. While protecting against unwarranted removal (and preserving needed

[4] Because the governing statutes, structure of supervision, and scope of ALJ duties vary tremendously, any remedy will also vary from agency to agency. *Cf.* SEC Br. 66-67 (arguing, if any remedy warranted, the fix should be at-will removal limited to "SEC ALJs").

adjudicator independence), Congress also retained Executive Branch accountability through many other APA mechanisms, chief among them the agency's ability to replace or negate any ALJ decision. The good cause standard, too, promotes this accountability.

1. Adjudicative impartiality fosters the public interest in due process.

"[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities," including "administrative law judges." *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). "[A]bsolute probity" from adjudicators is essential to maintain the public's respect. *See Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (citation omitted). Biased adjudicators "not only undermine[] judicial fairness; [they] weaken[] public confidence in that fairness." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41-42 (1950).

Even the appearance of bias and unfairness undercuts this fundamental public trust, especially in the context of agency adjudication. "Given the conflict of interest that hovers over any scheme of administrative adjudication"—especially one where "private parties are engaged in a dispute with the very agency that is adjudicating the dispute"—"confidence in the integrity of ALJ proceedings is critical." Krent, *Limits*, *supra*, at 86-87. Without "accurate, truthful fact-finding by neutral examiners," "it would not be long before the American people would lose faith in the integrity of the administrative law system." Steven A. Glazer, *A Constitutionally Appointed Administrative*

Law Judge – You "Know It When You See It," 38 ENERGY L. J. 359, 369 (2017).

Because the power to remove a government official creates a "here-and-now subservience" to the wielder of the removal power, *Bowsher v. Synar*, 478 U.S. 714, 720, 730 (1986), tenure protection is critical to adjudicator impartiality. As Alexander Hamilton explained, "a power over a man's subsistence amounts to a power over his will." The Federalist No. 79. "[O]ne 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." *Wiener*, 357 U.S. at 353-54 (citation omitted); *see also Free Enter. Fund*, 537 F.3d at 690-91 (Kavanaugh, J., dissenting) (quoting *Bowsher*, 478 U.S. at 726) ("Once an officer is appointed, it is only the authority that can remove him, and not the authority that had appointed him that he must fear and, in the performance of his functions, obey."). It is consequently a fundamental precept of due process that adjudicators cannot be beholden to a party for their position. *See Caperton*, 556 U.S. at 878, 881, 884 (finding that a party's large donation to a judge's re-election campaign created an unconstitutional "potential for bias" that could "tempt adjudicators to disregard neutrality").

The importance of tenure protection to fundamental fairness is perhaps at its zenith in the administrative adjudication context. Because ALJs often render decisions to which the agency is a party, and nearly always make decisions that affect the agency's obligations or authority, at-will removal by the agency would fundamentally undermine the very

due process function ALJs are meant to serve. Without good cause tenure protections, an ALJ's fear of and therefore obedience to the agency would mean that the agency has an enormously heavy thumb on the scale. *See* Kent H. Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1698-99 (2020).

2. Congress constrained ALJ removal to protect adjudicative impartiality.

History teaches that permitting agencies to remove adjudicators at will threatens adjudicator impartiality. Before enactment of the APA, agency adjudicators' "continued employment, classification, compensation, and promotion were all dependent on how their employing agency rated them." Cong. Research Serv., LSB10823, *Removal Protections for Administrative Adjudicators: Constitutional Scrutiny and Considerations for Congress* 2 (2022). Because of this dependent structure, "[m]any complaints were voiced against the actions of [ALJs], it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations." *Ramspeck v. Federal Trial Examiners Conf.*, 345 U.S. 128, 131 (1953). A 1936 ABA Special Committee on Administrative Law decried "the fact that the tenure of office of administrative judges is insecure," which makes their decisions "exposed to the influence of all the political forces." *Report of the Special Comm. on Admin. Law*, 61 ANN. REP. A.B.A. 720, 724, 735 n.47 (1936) (citation omitted). The ABA later urged reform

to prevent judicial bodies from becoming "'government organs of vengeance' … for the carrying out of the predeterminations of the governmental policy-makers, irrespective of the facts as to the individuals involved." Editorial, *Impartiality Is Essential*, 33 A.B.A. J. 148, 148 (1947).

These were not just subjective complaints of bias from disappointed litigants. The historical record is replete with examples confirming the bias of agency adjudicators operating in the shadow of at-will removal. Before the APA, because "[a]gencies were responsible for … disciplining" ALJs, they "favored the agencies in which they worked in resolving private parties' disputes with the government." Krent, *Limits*, *supra*, at 89-90. As a 1930s ABA report put it, in language later echoed in *Wiener*, "[i]t is not easy to maintain judicial independence or high standards of judicial conduct when a political sword of Damocles continually threatens the judge's source of livelihood." *Report of the Special Comm. on Admin. Law*, 57 ANN. REP. A.B.A. 539, 546 (1934). [5]

[5] More recent research has reiterated that "adjudicators without removal protections are less independent from their parent agency." Cong. Research Serv., *supra*, at 4. For instance, non-tenure-protected immigration judges are often subjected to political pressure in their decision-making. *See* Richard J. Pierce, Jr., *Agency Adjudication: It Is Time to Hit the Reset Button*, 28 GEO. MASON L. REV. 643, 647 & n.30 (2021) (describing empirical study of decision-making by immigration judges). "In a notorious case …, a Department of Justice (DOJ) official called the Chief Immigration Judge and convinced him to direct an immigration judge handling a controversial case to change his decision." Krent, *Limits*, *supra*, at 91.

The Administrative Procedure Act was Congress's carefully crafted solution, passed unanimously by both houses after a 15-year "period of study and strife." *Wong Yang Sung*, 339 U.S. at 39-41. The Act's formal adjudication procedures were expressly designed to address due process concerns and to bolster faith in administrative adjudications by limiting both bias and the appearance of bias. *Id*. at 41-42; Pierce, *supra*, at 644. In a direct rebuke to the pre-APA regime, the APA "render[ed] examiners independent and secure in their tenure and compensation." S. Rep. No. 79-752, at 215 (1945), *as reprinted in* Legis. Hist. of the Admin. Proc. Act, S. Doc. No. 79-248 (2d Sess. 1946).

Under the APA, agencies have no control over an ALJ's compensation, 5 U.S.C. § 5372, and no one involved in an investigation or enforcement can supervise an ALJ, *id.* § 554(d)(2). Moreover, ALJs are removable only for cause (as "established and determined by the" MSPB after a hearing). *Id*. § 7521(a). By protecting hearing examiners from being "discharged at the whim or caprice of the agency or for political reasons," *Ramspeck*, 345 U.S. at 142, Congress sought to "guarantee the impartiality of the administrative process," *Wong Yang Sung*, 339 U.S. at 52.

MSPB review of good cause for removal is a critical mechanism for protecting ALJ impartiality. The agency decides to initiate a removal, 5 U.S.C. § 7521(a), but the MSPB ensures that the statutory good-cause requirement is fulfilled. As the MSPB has emphasized, however, it is not a decision-maker on whether to remove an ALJ. *See* SEC Br. 62-63. Its

decision does not "remove[] [an ALJ] because the Board's finding of good cause for removal does not bind the petitioner agency to remove [an ALJ], but merely authorizes it to do so." *SSA v. Levinson*, 2023 M.S.P.B. 20, 2023 WL 4496927, at *8 (July 12, 2023). Review by the MSPB is thus akin to judicial review of a removal decision, which similarly ensures that an officer "is removed only in accordance with" statutory requirements and creates "no constitutional problem." *Morrison*, 487 U.S. at 693 n.33. And this is so even though, with judicial review, the authority reviewing the removal decision (an Article III judge) cannot be removed by the President (even for cause).

Similarly, just as "a court would act as a check on the termination of an employee who files a wrongful termination suit," the MSPB "acts as an independent check on the existence of good cause." Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 74 (2020). Such oversight by the MSPB, like oversight by the courts, does not "by itself, put any additional burden on the President's exercise of executive authority." *Morrison*, 487 U.S. at 693 n.33 (upholding law providing for "for cause" removal of independent counsel, subject to judicial review).

In contrast to other scenarios where tenure protections had no similar (and storied) history, the long history of the APA's tenure protections for ALJs also supports their constitutionality. Limiting the grounds for ALJ removal has been a "[l]ong settled and established practice" since 1946, which "'is a consideration of great weight in a proper interpretation of constitutional provisions' regulating the relationship between Congress and the President."

NLRB v. Noel Canning, 573 U.S. 513, 524 (2014) (alteration in original) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)); *see id.* at 525-26 (citing with approval the reliance of *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981), on one branch's acquiescence in a practice since 1952). Unlike the "new situation" having "no basis in history" at issue in *Seila Law v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2201 (2020), or the "novel structure" lacking "any historical analogues" in *Free Enterprise Fund*, 561 U.S. at 505, tenure protection for ALJs has long been the law.[6]

3. The good cause standard permits executive supervision while preserving crucial impartiality.

Congress took pains, in the APA, to preserve agency control over policymaking, while ensuring the goal of adjudicative impartiality. Several provisions of the APA limit ALJ authority and provide for executive supervision—most pertinently the agency's complete discretion to replace the ALJ's decision with its own.

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[6] There is even earlier historical precedent. The 1793 Patent Act allowed for adjudication of patentability by an independent board of three arbitrators, two of whom were non-Executive actors selected by the parties themselves. Patent Act of 1793, ch. 11, Pub. L. No. 2-11, § 9, 1 Stat. 318, 322-23 (1793); *see also Arthrex,* 141 S. Ct. at 2004 (Thomas, J., dissenting). "At the time of the Founding, therefore, there was clearly no consensus that the President through appointment and removal had to control all adjudicative responsibilities delegated by Congress." Krent, *Limits*, *supra*, at 104.

5 U.S.C. § 557(b). And, unlike the "unusually high standard" for removal in *Free Enterprise Fund*, 561 U.S. at 503, the good-cause standard itself provides sufficient supervisory authority in the adjudicative-official context.

First, the agency has authority to completely replace each and every one of an ALJ's decisions with which it disagrees. 5 U.S.C. § 557(b); *see also, e.g.*, 20 C.F.R. § 404.969(a)-(b) (empowering the SSA to select cases to review pre-effectuation). "[H]eads of agencies can still set agency policy and supervise ALJs. They have the authority to reverse ALJs' decisions in full, as to both fact and law." Kent H. Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 806-07 (2013). Because the employing agency has complete authority to review, modify, or vacate an ALJ decision before it becomes final agency action, *see Block v. U.S. Int'l Trade Comm'n*, 777 F.2d 1568, 1571 (Fed. Cir. 1985), the agency head is completely accountable within the Executive Branch for any decision issued by an ALJ.

These measures to ensure Executive Branch control and accountability for policymaking—while protecting adjudicative neutrality and transparency—were grounded in careful study. The 1940 Attorney General's Committee to Study Administrative Procedure concluded that "the use of independent hearing examiners would not divest the agencies of their control over policy, since the agencies retained the power to reverse hearing examiner decisions upon review." 2 Verkuil et al., *supra*, at 802-03. And when "the agency … reverse[s] an [ALJ] decision for policy reasons, the parties and the public" doubly benefit. *Id.*

There is first "the benefit of a visibly independent determination of the evidentiary facts"—from the ALJ exercising an adjudicative function. *Id.* at 802. In addition, the "application of policy at the agency level would then be seen for what it was: a policy determination rather than a skewing of evidentiary factfinding for policy reasons." *Id.*

Second, ALJ decisions are tightly constrained by comprehensive agency regulations and guidelines. ALJs "have no independent authority to divine policy." James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1199 (2006).

Third, an agency need not even use ALJs for hearings. 5 U.S.C. § 556(b). The APA also provides options for an agency to preside over an adjudication itself, or to allow "one or more members of the body which comprises the agency" to be presiding officers. *Id.* "Congress has not imposed ALJs on the Executive Branch," but instead offered them as an option, another factor weighing in favor of constitutionality. *Free Enter. Fund*, 537 F.3d at 697-701 & n.8 (Kavanaugh, J., dissenting).

Finally, the good cause removal provision itself provides ample executive supervisory authority, notwithstanding any tenure protection for the agency head or the role of the MSPB. Even for a "purely executive" officer, the authority to remove for good cause is an important means of "supervising or controlling" an officer, and limiting removal to "good cause" does not "unduly trammel[] on executive authority." *Morrison*, 487 U.S. at 690-91, 696. *A fortiori*, the good cause standard satisfies the Take

Care clause for quasi-judicial officers like ALJs. And the APA does not limit the ordinary "good cause" standard in any way, unlike the removal standard at issue in *Free Enterprise Fund*, which allowed Board members' removal only upon a showing of "willful violations[;] … willful abuse of authority; or unreasonable failure to enforce compliance." 561 U.S. at 503.

The good cause standard has teeth. ALJs have been removed (despite AALJ's protest) for being absent for extended periods, declining to set hearing dates, having a high rate of significant adjudicatory errors, not following mandatory rules, and deciding too few cases. *See* Harold J. Krent, *Presidential Control of Adjudication Within the Executive Branch*, 65 CASE W. RESERVE L. REV. 1083, 1109 & nn. 134-36 (2015); Barnett, *Resolving ALJ Quandary*, *supra*, at 807; *see also e.g.*, *Shapiro v. Soc. Sec. Admin.*, 800 F.3d 1332, 1334 (Fed. Cir. 2015) (sustaining good cause removal because an ALJ's "production was dramatically lower than" his peers'); *Abrams v. Soc. Sec. Admin.*, 703 F.3d 538, 543 (Fed. Cir. 2012) (sustaining good cause removal because of ALJ's long delays and "failure to follow directions"). Good cause removal readily satisfies the Take Care clause while preserving judicial impartiality, remaining an important and powerful tool of executive accountability for adjudicative functions.

II. Because SSA ALJs Perform Purely Adjudicative Functions, the Constitutionality of Removal Limits for SSA ALJs Stands on Particularly Firm Footing.

A. The Separation-of-Powers Analysis Must Consider Different ALJs' Specific Authorities and Constraints.

Given the "size and variety of the Federal Government," the Court has previously cautioned against "general pronouncements" on separation-of-powers questions not specifically presented. *Free Enter. Fund*, 561 U.S. at 506-07.

For the reasons described above, good-cause limits on ALJ removal are constitutional for all ALJs, even when the agency's head enjoys tenure protections. But if the Court concludes otherwise for SEC ALJs (given their agency-conferred duties and responsibilities), that analysis should not control for ALJs from other agencies. Every agency deploys its ALJs differently, and there can be no general-purpose answer to functional Article II questions. *See* SEC Br. 52 n.5 (noting "[a]gency-by-agency variations" among ALJs and therefore "focus[ing] on the role played by SEC ALJs").

As Justice Frankfurter observed, the APA established a "mood" that "must be respected … [that] can only serve as a standard for judgment and not as a body of rigid rules assuming sameness of applications." *Universal Camera Corp. v. NLRB*, 340

U.S. 474, 487 (1951). This diversity of agency practice has only increased over time. Thus, under current hiring practices, every agency may set its own selection criteria for ALJs (in addition to the requirement of an active bar license). While agencies are encouraged to select candidates who exhibit "appropriate temperament, legal acumen, impartiality, and sound judgment," consistent with the adjudicative role performed by ALJs, Exec. Order 13843 (July 10, 2018), there "is no 'one-size-fits-all' procedure for appointing ALJs," Admin. Conf. of the U.S., Recommendation 2019-2, Agency Recruitment and Selection of Administrative Law Judges, 84 Fed. Reg. 38,927, 38,931 (Aug. 8, 2019).

Once placed within a given agency, the duties ALJs perform vary tremendously, as does the degree of review and oversight within the agency. Some, like those at the SEC, preside over adversarial enforcement proceedings, while others, like ALJs who work for the Social Security Administration, determine eligibility for government benefits under strictly circumscribed agency criteria. Still others hear regulatory matters, *e.g.*, FCC hearings on licenses under 47 U.S.C. §§ 312, 309(k), or FERC hearings resolving rate disputes, 18 C.F.R. §§ 385.206-.207. *See generally* Daniel F. Solomon, *Summary of Administrative Law Judge Responsibilities,* 31 J. NAT'L ASSOC. OF ADMIN. LAW JUDICIARY 475 (2011); *see also* Kent H. Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1652 & n.42 (2016).

Thus, no ALJ makes policy, but given the wide spectrum of ALJ duties and authorities, some ALJ decisions may have more policy implications than

others. In particular, ALJs like SEC ALJs who preside over enforcement proceedings could perform functions that more directly have an impact on policy and thus raise additional concern for ensuring executive accountability. Other ALJs, who do not issue precedential decisions and do not preside over enforcement proceedings, function far from the policymaking side of the spectrum.

The size and scope of agency adjudications also matters. It often affects the degree of intra-agency review of ALJ decisions. In an agency like SSA, which employs the vast majority of ALJs and conducts hundreds of thousands of hearings per year, the need for consistency drives tight constraints on ALJ decision-making. SSA thus has extensive review procedures which may not apply in other agencies. Comparing the duties and authorities of SEC ALJs (and ALJs presiding over adversarial hearings more generally) to those of SSA ALJs illustrates that ALJ adjudicative powers within agencies vary and thus require distinct constitutional examination.

B. Social Security ALJs Are Barred from Policymaking, Subject to Extensive Review, and Preside Over Non-Adversarial Hearings.

SSA ALJs are arguably the quintessential ALJs, serving paradigmatic adjudicative—not policymaking—functions. SSA adjudicators pre-date the APA and served as the model for APA hearing examiners. *See Richardson v. Perales*, 402 U.S. 389, 409 (1971). The ALJs working for SSA far outnumber their peers in other agencies. *See* Federal Workforce

Data, *supra* (as of September 2022, SSA ALJs represented nearly 80% of federal ALJs). They preside over hundreds of thousands of non-adversarial administrative adjudications brought under the Social Security Act each year. *See, e.g.*, 42 U.S.C. § 405(b)(1).[7]

As then-Commissioner Astrue testified in 2012, a "key component of the integrity of [the SSA] hearings process is that ALJs act as independent adjudicators—who fairly apply the standards in the Act and our regulations. We respect the qualified decisional independence that is integral to the ALJ's role as an independent adjudicator." *Securing the Future of the Social Security Disability Insurance Program: Hearing Before the H. Subcomm. on Ways and Means*, 112th Cong. 12-13 (2012), https://tinyurl.com/2rn484k6 ("Astrue Testimony").

SSA ALJs play an essential role in an important fact-finding phase of an administrative process that has been described as "unusually protective" of disability claimants. *Heckler v. Day*, 467 U.S. 104, 106 (1984). An on-the-record hearing before an SSA ALJ is the third stage of agency review, occurring only after a claimant has been twice-denied benefits at the State level. *See generally* Astrue Testimony, *supra* (explaining the four-stage administrative review process); *see also Richardson*, 402 U.S. at 392-98 (detailing one claimant's path through the administrative process).

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[7] *See also* Titles II, VIII, XVI, XVIII of the Social Security Act, 42 U.S.C. §§ 401 *et seq.*; *id.* §§ 1001 *et. seq.*; *id.* §§ 1381 *et seq.*; *id.* §§ 1395 *et seq.*

The hearings are non-adversarial. *See Sims v. Apfel*, 530 U.S. 103, 110-11 (2000) (plurality op.). This independent "duty to inquire" by SSA ALJs, *Heckler v. Campbell,* 461 U.S. 458, 471 (1983) (Brennan, J., concurring), exemplifies the core fact-finding and record-building functions of ALJs as originally contemplated under the APA. Fulsome internal review and extensive decision-making constraints in the form of policy guidance—driven by the imperatives of ensuring consistency across staggeringly high caseloads—together reinforce the paradigmatic adjudicative, not policymaking, nature of ALJs' roles.

1. A crucial distinguishing feature for SSA ALJs is the nature of internal review mechanisms, and thus the degree of executive supervision outside of the removal power. In contrast to other agencies, an additional level of review—the Appeals Council—plays a critical role in Social Security determinations. *See generally* 20 C.F.R. §§ 404.900-.996, 422.205; *see also Mullen v. Bowen*, 800 F.2d 535, 536-537 (6th Cir. 1986) (en banc) (describing Appeals Council).

The Appeals Council is staffed by non-ALJs (called "Administrative Appeals Judges") who exercise the Commissioner's delegated final decision-making authority and are *not* subject to the APA tenure protections that apply to ALJs. *See* 20 C.F.R. §§ 404.981, 416.1481. Notably, the Appeals Council is authorized to review any SSA ALJ decision whenever there is a broad policy or procedural issue that may affect the general public interest. 20 C.F.R. §§ 404.970(a)(4), 416.1470(a)(4). Unlike ALJs, members of the Appeals Council are eligible for agency-determined bonuses and can more easily be

removed from their positions. *See* Hearings Held by Administrative Appeals Judges of the Appeals Council, 85 Fed. Reg. 73,138, 73,145 (Nov. 16, 2020).

The Appeals Council's authority is broader than its name suggests. Not only must claimants dissatisfied with an ALJ determination seek Appeals Council review to exhaust administrative remedies, 20 C.F.R. §§ 404.967, 416.1467, but the Appeals Council may also *sua sponte* assume responsibility for a decision at the hearing stage, *i.e.*, before an ALJ issues a decision, *id.* §§ 404.956(a), 416.1456(a). Furthermore, the Council itself can (and often does) review ALJ decisions on its own motion. *See id.* §§ 404.969(a), 416.1469(a). In addition, as part of a more generalized quality review system, the Appeals Council selects a sampling of cases to review *before* a decision is effectuated. *See id.* §§ 404.969(b), 416.1469(b).

To protect the integrity of ALJ decision-making, SSA regulations bar the agency from conducting pre-effectuation reviews of ALJs' decisions based on the identity of a specific ALJ or the hearing office where the decision was made. *Id.* §§ 404.969(b)(1), 416.1469(b)(1). Instead, SSA uses random and selective sampling to pick decisions allowing benefits for pre-effectuation reviews. *Id.* The agency also undertakes special studies based on anomalies identified. *See generally* Patrick P. O'Carroll, SSA, Off. of Inspector Gen., No. A-07-12-21234, *The Social Security Administration's Review of Administrative Law Judges' Decisions*, at 6-7 (March 2012), https://tinyurl.com/4dxwhchw. Through these various review processes, the SSA aims to ensure that ALJ

decisions, overall, do not stray from mandated regulatory policy, which is set by other agency actors—not SSA ALJs.

2. In addition to substantial pre- and post-decisional review, SSA ALJs must work within comprehensive agency policy guidelines when determining eligibility for benefits and adjudicating other issues they are tasked to decide. Those guidelines include Listings of Impairments that would direct a finding of disability and medical-vocational grids that provide detailed schedules on vocational criteria for different levels of impairment. *See* 20 C.F.R. pt. 404, subpt. P, apps. 1 & 2.

SSA policymakers provide such listings and grids, and other extensive internal guidance tools, like Social Security Rulings. SSA regulations dictate that Social Security Rulings are binding on all components of the Agency. *Id.* § 402.35(b)(1). SSA has also issued other sub-regulatory guidance, such as the Hearings, Appeals and Litigation Law (HALLEX) manual.[8] Although HALLEX guidelines are not promulgated through notice and comment rulemaking, SSA has stated that the

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[8] Because HALLEX guidelines are not promulgated through notice and comment rulemaking, courts have viewed them as not binding like legislative rules. *See Schweiker v. Hanson*, 450 U.S. 785, 789 (1981); *Moore v. Apfel*, 216 F.3d 864, 868-69 (9th Cir. 2000). The extent to which HALLEX guidelines bind SSA ALJs—particularly if they encroach upon an ALJ's independence in how hearings are conducted or may conflict with published regulations—is frequently litigated between AALJ members and SSA. Even if not binding, the agency's promulgation of such extensive policy guidance for ALJs to apply reinforces that ALJs have no policymaking function themselves.

HALLEX is intended to "communicate[] guiding principles and procedures" to SSA adjudicators. HALLEX I-1-0-3. One such guideline urges ALJs to refer novel policy issues to their agency supervisors, rather than decide the question themselves in the first instance, recognizing that such referrals will be rare given the comprehensive guidelines already provided. *See* HALLEX I-2-1090.

SEC ALJs, by contrast, although also circumscribed by the APA and agency constraints in any policymaking function, have considerably more leeway for interstitial common-law decision making. Unlike non-adversarial determinations of benefit eligibility status, administrative enforcement proceedings will, by necessity, involve the refining of "statutory standards" through "case-by-case evolution." *SEC v. Chenery Corp*, 332 U.S. 194, 202-03 (1947).

SEC ALJs can enforce their common-law decision-making, moreover, through extensive penalties. They have authority to impose substantial monetary penalties, including the power to order disgorgement, 15 U.S.C. § 77t, (though the Fifth Circuit held that the power to impose civil penalties in an administrative action was inconsistent with the Seventh Amendment in the decision under review here, Pet. App. 10a-17a). SEC ALJs also have cease-and-desist powers—that is, powers prohibiting licensed firms and persons from violating the securities laws—and the ability to revoke licenses or bar defendants from doing securities-industry work. 15 U.S.C. § 77h-1. While SEC ALJ decisions and penalties are subject to plenary Commission review,

the opportunity for SEC ALJs to make these sorts of legal determinations and establish penalties even in the first instance is an adjudicative authority not granted to SSA ALJs.

3. These constraints on SSA ALJ policymaking are driven by another key difference between SSA ALJs and other ALJs—the sheer size of the enterprise. This Court has recognized that the disability programs administered by SSA are of "a size and extent difficult to comprehend." *Richardson*, 402 U.S. at 399. And the workload has only grown since then. The number of ALJs employed by SSA, and the quantity of cases they handle, reinforces that SSA ALJs apply policies to discrete facts, rather than make policy.

As of 2017, there were only five ALJs at the SEC, and the Federal Trade Commission and the Consumer Financial Protection Bureau, other agencies that pursue administrative enforcement actions, had only one apiece. *See* U.S. Office of Personnel Mgmt, *ALJs by Agency*, http://tinyurl.com/yc7nkcd2. In contrast, some 1,200 ALJs (excluding Regional Chief ALJs) currently serve at the Social Security Administration. *See* Social Security Admin., *Annual Statistical Supplement 2022*, Table 2.F8, https://tinyurl.com/mtkbxe3c. And they handle a far greater number of cases, both overall and per judge.

In 2021, roughly 451,000 hearing-level dispositions were issued by SSA ALJs. *Id.* at Table 2.F9. Each ALJ issued 30 dispositions per month, on average, and had over 270 cases pending on their docket at the end of the year. *Id.* at Table 2.F8. In contrast, about 250 administrative proceedings are

currently pending, at all stages, before the SEC. SEC, *Open Administrative Proceeding Cases*, https://tinyurl.com/54sar3ud.

The imperative to ensure consistency and fairness across a huge caseload helps explain why SSA ALJs are subject to more levels and varieties of internal agency control than their counterparts in other agencies. A ban on policymaking, non-precedential decision-making, detailed guidelines confining discretion, and proactive mechanisms for agency review and supervision—all on top of good-cause removal—together show the plenary executive supervision of SSA ALJs that may not apply to the same degree for other ALJs.

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Congress's solution to the problems that plagued pre-APA administrative decision-making—a solution that has proved its worth over nearly eight decades of adjudicative decision-making—should not be overturned lightly, particularly when the proposed "solution" of increasing the power of agency heads over ALJ tenure could introduce the very bias that the APA was enacted to eradicate. Existing removal protections for all ALJs are constitutional.

But, even if the Court deems two layers of tenure protection for SEC ALJs to be a constitutional violation, this is not a one-size-fits-all answer. AALJ urges the Court to specify that such a decision should not be applied to SSA and other ALJs, whose authorities and duties are vastly different.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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