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 FOR MORRIS & DICKSON AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Morris & Dickson (M&D) respectfully submits this brief as *amicus curiae* in support of Respondents.[1] M&D is a family-owned pharmaceutical distribution company based in Louisiana. It has served communities in the American Southeast for over 180 years. Like Respondents, M&D was subjected to an agency adjudication by an administrative law judge (ALJ) unconstitutionally insulated from removal. *See Morris & Dickson v. DEA*, No. 23-60284 (5th Cir.).

M&D submits this brief to elaborate on the ALJ question, given that the parties here and the court below have focused on two antecedent challenges to agency adjudication. ALJs' removal protections are unconstitutional for more fundamental reasons than the rationale given by the Fifth Circuit, and the remedy for that violation is more substantial than the one proposed by the Government.

SUMMARY OF ARGUMENT

ALJs operate at the frontlines of the administrative state. They exercise significant executive authority in shaping agency records and implementing ambiguous statutes. And they have the power to affect vast aspects of everyday life in this country. Article II demands they be accountable to the President, whose executive power they wield.

Congress, however, has constructed a statutory scheme designed to meaningfully insulate ALJs from presidential supervision. ALJs enjoy two robust

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[1] No counsel for a party authored any part of this brief, and no person other than M&D or its counsel made any monetary contribution intended to fund its preparation or submission.

layers of removal protection. The first level alone is unconstitutional, and the second level compounds the violation.

Under Article II and this Court's precedents, the general rule is that the President has unrestricted power to remove subordinate executive officers. Although this Court has permitted a narrow exception for inferior officers who have limited duties and wield no policymaking or administrative authority, ALJs meet none of those criteria. And their adjudicatory role is no reason to create a new exception. Regardless, even if ALJs could enjoy some measure of removal protection, Congress has gone much too far. As statutorily established by the Merit Systems Protection Board (MSPB), "good cause" to remove ALJs is very narrow in order to safeguard their "decisional independence." That goes well beyond anything this Court has ever tolerated for an inferior officer acting within and for an executive agency. Moreover, the MSPB is itself an independent agency shielded by exceedingly stringent removal protections. That creates the type of multi-layer insulation from the President that this Court has already rejected, as the Fifth Circuit correctly held.

For its part, the Government tries to resurrect a moribund approach to the removal power. Implicitly conceding that ALJs do not fit within the only exceptions this Court has allowed, the Government urges a sweeping new one that would swallow the rule. It contends that Congress may impose any restrictions on the removal of inferior officers that it deems in "the public interest," so long as the President's control over the Executive Branch is not "impermissibly burdened" (whatever that means).

But this Court's most recent cases have decisively rejected that balancing approach, holding that the existing exceptions are the furthest incursions on the removal power that it will tolerate. This Court should reaffirm those defined bounds and reject the Government's call to replace them with open borders.

Turning to the remedy, this Court should affirm the vacatur of the agency order. The Government asserts that a remand would be needed to determine whether the removal restriction had a prejudicial effect on the order, but that is incorrect for two independent reasons. Unlike in past removal cases, this one seeks review of an agency adjudication. In this context, an unconstitutional tenure provision is structural error that is prejudicial *per se*. Further unlike past removal cases, the tenure protections for ALJs are nonseverable from their adjudicatory powers. Congress only vested ALJs with the latter because they were cloaked with the former—which were intended to remedy complaints about the fairness and impartiality of agency adjudications, as the Government itself emphasizes.

ARGUMENT

I. ALJs' REMOVAL PROTECTIONS ARE UNCONSTITUTIONAL

By intent and design, ALJs are very hard to fire. ALJs may be removed by the heads of their agencies "only for good cause established and determined by the [MSPB]," 5 U.S.C. § 7521(a); and MSPB members in turn may be removed by the President "only for inefficiency, neglect of duty, or malfeasance in office," *id.* § 1202(d). This statutory scheme is irreconcilable with Article II and this Court's precedents.

A. Article II's General Rule Requires At-Will Removal, And This Court's Cases Tolerate Only Two Narrow Exceptions

1. The Constitution vests the "entire" power to execute federal law in the President "alone." *Seila Law v. CFPB*, 140 S. Ct. 2183, 2197 (2020). Wielding that power means the President must have the "authority to remove those who assist him." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 513-14 (2010). The President's ability to control his subordinates is necessary for him to be "fully accountable for discharging his own responsibilities," *id.* at 514, through a "clear and effective chain of command," *id.* at 498. As a result, the "general rule" is the President has "unrestricted removal power" over executive officers. *Seila Law*, 140 S. Ct. at 2198.

That rule is dictated by the Constitution's text. Article II "vest[s]" all of "[t]he executive Power … in a President." U.S. Const. art. II, § 1, cl. 1. And it imposes on him a corresponding duty to "take Care that the Laws be faithfully executed." *Id.* art. II, § 3. This enormous and exclusive mandate requires that he have subordinates to assist him and the ability to supervise them. *Seila Law*, 140 S. Ct. at 2197.

In turn, the power to supervise "generally includes the ability to remove executive officials," because it is only the person who "can remove" such officials that they "must fear and, in the performance of their functions, obey." *Id.* (cleaned up). Or as Madison put it: the executive power necessarily encompasses "the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789).

The Constitution has been understood this way "[s]ince 1789." *Seila Law*, 140 S. Ct. at 2198. In creating the seminal executive departments, the First Congress settled that the President must have the "power to remove—and thus supervise—those who wield executive power on his behalf." *Id.* at 2191-92. And nearly a century ago, Chief Justice Taft, writing for this Court, confirmed in a landmark opinion that the President's "control of those executing the laws" includes the "essential" power of "removal." *Myers v. United States*, 272 U.S. 52, 117, 163-64 (1926).

2. This Court has "recognized only two exceptions to the President's unrestricted removal power." *Seila* Law, 140 S. Ct. at 2192. One applies to certain principal officers, whose direct superior is the President; the other to certain inferior officers, who are "directed and supervised at some level" by principal officers. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1980 (2021). The two exceptions are "the outermost constitutional limits of permissible congressional restrictions on the President's removal power." *Seila Law*, 140 S. Ct. at 2199-2200 (quoting *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 698 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)).

First, as to principal officers, this Court has allowed Congress to restrict the President's removal power only for those who head "multimember expert agencies that do not wield substantial executive power." *Id.* at 2199-2200. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court considered the five-member FTC, which it saw as a nonpartisan "administrative body" that exercised "quasi judicial and quasi legislative" functions, but "no part of the executive power." *Id.* at 624, 628. On

that understanding, the Court upheld a provision prohibiting the President from removing FTC Commissioners absent "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 620, 628; *see also Wiener v. United States*, 357 U.S. 349, 350, 354-56 (1958) (invoking *Humphrey's Executor* to infer similar removal restriction for War Claims Commission).

This Court, however, has rejected restrictions on the removal of principal officers that do not fit within the mold of *Humphrey's Executor*. Twice in the past three years, this Court invalidated removal protections that insulated single-headed agencies wielding substantial executive power. *Seila Law*, 140 S. Ct. at 2192 (CFPB); *Collins v. Yellen*, 141 S. Ct. 1761, 1783-84 (2021) (FHFA). Moreover, the Court has pointedly noted that the rationale of *Humphrey's Executor* was repudiated by later precedent. *Seila Law*, 140 S. Ct. at 2198 n.2.

Second, as to inferior officers, this Court has allowed Congress to restrict the President's removal power only for those "with limited duties and no policymaking or administrative authority." *Seila Law*, 140 S. Ct. at 2200. In the late 19th century, the Court upheld a rule that prevented the Secretary of the Navy from discharging a low-ranking cadet-engineer during peacetime without first finding misconduct or convening a court-martial. *United States v. Perkins*, 116 U.S. 483, 483-85 (1886). And a century later, the Court upheld a "good cause" restriction on the Attorney General's ability to remove an independent counsel specially appointed to investigate and prosecute, pursuant to DOJ policy, certain crimes by high-ranking officials. *Morrison v. Olson*, 487 U.S. 654, 691-92 (1988).

Notably, in addition to the limited scope of the offices at issue, the removal restrictions were relatively modest. In *Morrison*, the Court observed that the Attorney General could remove the counsel for any misconduct. *Id.* at 692; *see id.* at 724 n.4 (Scalia, J., dissenting) (explaining "*cause*" would "include, of course, the failure to accept supervision"). And in *Perkins*, although the Court did not opine on the standard for misconduct—because the cadet-engineer had not engaged in *any* wrongdoing—the military context made clear that insubordination would be an offense punishable by removal (or worse). *Cf. Free Enter. Fund*, 561 U.S. at 507.

Once more, this Court has invalidated removal restrictions for inferior officers that do not fit the mold of the "limited restrictions" in *Perkins* and *Morrison*. *Id.* at 495. In *Free Enterprise Fund*, the Court addressed inferior officers shielded by two levels of removal protections: PCAOB members could be removed by the SEC only in extreme situations, and SEC Commissioners in turn were assumed to be protected from removal under *Wiener*. *Id.* at 486-87. The Court held that this "added layer of tenure protection" unconstitutionally withdrew "from the President any decision" on whether there was cause to remove a PCAOB member, creating "a Board that is not accountable to the President, and a President who is not responsible for the Board." *Id.* at 495-96.

3. Quite tellingly, the Government all but ignores *Seila Law* and instead tries to make *Morrison* the rule rather than the exception. For inferior officers appointed by department heads, the Government claims that Article II is violated only if a removal restriction "'impermissibly burdens the President's

power to control or supervise' the Executive Branch." Pet. Br. 47 (quoting *Morrison*, 478 U.S. at 692). Otherwise, the Government insists, Congress "'may limit and restrict the power of removal as it deems best for the public interest.'" Pet. Br. 46 (quoting *Perkins*, 116 U.S. at 485). None of that is the law.

First, the Government's attempt to breathe new life into *Morrison*'s functionalist approach to the removal power is foreclosed by recent precedent. Nowhere in *Seila Law* did this Court even repeat, much less apply, *Morrison*'s "impermissibly burden" standard. Instead, as discussed, *Seila Law* held that the "general rule" is the President has "unrestricted removal power" even for "inferior officers," with an "exception[]" only for those who have "limited duties and no policymaking or administrative authority." 140 S. Ct. at 2198-2200. *That* was the test *Seila Law* applied to distinguish the independent counsel in *Morrison*. *Id.* at 2200. So while the Court did "not revisit" *Morrison*'s holding as to that singular officer, it admonished that the decision is not "a freestanding invitation for Congress to impose additional restrictions on the President's removal authority." *Id.* at 2206. To borrow an apt phrase, *Morrison*'s functionalist approach has been "swept into the dustbin of repudiated constitutional principles." *Morrison*, 487 U.S. at 725 (Scalia, J., dissenting).

Indeed, the Government's position here echoes the failed theory of the Court-appointed *amicus* in *Seila Law*. He similarly argued that *Morrison* and *Humphrey's Executor* established a "general rule that Congress may impose modest restrictions on the President's removal power, with only two limited exceptions"—where Congress reserves for itself a role

in removal (as in *Myers*) or where it effectively eliminates the President's removal power altogether (as in *Free Enterprise Fund*). 140 S. Ct. at 2205. This Court rejected that view as *backwards*: The "President's removal power is the rule, not the exception." *Id.* at 2206. And the "exceptions" that have been recognized are "the outermost … limits" the Court will tolerate. *Id.* at 2200.

Collins confirms the flaw in the Government's reliance on *Morrison*. Emphasizing that "[c]ourts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies," this Court held that "the constitutionality of removal restrictions" does *not* "hing[e] on such an inquiry." 141 S. Ct. at 1785. The same "severe practical problems" (*id.* at 1784) would plague any attempt to resurrect *Morrison*'s "impermissibly burden" standard—a standard *defined* by amorphous balancing. 487 U.S. at 695-96; *accord id.* at 711-12 (Scalia, J., dissenting).

Second, the Government's treatment of *Perkins* is likewise outdated. Although the Court in *Perkins* reasoned that Congress's authority to vest the appointment of inferior officers in a department head "implies authority to limit, restrict, and regulate the removal" of officers so appointed, 116 U.S. at 485, this Court has not retained that overbroad rationale. Again, *Seila Law* justified *Perkins* based on the narrow scope of the cadet-engineer's office. 140 S. Ct. at 2199-2200. That is unsurprising, as the broader rationale in *Perkins* makes no sense. While the Appointments Clause gives Congress the ability to vest appointment of inferior officers in a department head rather than the President, *Arthrex*, 141 S. Ct. at

1979, that in no way limits the President's separate prerogative under the Vesting Clause to use removal to supervise how such inferior officers exercise *his* executive power, *Seila Law*, 140 S. Ct. at 2197.

Moreover, if any inference were to be drawn from the manner of appointment, it would be the *opposite* of what *Perkins* suggested. Insofar as "[t]he power to remove inferior executive officers … is an incident of the power to appoint them," *Myers*, 272 U.S. at 161, the President should have greater power to remove the inferior officers appointed *solely* by his "*alter ego*" department heads, compared to the inferior officers as to whom he *shares* appointment with *the Senate*, *id.* at 133. Relatedly, the Government is wrong to suggest (Pet. Br. 46) that Chief Justice Taft's opinion in *Myers* followed the flawed rationale in *Perkins*. Just like the Court in *Seila Law*, the Court in *Myers* accepted the result in *Perkins* but did not adopt its reasoning or extend it to other officers. 272 U.S. at 161-63. Thus, as in *Seila Law*, *Myers* emphasized that the President's removal power under Article II extends to *all* "executive officers, whether superior or inferior," and that any exceptions are to be "strictly construed, and not to be extended by implication." *Id.* at 163-64.

B. ALJs Fit Neither Exception To Article II's General Rule Of At-Will Removal

1. Accordingly, while the Fifth Circuit focused on whether ALJs' removal protections are too robust, the threshold inquiry under this Court's precedent is whether ALJs can be protected from removal *at all*: Do ALJs fall within either of the exceptions to at-will removal identified in *Seila Law*? And given that the

Humphrey's Executor exception for principal officers of certain multimember agencies plainly does not apply to ALJs—who are inferior officers within executive agencies—the real question is whether the *Morrison/Perkins* exception applies: Do ALJs exercise "limited duties *and* no policymaking *or* administrative authority"? *Seila Law*, 140 S. Ct. at 2199-2200 (emphases added). On every prong, the answer is "no."

Start with ALJs' duties. They are not limited in the same durational or substantive manner as the officers' duties in *Morrison* and *Perkins*—or in any material sense. ALJs serve indefinitely, unlike an independent counsel with a temporary mandate to fulfill a "single task." *Morrison*, 487 U.S. at 672. And they regulate ordinary Americans, whereas the counsel's coercive power was "trained inward to high-ranking Governmental actors identified by others." *Seila Law*, 140 S. Ct. at 2200. Likewise, the naval cadet-engineer in *Perkins* was near the bottom of the command chain and therefore primarily responsible for carrying out superiors' instructions, *see* 116 U.S. at 483, while ALJs wield "significant discretion" and powerful "tools" in conducting "adversarial hearings," *see Lucia v. SEC*, 138 S. Ct. 2044, 2053 (2018).

Relatedly, ALJs exercise policymaking authority. DOJ *itself* has long recognized that ALJs "determine, on a case-by-case basis, the policy of an executive branch agency." Sec'y of Educ. Review of ALJ Decisions, 15 Op. O.L.C. 8, 15 (1991). Nor can that plausibly be disputed. Through adjudications, ALJs necessarily "fill statutory and regulatory interstices comprehensively with [their] own policy judgments." *Id.* at 14; *see City of Arlington v. FCC*, 569 U.S. 290,

304-05 (2013) (noting that judges of all types decide "how best to construe an ambiguous term in light of competing policy interests"). After all, it is black-letter administrative law that agencies can use a party-specific adjudication, just like general rulemaking, to "formulat[e] … agency policies" and "promulgate a new standard that w[ill] govern future conduct." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-94 (1974)

At minimum, *Administrative* Law Judges possess administrative authority. They are inferior officers exercising "significant authority" under federal law *because of* the myriad ways they "critically shape the administrative record." *Lucia*, 138 S. Ct. at 2052-53. Simply put, ALJs have earned their name; if what they do is not exercising administrative authority, then nothing is.

2. Astonishingly, the Government *never mentions* the *Seila Law* test, much less tries to satisfy it. Instead, the Government offers a scattershot of reasons why this Court should create a *new exception* for ALJs. Even setting aside that this Court has already "decline[d]" the "invitation" to uphold "additional restrictions on the President's removal authority," *Seila Law*, 140 S. Ct. at 2206, the Government's points fail on their own terms.

a. The Government principally contends that "adjudicators" are special, and that those who perform this function within the Executive Branch need not be as "accountable" to the President as "policymakers." Pet. Br. 51-52. That distinction is both illusory and misguided.

For starters, ALJs *do* make policy through adjudicatory decisions. The Government itself admits the two functions "are not hermetically sealed," while noting merely that an agency head retains some power to supervise ALJs' policymaking through substantive review and removal for cause. Pet. Br. 52. But the Government cannot explain why that renders ALJs different from *other* inferior officers who exercise policymaking authority—who all also have superiors (by definition) *yet still* fall outside the exception to at-will removal.

More fundamentally, ALJs must be accountable to the President even if they do not make policy. "[U]nder our constitutional structure," agency "adjudications … *must be* exercises of … the 'executive Power.'" *City of Arlington*, 569 U.S. at 305 n.4. Thus, like the Administrative Patent Judges in *Arthrex*, "[w]hile the duties of [ALJs] partake of a Judiciary quality as well as Executive, [ALJs] are still exercising executive power and must remain dependent upon the President." 141 S. Ct. at 1982. Although the Government emphasizes that Congress sought to provide ALJs independence to promote fairness and impartiality, Pet. Br. 53-54, 65-66, the desire for "'technical competence' and 'apolitical expertise'" does not justify curtailing "the role for oversight by an elected President." *Free Enter. Fund*, 561 U.S. at 498-99.

For better or worse, executive adjudication—conducted by nearly 2,000 ALJs (more than double the number of Article III judges)—"now wields vast power and touches almost every aspect of daily life." *Id.* at 499. Scores of Americans are hauled before such adjudicators and subjected to their many

coercive powers. *Lucia*, 138 S. Ct. at 2053. To prevent their exercise of executive authority from "slip[ping] from the [Chief] Executive's control," the use of "removal as a tool of supervision" cannot be restricted. *Free Enter. Fund*, 561 U.S. at 499.

b. The Government next asserts that ALJs' removal protections have historical grounding. Pet. Br. 54-55. But the Government overstates its case.

The Government begins by emphasizing the early D.C. justices of the peace. But this Court has long recognized that those local officials' tenure protections shed no light on the President's power to remove officers within the Executive Branch, given Congress's exclusive power to regulate for the District of Columbia. *See Parsons v. United States*, 167 U.S. 324, 335-36 (1897); *cf. Ortiz v. United States*, 138 S. Ct. 2165, 2177 (2018).

The Government also lists several stand-alone adjudicative tribunals that Congress has established. But those entities rest on the inapposite fiction that they exercise "'no part of the executive power'" in light of, among other things, their "organizational features" as freestanding "administrative bod[ies]." *Seila Law*, 140 S. Ct. at 2198 (quoting *Humphrey's Executor*, 295 U.S. at 628). Especially since that fiction "has not withstood the test of time," *id.* at 2198 n.2 (citing *City of Arlington*, 569 U.S. at 305 n.4), it should *not be extended* to inferior officers like ALJs who adjudicate matters *within and for* an agency. Where the agency head is removable at will by the President, applying the fiction to the agency's ALJs is untenable: they are indisputably "part of the Executive establishment," *Wiener*, 357 U.S. at 353,

and thus insulating them from removal "blur[s] the lines of accountability" within an entity for which the public holds the President responsible, *Arthrex*, 141 S. Ct. at 1973. And where the agency head is *not* removable at will by the President, applying the fiction to the agency's ALJs is intolerable: "a second level of tenure protection changes the nature of the President's review," because the President cannot even hold the agency accountable "to the same extent that he may hold [it] accountable for everything else that it does," given that the agency "cannot remove [an ALJ] at will." *Free Enter. Fund*, 561 U.S. at 496.[2]

The Government identifies only two adjudicative tribunals with removal protection that are inferior establishments within a larger agency—one involving federal contracts, the other farm-program decisions. 41 U.S.C. § 7105; 7 U.S.C. § 6992. As in *Seila Law*, these "isolated examples" are insufficient: they are "modern" (in fact, one was created in 1978 and the other in 1994, just as in *Seila Law*), and they are not "remotely comparable" in power (for they both involve parties who choose to transact with the Government). 140 S. Ct. at 2202.

Indeed, history refutes the Government's position. Adjudications by executive officers have occurred "since the beginning of the Republic." *City of*

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[2] Although the Government notes that *the SEC's* removal protection was assumed below and in *Free Enterprise Fund*, it never says whether that assumption is correct, Pet. Br. 47-49, and the assumption is wrong. SEC Commissioners have no express removal protection, *see* 15 U.S.C. § 78d(a), and *Collins* held that removal protection cannot be inferred except perhaps for purely adjudicatory bodies, *see* 141 S. Ct. at 1783 & n.4 (distinguishing *Wiener*), which the SEC is not.

Arlington, 569 U.S. at 305 n.4. And until the 20th century, it was common for officers exercising such functions to be subject to presidential removal. Harold J. Krent, *Presidential Control of Adjudication Within The Executive Branch*, 65 CASE W. RESERVE L. REV. 1083, 1089-91 (2015). Even now, the APA generally allows agency heads *themselves* to conduct adjudications. 5 U.S.C. § 556(b). In short, there is no well-rooted "historical exception" to the President's removal authority for adjudicators within the Executive Branch. *Ortiz*, 138 S. Ct. at 2186 (Thomas, J., concurring.).

c. The Government also grasps for support from a few stray sentences in this Court's decisions. Pet. Br. 55-56. Once more, the slender reeds identified by the Government cannot bear so much weight.

The Government highlights the observation in *Myers* that the President may not be able to direct executive officers exercising "quasi-judicial duties" how they should decide "a particular case." 272 U.S. at 135. The Government fails to mention, however, that the *next two sentences reject its position*. "[E]ven in such a case," *Myers* explained, the President must be able to "consider the decision after its rendition as a reason for removing the officer," for "[o]therwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed." *Id.*

The Government also repeatedly cites a footnote from *Free Enterprise Fund*. But there, as part of a broader disavowal of "general pronouncements on matters neither briefed nor argued," 561 U.S. at 506, the Court simply stated that its decision did "not address" ALJs one way or the other, *id.* at 507 n.10.

And while the footnote further observed that ALJs' status as "officers" was unsettled at the time, in part because their powers are "adjudicative" and sometimes "recommendatory," *id.*, this Court has since held that ALJs are nevertheless officers, *Lucia*, 138 S. Ct. at 2053-54, and that executive adjudication exercises executive power all the same, *Seila Law*, 140 S. Ct. at 2198 n.2; *Arthrex*, 141 S. Ct. at 1982. Moreover, unlike *Free Enterprise Fund*, *Seila Law* is full of "general pronouncements." *Supra* at 4-5, 8.

d. The Government finally insists that agency heads have "adequate control" over ALJs even without at-will removal, through the ability to decide which cases they hear and tasks they perform, what rules they must follow, and whether to reverse their decisions. Pet. Br. 56-59. But in *Free Enterprise Fund*, this Court held that "[b]road powers over [an inferior officer's] functions is not equivalent to the power to remove" such officers. 561 U.S. at 504.

There, the SEC likewise emphasized its power to "relieve the [PCAOB] of authority," "issue binding regulations" for the Board, and "amend Board sanctions." *Id.* That was no "substitute" for removal, however, because taking such actions would require "destroy[ing] the Board in order to fix it." *Id.* Rather than achieving "a clear and effective chain of command" by using the threat of removal to ensure that inferior officers do their jobs correctly in the first place, the principal officer would have to take comfort in the ability to redo their jobs for them after they screwed up. *Id.* at 498. Far from "adequate control," that would turn Article II upside down.

C. In All Events, ALJs' Removal Protections Are Too Stringent

Even assuming ALJs could receive some type of tenure protection, the scheme Congress has imposed goes much too far. ALJs are cloaked with atypically robust removal protections for inferior officers—far more than what this Court tolerated in *Perkins* and *Morrison*. And the MSPB members who determine whether ALJs may be removed are themselves shielded from removal—a double-insulated system that violates *Free Enterprise Fund*.

1. Starting with the first level, the MSPB has "established" a "good cause" standard for ALJ removal under 5 U.S.C. § 7521(a) that goes well beyond what Article II and this Court's cases permit.

a. The MSPB's "baseline for evaluating good cause in any action against an ALJ is whether the action improperly interferes with the ALJ's ability to function as an independent and impartial decision maker." *Dep't of Labor v. Avery*, 120 M.S.P.R. 150, 153 (2013). Accordingly, the MSPB will not permit an agency to take any adverse action against ALJs "for a reason that interferes with [their] qualified judicial independence." *Id.* at 155.

Thus, as in *Free Enterprise Fund*, the "good cause" standard established by the MSPB is "rigorous" and "unusually high." 561 U.S. at 503. Only in narrow circumstances will poor adjudicatory performance, such as adjudicatory errors or failure to follow adjudicatory instructions, be deemed "good cause" that justifies disciplining an ALJ. *See, e.g.*, *Abrams v. SSA*, 703 F.3d 538, 545 (Fed. Cir. 2012) (holding that the "failure to follow instructions" qualifies if,

but only if, the instructions were "unrelated to their decisional independence"). Moreover, even when the MSPB *has* found that an ALJ engaged in misconduct warranting discipline, it often has insisted that a lesser sanction than removal is appropriate. *See, e.g.*, *SSA v. Brennan*, 27 M.S.P.R. 242, 248, 251 (1985), *aff'd*, 787 F.2d 1559 (Fed. Cir. 1986) ("disruptive conduct" did not warrant removal).

That degree of insulation far exceeds what *Perkins* and *Morrison* were willing to accept. There, the restrictions were relatively modest and permitted removal for insubordination. *Supra* at 6-7. Not so here, given the MSPB's commitment to ALJs' decisional independence.

b. The Government concedes that the "good cause" standard in § 7521(a) provides ALJs with "significant decisional independence." Pet. Br. 52. And the Government reaffirms that removal for job performance requires "substantially deficient" flaws, and that misconduct likewise must be "significant." Pet. Br. 60-61. Yet the Government obviously cannot say that the midshipman in *Perkins* or even the counsel in *Morrison* had *that degree* of job protection.

Although the Government trumpets that the MSPB recently overruled its decisions second-guessing an agency's choice of removal rather than a lesser punishment for sanctionable conduct, Pet. Br. 62-63, that hardly ameliorates the problem. The Board will still assess for itself whether "good cause" to take any adverse action exists. *See SSA v. Levinson*, 2023 M.S.P.B. 20, ¶¶ 37-48 (July 12, 2023). As such, "qualified judicial independence" remains the "baseline for evaluating good cause." *Avery*,

120 M.S.P.R. at 153, 155. This regime far exceeds "the outermost constitutional limits" for inferior officers. *Seila Law*, 140 S. Ct. at 2200.

2. The icing on this poisoned cake is the second level of removal protection layered on top. The MSPB members themselves are shielded from removal by the President under the highly restrictive "inefficiency, neglect of duty, or malfeasance in office" standard. *See* 5 U.S.C. § 1202(d); *Seila Law*, 140 S. Ct. at 2206-07. *Free Enterprise Fund* forecloses this multi-level insulation.

a. The core reasoning of *Free Enterprise Fund* directly and straightforwardly applies here. ALJs' "dual for-cause limitations" on removal violate Article II by depriving the President of "the ability to oversee [ALJs] or to attribute [their] failings to those whom he *can* oversee." 561 U.S. at 492, 496.

More specifically, the statutory scheme "not only protects [ALJs] from removal except for good cause, but withdraws from the President any decision on whether that good cause exists." *Id.* at 495. "That decision is vested instead in [the MSPB]," and "if the President disagrees with [its] determination, he is powerless to intervene—unless that determination is so unreasonable as to" itself constitute cause. *Id.* at 495-96. "The result is [ALJs who are] not accountable to the President, and a President who is not responsible for [ALJs]." *Id.* at 495.

b. The Government resists *Free Enterprise Fund* in a few ways. All fail.

First, the Government tries to limit the decision to its facts, insisting the case turned on the PCAOB being *especially* powerful and *especially* tenured.

Pet. Br. 47-50, 56-57, 59-60. But *Free Enterprise Fund* was not a single-punch ticket. This Court described the holding in broad, non-PCAOB-specific terms in *Seila Law*: "[W]e declined to extend [removal] limits to … an official insulated by *two* layers of for-cause removal protection." 140 S. Ct. at 2198. Indeed, the Court *never even mentioned* the factual aspects of *Free Enterprise Fund* that the Government now proffers as critical limitations—an omission that is particularly telling since the Court *did* carefully catalog and discuss the factual aspects of *Morrison* and *Humphrey's Executor* that limit *those* holdings. *Id.* at 2198-2200.

Second, the Government downplays the MSPB's role, equating it with an Article III court's review of whether cause exists under otherwise-permissible removal restrictions. Pet. Br. 61-65. But in vesting review of an executive agency's decision to remove an inferior officer, there is a critical difference between selecting the *separate* Judicial Branch versus an independent tribunal *within* the Executive Branch itself. When one part of the Executive blocks another from removing an inferior officer, "such machinations blur the lines of accountability," *Arthrex*, 141 S. Ct. at 1982, and confuse the public's ability to "determine on whom the blame … ought really to fall" that an unsuited officer remains on the job, *Free Enter. Fund*, 561 U.S. at 498. Whereas citizens would know that the President was not to blame for an ALJ's future misdeeds *if a federal court* blocked an agency head from removing the ALJ, not so for the MSPB. The public may well treat that intra-Executive squabble as the President's fault.

Third, the Government objects that ALJs' removal protections are a "longstanding practice" dating back "three quarters of a century." Pet. Br. 65. Not really. As detailed below, ALJs have been cloaked in *two* layers of removal protection only since 1978, as the MSPB's precursor was subject to the President's unrestricted removal power; and Congress replaced that non-independent agency *because* it was viewed as too susceptible to Executive Branch influence between 1946 and 1978. *Infra* at 28-29. ALJs' tenure protections are novel and unconstitutional.

II. THE PROPER REMEDY IS TO SET ASIDE THE AGENCY ORDER AND LEAVE IT TO CONGRESS TO FIX THE ADJUDICATORY SCHEME

Although the Fifth Circuit did not decide what remedy is appropriate for ALJs' unconstitutional insulation, the Government asserts that their removal protections are severable and that a remand is necessary to assess under *Collins* whether the existence of those protections had a prejudicial effect on the adjudication. Pet. Br. 66-67. Not so. *Collins* is inapplicable here for two independent reasons. Unlike in *Collins*, this case involves a challenge to an adjudication, and well-established remedial principles in this context dictate that a removal restriction unconstitutionally shielding an adjudicator is a structural error not susceptible to a prejudice inquiry. Also unlike in *Collins*, ALJs' removal protections are nonseverable because, as the Government itself admits, making ALJs removable at will by their agency heads would recreate the very problems with agency adjudications that Congress was trying to solve. Accordingly, the Court should

simply affirm the vacatur of the agency order and leave it to Congress to fix the adjudicatory scheme.

A. Improper Insulation Of An ALJ Is A Structural Error In Adjudication

1. Under this Court's cases, the longstanding remedy for separation-of-powers defects in an adjudication is vacatur of the underlying order. *See, e.g.*, *Lucia*, 138 S. Ct. at 2055 (administrative judges); *Ryder v. United States*, 515 U.S. 177, 182-83 (1995) (military judges); *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (patent judges). When the error goes to the *nature* of the adjudicator—not something that *happens* in the adjudication—courts must "invalidate[] the judgment … without assessing prejudice." *Nguyen v. United States*, 539 U.S. 69, 81 (2003). In short, such a fundamental defect is "a structural error" that "affect[s] the framework within which the [adjudication] proceeds." *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017).

Applying that principle, this Court has regularly set aside as prejudicial *per se* decisions rendered by adjudicators who *lacked* sufficient tenure protections. In *Nguyen*, the Court vacated the judgment of a federal appellate panel improperly composed of two Article III judges and one territorial judge (who lacked Article III's tenure protections)—even though the panel's decision was unanimous and had an Article III majority. 539 U.S. at 81. Likewise, in *Stern v. Marshall*, 564 U.S. 462 (2011), this Court set aside the order of a bankruptcy judge who heard a matter reserved for Article III courts—once again, without analyzing if the lack of tenure protection affected the underlying decision. *Id.* at 502-03.

As the lack of necessary tenure protections in a judicial proceeding is inherently prejudicial, the *presence of improper* tenure protections in an agency adjudication is too. When ALJs are shielded unconstitutionally from presidential removal, the adjudication is just as corrupted, though the reason is inverted. Whereas Article III protects independence, Article II guarantees accountability; and the respective tenure rules prescribed by the Constitution—good behavior for the former, at will for the latter—reinforce those commitments. Thus, in both circumstances, when the adjudicator is insulated in a manner different from what the Constitution commands, it infects the proceeding's "framework." *Weaver*, 582 U.S. at 295.

Structural-error rules apply with equal force to *administrative* adjudications. The APA provides that "due account shall be taken of the rule of prejudicial error," 5 U.S.C. § 706, and federal courts apply to administrative adjudications the "same harmless error rule" used for trials, *see*, *e.g.*, *Sea "B" Mining v. Addison*, 831 F.3d 244, 253 (4th Cir. 2016). Because that rule has an exception for structural errors, the APA likewise incorporates that aspect of "the common law of judicial review of agency action." *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2419-20 (2019) (plurality op.). And as a matter of basic logic, "structural defects" that "defy analysis by 'harmless-error' standards" after trials, *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991), are no more amenable to harmless-error review after executive adjudications.

In sum, structural-error doctrine is about a certain type of adjudicative error—one that is fundamental to the "framework" of the adjudication itself, even if

difficult to isolate and quantify on its own. *Weaver*, 582 U.S. at 295-96. Those sorts of errors may arise in *any* type of adjudication, whether purely judicial or only quasi-judicial. After all, if a federal statute unconstitutionally purported to grant an ALJ a direct financial benefit for ruling in the Government's favor, nobody would think a harmless-error analysis would be appropriate. *Cf. Tumey v. Ohio*, 273 U.S. 510, 522 (1927). That structural defect would be prejudicial *per se*. So too for an ALJ unconstitutionally shielded from supervision by the President.

2. Nothing in *Collins* is inconsistent with this conclusion. That case is inapposite in myriad ways.

To start, *Collins* did not arise out of a party-specific adjudication at all. It instead involved an attempt to use an agency head's removal protections to collaterally attack the adoption and implementation of a hundred-billion-dollar contract years after it had gone into effect. 141 S. Ct. at 1787-89. This Court's adoption of a novel prejudice analysis in that unusual context did not somehow displace the structural-error principles ordinarily applicable to judicial review of agency adjudications under the APA.

Moreover, extending *Collins* to the adjudicatory context would make no sense. The whole point of the structural-error doctrine is that defects in an adjudication's framework "defy" harmless-error analysis because it is difficult (if not impossible) to identify the prejudicial effect. *Fulminante*, 499 U.S. at 309. An adjudicatory-prejudice analysis is no more feasible or appropriate when the structural defect concerns unconstitutional tenure protections.

Extending *Collins* to this context would also conflict with a separate line of remedial precedent. This Court has emphasized that separation-of-powers remedies should be molded to incentivize such claims. *See, e.g.*, *Lucia*, 138 S. Ct. at 2055 n.5 (citing *Ryder*, 515 U.S. at 183). That principle would be flouted by effectively denying any meaningful remedy to parties subjected to adjudication before an unconstitutionally insulated ALJ. Indeed, elsewhere this Term, the Government has recognized that "[s]ound reasons justify treating adjudications differently" with respect to "[r]etrospective relief," because "[a] prospective remedy … would not benefit most litigants, who cannot expect to appear before the same adjudicator again." Pet. Reply Br. 23, *CFPB v. CFSA*, No. 22-448 (Aug. 2, 2023).

Accordingly, *Collins* does not alter the conclusion that an unconstitutional tenure rule for an agency adjudicator is structural error requiring vacatur.

B. ALJs' Powers Are Nonseverable From Their Removal Protections

In all events, the remedial analysis in *Collins* was premised on the statute-specific conclusion that the challenged removal restriction there was *severable* from the officer's authority to act. 141 S. Ct. at 1787-88 & n.23. If instead "the unlawfulness of the removal provision" *had* "strip[ped] the [officer] of the power to undertake the other responsibilities of his office," then his actions would have been "void" as an "exercise of power that [he] did not lawfully possess." *Id.* That is the case here because, unlike in *Collins*, ALJs' removal protections are nonseverable from their adjudicatory powers.

1. The critical "inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress" if the invalid portion alone is voided. *Alaska Airlines v. Brock*, 480 U.S. 678, 685 (1987). That inquiry requires understanding the role of ALJs' removal protections in the regime established by Congress.

"The substantial independence that the [APA]'s removal protections provide to [ALJs] is a central part of the Act's overall scheme." *Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring in the judgment in part). Indeed, it is near impossible to think of a context where removal restrictions are *more* essential to the statutory scheme—a point that the Government and its *amici* themselves emphasize in defending the restrictions' constitutionality. *See, e.g.*, Pet. Br. 44-45, 52, 65-66; Br. of Fed. ALJs Conf. 8-10; Br. of Admin. Law Scholars 7-13.

Before 1946, ALJs (called "hearing examiners" back then) were employees whose "tenure and status" "depended upon their classification," which "was determined by the ratings given them by the[ir] agency." *Ramspeck v. Fed. Trial Examiners Conf.*, 345 U.S. 128, 130 (1953). This dependence produced "[m]any complaints" that "they were mere tools of the agency concerned and subservient to the agency heads." *Id.* at 131. And that was seen as incompatible with the "independent judgment" needed for a "fair and competent hearing." *Butz v. Economou*, 438 U.S. 478, 513-14 (1978). Over the course of "extensive hearings" by executive and legislative committees, "[s]everal proposals were considered" for how best to solve the problem. *Ramspeck*, 345 U.S. at 131-32.

In enacting the APA in 1946, Congress ultimately chose "to make hearing examiners a special class of semi-independent subordinate hearing officers by vesting control of their compensation, promotion, and tenure in the Civil Service Commission." *Id.* at 132 (cleaned up). As a result, until 1978, ALJs were "removable by the agency in which they are employed only for good cause established and determined by" the Commission. Administrative Procedure Act, Pub. L. No. 70-404, § 11, 60 Stat. 237 (1946). And correspondingly, these newly insulated adjudicators were granted additional "powers" that were "'functionally comparable' to that of a judge." *Economou*, 438 U.S. at 513.

Notably, though, the members of the Civil Service Commission were removable at will by the President. 5 U.S.C. § 632 (1946). This gave rise to objections that the Commission was susceptible to "being pressured" by the Executive. Civil Service Reform: Hearings on H.R. 11280 Before the H. Comm. on Post Off. & Civ. Serv., 95th Cong. 824 (1978).

In 1978, therefore, Congress further insulated ALJs in the Civil Service Reform Act. It created the MSPB to replace the Commission, *see* Pub. L. No. 95-454, §§ 202, 204, 92 Stat. 1111, 1121-22, 1137, and it "confer[red] upon [MSPB] members a tenure akin to that of the Federal Judiciary," Hearings on H.R. 11280, *supra*, at 824. As discussed, Congress provided that MSPB members could be removed by the President only under the *Humphrey's Executor* removal standard, 5 U.S.C. § 1202(d), and that an agency may remove an ALJ "only for good cause established and determined by the [MSPB]," 5 U.S.C. § 7521(a). Congress understood these two protections

to work in tandem; and unsurprisingly, the Civil Service Reform Act does not include a severability clause should either layer be held unconstitutional.

The upshot of this history is that the relevant provisions of the APA and Civil Service Reform Act were *remedial* legislation. Rather than creating a new system of executive adjudication, these statutes reformed the old system to cure past "complaints." *Ramspeck*, 345 U.S. at 131. Congress made agency adjudicators "independent and secure in their tenure and compensation," S. Rep. No. 79-752, at 215 (1945), in order to safeguard actual and apparent impartiality by ensuring that judge-like powers were wielded only by "fair and competent hearing personnel," *Economou*, 438 U.S. at 513-14.

2. In light of that background, it is evident that severing ALJs' removal protections would improperly "rewrite [the] statute" in a manner that would "give it an effect altogether different from that sought by the measure viewed as a whole." *Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018). This Court "cannot use its remedial powers to circumvent the intent of the legislature" in this way, *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006) (cleaned up), which "would be to make a new law, not to enforce an old one," *United States v. Reese*, 92 U.S. 214, 221 (1875).

The Government *itself admits* that invalidating ALJs' removal protections "could recreate the problems that the APA was meant to solve, thereby undermining both the 'fairness' of agency hearings and 'public confidence in that fairness.'" Pet. Br. 66. Although that policy concern cannot justify

disregarding the constitutional defect with insulating executive officers from presidential supervision, *supra* at 12-14, it is critical to selecting the remedy most consistent with the statutory scheme. Severing ALJs' removal protections would turn them back into the very agency foot-soldiers that Congress sought to replace, and thus would reinstate the very system of adjudications that Congress determined lacked the appearance, if not the reality, of fairness and impartiality. In fact, it would *exacerbate* the problem, because the non-independent adjudicators could wield the additional powers that Congress granted them thinking they would be comparable to federal judges. *Supra* at 27-29. In short, ALJs' tenure protections were the rock upon which their adjudicatory powers were built—so without them, the entire scheme collapses.

That is especially so since Congress considered "[s]everal proposals" *besides* tenure protection to solve the pre-APA problems with hearing examiners. *Ramspeck*, 345 U.S. at 131. Given the existence of constitutionally compliant alternatives such as creating "a completely separate 'examiners' pool," *id.* at 132 n.2, it is clear that "Congress would not have enacted" a scheme creating turbo-charged hearing examiners who remained removable at will by their agency heads, *Alaska Airlines*, 480 U.S. at 685. *That* option "would have seemed exactly backwards" to the "Congress[es] that adopted" the APA and the Civil Service Reform Act. *Murphy*, 138 S. Ct. at 1483.[3]

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[3] As for severing *the MSPB's* removal protection, that would be both underinclusive (because it would not solve the problem with ALJs' own removal protection, *supra* at Part I.B) and

Given all this, the Government is wrong that severance of ALJs' removal protections follows directly from this Court's choice to sever the removal restrictions of the officers involved in *Free Enterprise Fund*, *Seila Law*, and *Collins*. Pet. Br. 66. The PCAOB, CFPB, and FHFA were each new agencies created to fill a perceived regulatory void. Accordingly, while Congress would have preferred those agencies *also* to be independent, there was no statutory basis to conclude that Congress "would have preferred no [agency] at all to [an agency] whose [head would be] removable at will." *Seila Law*, 140 S. Ct. at 2209. In that context, something was better than nothing.

By contrast, here, the opposite is true: Half a loaf is worse than none when the bread is moldy. Because the ALJs' removal protections were designed to remedy an adjudicatory scheme that was perceived as lacking the "appearance of fairness and impartiality," Pet. Br. 54, the last thing Congress would have preferred is for the judiciary to restore that flawed state of affairs. Instead, the appropriate response is for this Court to halt ALJ adjudications until Congress can adopt one of the constitutionally compliant alternative options that would further its policy objective rather than undermining it.[4]

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overinclusive (because the MSPB's non-ALJ-related adjudicatory duties may be performed by an independent agency under *Wiener*, *supra* at 5-6).

[4] The analysis might be different for ALJs who only *grant benefits*, rather than impose coercive sanctions: there, both Congress and private parties may prefer even adjudications that are perceived as slanted in the Government's favor to no adjudications at all. *Cf. Seila Law*, 140 S. Ct. at 2202, 2210.

CONCLUSION

The judgment below should be affirmed.

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Respectfully submitted,

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