No. 24-943

In the Supreme Court of the United States

FARES JERIES RABADI, PETITIONER

v.

DRUG ENFORCEMENT ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

D. JOHN SAUER
Solicitor General
Counsel of Record
YAAKOV M. ROTH
Acting Assistant Attorney General
JOSHUA M. SALZMAN
DANIEL AGUILAR
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a decision by the Administrator of the Drug Enforcement Administration to revoke petitioner's registration to dispense controlled substances should be vacated because the administrative law judge whose recommended findings were adopted by the Administrator was unconstitutionally insulated from removal by two layers of statutory tenure protection.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulations:

Statutes and regulations—Continued: Page

Miscellaneous: Page

In the Supreme Court of the United States

No. 24-943

FARES JERIES RABADI, PETITIONER

v.

DRUG ENFORCEMENT ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 122 F.4th 371. The decision and order of the Drug Enforcement Administration (Pet. App. 11a-214a) is published at 87 Fed. Reg. 30564.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 2024. The petition for a writ of certiorari was filed on February 24, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Controlled Substances Act, Pub. L. No. 91-513, Tit. II, 84 Stat. 1242 (21 U.S.C. 801 *et seq.*), to "consolidate various drug laws on the books into a comprehensive statute, provide meaningful regulation over legitimate sources of drugs to prevent diver-

sion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs." *Gonzales* v. *Raich*, 545 U.S. 1, 10 (2005). Controlled substances are categorized onto various schedules, 21 U.S.C. 812, which are then subject to a "closed regulatory system" that prohibits the unauthorized manufacture, distribution, dispensation, or possession of "any controlled substance," *Raich*, 545 U.S. at 13.

Any person who seeks to manufacture, dispense, or distribute controlled substances in the United States, including any physician, generally must obtain a registration from the Attorney General. 21 U.S.C. 822(a); see 21 U.S.C. 822(c) and (d) (exceptions and waivers). The Controlled Substances Act directs the Attorney General to issue such registrations consistent with the "public interest" and specifies various factors that "shall be considered." 21 U.S.C. 823(a) (manufacturers of schedule I and II controlled substances); see 21 U.S.C. 823(b) (distributors); 21 U.S.C. 823(e), (f), and (i) (2018 & Supp. IV 2022) (other applicants). The specified factors include the applicant's "maintenance of effective controls against diversion" of controlled substances, "compliance with" applicable law, any prior convictions for controlled-substance offenses, and "such other factors as may be relevant to and consistent with the public health and safety." 21 U.S.C. 823(a)(1), (2), (4), and (6).

After a registration has been granted, the Attorney General may suspend or revoke it on grounds specified in 21 U.S.C. 824. For example, a registration may be suspended or revoked if the registrant has materially falsified an application under the Controlled Substances Act, has been convicted of a controlled-substance felony, or "has committed such acts as would render" registration "inconsistent with the public interest." 21 U.S.C.

824(a)(1), (2), and (4) (2018 & Supp. IV 2022). Before revoking a registration, the Attorney General generally must serve the registrant with a notice to show cause why the registration should not be revoked. 21 U.S.C. 824(c). In cases of "imminent danger to the public health or safety," the Attorney General may immediately suspend a person's registration while also initiating revocation proceedings. 21 U.S.C. 824(d)(1) (2018 & Supp. IV 2022). If the Attorney General revokes or suspends a registration, the aggrieved person may file a petition for review in the D.C. Circuit or the regional circuit in which the registrant principally does business. 21 U.S.C. 877.

The Controlled Substances Act states that any proceedings to deny, revoke, or suspend a registration "shall be conducted * * * in accordance with subchapter II of chapter 5 of title 5." 21 U.S.C. 824(c)(4). The cross-referenced provisions in Title 5 are part of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and set forth the procedures for agency rulemakings and adjudications. As relevant here, for an adjudication involving a hearing on the record, the APA permits agencies to allow an administrative law judge (ALJ) to preside over the hearing. 5 U.S.C. 556(b)(3).

The Attorney General's functions under the Controlled Substances Act have generally been delegated to the Administrator of the Drug Enforcement Administration (DEA). 28 C.F.R. 0.100(b). DEA regulations in turn contemplate that administrative hearings before the agency will generally be conducted before a "presiding officer," 21 C.F.R. 1316.52, who is by definition an ALJ "appointed as provided in the Administrative Procedure Act (5 U.S.C. 556)." 21 C.F.R. 1316.42(f). The ALJ takes evidence, rules on procedural matters, and

otherwise oversees the adjudicatory hearing. See 21 C.F.R. 1316.52-1316.61. At the conclusion of the proceedings, the ALJ must prepare a report of the ALJ's "recommended rulings" of law, "recommended findings of fact," and "recommended decision." 21 C.F.R. 1316.65(a). The Administrator then makes the final decision in the matter on behalf of the agency. 21 C.F.R. 1316.67; see 21 C.F.R. 1301.46.

2. Petitioner is a physician in California who possessed a registration to dispense controlled substances. Pet. App. 3a. In 2018, DEA began to investigate him "after being alerted to his high-risk prescribing practices." *Ibid.* In 2020, the agency instituted proceedings to revoke petitioner's registration and to deny any pending application to renew his registration because "continued registration would be inconsistent with the public interest." *Id.* at 13a. The agency also immediately suspended his registration based on "imminent danger to the public health or safety." *Id.* at 11a (citation omitted). Petitioner requested a hearing, which was held before an ALJ. *Id.* at 12a.

The evidence showed that petitioner issued 9000 prescriptions for opioids over three years, 56% of which were for hydrocodone. Pet. App. 19a. Petitioner also issued "a large amount of polypharmaceutical cocktails or combinations of a benzodiazepine and an opioid." *Ibid.* Such combinations are "highly sought after by the black market and are dangerous to the patient." *Ibid.* More than 96% of petitioner's overall prescriptions during the three-year period were for "either hydrocodone (a narcotic), alprazolam (a benzodiazepine), or carisoprodol (a muscle relaxant)." *Id.* at 20a n.*D. The combination of those three drugs is known to be "highly addictive and highly dangerous." *Id.* at 19a-20a.

The evidence further showed that petitioner "failed to conduct adequate examinations" of his patients and failed to "keep adequate medical records." Pet. App. 3a. Petitioner attempted to "explain[] the lack of documentation in his records" by claiming to rely instead on his "'photographic memory.'" *Ibid.* Yet he testified that he has treated 5000 patients in his career and was, at the time of the hearing, treating around "550-600 patients," and the ALJ found him unable to recall specific events that occurred for a given patient in the absence of any medical documentation. *Id.* at 194a. Petitioner attempted to explain the high dosages he prescribed by asserting that his patients would "'not overdose'" based on his evaluation of certain "'study dosages,'" but the ALJ sustained the government's objection to that testimony, for which petitioner failed to "cite or submit any studies supporting [the] claim." *Id.* at 3a-4a, 9a.

Considering all the evidence, the ALJ recommended finding that petitioner's continued registration to dispense controlled substances was "inconsistent with the public interest" and recommended that the Administrator revoke petitioner's registration. Pet. App. 213a; see *id.* at 215a-415a. Petitioner and the agency both filed exceptions (objections). *Id.* at 12a. The Administrator reviewed the record and modified the ALJ's recommended decision in some respects, including in response to the parties' exceptions. *Ibid.* But "none of those changes and none of [petitioner's] arguments persuaded [the Administrator] to reach a different conclusion from the ALJ." *Ibid.* Accordingly, the Administrator ordered that petitioner's registration be revoked and that any pending applications for renewal be denied, effective June 21, 2022. *Id.* at 214a.

3. The court of appeals denied petitioner's petition for review, upholding the Administrator's revocation order. Pet. App. 1a-10a. Petitioner contended that the Administrator's order was "invalid because DEA ALJs are unconstitutionally insulated from removal by two layers of 'for-cause' protections." *Id.* at 4a. As explained above, the Controlled Substances Act provides that revocation proceedings shall be conducted consistent with the APA, 21 U.S.C. 824(c)(4), which in turn permits agencies to rely on ALJs to preside over on-the-record hearings, 5 U.S.C. 556(b)(3). Congress has provided that such ALJs may be removed from office "only for good cause established and determined by the Merit Systems Protection Board" (MSPB). 5 U.S.C. 7521(a). The MSPB is an adjudicative agency that is "composed of 3 members appointed by the President, by and with the advice and consent of the Senate." 5 U.S.C. 1201. Congress has purported to make members of the MSPB removable by the President "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. 1202(d).

The court of appeals found petitioner's constitutional argument to be foreclosed by circuit precedent. Pet. App. 5a-8a. In an earlier case, the court had rejected a materially identical constitutional challenge to "the same ALJ removal protections," in the context of ALJs within the Department of Labor. *Id.* at 5a (discussing *Decker Coal Co.* v. *Pehringer*, 8 F.4th 1123 (9th Cir. 2021)). The court had concluded in that earlier case that the combined removal restrictions on ALJs and members of the MSPB are distinguishable from the situation that this Court addressed in *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010). See *Decker Coal*, 8 F.4th at 1134. In *Decker Coal*, the court had also held in the alternative that even

if the challenged ALJ removal protections were unconstitutional, it would be improper to "unwind" the agency's decision unless a challenger could demonstrate harm resulting from the ALJ's insulation from removal. *Id.* at 1137; see *id.* at 1136-1138 (discussing *Collins* v. *Yellen*, 594 U.S. 220, 257-260 (2021)).

Here, the court of appeals found its prior decision in *Decker Coal* controlling. Pet. App. 5a. The court saw no material differences in the role or function of ALJs within the two agencies or statutory schemes. *Id.* at 6a-7a. The court also observed that its conclusion regarding DEA ALJs was "not undermine[d]," *id.* at 7a, by the Fifth Circuit's decision in *Jarkesy* v. *SEC*, 34 F.4th 446 (2022), cert. granted, 143 S. Ct. 2688 (2023), cert. denied, 143 S. Ct. 2690 (2023), aff'd on other grounds, 603 U.S. 109 (2024). In *Jarkesy*, the Fifth Circuit had held unconstitutional the statutory removal restrictions for ALJs within the Securities and Exchange Commission (SEC). See *id.* at 463-465. Here, the Ninth Circuit stated that the SEC ALJs at issue in *Jarkesy* were differently situated from DEA ALJs in several respects. Pet. App. 7a. Among other things, the court explained that SEC Commissioners were understood in *Jarkesy* to be removable only for cause, whereas the Attorney General and the Administrator are each removable at will by the President. *Id.* at 8a (citing *Jarkesy*, 34 F.4th at 465).

ARGUMENT

No further review is warranted. Petitioner is correct that the statutory framework that insulates ALJs from Presidential supervision and control by two layers of removal restrictions violates Article II. In an appropriate case, this Court may wish to address that constitutional problem. But this case is not a suitable vehicle in which

to do so because petitioner is not entitled to the relief he seeks—vacatur of the DEA's order revoking his registration under the Controlled Substances Act—even accepting that the ALJ who presided over the revocation hearing did so while unconstitutionally insulated from removal. Petitioner has never shown any cognizable harm from the constitutional violation. And to the extent that the Court may wish to address the Article II question, other pending cases are likely to provide better opportunities to do.

1. Petitioner contends (Pet. 6-16) that the ALJ who served as the presiding officer at petitioner's revocation hearing was unconstitutionally insulated from presidential supervision and control by two layers of statutory removal restrictions. Petitioner further contends (*ibid.*) that the Ninth Circuit's rejection of his constitutional arguments conflicts with a decision of the Fifth Circuit regarding ALJs in the SEC. See *Jarkesy* v. *SEC*, 34 F.4th 446 (2022), cert. granted, 143 S. Ct. 2688 (2023), cert. denied, 143 S. Ct. 2690 (2023), aff'd on other grounds, 603 U.S. 109 (2024). This Court granted review in *Jarkesy* to address, among other things, whether the two layers of removal restrictions for ALJs—*i.e.*, the combination of making ALJs removable only for cause in proceedings before the MSPB, and making members of the MSPB removable by the President only for cause—violates Article II. But the Court did not ultimately resolve that question in *Jarkesy*. See *SEC* v. *Jarkesy*, 603 U.S. 109, 121 (2024) (declining to reach any "removal issues").

In the court of appeals, the government contended that petitioner's constitutional challenge was foreclosed by Ninth Circuit precedent, and the court agreed with that contention. See Gov't C.A. Br. 20-21; Gov't Supp.

C.A. Br. 4; Pet. App. 4a-9a (adhering to *Decker Coal Co.* v. *Pehringer*, 8 F.4th 1123 (9th Cir. 2021)). On February 20, 2025, however, the then-Acting Solicitor General notified Members of Congress "that the Department of Justice has concluded that the multiple layers of removal restrictions for administrative law judges (ALJs) in 5 U.S.C. 1202(d) and 7521(a) violate the Constitution, [and] that the Department will no longer defend them in court." Letter from Sarah M. Harris, Acting Solicitor General, Dep't of Justice, to Hon. Mike Johnson, Speaker, House of Representatives, *Re: Multilayer Restrictions on the Removal of Administrative Law Judges* 1 (Feb. 20, 2025) (ALJ Letter), perma.cc/C9UQ-J8YF; cf. 28 U.S.C. 530D. The Acting Solicitor General's letter explained that, under this Court's decision in *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), granting "multilevel protection from removal" to executive officers such as ALJs "is contrary to Article II's vesting of the executive power in the President," *id.* at 484. See ALJ Letter 1.

Accordingly, the government agrees with petitioner that making members of the MSPB and ALJs removable only for cause "violate[s] Article II by restricting the President's ability to remove principal executive officers, who are in turn restricted in their ability to remove inferior executive officers." ALJ Letter 1.

2. Whether the combination of removal restrictions in 5 U.S.C. 1202(d) and 7521(a) violates Article II is a question that may warrant this Court's review in an appropriate case, but this is not such a case. For at least two reasons, this case would be an unsuitable vehicle for reaching the constitutional question.

a. First, as the government has consistently maintained in this and other cases, a party challenging multi-

layer removal restrictions on ALJs is not entitled to an injunction or vacatur of an agency's action unless the party can demonstrate that the constitutional violation "inflict[ed] compensable harm." *Collins* v. *Yellen*, 594 U.S. 220, 259 (2021); see *id.* at 267 (Thomas, J., concurring) ("The mere existence of an unconstitutional removal provision * * * generally does not automatically taint Government action by an official unlawfully insulated."); *id.* at 274 (Kagan, J., concurring in part and concurring in the judgment) ("I also agree that plaintiffs alleging a removal violation are entitled to injunctive relief—a rewinding of agency action—only when the President's inability to fire an agency head affected the complained-of decision."); cf. Gov't C.A. Br. 22 (arguing lack of harm); Gov't C.A. Supp. Br. 3-4 (same).

Petitioner made no showing of any harm here. Petitioner identifies nothing in the record of this case (or outside of the record) to suggest that the multilayer removal restrictions had any bearing on the Administrator's final decision in the revocation proceedings. Nor does petitioner identify any evidence suggesting that the Administrator or the members of the MSPB were at all dissatisfied with the performance of the ALJ who presided over the revocation proceeding, or that then-President Biden was dissatisfied with members of the MSPB during the administrative proceedings here. See *Collins*, 595 U.S. at 259-260. Accordingly, petitioner would not be entitled to any relief even assuming (as both parties now agree) that two layers of removal restrictions for ALJs violate Article II. Resolution of the constitutional question in petitioner's favor would make no difference to the correct disposition of this case, and the Court should deny further review on that basis.

Indeed, even if this Court were to decide the threshold constitutional question and remand for further proceedings, binding Ninth Circuit precedent would dictate the same outcome and would do so without implicating any conflict in the courts of appeals. The decision below rejected petitioner's constitutional challenge on the basis of the prior decision in *Decker Coal, supra*. In that case, the Ninth Circuit had rejected a similar challenge to multilayer removal restrictions for an ALJ. See *Decker Coal*, 8 F.4th at 1133. But the court also made clear that, even if the challenged ALJ removal protections were unconstitutional, it would still be improper to "unwind" the agency's decision unless the challenger could demonstrate harm resulting from the ALJ's insulation from removal. *Id.* at 1137; see *id.* at 1136-1138 (discussing *Collins*).

Other courts of appeals have likewise determined, consistent with this Court's guidance in *Collins*, that a party challenging agency action based on the unconstitutionality of Section 7521 cannot obtain relief without demonstrating compensable harm. See *NLRB* v. *Starbucks, Corp.*, 125 F.4th 78, 88-89 (3d Cir. 2024); *K&R Contractors, LLC* v. *Keene*, 86 F.4th 135, 149 (4th Cir. 2023); *Calcutt* v. *FDIC*, 37 F.4th 293, 317-320 (6th Cir. 2022), cert. granted and rev'd on other grounds, 598 U.S. 623 (2023) (per curiam); *Leachco, Inc.* v. *Consumer Prod. Safety Comm'n*, 103 F.4th 748, 763-764 (10th Cir. 2024), cert. denied, 145 S. Ct. 1047 (2025); *Rodriguez* v. *SSA*, 118 F.4th 1302, 1315 (11th Cir. 2024); cf. *Jarkesy*, 34 F.4th at 463 n.17 (5th Cir.) (concluding that Section 7521 is unconstitutional as applied to SEC ALJs, but finding it unnecessary to decide whether, in light of *Collins*, "vacating [the challenged agency decision] would be the appropriate remedy based on this error alone").

Additionally, several courts of appeals that have not yet had occasion to consider a challenge to multilayer removal restrictions in the context of ALJs have followed similar remedial principles in the context of analogous challenges involving other officers. See *CFPB* v. *Law Offices of Crystal Moroney, P.C.*, 63 F.4th 174, 179-181 (2d Cir. 2023), cert. denied, 144 S. Ct. 2579 (2024); *Community Fin. Servs. Ass'n of Am., Ltd.* v. *CFPB*, 51 F.4th 616, 631-633 (5th Cir. 2022), cert granted, 143 S. Ct. 978 (2023), cert. denied, 143 S. Ct. 981 (2023), rev'd on other grounds, 601 U.S. 416 (2024); *Bhatti* v. *FHFA*, 97 F.4th 556, 559-562 (8th Cir. 2024). In light of those precedents, petitioner fails to show that the result in this case would have been different in any other circuit.

b. Second, the constitutional question that petitioner seeks to present arises from the combination of restrictions that Congress purported to impose on the removal of ALJs and members of the MSPB. The latter restrictions are also unconstitutional on the independent ground that members of the MSPB are principal officers of the United States who must be removable at will by the President. Members of the MSPB exercise "substantial executive power," *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 218 (2020), and therefore do not fall within the narrow exception to the President's removal authority established in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935).

The Department has taken that position in pending litigation defending President Trump's decision to remove Cathy A. Harris from her position as a member of the MSPB. See Letter from Sarah M. Harris, Acting Solicitor General, Dep't of Justice, to Hon. Mike Johnson, Speaker, House of Representatives, *Re: Restrictions on the Removal of Members of the Merit Systems*

Protection Board 1-2 (Feb. 25, 2025), perma.cc/7D7F-9ELP. On May 22, 2025, this Court granted the government's application to stay preliminary injunctions entered in that case and in a parallel case involving the removal of a member of the National Labor Relations Board (NLRB). See *Trump* v. *Wilcox*, No. 24A966, slip op. 1-2. In doing so, the Court observed that its stay "reflects [the Court's] judgment that the Government is likely to show that both the NLRB and MSPB exercise considerable executive power." *Id.* at 1. The government's appeals from both preliminary injunctions remain pending before the D.C. Circuit. See *Harris* v. *Bessent*, No. 25-5055 (D.C. Cir. argued May 16, 2025) (MSPB); *Wilcox* v. *Trump*, No. 25-5057 (D.C. Cir. argued May 16, 2025) (NLRB).

If this Court were inclined to address the constitutionality of the removal restrictions on members of the MSPB, it would be preferable to do so in the context of a concrete challenge to an actual exercise of the President's removal authority—as in this Court's seminal removal decisions, see *Humphrey's Executor*, 295 U.S. at 618-619 (suit for backpay after President Roosevelt's removal of a Commissioner of the Federal Trade Commission); *Myers* v. *United States*, 272 U.S. 52, 106 (1926) (suit for backpay after President Wilson's removal of a "postmaster of the first class"); cf. *Wiener* v. *United States*, 357 U.S. 349, 349-350 (1958) (suit for backpay after President Eisenhower's removal of a member of the War Claims Commission). The *Harris* or *Wilcox* case could provide such an opportunity. Several other pending cases could also provide an opportunity to address the continuing vitality of *Humphrey's Executor* in the context of the President's recent removals of members of other multimember boards or commissions. See

Grundmann v. *Trump*, No. 25-5165 (D.C. Cir. filed May 14, 2025) (Federal Labor Relations Authority); *Slaughter* v. *Trump*, No. 25-cv-909 (D.D.C. filed Mar. 27, 2025) (Federal Trade Commission); cf. *Wilcox*, No. 24A966, slip op. 7 (Kagan, J., dissenting) (predicting that the Court will "surely next Term * * * decide[] the fate of *Humphrey's* [*Executor*]").

Awaiting a case involving the actual removal of a board member would allow the Court to avoid a question that arises in a case like this one, involving a challenge to the combined effect of two layers of removal restrictions—namely, "which layer goes" first to solve the Article II problem. *VHS Acquisition Subsidiary No. 7* v. *NLRB*, 759 F. Supp. 3d 88, 100 (D.D.C. 2024), appeal pending, No. 25-5021 (D.C. Cir. filed Feb. 5, 2025); see *id.* at 101 (declaring the ALJ-level removal restriction invalid); cf. *Bandimere* v. *SEC*, 844 F.3d 1168, 1190-1191 (10th Cir. 2016) (Briscoe, J., concurring) (stating that the MSPB-level restrictions should be treated as invalid), cert. denied, 585 U.S. 1035 (2018); *Fleming* v. *United States Dep't of Agric.*, 987 F.3d 1093, 1123-1124 (D.C. Cir. 2021) (Rao, J., concurring in part and dissenting in part) (proposing that an agency head who is removable at will, rather than the MSPB, must be responsible for determining "whether there is good cause to remove an ALJ"). That additional complexity weighs against further review here, where petitioner would not be entitled to relief in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

D. JOHN SAUER
Solicitor General
YAAKOV M. ROTH
Acting Assistant Attorney General
JOSHUA M. SALZMAN
DANIEL AGUILAR
Attorneys

MAY 2025