No. _____

In the Supreme Court of the United States

YAPP USA AUTOMOTIVE SYSTEMS, INC.,

Applicant,

v.

NATIONAL LABOR RELATIONS BOARD, a federal administrative agency; JENNIFER ABRUZZO, in her official capacity as the General Counsel of the National Labor Relations Board; LAUREN M. McFERRAN, in her official capacity as the Chairman of the National Labor Relations Board; MARVIN E. KAPLAN, GWYNNE A. WILCOX, and DAVID M. PROUTY, in their official capacities as Board Members of the National Labor Relations Board; and ARTHUR AMCHAN in his official capacity as an Administrative Law Judge of the National Labor Relations Board,

Respondents.

To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit

Application from The United States Court of Appeals for the Sixth Circuit (No. 24-1754)

EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

RELIEF REQUESTED BY TUESDAY, OCTOBER 15, 2024

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Dated: October 14, 2024

QUESTIONS PRESENTED

1. Is Applicant entitled to a preliminary injunction enjoining Respondents from proceeding with the underlying unconstitutional administrative action against Applicant while this suit is pending?

2. Did the courts below err in not enjoining the unconstitutional proceedings and thereby subject Applicant to a here-and-now injury that cannot be remedied after the proceeding is over?

TABLE OF CONTENTS

Page

INDEX OF APPENDIX

(by separate volume)

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

APPLICATION

To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit

This Application arises from a Sixth Circuit panel's decision to deny YAPP USA Automotive Systems, LLC's emergency motion for injunctive relief, in contravention of this Court's reasoning in *Axon Enterprises, Inc.* v. *FTC,* 598 U.S. 175, 179 (2023) and contrary to the Fifth Circuit's decision in *Cochran* v. *SEC*, 20 F.4th 194, 210-213 (5th Cir. 2021) (en banc), aff'd and remanded sub nom., *Axon*, 598 U.S. 175.

This is an action challenging the constitutionality of the structure of the National Labor Relations Board ("NLRB" or "Board") and correspondingly the constitutionality of proceeding before the NLRB and its administrative law judges ("ALJs"). Similar challenges are pending in various other courts, including the Fifth Circuit. See App.2-3 [*YAPP USA Auto. Sys., Inc.* v. *NLRB*, 2024 WL 4119058, at *1 fn.1 (E.D. Mich. Sept. 9, 2024)].

Applicant YAPP is the subject of NLRB proceedings before an NLRB ALJ. Those hearings were scheduled for four days starting September 10, 2024, until the district court stayed the proceeding. After that stay was later lifted, the NLRB rescheduled the administrative hearing to begin Tuesday, October 15, 2024. YAPP had sought a preliminary injunction from the district court, but that court denied the motion. The district court's ruling was an abuse of discretion, so YAPP promptly made an emergency appeal to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(a)(1). After appealing, YAPP sought a stay and

preliminary injunction against the NLRB proceedings pending appeal from the district court. That court initially granted the motion but then reversed itself. After the NLRB indicated its intent to reschedule the hearing for October 2024, YAPP promptly filed an emergency motion for a stay and injunction pending appeal with the Sixth Circuit. On October 13, 2024, the Sixth Circuit denied YAPP's motion, ruling that YAPP cannot establish the necessary harm to warrant the requested injunction. In doing so, the Sixth Circuit adopted reasoning contrary to this Court's decision in *Axon* and contrary to a decision of the Fifth Circuit.

If the NLRB proceedings are allowed to continue, YAPP will suffer the very harm that its challenge to the constitutionality of the NLRB's proceedings is intended to prevent—"being subjected to 'unconstitutional agency authority'—'a proceeding by an unaccountable ALJ.'" *Axon*, 598 U.S. at 179 (cleaned up). As this Court has explained, this is a "here-and-now injury" that "it is impossible to remedy once the proceeding is over, which is when appellate review kicks in." *Ibid*. Respondents have refused to stay the underlying NLRB proceedings while YAPP seeks to vindicate its constitutional rights in federal court, instead having hurriedly rescheduled the hearing for Tuesday, October 15. That hearing is scheduled to begin at 11:00 a.m. ET and will continue for the days thereafter. Thus, YAPP requests relief by October 15 or as soon thereafter as is practicable. Although the hearing will conclude within days, the proceeding itself will continue for perhaps some months until the ALJ issues a ruling. Accordingly, pending resolution of YAPP's appeal, YAPP respectfully requests that this Court

preliminarily enjoin the NLRB from further administrative proceedings against YAPP.

OPINIONS BELOW

The Opinion and Order of the U.S. District Court for the Eastern District of Michigan, dated September 9, 2024, denying YAPP's Motion for Preliminary Injunction is attached at App.1 and is also available at 2024 WL 4119058.

The order of the U.S. Court of Appeals for the Sixth Circuit, dated October 13, 2024, affirming denial of YAPP's Motion for Preliminary Injunction is attached at App.41. The docket number in the U.S. District Court for the Eastern District of Michigan is 2:24-cv-12173-LJM-DRG, and the docket number in the U.S. Court of Appeals for the Sixth Circuit is 24-1754.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254 and 1651.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of Article II of the United States Constitution provides in relevant part:

> The executive Power shall be vested in a President of the United States of America. …

U.S. C0NST. art. II, § 1.

The Take Care Clause provides in pertinent part:

> [The President] shall take Care that the Laws be faithfully executed.

U.S. C0NST. art. II, § 3, cl. 3.

STATEMENT OF THE CASE

YAPP is a world class, Tier 1 automotive supplier. (Pratt Decl. ¶ 4, ECF No. 4-1, PageID.83.)[1] YAPP has a facility located in Romulus, Michigan. (*Id.* ¶ 5, PageID.83).

Former YAPP employee Jesse Dowling worked as an Advanced Maintenance Technician at the Romulus plant. (*Id.* at 122, ¶ 6). On May 5, 2023, YAPP terminated Mr. Dowling for workplace violence. (*Id.* at 122, ¶ 7). On June 22, 2023, UAW Local 174 ("Charging Party" or "UAW") filed an unfair labor practice charge (Case 07-CA-320369) regarding Mr. Dowling's termination. (Garrett Decl. ¶ 5, ECF No. 4-2, PageID.86).

On July 31, 2023, the UAW filed a Certification of Representative Petition for a Unit at YAPP's Romulus plant consisting of all full-time and regular part-time production and maintenance employees. (Garrett Decl. ¶ 7, ECF No. 4-2, PageID 86; Ex. A (Cert. of Results of Election), ECF No.4-2, PageID.89). An election was held, and on September 25, 2023, Elizabeth Kerwin, Region 7 Regional Director, certified the elections results, noting that a collective-bargaining representative had not been selected and that no timely objections had been filed. (*Ibid.*).

On September 29, 2023, the UAW filed an amended unfair labor practice charge regarding the Dowling termination and certain terms and conditions of

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[1] All references to ECF Nos. are to the docket in the district court.

employment for YAPP employees, but it made no allegation with respect to the conduct of the election. (Garrett Decl. ¶ 8, ECF No. 4-2, PageID.86-87).

On February 1, 2024, UAW filed another unfair labor practice charge (Case 07-CA-336485) regarding the election and other claims. (Garrett Decl. ¶ 9, ECF No. 4-2, PageID.87).

On April 9, 2024, Region 7 Regional Director issued a complaint as to the first charge, 07-CA-320369, and noticed an administrative hearing for July 16, 2024. (Garrett Decl. ¶ 10, ECF No. 4-2, PageID.87; Ex. B (Notice), ECF No. 4-2, PageID.90). YAPP answered the complaint. (*Ibid.*). By agreement, the hearing was continued to September 10, 2024. (*Ibid.*).

On August 6, 2024, the Regional Director consolidated the two cases, issued an amended complaint (which YAPP answered), and set an administrative hearing on the amended complaint for the September 10, 2024 date already scheduled. (Garrett Decl. ¶ 11, ECF No. 4-2, PageID.87; Ex. C. (Compl. & Notice of Hr'g), ECF. No. 4-2, PageID.100-110).

On August 12, 2024, YAPP moved to postpone the hearing given the numerous new allegations. (Garrett Decl. ¶ 12, ECF No. 4-2, PageID. 87-88). YAPP asked for a two-month extension—a reasonable period, given the added allegations and additional material relief sought. (*Ibid.*). The General Counsel and Union objected, and on August 13, 2024, Defendant ALJ Amchan denied YAPP's motion. (*Id.* at PageID.88). The hearing remained set for September 10, 2024. (*Ibid.*).

On August 19, 2024, YAPP sued in the Eastern District of Michigan. (Compl., ECF No. 1, PageID.1-28). YAPP asked the court to enjoin the NLRB proceedings because the NLRB's structure is unconstitutional and so are the administrative proceedings. (Mot. for Prelimin. Injunc., ECF No. 4, PageID.37-38). On September 9, 2024, the district court denied YAPP's preliminary injunction motion. App.1-34. YAPP immediately appealed to the Sixth Circuit. YAPP also immediately moved for a stay and injunction pending appeal, which the district court granted later that same day. App.35-36. Defendants sought reconsideration, and the district court reversed itself on Friday, September 13, lifting the stay of the administrative proceedings. App.37-40. After the reconsideration order, the NLRB rescheduled the hearing for Tuesday, October 15. And, on September 17, 2024, YAPP filed its emergency motion to enjoin the NLRB proceedings with the Sixth Circuit. On October 13, 2024, the Sixth Circuit issued its opinion and judgment denying an injunction. App.41-47.

REASONS FOR GRANTING THE APPLICATION

The All Writs Act, 28 U.S.C. § 1651(a), authorizes this Court to issue an injunction. An injunction pending appeal is appropriate when applicants face irreparable harm, when applicants are likely to succeed on the merits of their claims, and when the public interest would not be harmed. *Tandon* v. *Newsom,* 593 U.S. 61, 64 (2021) (per curiam) (citing *Roman Cath. Diocese of Brooklyn* v. *Cuomo,* 592 U.S. 14, 16 (2020)); see also *Does 1-3* v. *Mills,* 142 S. Ct. 17, at *18 (2021) (Barrett, J., concurring). This Court may issue an injunction when the legal rights are "indisputably clear" and when injunctive relief is "necessary or appropriate in

aid of the Court's jurisdiction." *Lux* v. *Rodrigues,* 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers); *Ohio Citizens for Responsible Energy, Inc.* v. *NRC,* 479 U.S. 1312 (1986) (Scalia, J., in chambers) (citation omitted). Justices also have discretion to issue an injunction "based on all the circumstances of the case," without the injunction "be[ing] construed as an expression of the Court's views on the merits" of the case. *Little Sisters of the Poor Home for the Aged* v. *Sebelius,* 571 U.S. 1171 (2014).

YAPP meets these stringent criteria. YAPP's right to relief is clear from this Court's precedent, which demands that YAPP only be subjected to an accountable government agency. Yet, the NLRB and its ALJs are not accountable to the President in being able to exert his Executive Authority over officers of the Executive Branch, because of the current statutory scheme of the National Labor Relations Act and other laws. Injunctive relief is appropriate in aid of the Court's jurisdiction because without an injunction, the "harm" of "'being subjected' to 'unconstitutional agency authority'—'a proceeding by an unaccountable ALJ'" is a "here-and-now injury" that "it is impossible to remedy once the proceeding is over, which is when appellate review kicks in." *Axon*, 598 U.S. at 179. YAPP faces imminent *and* irreparable harm because, if the "illegitimate proceeding before an illegitimate decisionmaker" were to go forward, "structural constitutional claims would come too late to be meaningful." *Ibid*. YAPP is also likely to obtain certiorari review, especially given that the Sixth Circuit's decision here is in direct contradiction to the Fifth Circuit's decision and there are splits forming across the district courts in

other Circuits over whether the NLRB and its ALJs are improperly protected from removal in violation of the Constitution.[2] YAPP respectfully requests an injunction from this Court.

I. YAPP is likely to succeed on the merits.[3]

A. NLRB Board Members are unconstitutionally insulated from removal.

Article II of the Constitution states that the President must "take care that the Laws be faithfully executed." U.S. Const. art. II, § 3, cl. 3. Because the executive responsibility remains vested in the President, the officers of every administrative agency—including "independent" ones—must be subject to presidential oversight. See *Free Enter. Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477, 513-514 (2010). To exercise this power and comply with this "Take Care Clause," the President must be able to remove subordinate officers who assist in effectuating the President's duties. *Id.* The Constitution thus requires that the President have the "power to remove—and thus supervise—those who wield executive power on his behalf." *Seila Law LLC*

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[2] Here, as the district court found in its original order granting the stay, "conflicting opinions have been issued on the claims raised in the underlying motion and others remain pending," and the Sixth Circuit has not addressed these claims "in connection with the NLRB." App.35-36. As noted in Footnote 2, *infra*, even after noting that "some courts have found that the dual-layer removal protections for executive agency ALJs are unconstitutional," App.43, the Sixth Circuit did not address these claims in its opinion.

[3] The Sixth Circuit did not address the likelihood of success on the merits by YAPP. However, given relevant precedent, YAPP sets forth this argument for the Court and addresses the district court's error with respect to these issues.

v. *CFPB*, 591 U.S. 197, 204 (2020). "The President's removal power is the rule, not the exception." *Id.* at 228.

The President has the power to appoint NLRB Board members. See 29 U.S.C. § 153(a). The NLRB consists of five Board members. *Id.* With the advice and consent of the Senate, the President appoints Board members to staggered, five-year terms. The President designates one Board member to serve as the Chairman. *Id.* Article II requires the President to maintain "unrestricted removal power" over all federal officials "who wield executive power," subject to two potential exceptions. *Seila Law*, 591 U.S. at 204. However, under the NLRA, the President may only remove Board members "upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause." 29 U.S.C. § 153(a). These limitations restrict the President's "unrestricted removal power" guaranteed by Article II. *Seila Law*, 591 U.S. at 204.

This Court has found this restriction on the President's power to be unconstitutional. See *Collins* v. *Yellen*, 594 U.S. 220, 256 (2021) ("The President must be able to remove not just officers who disobey his commands but also those he finds 'negligent and inefficient[.]'" (quoting *Myers* v. *United States*, 272 U.S. 52, 135 (1926))). In *Seila Law*, the Court held that "the [Consumer Financial Protection Bureau]'s leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers." 591 U.S. at 213.

For principal officers, the Court has recognized only one narrow exception "for multimember expert agencies that do not wield substantial executive power."

Id. at 218. This exception originated in *Humphrey's Executor* v. *United States*, which determined that the Commissioners of the Federal Trade Commission ("FTC") did not at the time exercise "executive power in the constitutional sense." 295 U.S. 602, 628 (1935).[4]

However, contrary to the district court's ruling, NLRB Board Members do wield substantial executive power. The Board has power to appoint the "executive secretary, and such attorneys, examiners, and regional directors, and other such employees as it may…find necessary for the proper performance of its duties." 29 U.S.C. § 154. The Board has the executive power to prevent any person from engaging in an unfair labor practice, decide unfair-labor-practice charges, issue subpoenas, engage in rulemaking, conduct union-representation elections, determine appropriate units for the purpose of collective bargaining, and adjudicate representation-election disputes. See 29 U.S.C. §§ 156, 159, 160. By further example, Section 10(j) gives the Board authority to exercise quintessentially prosecutorial power in federal district courts. 29 U.S.C. § 160(j); *see, e.g.*, *Overstreet* v. *El Paso Disposal, L.P.*, 625 F.3d 844, 852 (5th Cir. 2010) ("Petition power under § 10(j) is prosecutorial in nature[.]"). The NLRA vests in the Board the authority "to prevent any person from engaging in any unfair labor

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[4] In *Seila Law*, the Court stated that its conclusion that "the FTC did not exercise executive power has not withstood the test of time. . . . '[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree.'" 591 U.S. at 216 n.2.

practice (listed in section 8) affecting commerce." 29 U.S.C. § 160(a). In this way, the NLRB wields substantial executive power as an enforcement body.

The Court has made clear that even when "the activities of administrative agencies 'take "legislative" and "judicial" forms,' 'they are exercises of—indeed, under our constitutional structure they must be exercises of—the "executive Power."'" *Seila Law*, 591 U.S. at 216 n.2.[5] And prosecuting someone for alleged violations of federal law lies at the heart of the Constitution's concept of Executive Power. *See, e.g.*, *United States* v. *Texas*, 599 U.S. 670, 678-79 (2023); *Seila Law*, 591 U.S. at 218-19. Because Board Members exert substantial executive authority, the President must be able to remove them without barriers.

The Court recognizes this removal power is impermissibly restrained by statutes that limit the President's ability to remove an executive official, either by restricting who can remove, or limiting the rationale for removal. See *Free Enterprise Fund*, 561 U.S. at 495; *Seila Law*, 591 U.S. at 205; *Collins*, 594 U.S. 220 at 250-51. For example, in *Free Enterprise Fund*, the Court invalidated a for-cause removal restriction on the members of the Public Company Accounting Oversight Board. 561 U.S. at 495-96. The officers in question could be removed only for cause by officers of the SEC, who in turn could be removed only for cause by the President. The Court held that this removal restriction "subvert[ed] the President's ability to ensure that the laws are faithfully executed" and was

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[5] The Court's discussion in *Selia Law* show that *Leachco*, see infra n.7, and the district court's reliance upon it in this regard, is error.

thus "incompatible with the Constitution's separation of powers." *Id.* at 498. Indeed, the Court stated:

> No one doubts Congress's power to create a vast and varied federal bureaucracy. But where, in all this, is the role for oversight by an elected President? The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws. And the 'fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution,' for '[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.'

Free Enter. Fund, 561 U.S. at 499.[6]

The President's lack of unfettered power to remove NLRB Board members due to these statutory restrictions violates Article II of the Constitution.

Here, the district court incorrectly held that the "NLRB appears to fall comfortably within the *Humphrey's Executor* exception." App.10. The district court's application of *Humphrey's Executor* to the NLRB is wrong.[7] There, the

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[6] The removal protections for NLRB Members are stricter than those recognized as the outer limits of constitutional permissiveness that insulated the FTC Commissioners in 1935 (and still do). The latter are removable "for inefficiency, neglect of duty, or malfeasance in office," *Humphrey's Ex'r*, 295 U.S. at 620 (quoting 15 U.S.C. § 41). NLRB Members, in contrast, are removable only "for neglect of duty or malfeasance in office," but not for other causes like inefficiency, 29 U.S.C. § 153(a).

[7] With respect to the Board Members, as well as with respect to the ALJs and irreparable harm, the Sixth Circuit and the district court relied on *Leachco, Inc.* v. *Consumer Product Safety Commission*, 103 F.4th 748 (10th Cir. 2024). However, that case was wrongly decided and is not applicable here. First, it does not analyze or even acknowledge the harm alleged here—the harm inherent in being made to participate in an unconstitutional proceeding. The Sixth Circuit and the district court erred by relying upon *Leachco* because unlike the issue there, the underlying issue here "is about subjection to an illegitimate proceeding, led by an illegitimate decisionmaker." Even though the agency's order could be vacated after the proceeding, a "separation-of-powers claim"

Court recognized only one narrow exception for principal officers, namely "for multimember expert agencies that do not wield substantial executive power." *Seila Law*, 591 U.S. at 218. But that narrow exception does not apply here because NLRB Board Members *do* wield substantial executive power. Indeed, this very application of *Humphrey's Executor* was appropriately rejected in *Space Exploration Technolo-Gies Corp.* v. *NLRB*:

> [A]llowing Congress to eliminate the President's ability to remove principal officers for inefficiency would be an unjustified expansion of Humphrey's Executor. See *Collins*, 141 S. Ct. at 1787. ("The President must be able to remove not just officers who disobey his commands but also those he finds 'negligent and inefficient[.]' ") (quoting *Myers* v. *U.S.*, 272 U.S. 52, 135, 47 S. Ct. 21, 71 L. Ed. 160 (1926)). **Finding that NLRB Member's removal protection constitutional would require this court to expand *Humphrey's Executor* where the Supreme Court has repeatedly declined to do so.** See *Free Enterprise Fund*, 561 U.S. 477 …; see also *Seila L. LLC*, 591 U.S. 197 …; *Collins*, 594 U.S. 220….

--- F. Supp.3d ---, 2024 WL 3512082, at *4 (W.D. Tex. 2024) (emphasis added).

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challenging unconstitutional removal protections "is not about that order" but about avoiding "an illegitimate proceeding." See *Space Exploration Technolo-Gies Corp.* v. *NLRB*, --- F. Supp.3d ---, 2024 WL 3512082, at *4 (W.D. Tex. 2024) (citing *Axon*, 598 U.S. at 191). Second, the Consumer Product Safety Commission is not akin to the NLRB. Therefore, the holding in *Leachco* should not apply to the NLRB as the Sixth Circuit attempts to do. Instead, this case is now before the Court following the Court's decision in *Axon*, which is binding. Furthermore, the district court's reliance upon *Morrison*, which *Leachco* heavily relies upon, is also misplaced as *Morrison* dealt with inferior officers. *See Seila Law*, 591 U.S. at 219 ("The logic of *Morrison* also does not apply.").

B. NLRB ALJs are unconstitutionally insulated from removal.

Article II's Appointments Clause also provides the President authority to appoint officers and inferior officers of the United States. See U.S. Const. art. II, § 2. ALJs function as inferior officers of an executive agency. See *Lucia* v. *SEC*, 585 U.S. 237, 248-49 (2018); *Westrock Servs., Inc.*, 366 NLRB No. 157, slip op. at 1 (Aug. 6, 2018) ("Board judges, like SEC judges, are inferior officers[.]"). Inferior officers "are sufficiently important to executing the laws that the Constitution requires that the President be able to exercise authority over their functions." *Jarkesy* v. *SEC*, 34 F.4th 446, 464 (5th Cir. 2022), *aff'd*, 144 S. Ct. 2117 (2024). "If principal officers cannot intervene in their inferior officers' actions except in rare cases, the President lacks the control necessary to ensure that the laws are faithfully executed." *Jarkesy*, 34 F.4th at 464.

The Court did recognize in *Humphrey's Executor* an exception to the President's removal power as it relates to inferior officers: "one for inferior officers with limited duties and no policymaking or administrative authority." *Seila Law*, 591 U.S. at 218. That exception does not apply here, however, because NLRB ALJs possess vast "administrative authority." *Id.* The NLRB's ALJs exercise considerable power over administrative case records by controlling the presentation and admission of evidence. 29 CFR § 102.35-45. In some cases, ALJ decisions are final and binding. Once an ALJ files a decision and recommended order, absent timely exceptions, the findings, conclusions, and recommendations contained in the ALJ's decision will automatically become the

decision and order of the Board pursuant to Section 10(c) of the Act. 29 U.S.C. §160(c) and 29 CFR §102.48(a).

Relying on this Court's precedent, the Fifth Circuit recently ruled that SEC ALJs were unconstitutionally insulated from removal by a two-layer "for cause" removal system. Under the SEC structure, SEC ALJs could be removed: (1) by the SEC "for good cause established and determined by the Merit Systems Protection Board (MSPB) on the record after opportunity for hearing before the Board,"[8] and (2) the SEC Commissioners could only be removed by the President for good cause. *Jarkesy*, 34 F.4th at 463.[9]

The Fifth Circuit ruled that "SEC ALJs exercise considerable power over administrative case records by controlling the presentation and admission of evidence; they may punish contemptuous conduct; and often their decisions are final and binding." *Id.* Because ALJs were so insulated from removal, the Fifth Circuit determined that the President could not take care to faithfully execute the laws as required by the Take Care Clause.

This structure, found unconstitutional by the Fifth Circuit based on this Court's precedent, is nearly identical to the NLRB's structure for ALJs, including the ALJ assigned to preside over the pending NLRB proceedings against YAPP.

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[8] If the MSPB finds good cause to remove an SEC ALJ, the Commission must then choose to act on that finding. *Jarkesy*, 34 F.4th at 463.

[9] The Court very recently affirmed the Fifth Circuit's ruling on other grounds without disturbing the Article II argument. *SEC* v. *Jarkesy*, 144 S. Ct. 2117, 2127-28 (2024).

The NLRB appoints ALJs, but the NLRA provides at least two layers of for-cause removal protections for them, which in turn unconstitutionally prevents the President from exercising Presidential authority under Article II. NLRB ALJs can only be removed "for good cause established and determined" by the MSPB after hearing, and the MSPB Members who may remove ALJs are removable by the President only for "inefficiency, neglect of duty, or malfeasance in office." Thus, NLRB ALJs are insulated from the President by at least two layers of for-cause removal protections. See 5 U.S.C. § 7521(a) and 5 U.S.C. § 1202(d). As the Court has held, "the added layer of tenure protection makes a difference…[a] second level of tenure protection changes the nature of the President's review…[t]hat arrangement is contrary to Article II's vesting of the executive power in the President." *Free Enter. Fund*, 561 U.S. at 495-96. Therefore, existing Court precedent shows that YAPP will likely succeed on its claim here. Indeed, two district courts recently addressed this exact issue in the context of the NLRB ALJs, and both have granted motions for preliminary injunctions. See *Space Expl.*, 2024 WL 3512082 (W.D. Tex. July 23, 2024); *Energy Transfer, LP,* v. *NLRB*, --- F. Supp.3d ---, 2024 WL 3571494 (S.D. Tex. July 29, 2024).

In *Calcutt* v. *FDIC*, 37 F.4th 293 (6th Cir. 2022) *rev'd in part on other grounds* 598 U.S. 623 (2023), the Sixth Circuit held that ALJs for the Federal Deposit Insurance Corporation (FDIC) were not unconstitutionally protected from removal. The district court relied upon that decision in finding against YAPP, but that analysis is inapposite here. FDIC ALJs only make recommendations that are subject to review by the FDIC Board. After an FDIC ALJ makes a recommendation,

the FDIC Board's final decision "will be based upon review of the entire record of the proceeding, except that the Board of Directors may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties." 12 CFR § 208.39(c)(1). Thus, the decisions of FDIC ALJs are subject to review in all cases.

In contrast, the NLRA and the NLRB's rules and regulations provide that, absent timely exceptions, the findings, conclusions, and recommendations of the ALJ's decision will automatically become the decision and order of the Board, as discussed above and as provided in Section 10(c) and applicable regulations. 29 U.S.C. § 160(c); 29 CFR § 102.48(a) ("If no exceptions are filed, the administrative law judge's decision and recommended order **automatically become the decision and order of the Board pursuant to section 10(c) of the Act**. All objections and exceptions, whether or not previously made during or after the hearing, are deemed waived for all purposes." (emphasis added)). Indeed, the district court acknowledged that NLRB ALJs' decisions, absent exceptions, do become decisions of the Board, and yet inexplicably found there were only "minor differences" between the NLRB and FDIC ALJs. App.26. Thus, NLRB ALJs have greater decisional authority than the FDIC ALJs discussed in *Calcutt*.

In its decision denying an injunction pending appeal, the Sixth Circuit did not address this aspect of *Calcutt*, focusing instead only on whether YAPP could show irreparable harm. YAPP respectfully submits that it has established a likelihood of success on the merits that warrants an injunction pending appeal

to allow an orderly assessment of the NLRB's authority by the Sixth Circuit and, if necessary, this Court.

II. YAPP will suffer irreparable harm without a preliminary injunction.

YAPP will suffer immediate and irreparable harm absent injunctive relief. The Court recently confirmed that irreparable harm is inflicted on a party that is subject to a proceeding before a decisionmaker who is unconstitutionally insulated from presidential oversight in *Axon*.

In *Axon*, the plaintiffs sought to enjoin FTC and SEC enforcement proceedings by challenging the constitutionality of tenure protection for the FTC's and SEC's ALJs. *Axon Enterp.*, 598 U.S. at 179. The Court recognized that the "harm" of "'being subjected' to 'unconstitutional agency authority'—'a proceeding by an unaccountable ALJ'" is a "here-and-now injury" because "**it is impossible to remedy once the proceeding is over, which is when appellate review kicks in**." *Id.* (emphasis added). Were the "illegitimate proceeding before an illegitimate decisionmaker" to go forward, "structural constitutional claims would come too late to be meaningful." *Id.* The same rationale applies here. Should the NLRB proceeding go forward, YAPP will lose its right not to undergo an unconstitutional proceeding, an "injury…impossible to remedy once the proceeding is over," and "judicial review of [its] structural constitutional claims would thus come too late to be meaningful." *Axon*, 598 U.S. at 175.

When alleging a "constitutional injury from the threat of being subject[ed] to a regulatory scheme and governmental action lacking Article II oversight," the Court's ruling in *Free Enterprise Fund* is also instructive. 561 U.S. at 513. There,

the Court explained, "We normally do not require plaintiffs to bet the farm…by taking the violative action before testing the validity of the law, and we do not consider this a meaningful avenue of relief." *Id.* at 489-91. In other words, YAPP should not have to undergo the unconstitutional proceeding and await an unfavorable decision before it contests the agency's ability to issue that decision in a constitutional manner. Rather, YAPP is "entitled to declaratory relief sufficient to ensure that the [administrative] requirements…to which they are subject will be enforced only by a constitutional agency accountable to the Executive." *Id.* at 513.

Before the Court's decision in *Axon*, the Sixth Circuit had ruled that a party challenging an agency action based on an unconstitutional removal process must show an injury that results from the unconstitutional removal process. *Calcutt*, 37 F.4th 293. While *Calcutt* held that an adverse administrative ruling by itself does not constitute the needed harm from the appointment process, the Court in *Axon* has since made clear that a challenge to an agency's "power to proceed at all" differs from a challenge to "action[s] [already] taken in the agency proceedings." *Axon*, 598 U.S. at 192. As the Court ruled, a party's being subjected "to an illegitimate proceeding, led by an illegitimate decisionmaker," is a constitutional injury that "cannot be undone" after the fact. *Id.* at 191; see also *Cochran* v. *SEC*, 20 F.4th 194, 212-213 (5th Cir. 2021) (en banc), *aff'd and remanded sub nom.*, *Axon*, 598 U.S. 175 (if removal claim is "meritorious," plaintiff should not be "forc[ed] to litigate before an ALJ who is unconstitutionally insulated from presidential control"); *Alpine Sec. Corp.* v.

FINRA, 2023 WL 4703307, at *3 (D.C. Cir. July 5, 2023) (Walker, J., concurring) (finding an injunction of an administrative adjudication pending appeal appropriate based on *Axon* because the plaintiff was likely to prevail on claim that officers were unlawfully "shielded from removal").

Here, even though the Court's *Axon* decision post-dates *Calcutt*, the Sixth Circuit continued to rely upon *Calcutt* and ruled that YAPP could not show the necessary harm be entitled to injunctive relief. This continued reliance upon *Calcutt* here contrary to the Court's *Axon* decision is error. Critically, the Court in *Axon* held that a court of appeals could of course vacate an order, "[b]ut *Axon's* separation-of-powers claim is not about that order; indeed, *Axon* would have the same claim had it *won* before the agency." *Id.* at 191. Accordingly, each removal protection problem poses its own irreparable harm.

The only avenue for YAPP to avoid suffering an unconstitutional proceeding is to obtain injunctive relief to delay the administrative hearing until the judicial process is completed. The Sixth Circuit and district court wrongly relied upon *Collins* to find that there is no casual harm, and the Sixth Circuit's reliance and decision has created a split with the Fifth Circuit. The Fifth Circuit, en banc, determined that *Collins* does not apply when the claimant "does not seek to 'void' the acts of any [administrative] official," but instead, "seeks an administrative adjudication untainted by separation-of-powers violations." *Cochran*, 20 F.4th at 210 n.16. An administrative adjudication untainted by separation-of-powers violations is precisely what YAPP seeks here. YAPP does not seek to void acts of an administrative official. Rather, YAPP seeks the instant

preliminary injunction *so it will not have to endure* proceedings before unconstitutionally insulated administrative officials.[10]

Axon is the controlling case here, and it makes clear that YAPP will suffer irreparable harm if it is required to proceed to an administrative hearing before an unconstitutionally insulated ALJ, and later, unconstitutionally insulated Board Members. See also *Overstreet* v. *Lexington–Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) (The "denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights.").

The Sixth Circuit's reaffirmation of *Calcutt* and its reliance upon *Collins* has confirmed a split with the Fifth Circuit, necessitating the Court's attention.[11]

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[10] Alternatively, as the district court in *Energy Transfer* held, "[f]or removal-restriction claims that seek relief before an insulated actor acts, it is not that *Collins's* causal-harm requirement is altogether inapplicable, but rather that it is readily satisfied." 2024 WL 3571494, at *4.

[11] Alternatively, the Court should treat this Application as a Petition for Certiorari and grant Certiorari now, as this case reveals conflict between lower courts over a Constitutional issue of immediate importance. The Sixth Circuit's rationale splits with the Fifth (as well as several of this Court's rulings, see supra), on an issue of great national importance, so this Court will very likely grant certiorari when the merits appeal percolates through the Sixth Circuit. That satisfies the standard for injunctive relief under the All Writs Act, which permits an injunction when there is a "significant possibility that this Court would grant plenary review and reverse" the courts below, and supports this Court granting an injunction pending appeal. *Neb. Press Ass'n* v. *Stuart,* 423 U.S. 1327, 1331 (1975). For these same reasons and others articulated throughout this Application, in the alternative, the Court should treat this application as a Petition for Certiorari and grant Certiorari, with an interim injunction that would prohibit Respondents from proceeding with the underlying administrative action against YAPP. Certiorari is warranted due to the important federal questions at issue, the conflicts with this Court's precedents, and the decision's creation of a growing split in authority over

III. The balance of equities tips in YAPP's favor and an injunction is in the public interest.[12]

Measuring the harm against Defendants, the balance of equities tips strongly in YAPP's favor. Where "the Government is the opposing party," the "harm to the opposing party and the public interest" factors "merge." *Nken* v. *Holder*, 556 U.S. 418, 435 (2009). Without an injunction, YAPP stands to lose by having to submit to a hearing before an ALJ who is unconstitutionally insulated from Presidential removal, and a process before an agency violating the separation of powers, none of which can be compensated by monetary damages. See *Overstreet*, 305 F.3d at 578 ("A plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages."); see also *Planned Parenthood Ass'n of Cincinnati, Inc.* v. *City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987) (finding irreparable harm based on a violation of constitutional rights.).

Given YAPP's likelihood of success on the merits, an injunction would not harm Defendants because the government suffers no cognizable harm from stopping "the perpetuation of unlawful agency action." *League of Women Voters of U.S.* v. *Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016); see also*, e.g., BST Holdings, L.L.C.* v. *OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) ("Any interest [the NLRB] may claim in enforcing an unlawful (and likely unconstitutional) proceeding is

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whether the NLRB and its ALJs are unconstitutionally protected from removal and whether an injunction is appropriate to prohibit an unconstitutional agency from proceeding with its actions.

[12] The Sixth Circuit did not reach this issue in its decision.

illegitimate.") (cleaned up); *Deja Vu of Nashville, Inc.* v. *Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 400 (6th Cir. 2001) (holding it is always in the public interest to prevent violation of a party's constitutional rights). It is not in the public interest to have an increasingly expansive Executive Branch that nonetheless "slip[s] from the Executive's control, and thus from that of the people," *Free Enter.*, 561 U.S. at 499, or that infringes the constitutional imperative that "the judiciary remain[] truly distinct from … the executive," *Stern*, 564 U.S. at 483 (alteration in original) (quoting THE FEDERALIST No. 78, at 466 (Alexander Hamilton) (C. Rossiter ed. 1961)).

Additionally, should this Court ultimately rule against YAPP, any alleged harm to Dowling from this delay can be compensated by monetary damages. Furthermore, the NLRB maintains considerable powers to correct wrongdoings under the NLRA. Any alleged harms from a delay in the underlying proceedings, albeit likely speculative at best, can eventually be righted by the order of an ALJ or the NLRB. YAPP's injury cannot. As the Court in *Axon* acknowledges, should the proceeding take place, there is no remedy for YAPP.

The requested injunction would merely require the NLRB to stay the unfair labor practice proceedings while this Court makes its determination. While YAPP will likely suffer constitutional deprivation from the hearing's proceeding, Defendants do not stand to lose anything nearly so compelling.

CONCLUSION AND REQUESTED RELIEF

For these reasons, YAPP respectfully requests that this Application be granted and an emergency injunction be issued by October 15, 2024 or as soon

thereafter as possible, that enjoins the NLRB's administrative proceedings against YAPP.

Dated: October 14, 2024.

s/ Timothy K. Garrett

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