25-7015

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

STEPHEN McCARTHY, P.A.,

Petitioner,

v.

UNITED STATES DRUG ENFORCEMENT ADMINISTRATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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Date: December 7, 2025

QUESTIONS PRESENTED

1. Structural error and remedy after *Collins*. This Court's precedents treat structural defects in agency adjudications—such as Appointments Clause violations—as warranting automatic or strongly presumptive relief, including a new hearing before a proper adjudicator, without a granular showing that the outcome would have differed. See *Lucia v. SEC*, 585 U.S. 237 (2018); *Ryder v. United States*, 515 U.S. 177 (1995). After *Collins v. Yellen*, 594 U.S. 220 (2021), some courts now require litigants challenging ALJ removal protections to prove that the unconstitutional insulation caused a different outcome in their specific case before any relief is available. In the adjudicatory context, where evidence of such a causal chain is effectively inaccessible, does Article II permit courts to deny any remedy for an unconstitutional multilevel removal scheme absent outcome-determinative proof of harm, or should prejudice be presumed (or assessed under a lower "realistic possibility" standard with the burden on the Government) in ALJ-removal cases seeking a new hearing as the remedy?

Relying on *Collins* as interpreted in *NLRB v. Starbucks Corp.*, 125 F.4th 78 (3d Cir. 2024), and *CFPB v. National Collegiate Master Student Loan Trust*, 96 F.4th 599 (3d Cir. 2024), the Third Circuit held that Petitioner "cannot bring" a removal-protection challenge at all unless he first shows a "causal link" between the removal defect and an actual injury. Did the court err by treating *Collins*'s harm discussion as a threshold bar to even raising a structural Article II claim, rather than as a remedial question once a violation is found?

2. Sanction and public interest. DEA revoked Petitioner's registration as inconsistent with the public interest based on brief lapses in a state-law supervision-agreement requirement, without findings of diversion, abuse, or actual patient harm, and despite evidence that Petitioner provides specialized psychiatric care not easily replaced. The Third Circuit affirmed,

emphasizing that unintentional misconduct can justify revocation and that DEA may find the public interest unmet "even when a harm has not yet been realized." Does the Controlled Substances Act permit revocation in such circumstances without meaningful consideration of diversion or harm and the clinical consequences of severing treatment?

PARTIES AND RULE 29.6 STATEMENT

Petitioner is an individual physician assistant. He is not a corporation, has no parent corporation, and no publicly held corporation owns 10% or more of any interest in him.

The parties are listed in the caption.

RELATED PROCEEDINGS

Stephen McCarthy, P.A. v. United States Drug Enforcement Administration, No. 24-2704 (3d Cir.), judgment entered July 21, 2025 (petition for review denied).

In the Matter of Stephen McCarthy, P.A., DEA Docket No. 23-40, Decision and Order of the Administrator (Aug. 19, 2024) (revoking registration).

In the Matter of Stephen McCarthy, P.A., DEA Docket No. 23-40, Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge (Oct. 27, 2023).

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The opinion of the United States Court of Appeals for the Third Circuit (not precedential, filed July 21, 2025) is reproduced in Appendix A. The judgment is reproduced in Appendix B. The DEA Administrator's Decision and Order (Aug. 19, 2024) is reproduced in Appendix C, and the ALJ's Recommended Decision (Oct. 27, 2023) in Appendix D.

JURISDICTION

The court of appeals entered judgment on July 21, 2025. This Court's jurisdiction rests on 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rule 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article II of the United States Constitution; 21 U.S.C. §§ 823(g)(1), 824(a)(4), 877; 5 U.S.C. §§ 3105, 556(b)(3), 7521; 63 Pa. Stat. § 422.13(a), (e), (f); 49 Pa. Code § 18.152(a). Pertinent provisions are reproduced in the Appendix.

STATEMENT OF THE CASE

1. Petitioner and the regulatory framework

Petitioner is a Pennsylvania-licensed physician assistant who, until this case, held a DEA Certificate of Registration authorizing him to prescribe Schedule II–V controlled substances. He practices in psychiatry.

Pennsylvania law requires a physician assistant to practice pursuant to a written supervision agreement with an approved supervising physician. 63 Pa. Stat. § 422.13(a), (e);

49 Pa. Code § 18.152(a). Petitioner worked at Nulton Diagnostic & Treatment Center and later PA Treatment Center, treating patients with opioid-use disorder and ADHD. For those patients, abrupt cessation of controlled-substance therapy carries a risk of withdrawal, relapse, and overdose.

2. Administrative proceedings

On April 21, 2023, DEA issued an Order to Show Cause proposing to revoke Petitioner's registration and deny any pending applications under 21 U.S.C. §§ 823(g)(1), 824(a)(4). It alleged that Petitioner issued controlled-substance prescriptions without being covered by a written agreement with a supervising physician, in violation of Pennsylvania law and hence outside the usual course of professional practice.

A hearing was held on August 31, 2023, before ALJ Paul E. Soeffing. DEA presented evidence that between (1) August 24 and September 7, 2022, and (2) October 6 and November 8, 2022, Petitioner issued approximately seventeen prescriptions while not covered by a written supervision agreement. Petitioner did not dispute those dates. He testified that he believed an earlier agreement with psychiatrist Dr. Elizabeth Fourcade remained in effect because:

- the Pennsylvania Licensing System (PALS) showed the agreement without any end date;
- he had never received notice of termination; and
- in his experience, supervising physicians often had minimal communication with him.

Dr. Fourcade testified that the agreement was inactivated in October 2019, that she never actually supervised Petitioner, and that PALS is "often outdated."

The ALJ found that Petitioner had issued prescriptions without any active written agreement during the identified periods in 2022, and that under Pennsylvania law he therefore lacked authority to prescribe controlled substances. The ALJ further found that Petitioner failed to "unequivocally accept responsibility" and described his conduct as "egregious," emphasizing deterrence. The ALJ recommended revocation of Petitioner's registration and denial of any pending applications.

The DEA Administrator adopted the ALJ's findings and recommendation in full, ordering revocation and denying any pending applications.

3. Proceedings in the Third Circuit

Petitioner sought review in the Third Circuit, raising two principal issues: (1) the ALJ's dual for-cause removal protections violated Article II; and (2) the Administrator's choice of revocation, rather than a lesser sanction, was arbitrary, capricious, and an abuse of discretion.

The Third Circuit denied the petition. On the Article II question, the court explained that DEA ALJs are removable by the Attorney General "only for good cause established and determined by the Merit Systems Protection Board," and that MSPB members are themselves removable by the President only for inefficiency, neglect of duty, or malfeasance in office. 5 U.S.C. §§ 7521(a), 1202(d). The court acknowledged that this structure amounts to unconstitutional "multilevel protection from removal" under *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

The court nonetheless declined to reach the merits. Relying on *Starbucks* and *National Collegiate*, it held that a litigant "must show that the constitutional infirmity actually caused harm" and must show a "causal link" between the removal restriction and an actual injury in

order to "bring" a removal-protection challenge. Because Petitioner did not show, or even argue, that his injury "would have been lessened or eliminated if the ALJ did not have dual for-cause removal protections," the court held that his removal-protection challenge "fails."

On the sanction issue, the court affirmed the Administrator's decision. It held that revocation was not arbitrary or capricious and not an abuse of discretion, emphasizing that unintentional misconduct can justify revocation and that DEA may find the public interest unmet "even when a harm has not yet been realized." The court also upheld the Administrator's rejection of Petitioner's mitigation arguments, including his assertion that he provides critical specialized psychiatric care.

4. Record supplementation and the Appointments Clause

Petitioner also raised an Appointments Clause challenge, arguing that the ALJ had not been properly appointed by the Attorney General. The Third Circuit assumed without deciding that this issue could be raised for the first time on judicial review, but it allowed the Government to supplement the record with a new appointment document showing that the Attorney General had appointed the ALJ on December 1, 2020. The court granted the motion under its "exceptional circumstances" doctrine and rejected the Appointments Clause challenge as factually incorrect.

Thus, in the same opinion, the court (1) permitted the Government to cure a constitutional defect by enlarging the record on appeal, while (2) demanding that Petitioner show an outcome-determinative "causal link" that could not be established from the record in order even to raise a conceded removal-protection problem.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's "causal link" requirement for structural Article II violations conflicts with this Court's separation-of-powers precedents and makes removal-protection challenges practically impossible in adjudications.

This Court has treated certain structural defects in adjudication—such as Appointments Clause violations—as warranting automatic or strongly presumptive relief, without requiring a litigant to prove that the outcome would have been different before a properly structured tribunal. *Lucia*, 585 U.S. at 251–52; *Ryder*, 515 U.S. at 182–83.

Collins, 594 U.S. at 268–69, addressed a different context: actions by a properly appointed agency head subject to an unconstitutional removal restriction. The Court held that such actions are not void ab initio and that retrospective relief may depend on whether the removal restriction caused harm in the particular case. But *Collins* did not purport to displace *Lucia* or *Ryder* in the ALJ adjudication setting or to impose a strict, outcome-determinative "harm" requirement in all removal-protection cases.

The Third Circuit's decision stretches *Collins* beyond its limits. It held that in order to "bring" a removal-protection challenge, a litigant must show that the constitutional infirmity "actually caused harm" and must demonstrate a "causal link" between the removal defect and an actual injury. Because Petitioner did not show that his injury "would have been lessened or eliminated" absent the removal protections, the court refused to address the merits of the conceded structural defect.

That rule is incompatible with structural-error doctrine and unworkable in practice. The harm in a separation-of-powers violation of this sort is not confined to the bottom-line result; it is the proceeding itself—being compelled to litigate before a tribunal whose structure violates

Article II. Requiring a litigant to prove that a differently structured ALJ would have reached a different outcome is speculative and effectively impossible. The ALJ's internal deliberations are never in the record. Evidence about how removal protections shape supervision, discipline, or decisional culture lies entirely within the Executive Branch and is inaccessible to individual respondents.

If *Collins* is read as the Third Circuit reads it, structural removal-protection claims in adjudications will rarely, if ever, be remedied, even where the Government concedes that the removal scheme is unconstitutional. That is not a workable or faithful application of this Court's separation-of-powers jurisprudence.

A more appropriate approach would treat unconstitutional ALJ removal protections as a structural defect warranting:

- a presumption of prejudice and a new hearing before a properly accountable adjudicator; or
- at least a "realistic possibility" standard, under which the burden would shift to the Government to show that the defect was harmless.

The decision below adopts a much harsher rule, effectively converting Article II into a right with no remedy in the very context—adjudication—where judicial oversight is most needed.

II. The question is nationally important, and the underlying sanction illustrates the need for robust Article II enforcement.

The constitutional problem of multilayer tenure protections for ALJs is of significant national importance. The Fifth Circuit's decision in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir.

2022), held that SEC ALJs are unconstitutionally insulated by at least two layers of for-cause removal protection. On remand after this Court's 2024 *Jarkesy* decision, *SEC v. Jarkesy*, 603 U.S. 109 (2024), the Fifth Circuit reaffirmed that its removal holding remained intact. Other courts have recognized that 5 U.S.C. § 7521, combined with for-cause protection for MSPB members, raises serious Article II concerns for ALJs across agencies.

In this case, the Government itself conceded that DEA ALJs are subject to unconstitutional multilevel removal protection. Yet the Third Circuit declined to address the defect, invoking a "causal link" requirement that no individual litigant can realistically satisfy. If that framework stands, agencies may continue to use unconstitutionally structured tribunals indefinitely, secure in the knowledge that structural challenges will almost never succeed.

The facts of this case underscore why that is untenable.

A. Punishing reliance on the Commonwealth's own licensing system is arbitrary.

A central factual issue was Petitioner's reliance on PALS, the Pennsylvania Licensing System. PALS is the Commonwealth's own electronic system for tracking licenses and supervising-physician agreements. The record shows that PALS displayed Petitioner's agreement with Dr. Fourcade with a start date but no end date, and Petitioner testified that he never received an inactivation notice. Dr. Fourcade, for her part, testified that PALS is "often outdated" and that she was not surprised it failed to reflect termination.

The ALJ nonetheless treated Petitioner's reliance on PALS as evidence against his credibility, finding that Petitioner "should have been aware" the agreement had ended and faulting him for not taking additional steps beyond consulting PALS. The Administrator agreed, and the Third Circuit affirmed, emphasizing the Administrator's view that any

misunderstanding could have been avoided with "basic due diligence" and "proper and ongoing communication" with supervisors.

In practical terms, that means a practitioner is deemed irresponsible for trusting the Commonwealth's official licensing system. That is the very definition of arbitrary: the State compels licensees to use a system and then punishes them for relying on what the system shows.

B. Imposing a trafficking-level sanction where there is no diversion or harm is disproportionate.

The Controlled Substances Act is designed to prevent diversion and protect public health. Here, the record contains no findings that Petitioner diverted controlled substances, trafficked drugs, or harmed patients. The prescriptions at issue were for diagnosed patients being treated for opioid-use disorder and ADHD.

Nevertheless, DEA imposed revocation—the same sanction it uses for practitioners who divert drugs into illegitimate channels—and the Third Circuit affirmed. The court emphasized that unintentional misconduct can justify revocation and that DEA may find the public interest unmet "even when a harm has not yet been realized." The Administrator also rejected Petitioner's argument that he provides specialized psychiatric care that is not easily replaced.

This combination—a structurally questionable tribunal, a maximum sanction without diversion or harm, and deference to both—demonstrates why meaningful Article II enforcement is indispensable. Structural protections are supposed to discipline the exercise of administrative power; under the Third Circuit's rule, they do not.

C. Counsel's AI-related misconduct and pro se status further support review.

On appeal, Petitioner's counsel relied on AI-generated "summaries" of supposed DEA cases that were inaccurate or did not exist. The Third Circuit refused to consider that portion of the brief and initiated separate sanction proceedings against counsel for lack of candor. Petitioner now appears pro se. In combination with the structural defect and the severity of the sanction, this further underscores why this case is an appropriate vehicle for this Court's intervention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the Court should grant the petition, vacate the judgment below, and remand for reconsideration under a remedial framework consistent with *Collins*, *Lucia*, and this Court's structural-error precedents.

Respectfully submitted,

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Date: December 7, 2025

APPENDIX INDEX

Appendix A – Opinion of the United States Court of Appeals for the Third Circuit (July 21, 2025).

Appendix B – Judgment of the United States Court of Appeals for the Third Circuit (July 21, 2025).

Appendix C – Decision and Order of the DEA Administrator (Aug. 19, 2024).

Appendix D – Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge (Oct. 27, 2023).