UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Rebecca Kelly Slaughter
Alvaro M. Bedoya
Melissa Holyoak
Andrew Ferguson

In the Matter of **H&R Block Inc.,** **a corporation,** **HRB Digital, LLC,** **a limited liability company, and** **HRB Tax Group, Inc.,** **a corporation.**	**Docket No. 9427**

ORDER DENYING RESPONDENTS' MOTION TO DISQUALIFY THE ADMINISTRATIVE LAW JUDGE

On March 26, 2024, Respondents H&R Block, Inc., HRB Digital, LLC, and HRB Tax Group, Inc. ("Respondents") filed a motion before the Administrative Law Judge ("ALJ"), seeking to disqualify him and all other Federal Trade Commission ALJs from participating in this adjudication ("Motion"). The Motion challenges the constitutionality of the ALJs' participation, asserting that Congress has impermissibly shielded the ALJs from removal by the President, diminishing Presidential control over them improperly in violation of Article II of the United States Constitution. Mot. 1, 3, 5.

Respondents filed their Motion before the ALJ in the first instance. *See* Commission Rule 3.42(g)(2), 16 C.F.R. § 3.42(g)(2). On April 4, 2024, the ALJ issued an order declining to disqualify himself and certifying the Motion to the Commission for further proceedings. *See id.* We have considered Respondents' asserted grounds for disqualification and Complaint Counsel's opposition. For the reasons explained below, we decline to disqualify the ALJs.[1]

[1] On March 20, 2024, Respondents filed a federal district court complaint and simultaneously a motion for a preliminary injunction seeking to block the Commission from using an ALJ in this proceeding, on grounds substantially similar to those advanced in the Motion. *H&R Block, Inc. v. Himes*, No. 4:24-cv-00198-BP (W.D. Mo.), Docs. 1, 4–5. On August 1, 2024, the district court (Phillips, Chief Judge) declined to issue the requested injunction. Order Den. Mot. for Prelim. Inj., *H&R Block, Inc. v. Himes*, No. 4:24-cv-00198-BP, 2024 WL 3742310, at *4 (W.D. Mo.), *appeal docketed*, No. 24-2626 (8th Cir.

I. BACKGROUND

When the Commission has reason to believe that a corporation has been or is engaging in unfair methods of competition or unfair or deceptive acts or practices, it may issue a complaint setting the matter for a hearing. 15 U.S.C. § 45(b). The respondent has the right to appear at the hearing and show cause why the Commission should not enter an order requiring it to cease and desist from the charged violation. *Id*. The Commission may conduct the hearing itself and issue its own decision, or it may refer the matter to an ALJ who presides over the hearing and files a recommended decision. 16 C.F.R. §§ 3.42, 3.51–3.54. In the latter case, upon filing the recommended decision, the ALJ certifies the record of the proceeding to the Commission. *Id.* § 3.51(a)(2). The ALJ's recommended decision does not become final absent Commission review, which takes place upon exceptions filed by a party or, in the absence of such exceptions, automatically by rule. *Id.* §§ 3.52(a)–(b), 3.53. The Commission reviews the ALJ's recommended legal and factual determinations *de novo*, and may adopt, modify, or set aside any aspect of the ALJ's recommendations. *Id.* § 3.54(a). The Commission may also, if it wishes, require the parties to submit additional information or views prior to its ruling. *Id.* § 3.54(b).

To help preserve their decisional independence, Congress has provided ALJs with modest protections from removal. *See, e.g.*, *Mahoney v. Donovan*, 721 F.3d 633, 634–35 (D.C. Cir. 2013) (describing provisions of Civil Service Reform Act that "are designed to safeguard the decisional independence of administrative law judges").[2] The Commission may generally remove an ALJ "only for good cause established and determined by the Merit Systems Protection Board ['MSPB']." 5 U.S.C. § 7521(a). The members of the MSPB and the Commissioners, in turn, "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 1202(d); *see* 15 U.S.C. § 41.

On February 23, 2024, the Commission issued an administrative complaint against Respondents, alleging unfair and deceptive practices with respect to Respondents' online tax-preparation services. The Complaint advised that the matter would be heard by an ALJ on October 23, 2024, and the matter was subsequently assigned to ALJ Jay L. Himes. Compl. 16; Order Reassigning ALJ (Mar. 12, 2024). Respondents filed an Answer on March 12, 2024. Answer and Affirmative Defenses of Resp'ts H&R Block, Inc. *et al.* ("Answer"). Respondents' Answer asserts several defenses that rest on constitutional challenges to the Commission's structure or the conduct of its proceedings. Of greatest relevance here, Respondents claim that

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Aug. 9, 2024). Reviewing many of the same authorities that we rely on here, the court stated that it "[did] not believe Plaintiffs [Respondents here] have a fair chance of prevailing on their claim." *Id.* at *2; *see also id.* at *4 (expressing "serious doubt" about plaintiffs' ability to prevail on the merits). The United States Court of Appeals for the Eighth Circuit denied Respondents' motion for an injunction pending appeal. Order (Sept. 13, 2024), *pet. for reh'g en banc filed* (Sept. 18, 2024).

[2] As the district court described in denying Respondents' preliminary injunction motion (*see supra* note 1), Congress enacted the removal protections to respond to parties' concerns that adjudicators were mere tools of the agencies whose matters were assigned to them. *H&R Block, Inc.,* 2024 WL 3742310 at *4 & n.6. The court observed that Respondents' arguments have thus "come full circle" in claiming that the Constitution requires adjudicators to be beholden to agencies whose matters they adjudicate. *Id.*

the FTC administrative proceedings are invalid, asserting that the agency's "significant executive power," combined with limitations on the ability of the head of the executive branch to remove the Commissioners "and other FTC officials," violates the doctrine of the separation of powers. Third Defense, Answer 21.

The Motion levies a two-pronged attack on the constitutionality of the Commission's ALJs and their role in agency adjudications. First, Respondents assert that Article II requires that the President have unrestricted ability to remove executive branch officials, subject to two exceptions that Respondents say do not apply here. Mot. 2–4. Second, Respondents argue that, even conceding that some level of protection from Presidential removal might be constitutional for ALJs, Congress' chosen scheme "goes too far," because the restrictions are multi-layered and assertedly more limiting of Presidential power than other tenure protections previously sanctioned by the Supreme Court. Mot. 4–6.

II. ANALYSIS

A. The "Good Cause" Removal Protections That Apply to FTC ALJs Are Limited and Are Consistent with the President's Performance of His Presidential Duties, Especially Given the Nature of the FTC ALJs' Role

Article II of the United States Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America," art. II, § 1, cl. 1, and that the President shall "take Care that the Laws be faithfully executed," art. II, § 3. The Appointments Clause, in turn, establishes the permissible methods of appointing "Officers of the United States," a class of persons who are "distinct from mere employees." *Lucia v. SEC*, 585 U.S. 237, 241 (2018). Officers are subdivided into "principal" officers, whom the President must appoint with the advice and consent of the Senate, and "inferior" officers, who may constitutionally be appointed by the President, a court, or a head of a department. U.S. Const. art. II, § 2, cl. 2; *Lucia*, 585 U.S. at 244 n.3.

Respondents state that the Commission's ALJs are "inferior officers" and effectively concede that they were constitutionally appointed. *See* Mot. 3. Respondents' concern stems rather from the conditions under which ALJs may be *removed*. Pursuant to the Civil Service Reform Act, the Commission may remove ALJs only for "good cause" established and determined by the Merit Systems Protection Board after an opportunity for a hearing. 5 U.S.C. § 7521. Further, the Commissioners and the MSPB members are removable for inefficiency, neglect of duty, or malfeasance in office. 15 U.S.C. § 41; 5 U.S.C. § 1202(d). Respondents assert that § 7521, alone or in combination with the restraints on removal of the Commissioners and MSPB members, unduly restricts Presidential power. Mot. 1, 3–5.

Respondents' argument overshoots the mark. In *Morrison v. Olson*, 487 U.S. 654 (1988), the Court upheld a "good cause" restriction on removal of the independent counsel, *id.* at 691–93, an inferior officer, *id.* at 671.[3] The Court reasoned that the President's power to remove

[3] In the Ethics in Government Act, 28 U.S.C. §§ 591–599, Congress provided for the appointment of an independent counsel to investigate and, if appropriate, prosecute certain high-ranking government

Government officials under Article II is "not all-inclusive" and that "the imposition of a 'good cause' standard for removal by itself [does not] unduly trammel[] on executive authority." *Id.* at 687, 691; *see also Seila Law, LLC v. CFPB*, 591 U.S. 197, 215 (2020) (observing that the Supreme Court has "previously sustained congressional limits on . . . [the President's removal] power"); *United States v. Perkins*, 116 U.S. 483, 485 (1886). According to *Morrison*, the analysis should be functional, not categorical: it should focus on whether a removal standard—as applied to the functions of the officials in question—is consistent with the President's ability to perform his constitutional duty. 487 U.S. at 691.

Here, a "for cause" termination standard for the FTC's ALJs is fully consistent with the President's ability to carry out his constitutional duty and exercise his executive power. The Commission's ALJs perform solely adjudicative functions in their FTC Act cases and possess purely recommendatory powers. 16 C.F.R. §§ 0.14, 3.51–3.53. They can neither initiate investigations nor begin enforcement cases. 15 U.S.C. § 45(b), (*l*)–(m); 16 C.F.R. § 3.11(a). The ALJs' role is to preside over fair and impartial hearings and the parties' discovery,[4] and then to apply the law to the facts and prepare a recommended decision in accordance with Commission policies and subject to Commission review of the entire record, including all trial and pre-trial rulings. 16 C.F.R. §§ 0.14; 3.42(c); 3.51(a)(2); 3.51(c)(1); Rules of Practice, 88 Fed. Reg. 42872, 42873-74 (July 5, 2023). The ALJs' recommended decisions do not become final unless and until the Commission approves them. This aspect of the ALJs' role represents a change from prior practice under which, unless preliminary relief had been sought in federal court, an ALJ could issue an "initial decision" that would become final in the absence of appeal or Commission action to initiate review. Rules of Practice, 88 Fed. Reg. at 42873. The ALJs must perform their roles "in conformity with Commission decisions and policy directives and with its Rules of Practice." 16 C.F.R. § 0.14. Their adjudicatory role places them in a position where tenure protections are less likely to trigger a constitutional problem than for other executive branch members. *See, e.g.*, *Wiener v. United States*, 357 U.S. 349, 355–56 (1958) (explaining that Congress is free to protect bodies tasked with "adjudicat[ing] according to law . . . from the control or coercive influence, direct or indirect, . . . of either the Executive or Congress" (internal quotation marks omitted)).[5] Similarly, the FTC ALJs' limited, recommendatory role—subject to de novo review by the Commission—obviates the need for unfettered Presidential supervision.[6]

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officials for violations of federal criminal laws. *Morrison*, 487 U.S. at 660–61. The appointment would terminate upon a finding that the investigation and associated prosecutions were complete. *Id.* at 664.

[4] The Commission itself rules on pretrial motions to dismiss, to strike, and for summary decision, unless it specifically delegates the motion to the ALJ in a particular case. 16 C.F.R. § 3.22(a).

[5] *See also Morrison*, 487 U.S. at 691 n.30 ("It is not difficult to imagine situations in which Congress might desire that an official performing 'quasi-judicial' functions, for example, would be free of executive or political control."); *Decker Coal Co. v. Pehringer*, 8 F.4th 1124, 1133 (9th Cir. 2021) (concluding that Department of Labor ALJs' removal protections did not infringe upon the President's removal power; the ALJ "was performing a purely adjudicatory function"); *accord, Leachco, Inc. v. CPSC*, 103 F.4th 748, 764 (10th Cir. 2024).

[6] *See Seila Law*, 591 U.S. at 217–18 (acknowledging exceptions to at-will removal for officers with "limited duties and no policymaking or administrative authority"); *Free Enter. Fund v. Pub. Co. Acct.*

Seila Law identifies an exception allowing removal protections for officers with "limited duties and no policymaking or administrative authority." 591 U.S. at 217–18 (cleaned up). According to Respondents, that category excludes the Commission's ALJs because the ALJs serve indefinitely and their activities are directed to the citizenry, not fellow government officials on a temporary basis as in *Morrison*. Mot. 3–4. *Seila Law* dealt with tenure protection for a principal officer who alone headed a large agency, an issue that we do not face here. However, even accepting *Seila Law*'s focus on a lack of policymaking or administrative authority for inferior officers,[7] we would still find Congress' protection of Commission ALJs from removal using a "good cause" standard to be constitutional. The rulings of the Commission's ALJs are reviewable de novo by higher officials—*i.e.*, the presidentially appointed Commissioners. As noted above, the ALJs have no power to initiate investigations or enforcement cases. They do not establish agency policies[8] or priorities, enact rules, or impose financial penalties for FTC Act violations.[9] *Compare Decker Coal Co.*, 8 F.4th at 1133 (ALJs constitutional because, *inter alia*,

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Oversight Bd., 561 U.S. 477, 507 n.10 (2010) (distinguishing officers required to be terminable at-will from ALJs who "of course perform adjudicative rather than enforcement or policymaking functions" or "possess purely recommendatory powers"); *Otto Bock HealthCare N. Am., Inc.*, 168 F.T.C. 324, 389–90 (2019) (emphasizing Commission's de novo review of ALJ decisions in upholding removal restrictions); Order Den. Resp't's Mot. to Disqualify the Administrative Law Judge, *Axon Enter., Inc.*, 170 F.T.C. 454, 457–59 (Sept. 3, 2020); *1-800 Contacts, Inc.*, 166 F.T.C. 250, 309 (2018) (subsequent history omitted).

[7] Because the "no policymaking or administrative authority" language in *Seila Law* addresses an issue that the Court did not decide there, it does not foreclose us from analyzing the ALJ's actual duties as *Free Enterprise Fund* invites us to do. Summarizing the Court's reasoning in *Free Enterprise Fund*, the *Seila Law* Court observed that *Free Enterprise Fund* had "left in place two exceptions to the President's unrestricted removal power," one of which was for inferior officers with limited authority and no policymaking or administrative authority. 140 S. Ct. at 2198. But as noted in *Free Enterprise Fund*, 561 U.S. at 507 n.10, the Court specifically distinguished ALJs who "possess purely recommendatory powers" from PCAOB members empowered to take significant enforcement actions largely independently from the SEC, *id.* at 504. The Court did not reference that distinction in *Seila Law* because *Seila Law* dealt with a "principal officer."

[8] In asserting that FTC ALJs "determine, on a case-by-case basis, the policy of an executive branch agency" and "fill statutory and regulatory interstices comprehensively with [their] own policy judgments," Respondents misplace their reliance on a Department of Justice Office of Legal Counsel (OLC) opinion concerning ALJs from a different agency. Mot. 4 (quoting Sec'y of Educ. Review of ALJ Decisions, 15 Op. O.L.C. 8, 14–15 (1991)). Unlike those ALJs, the FTC's ALJs issue decisions that are recommendatory only. Respondents' position is thus undercut rather than helped by OLC's discussion of the constitutional problem that "would" arise *if* an ALJ's decision could not be reviewed by the agency head. *Id.* at 14. The whole purpose of OLC's advice was to avoid that constitutional problem by making the ALJ's decision reviewable by the agency's head—exactly as occurs here. *Id.* at 13–15.

[9] Consequently, we distinguish *Walmart, Inc. v. King*, No. CV623-040, 2024 WL 1258223 (S.D. Ga. Mar. 25, 2024), *appeal docketed*, No. 24-11733 (11th Cir. May 22, 2024), which held multilevel protections unconstitutional for certain U.S. Department of Justice ALJs who directly assess fines, penalties, and even forfeitures against private parties, and thus enforce federal law. *Id.* at *3. The Commission's ALJs do none of those things in proceedings under the FTC Act.

they perform a purely adjudicatory function without policymaking or ability to initiate cases). All of their rulings in adjudicating FTC Act proceedings are "certified to the Commission for a decision," along with their recommended decision. Rules of Practice, 88 Fed. Reg. at 42873-74; 16 C.F.R. § 3.51(a)(2). Thus, whereas the Commission administers statutes, its ALJs merely recommend.[10]

The Dissent/Concurrence argues that the FTC ALJs have "extensive" power over administrative hearings through their control over the creation of the administrative record, including control over discovery, the admission or exclusion of evidence, and every order necessary to direct the adjudication.[11] The Commission, however, oversees its ALJs at each step of the proceeding. Discovery and evidentiary rulings may be brought to the Commission for interlocutory review.[12] Moreover, such rulings are all subject to the Commission's de novo review following the issuance of the recommended decision, at which point the Commission can reverse evidentiary rulings and reopen the record as necessary to receive evidence improperly excluded.[13] Indeed, the Commission has a long history of scrutinizing the ALJs' discovery and evidentiary rulings.[14] Thus the ALJs' "extensive" power is actually fairly bounded, and their asserted "control" exists only if the Commission agrees, on review, with its exercise. FTC ALJs'

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[10] In a bit of wordplay, Respondents point out that the *Administrative* Law Judges must, by definition, possess "*administrative* authority," potentially contravening *Seila Law*. Mot. 4 (emphasis in original). But this approach incorrectly places labels over substance. Congress has empowered the Commission to lead the agency and to administer particular statutes. (The Commission "administers" a statute by promulgating rules and policy directives and by enforcing it. *See, e.g.*, *Etro v. Blitt & Gaines, PC*, No. 14 C 8924, 2015 WL 1281521, at *2 n.2 (N.D. Ill. Mar. 18, 2015) (noting that the Commission "administers" the Fair Debt Collection Practices Act) (citation omitted), *aff'd sub nom. Jackson v. Blitt & Gaines, PC*, 833 F.3d 860 (7th Cir. 2016); *In re Miller*, 335 B.R. 335, 346 n.7 (Bankr. E.D. Pa. 2005) (describing the FTC as the federal agency empowered to "administer and enforce" the Fair Credit Reporting Act)). As relevant here, the Commission has the authority to prevent persons from using unfair or deceptive acts and practices, 15 U.S.C. § 45, and ALJs assist the Commission in that work through their recommendations.

[11] Statement of Commissioner Andrew N. Ferguson Dissenting in Part and Concurring in the Denial of the Motion ("Dissenting/Concurring Statement") at 10.

[12] 16 C.F.R. § 3.23(b).

[13] *ECM Biofilms, Inc.*, 160 F.T.C. 652, 743 (2015) (applying an abuse-of-discretion standard and citing *Foster-Milburn Co.*, 51 F.T.C. 369, 371 (1954) (hearing examiner improperly denied Complaint Counsel's request to present scientific rebuttal witnesses); *Modern Methods, Inc.*, 60 F.T.C. 309, 339 (1962) (hearing examiner improperly denied respondent's request to present surrebuttal testimony)).

[14] *See, e.g.*, *Illumina, Inc.*, Dkt. 9401, 2023 WL 2946882 (F.T.C. Mar. 31, 2023), *39–41 & nn. 31, 33, *aff'd in relevant part*, 88 F.4th 1036 (5th Cir. 2023) (Commission re-weighed and accepted expert analysis that the ALJ had denigrated); *1-800 Contacts, Inc.*, 166 F.T.C. at 293–96 & n.46 (Commission extensively re-weighed and analyzed empirical expert testimony beyond what ALJ did in the initial decision); *In re Thompson Med. Co.*, 101 F.T.C. 385 (Order, Mar. 11, 1983) (Commission reviewed on an interlocutory basis the ALJ's order granting discovery). Of course, all prior experience preceded the 2023 change from initial to recommended decisions; the level of Commission supervision in practice under the new rules is still unknown, but, if anything, may be more frequent and more searching.

powers and duties consequently differ sharply from those of the CFPB Director that the Court addressed in *Seila Law*: a principal officer with sole responsibility for administering nineteen separate statutes and sole authority to impose billion-dollar civil penalties through administrative adjudications and civil actions. 140 S. Ct. at 2200–01.

Thus, Congress can give FTC ALJs modest removal protections without unduly restricting the Executive. *See Morrison*, 487 U.S. at 691; *1-800 Contacts*, 166 F.T.C. at 309 (rejecting constitutional challenge to ALJ's role, and noting that "[t]he FTC's ALJ[s] perform[] adjudicative rather than enforcement or policymaking functions" and are "subject to more Commission oversight"); *Axon Enter.*, 170 F.T.C. at 458 (upholding constitutionality of ALJs because, *inter alia*, "[t]he Commission is [] responsible for all final agency decisions" and maintains control over the case "from beginning to end"); *Otto Bock HealthCare N. Am.*, 168 F.T.C. at 389–90 (Commission upholding constitutionality of removal protections for its ALJs because ALJ's role is more circumscribed than the PCAOB and the Commission's oversight is greater).

Further demonstrating the sufficiency of the President's supervisory powers here, the removal protections applicable to the FTC's ALJs are modest and flexible. The ALJs are protected from termination by a requirement of "good cause," a term that Congress left undefined, 5 U.S.C. § 7521; *SSA v. Mills*, 73 M.S.P.R. 463, 467 (1996), *aff'd*, 124 F.3d 228 (Fed. Cir. 1997), but which the MSPB has interpreted broadly. *See Abrams v. SSA*, 703 F.3d 538, 543 (Fed. Cir. 2012) (deferring to MSPB's interpretation, which "includ[es] all matters which affect the ability and fitness of the ALJ to perform the duties of the office"). "Good cause" may be found based on, *inter alia*, "failure to follow instructions," *id.*, and deficient "performance, including . . . during the course of an adjudicatory proceeding." *SSA v. Anyel*, 58 M.S.P.R. 261, 267-8 (1993). Here, the Commission's regulations require ALJs to conduct proceedings "in conformity with Commission decisions and policy directives and with its Rules of Practice." 16 C.F.R. § 0.14. Thus, an ALJ's intentionally issuing recommended decisions that are out of step with Commission policy or precedent would meet the standard for "good cause" removal. *See Axon Enter.*, 170 F.T.C. at 460 (construing the "good cause" standard to include violations of agency policy and procedure); *see also Otto Bock HealthCare N. Am.*, 168 F.T.C. at 390; *1-800 Contacts*, 166 F.T.C. at 309.

In sum, the removal protections that apply to Commission ALJs afford much less shelter than those that the Court struck down in *Free Enterprise Fund*, which were "unusually high" and limited removal to willful violations of the relevant statutes or rules; willful abuse of authority; or unreasonable failure to enforce compliance. 561 U.S. at 503. As the Ninth Circuit reasoned in *Decker Coal Co.*, lesser protection means a lesser impingement on presidential authority. 8 F.4th at 1135.

B. Multi-Level Protections Do Not Disqualify the ALJs

Respondents contend further that the ALJs' removal protections are untenable under *Free Enterprise Fund*, which struck down two layers of removal protections for members of the Public Company Accounting Oversight Board ("PCAOB"). 561 U.S. at 495–96. The PCAOB was a five-member board created as part of the Sarbanes-Oxley Act of 2002 to tighten

supervision of the accounting industry after a series of scandals. *Id.* at 484. PCAOB members were appointed by the SEC, and Congress granted the PCAOB extensive policymaking and enforcement powers "to govern [the] entire industry." *Id.* at 484–85.[15] As noted above, Congress provided the PCAOB members with "unusually high" protection from removal by the Commissioners that far exceeded the broad, flexible "good cause" at issue in this case. *Id.* at 486, 503. The President, in turn, could remove the SEC Commissioners only for a "determination [] so unreasonable as to constitute 'inefficiency, neglect of duty, or malfeasance in office.'" *Id.* at 496.

The Court found this structure of dual-layer protections for PCAOB members unconstitutional. *Id.* However, it did so on grounds that are distinguishable from those presented here. For example, the Court expressed strong concerns about the PCAOB members' broad, unsupervised policymaking and enforcement authority. *See id.* at 483–84 (describing the question presented as whether "the President [may] be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, *even though that inferior officer determines the policy and enforces the laws of the United States*?") (emphasis added); *id.* at 508 ("The only issue in this case" is whether Congress may deprive the President of adequate control over the PCAOB, "which is the regulator of first resort and the primary law enforcement authority for a vital sector of our economy."). As discussed above, the Commission's ALJs do not set policy, nor can they issue non-recommendatory decisions to enforce the FTC Act. Furthermore, the Court in *Free Enterprise Fund* specifically carved out from its holding ALJs who are also subject to two-layer removal protections because, "unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, . . . or possess purely recommendatory powers." *Id.* at 507 n.10.

Respondents' likening of the Commission's structure to layers of a "poisoned cake" is inapt. As to the top layer, the Court upheld the Commissioners' statutory protections from removal in 1935 and has recently declined to revisit that holding. *See Humphrey's Ex'r v. United States*, 295 U.S. 602, 630–32 (1935) (upholding requirement of good cause for President to remove Federal Trade Commissioners); *see also Seila Law*, 591 U.S. at 204, 216–17 (noting for-cause exceptions for certain multimember expert agencies; "[W]e . . . do not revisit our prior decisions allowing certain limitations on the President's removal power . . . ."). Although the Court in *Free Enterprise Fund* explained that two layers of protection pose different and greater concerns than one, it excepted ALJs from its holding for reasons that suggest it would permit the structure here. 561 U.S. at 507 n.10; *see also Calcutt v. FDIC*, 37 F.4th 293, 319 (6th Cir. 2022) (suggesting that dual-level protection for FDIC ALJs is constitutional under *Free Enterprise Fund* because the ALJs "perform adjudicatory functions" and "file a recommended decision that is subject to review by the FDIC Board"), 320 ("the *Free Enterprise Fund* exception for ALJs centers on their status as adjudicatory officials that issue non-final recommendations to an agency, and not on

[15] The PCAOB registered all accounting firms that participated in auditing public companies, created audit and ethics rules for them, and could subject them to routine inspections for compliance with its rules. *Free Enter. Fund*, 561 U.S. at 484–85. The statute treated willful violations of PCAOB's rules as a federal crime, and the PCAOB could also sanction industry participants on its own account, including revocation of registrations and monetary penalties up to $15 million. *Id.* at 485.

how many levels of removal protections they enjoy"), *rev'd on other grounds*, 143 S. Ct. 1317 (2023).[16] Adjudicators are charged solely with recommending liability of particular parties before them by finding facts and applying the law to those facts. Removal protections for those adjudicators consequently raise little concern that the power to make important policy decisions "may slip from the Executive's control, and thus from that of the people." *Free Enter. Fund*, 561 U.S. at 499. Indeed, the Court in *Free Enterprise Fund* expressly invited making the PCAOB officials' duties recommendatory to cure the dual-layer removal problem. *Id.* at 509.

Ignoring these considerations, Respondents cite *Jarkesy v. SEC*, in which a divided Fifth Circuit held unconstitutional a limit on the removal of SEC ALJs that required findings of "good cause" by the SEC Commissioners, whose removal by the President was limited, in turn, to situations of "inefficiency, neglect of duty, or malfeasance in office." 34 F.4th 446, 463–65 (5th Cir. 2022), *aff'd on other grounds*, 144 S. Ct. 2117 (2024).[17] The Fifth Circuit *first* underscored *Lucia*'s holding that SEC ALJs are "inferior officers," a proposition grounded in Supreme Court law. 34 F.4th at 464 (citing *Lucia*, 138 S. Ct. 2044, 2053). But its next leap, that all such officers by definition are ineligible for dual-layer tenure protection, goes too far. *Free Enterprise Fund* does not forbid multilayer for-cause removal limits for all inferior officers. *See Decker Coal Co.*, 8 F.4th at 1132 ("Importantly, the Court did not broadly declare all two level for-cause protections for inferior officers unconstitutional."). Rather, as discussed above, it presumed that lower courts would consider and analyze the nature of ALJ activities and of the removal restraints themselves. 561 U.S. at 507 n.10.

The Dissenting/Concurring Statement makes a similar error. *Free Enterprise Fund* stated, "[O]ur holding does not address that subset of independent agency employees who serve as administrative law judges." *Id.* (noting their performance of "adjudicative rather than enforcement or policymaking functions" and their "purely recommendatory powers" in addition to their then-uncertain status as officers of the United States). The Court's express statement that it was not reaching the issue of ALJ termination is contrary to the central thesis of the dissent/concurrence, which springs from the assumption that *Free Enterprise Fund* allows no exceptions to its bar on dual for-cause tenure protections for inferior officers, no matter their duties. Dissenting/Concurring Statement at 7–9.[18]

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[16] *See also Leachco*, 103 F.4th at 764 (upholding dual-layer tenure protection for ALJ with purely adjudicatory function).

[17] In affirming the Fifth Circuit's vacatur of the SEC's cease and desist order, the Supreme Court in *Jarkesy* explicitly did not reach the Fifth Circuit's reasoning on ALJ removal and did not affirm it. 144 S. Ct. at 2139.

[18] The Dissenting/Concurring Statement relies on a phrase from *Seila Law* to cast an improper gloss on *Free Enterprise Fund*. It repeatedly asserts that *Free Enterprise Fund* "declined to extend" an exception to the President's removal power for inferior officers with limited duties and no policymaking or administrative authority. Dissenting/Concurring Statement at 6–8. The language cited, however, is *Seila Law*'s characterization of *Free Enterprise Fund*. *Seila Law*, 591 U.S. at 215 ("[W]e declined to extend those limits to 'a new situation not yet encountered by the Court' – an official insulated by two layers of for-cause removal protection …") (quoting *Free Enterprise Fund*, 561 U.S. at 463). *Seila Law* involved a principal officer, not an inferior officer, however. And the fact that *Free Enterprise Fund* "declined to

By wrongly concluding that *Free Enterprise Fund* shut off all inquiry, the analysis in *Jarkesy* could lead to missing essential distinctions, which the Dissenting/Concurring Statement in fact does: whereas the SEC ALJs' decisions are "often . . . final and binding," *Jarkesy*, 34 F.4th at 464, the Commission ALJs' FTC Act decisions are recommendatory only.[19] Furthermore, the Commission's ALJs do not issue monetary sanctions in those adjudications. The limited nature of FTC ALJs' duties, coupled with the limited nature of the removal restraints applicable to those ALJs, counsels against finding those restraints unconstitutional.

Most importantly, the Supreme Court in *Jarkesy* explicitly did not reach the Fifth Circuit's reasoning on ALJ removal and did not affirm its conclusions. 144 S. Ct. at 2139.[20] Therefore, it strikes us as particularly unsuitable to base a constitutional analysis of ALJ removal on the Fifth Circuit's *Jarkesy* reasoning, as the Dissenting/Concurring Statement does at 7, 10.

C. Disqualification of the ALJ Is Not an Appropriate Remedy

Finally, even if we agreed with Respondents that there were a constitutional problem with removability, the "good cause" requirement of § 7521 could be severed as it applies to Commission ALJs, leaving the Commission's ALJs terminable at will by the Commission or the President. *See Free Enter. Fund*, 561 U.S. at 508 (When addressing a constitutional flaw in a statute, courts typically sever the problematic portions and leave the remainder intact.); *Seila Law*, 591 U.S. at 234–35 (holding that unacceptable tenure constraint can be severed from the rest of the Dodd-Frank Act). As the Court has explained, "[e]ven in the absence of a severability clause, the 'traditional' rule is that 'the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.'" *Id.* (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987)). Pointing to the fact that Congress progressively enacted tenure protections over a thirty-year period to promote ALJ independence, Respondents speculate that, without such protections in their present form, "Congress" would prefer no ALJs at all. Mot. 7–8. It would be remarkable if Congress were to prefer no ALJs to the current corps of over two thousand of them, and Respondents unsurprisingly present no support for this contention. More likely, Congress would accept an imperfect but still functional system under which executive officers with less protection than they currently possess could carry on the

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extend" an exception to members of an accounting oversight board does not equate to rejecting the exception for *all* inferior officers; indeed, it is no basis for ignoring *Free Enterprise Fund*'s express language reserving decision on the constitutionality of dual for-cause termination provisions for administrative law judges.

[19] The *Lucia* Court found the distinction between recommendatory and binding decisions critically important in assessing the level of authority that an official wields. After an SEC ALJ prepares a decision, "the SEC can decide against reviewing an ALJ decision at all." 585 U.S. at 249. And when the SEC declines review, "the ALJ's decision itself becomes final and is deemed the action of the Commission." *Id.* (internal quotation omitted). The *Lucia* Court called this power "last-word capacity," *id.*, and the FTC ALJs' lack of that characteristic distinguishes the present case from *Jarkesy*.

[20] Indeed, the Dissenting/Concurring Statement relies on *Lucia* to build its case for the unconstitutionality of removal protections for FTC ALJs—but the *Lucia* Court specifically *declined* to take up the question of the constitutionality of removal protections for SEC ALJs. *Lucia v. SEC,* 585 U.S. at 244 n.1.

Government's work. Severability would allow this outcome.[21]

III. CONCLUSION

For the reasons explained above, we deny Respondents' Motion.

Accordingly,

IT IS HEREBY ORDERED THAT Respondents' Motion to Disqualify the Administrative Law Judge is **DENIED.**

By the Commission.

April J. Tabor
Secretary

SEAL:
ISSUED: October 18, 2024

[21] Even if we or a court were to find the ALJs' removal protections impermissibly restrictive, this would not render the ALJs' actions void. To obtain a remedy for a putative constitutional violation, Respondents would need to demonstrate harm in the form of, for example, a substantiated presidential desire to remove the ALJ that was blocked by the removal restrictions and that affected the outcome. *See Collins v. Yellen*, 141 S. Ct. 1761, 1789 (2021) (harm possible if, for example, the president attempted to remove an officer but was prevented from doing so); *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616, 632 (5th Cir. 2022), *rev'd on other grounds,* 601 U.S. 416 (2024) (To show harm, challenger must show that (1) the President had a "substantiated desire" to remove the ALJ; (2) the President was unable to remove the ALJ due to removal restrictions; and (3) a "nexus" exists between the President's inability to remove the ALJ and the case's outcome.). Because here, the ALJs' appointments are concededly valid, their actions are similarly valid absent a concrete harm connected to a constitutional violation. *See Collins*, 141 S. Ct. at 1787–89. Respondents have made no showing of concrete harm from the removal restrictions and do not allege that the adjudication would unfold differently without them. Indeed, the Commission is satisfied with the performance of its administrative law judges and would not take steps to remove them even absent the "for cause" removal protections.