UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the matter of

H&R BLOCK INC.,
a corporation,

HRB DIGITAL LLC,
a limited liability company, and

HRB TAX GROUP, INC.,
a corporation.

ARGUMENT

A. Article II Of The Constitution Imposes A General Rule That The President Must Have Unrestricted Ability To Remove Executive Officers, Subject To Only Two Narrow Exceptions

The Constitution vests the "entire" power to execute federal law in the President "alone," and requires him to "take Care that the Laws be faithfully executed." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191, 2197 (2020). That mandate "generally includes the ability to remove executive officials," because it is only the person who "can remove" such officials that they "must fear and, in the performance of their functions, obey." *Id.* (cleaned up). The "general rule" is thus that the President has "unrestricted removal power" over executive officers. *Id.* at 2198.

The Supreme Court has "recognized only two exceptions to the President's unrestricted removal power," which are "the outermost constitutional limits." *Id.* at 2192, 2199-2200. Besides the *Humphrey's Executor* exception for certain *principal* officers—like the Commissioners—deemed to head "multimember expert agencies that do not wield substantial executive power," *id.* at 2199-2200, the Court has upheld certain removal protections for certain *inferior* officers "with limited duties and no policymaking or administrative authori

any misconduct. *Id.* at 692. And in *Perkins*, although the Court did not opine on the standard for misconduct, the military context made clear that insubordination would be an offense punishable by removal (or worse).

The Supreme Court has rejected removal restrictions for inferior officers that exceed the "limited restrictions" in *Perkins* and *Morrison*. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 495 (2010). *Free Enterprise Fund* addressed inferior officers shielded by *two levels* of removal protections: Public Company Accounting Oversight Board (PCAOB) members were removable by the SEC only in extreme situations, and SEC Comm9 -2v. .sihar0wvereessmed t

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ALJs' duties are not limited in the same durational or substantive manner as in *Morrison* and *Perkins*—or in any material sense. ALJs serve indefinitely, unlike the independent counsel's temporary mandate in *Morrison* to fulfill a "single task." 487 U.S. at 672. And they wield power over ordinary citizens, whereas the counsel's power was "trained inward to high-ranking Governmental actors identified by others." *Seila Law*, 140 S. Ct. at 2200. Likewise, the cadet-engineer in *Perkins* was near the bottom of the command chain and primarily responsible for implementing superiors' instructions, *see* 116 U.S. at 483, while ALJs wield "significant discretion" and powerful "tools" in conducting "adversarial hearings," *see Lucia*, 585 U.S. at 238.

Relatedly, ALJs exercise policymaking authority. The Department of Justice has long recognized that ALJs "determine, on a case-by-case basis, the policy of an executive branch agency." Sec'y of Educ. Review of ALJ Decisions, 15 Op. O.L.C. 8, 15 (1991). Through adjudications, they necessarily "fill statutory and regulatory interstices comprehensively with [their] own policy judgments." *Id.* at 14; *accord NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-94 (1974).

If nothing else, *Administrative* Law Judges possess *administrative* authority. They are inferior officers exercising "significant authority" under federal law *because of* the myriad ways they "critically shape the administrative record." *Lucia*, 585 U.S. at 245, 248.

C. At Minimum, ALJs' Multiple Levels Of Stringent Removal Protections Violate Article II

Even if Congress could give ALJs *some* type of tenure protection, its chosen scheme goes too far. The three layers of robust removal protection are untenable.

Starting with the first layer, the "good cause" standard for ALJ removal "established" by the MSPB exceeds what Supreme Court precedent permits. 5 U.S.C. § 7521(a). The MSPB's "baseline for evaluating good cause in any action against an ALJ is whether the action improperly

who are] not accountable to the President, and a President who is not responsible for [ALJs]." *Id.* at 495. Indeed, the Fifth Circuit recently reached that exact conclusion for SEC ALJs. *See Jarkesy v. SEC*, 34 F.4th 446, 463-65 (5th Cir. 2022), *cert. granted*, No. 22-859 (U.S.).

D. The FTC May Not And Should Not Recognize A New Exception To The President's Removal Power For ALJs

The Commission previously viewed Executive Branch "adjudicators" as different from other executive officers. *See Axon*, 2020 WL 5406806, at *3-6. But *Seila Law* could not have been clearer that the "general rule" is "the President's unrestricted removal power," 140 S. Ct. at 2198, or that the "two exceptions" it articulated are the "outermost" incursions on the general rule, *id.* at 2199-2200.

Regardless, a novel "adjudicators exception" is misguided. Even if "the duties of [ALJs] partake of a Judiciary quality as well as Executive, [ALJs] are still exercising executive power and must remain dependent upon the President." *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1982 (2021) (cleaned up) (addressing analogous Administrative Patent Judges). Indeed, adjudications by removable executive officers have occurred "since the beginning of the Republic." *See id.*

In *Axon*, the Commission leaned heavily on a footnote in *Free Enterprise Fund*. *See Axon*, 2020 WL 5406806, at *3. But the footnote merely stated that the Court's holding did "not address" ALJs either way, 561 U.S. at 507 n.10, as part of a broader disavowal of "general pronouncements on matters neither briefed nor argued," *id.* at 506. The footnote further observed that ALJs' "officer" status was then

The Commission also reasoned that it has constitutionally sufficient control over ALJs because it reviews their decisions *de novo* and because they have limited powers (compared to the PCAOB). *See Axon*, 2020 WL 5406806, at *4-5. But *Lucia* held that the features identified "make no difference" to ALJs' status as inferior officers, 585 U.S. at 249-51, and *Free Enterprise Fund* held that "[b]road power over [an inferior officer's] functions is not equivalent to the power to remove" them. 561 U.S. at 504.

E. The ALJ Is Disqualified Because The Unconstitutional Removal Restrictions Are Not Severable

In federal court, the "appropriate remedy" for an unconstitutional removal restriction depends on a severability inquiry, analyzing whether to invalidate the officer's removal protection or instead to void his powers. *Seila Law*, 140 S. Ct. at 2207. But here, neither the ALJ nor the Commission has authority to declare unenforceable the removal restriction enacted by Congress. So the ALJ simply cannot act, and the Commission must conduct this adjudication itself.

The same conclusion follows under severability analysis. The critical "inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress" if the unconstitutional portion alone is voided. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). Even if the statute would be "fully operative" without the unconstitutional provisions, they still are not severable if "rewrit[ing] [the] statute" that way would "give it an effect altogether different from that sought by the measure viewed as a whole." *Murphy v. NCAA*, 584 U.S. 453, 481-82 (2018). And here, "[t]he substantial independence that the [APA]'s removal protections provide to [ALJs] is a central part of the Act's overall scheme." *Lucia*, 585 U.S. at 260 (Breyer, J., concurring in the judgment in part).

Before 1946, ALJs (called "hearing examiners") were employees whose "tenure and status" "depended upon their classification" and "the ratings given them by the[ir] agency."

Ramspeck v. Fed. Trial Examiners Conf., 345 U.S. 128, 130 (1953). This dependence produced "[m]any complaints" that "they were mere tools of the agency," "subservient to the agency heads." *Id.* at 131. That was deemed incompatible with the "independent judgment" needed for a "fair and competent hearing." *Butz v. Economou*, 438 U.S. 478, 513-14 (1978).

In enacting the APA in 1946, Congress chose "to make hearing examiners a special class of semi-independent subordinate hearing officers." *Ramspeck*, 345 U.S. at 130.

at 131, 132 n.2, it is evident that "Congress would not have [re-]enacted" a scheme of hearing examiners subservient to their agency heads, *Alaska Airlines*, 480 U.S. at 685.

Accordingly, the only remedy consistent with congressional intent is to regard ALJs' removal protections as nonseverable and ALJs themselves as disqualified from wielding executive power. *See Collins v. Yellen*, 141 S. Ct. 1761, 1788 & n.23 (2021) (recognizing that nonseverability of unconstitutional removal restriction deprives insulated officer of valid authority to act). While Congress emphatically rejected the use of nominally neutral hearing officers who were actually agency heads' tools, Congress expressly preserved agencies' ability to conduct adjudications themselves, *see* 5 U.S.C. §§ 556(b)(1), 557(b), and the latter, unlike the former, does not "blur the lines of accountability," *see Arthrex*, 141 S. Ct. at 1973. Thus, the Commission must conduct this adjudication without using ALJs.

CONCLUSION

The ALJ—and all other FTC ALJs—are disqualified for lack of constitutional authority, and the Commission must conduct this adjudication without them.

Dated: March 20, 2024
(Refiled on March 26, 2024)

Respectfully submitted,

By: /s/ Antonio F. Dias

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perjury, as follows:

1.

other FTC ALJs.

forth below.

them from at-will removal by the President: The Commission cannot remove them

Board," 5 U.S.C. § 7521(a); and in turn, neither MSPB members nor FTC

United States, 295 U.S. 602, 619, 632 (1935).

2022).

U.S. 128, 130-32 (1953), and *Collins v. Yellen*, 141 S. Ct. 1761, 1788 & n.23 (2021).

FURTHER AFFIANT SAYETH NOT.

PUBLIC

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document to be filed on March 20, 2024 (without the supporting affidavit), and re-filed on March 26, 2024 (with the supporting affidavit), electronically using the FTC's E-Filing system, which will send notificaDlm,.C0 Tc 0 Tw 3.36 06Td[(t)-2-t

STATEMENT OF CONFERENCE

Pursuant to the Scheduling Order entered on March 22, 2024, I hereby state that, on March 26, 2024, Carol Hogan and I (counsel for Respondents) conferred with Claire Wack, Christopher Brown, and Simon Barth (counsel supporting the Complaint), in an effort in good faith to resolve by agreement the issues raised by Respondents' Motion to Disqualify the Administrative Judge. We were unable to reach such an agreement, however, (h)-1 gBLIC Mar9 -1.15 Td7.4 501(T)-5 (E)Dw 24.