Oral Argument Scheduled for April 17, 2020
Nos. 17-1246, 17-1249, 17-1250 (consolidated)

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOE FLEMING, SAM PERKINS, & JARRETT BRADLEY,

Petitioners

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent

On Petitions for Review from Orders of the
United States Department of Agriculture

AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel certifies as follows:

A. Parties and Amici

Petitioners are Joe Fleming, Sam Perkins, and Jarrett Bradley. Respondent is the United States Department of Agriculture. The Court appointed Pratik A. Shah as *amicus curiae* by order dated December 6, 2019.

B. Rulings Under Review

USDA's Judicial Officer affirmed orders of default against Petitioners and imposed sanctions for violations of the Horse Protection Act in three separate decisions:

1. On October 31, 2017, the Judicial Officer issued a decision and Order against Sam Perkins, 2017 WL 9473091;

2. On November 1, 2017, the Judicial Officer issued a decision and Order against Jarrett Bradley, 2017 WL 9473092;

3. On November 6, 2017, the Judicial Officer issued a decision and order against Joe Fleming, 2017 WL 9473093.

C. Related Cases

Counsel is not aware of any other related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Aditya Dynar
Aditya Dynar

CORPORATE DISCLOSURE STATEMENT

New Civil Liberties Alliance is a nonpartisan, nonprofit organization under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to Fed. R. App. P. 29 and D.C. Cir. R. 29, NLCA respectfully files this amicus curiae brief with the consent of all parties. NCLA certifies that a separate brief is necessary because it intends to address the Appointments Clause violation, the constitutionality of multiple layers of tenure protections, as well as the issues relating to administrative exhaustion and forfeiture, agency attempts to nullify Art. III court jurisdiction, and what remedy is appropriate when an agency's ALJs are unconstitutional. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than the Amicus, its members, and counsel, contributed money that was intended to fund preparing or submitting this brief.

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GLOSSARY

ALJ	Administrative Law Judge
CAA	Court-appointed Amicus
CAA [xx]	Court-appointed Amicus' Brief
CRJ	Copyright Royalty Judge
FEF	*Free Enterprise Fund*
HPA	Horse Protection Act
JA	Joint Appendix
NCLA	New Civil Liberties Alliance
Pets. Supp.	Petitioners' Supplemental Brief
Resp't	Respondent's Brief
USDA	United States Department of Agriculture

INTEREST OF *AMICUS CURIAE*

The New Civil Liberties Alliance ("NCLA") is a non-partisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state. NCLA was founded to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other means of advocacy. NCLA views the administrative state as an especially serious threat to civil liberties. No other current legal development denies more rights to more Americans. Although we still enjoy the shell of our Republic, a very different sort of government has developed within it—a type, in fact, that our Constitution was designed to prevent.

In this case, NCLA takes issue with the United States Department of Agriculture's ("USDA") use of Administrative Law Judges ("ALJs") who violate Article II and the separation of powers. NCLA represents clients before the Fifth, Ninth, and Eleventh Circuits who are challenging the multiple for-cause removal protections enjoyed by ALJs in the Securities Exchange. *See Cochran v. SEC*, No. 19-10396 (5th Cir. 2019); *Lucia v. SEC*, No. 19-56101 (9th Cir. 2019); *Gibson v. SEC*, No. 19-11969 (11th Cir. 2020). Additionally, those cases have caused NCLA to confront issues relating to administrative exhaustion and forfeiture, agency attempts to nullify Art. III court jurisdiction, as well as what remedy is appropriate when an agency's ALJs are unconstitutional.

SUMMARY OF ARGUMENT

Through the Administrative Procedure Act and Civil Service Reform Act, Congress intended to construct an administrative-law system in which civil-service employees (be it hearing examiners or ALJs) serve a quasi-judicial role within the various Executive Departments and independent agencies. But Congress miscalculated. As we know from the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), some ALJs possess authority so significant that they are not mere civil-service employees, but rather Officers of the United States subject to the Appointments Clause in Article II, §2 of the Constitution.

Petitioners Joe Fleming, Sam Perkins, and Jarrett Bradley were sanctioned by a USDA ALJ who, all parties agree, was not constitutionally appointed under the rule recognized by the Supreme Court in *Lucia*. When Congress nests protections in Matryoshka-doll-like fashion—an officer who is removable only for cause by another officer or who is removable only for cause by another agency whose members are removable only for cause by the President—it effectively immunizes executive officers of the President from removal, defeating the design of Article II. Justice Breyer called this the "embedded constitutional question" in *Lucia*, 138 S. Ct. at 2057 (Breyer, J., concurring). Rather than answering that follow-on question of impermissible removal explicitly (though raised and forcefully argued by the Solicitor General as an unconstitutional defect in the *Lucia* proceedings), the *Lucia*

Court demurred so this court and its sister circuits could address the issue first. *Id.* at 2050 n.1.

That question—whether administrative schemes imposing multilevel tenure protections for Officers of the United States are unconstitutional—is now before this Court. Although the issue reaches the very core of how our Republic is structured, the Court-appointed Amicus ("CAA") responds to the constitutional infirmities with an array of policy arguments favoring the status quo.

To resolve the controversy between these parties, however, the Court need only apply binding precedent. The Supreme Court has ruled that Officers of the United States may not enjoy more than one layer of for-cause removal protection. *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) ("*FEF*"). Hence, any remand to an administrative proceeding before a USDA ALJ and Judicial Officer is preordained to become a nullity. Such serial, to-be-vacated proceedings violate Petitioners' constitutional rights of due process and to only be tried before lawful, constitutional adjudicators.

Administrative agencies such as USDA operate outside the pathways of binding power established by the Constitution. USDA ALJs not only adjudicate but also engage in formal rulemaking and set prices.[1] USDA ALJs preside over and control rulemaking proceedings and the Secretary then bases the binding rules on

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[1] *See, e.g.*, 7 U.S.C. § 608(c)(3) & 5 U.S.C. §§ 553, 556-57.

the record established by the ALJ. Such rules were not adopted by Congress and yet ALJs have the power to enforce them in tribunals over which they preside that are not courts, while illegitimately insulated from removal under the Constitution.

For such pathways of power to have any legitimacy, they must be subject to regular, speedy and full judicial review. Indeed, this was long offered as a principal justification for administrative power. *See* Thomas W. Merrill, *Article III, Agency Adjudication and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 939, 981-82, 1002-03 (2011) (reasoning that the "administrative state might … be a good deal more coherent" if courts reviewed "whether the agency was acting within the scope of its jurisdiction"). If this court backs away from this foundation for the legitimacy of administrative adjudication, it will do so at the prohibitive cost of raising profound questions about whether such unreviewed administrative power means that this agency has slipped its moorings and freed itself of the last element of constitutionality restraining it.

USDA knows its ALJs are unconstitutional and asks this court to rewrite 5 U.S.C. §7521 to mean something other than what the statute itself says.[2] This Court must decline the invitation to act as a super-legislature rewriting statutes to the

[2] *See generally* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1262 (2014) (interpreting removal limits to allow for a wide degree of presidential control still "does not leave administration sufficiently within the President's control").

bidding of administrative agencies when that power is vested in Congress alone. Congress itself must make the policy decisions and statutory amendments to cure the constitutional infirmities.

ARGUMENT

I. This Court Has Authority to Consider the Constitutionality of ALJ Removal Protections

Federal courts, not an ALJ whose very authority to act is in question, must adjudicate this matter to preserve due process and to protect the structural integrity of our Constitution.[3] Petitioners are now before a court that, for the first time, can rule on their constitutional questions.

The question of whether this Court should consider the constitutionality of 5 U.S.C. §7521 is prudential rather than jurisdictional. Three compelling reasons support this Court's review. *First*, Petitioners raised the issue below.[4] *Second*, USDA argued below, and the Judicial Officer ruled, that the administrative process

[3] Petitioners exhausted "all administrative *procedures*" before bringing this appeal, as required by 7 U.S.C. §6912(e) (emphasis added), which mandates only that a party exhaust all procedural steps. A party's failure to raise every conceivable argument before an administrative body does not deprive this Court of its authority to consider those issues on appeal. *See FEF*, 561 U.S. at 489 ("The text [of the Sarbanes-Oxley Act] does not expressly limit the jurisdiction that other statutes confer.").

[4] Petitioners sufficiently preserved the issue by asking, "Does the ALJ and JO enforcement scheme adopted by the USDA contravene the Appointments Clause and the separation of powers doctrine?" JA-415-16.

was not the proper forum for Petitioners' structural constitutional challenges. And *third*, both prudence and due process dictate that this Court "should exercise [its] discretion to hear petitioners' challenge to the constitutional authority" of USDA ALJs. *Freytag v. C.I.R.*, 501 U.S. 868, 879 (1991).

Petitioners repeatedly preserved their contention that USDA ALJs sit in violation of the Appointments Clause. Removal is the flip side of appointment, as recognized by the controlling case law, scholars, and the Solicitor General's briefs *and* Justice Breyer's concurrence in *Lucia*. Since the Founding, the power to appoint Officers of the United States has been understood to "carr[y] with it the power of removal." *Myers v. U.S.*, 272 U.S. 52, 118-20 (1926) (quoting Roger Sherman, 1 Annals of Congress, 491); *see also FEF*, 561 U.S. at 509 ("[R]emoval is incident to the power of appointment[.]"). As such, the removal question arises automatically if—but only if—the Court decides that an individual is an officer and thus subject to the Appointments Clause. Moreover, the analysis of appointments and removal are inextricably intertwined: a decision relating to an officer's removability may impact whether he or she is a principal or inferior officer, as well as how the Court may remedy an Appointments Clause violation.

A refusal to consider Petitioners' removal argument would countenance a particularly cruel trick by the agency. *Cf. Stern v. Marshall*, 564 U.S. 462, 482 (2011) (reasoning that the preservation requirement is intended to prevent

"'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." (citation omitted)). The Government took the position below that such challenges "have nothing to do with the [Horse Protection Act ("HPA")] and should be decided by an Article III court rather than the agency. JA-243-47. The Judicial Officer agreed, ruling that "challenges to the constitutionality of [USDA's ALJs] and the administrative process should be raised in an appropriate United States Court of Appeals." JA-372. Here, Petitioners would be sandbagged if they are penalized now for not adequately raising an issue below that USDA told them they could not raise at all.

Finally, this Court should exercise its discretion to answer the removal question. The Supreme Court deems it prudent to address "structural principles embodied in the Appointments Clause" even when a party fails to raise the challenge below (and even consents to the ALJ's assignment to the case). *Freytag*, 501 U.S. at 878; *see also Cirko v. Comm'r of Soc. Sec.*, 948 F.3d 148, 153 (3d Cir. 2020) ("[E]xhaustion is generally inappropriate where a claim serves to vindicate structural constitutional claims like Appointments Clause challenges, which implicate both individual constitutional rights and the structural imperative of separation of powers.") (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 536-37 (1962)). The Supreme Court recognizes the judiciary's "strong interest ... in maintaining the constitutional plan of separation of powers." *Freytag*, 501 U.S. at 878.

II. CONGRESS MAY NOT GRANT USDA ALJS MULTILEVEL TENURE PROTECTION

The Constitution separated the powers of government among the three branches: Legislative, Executive, and Judicial. Article I granted limited, enumerated powers to Congress; by contrast, Article II provides a general grant of executive power. *Myers*, 272 U.S. at 128.

As relevant here, Article II's Vesting Clause and Take Care Clause work in tandem to grant the President "the general administrative control of those executing the laws" and "the power of appointment and removal of executive officers." 272 U.S. at 163-64. But the Appointments Clause, Art. II, §2, grants Congress two checks on the Executive's appointment power. The President's appointments of principal officers are subject to the advice and consent of the Senate, Art. II, §2, (although the President's removal of those officers is not subject to Senate consent). *Myers*, 272 U.S. at 164. Additionally, Congress may vest the power to appoint inferior officers, "as they think proper, in the President alone, in the courts of law, or in the Heads of Departments." Art. II, §2. When Congress vests in Department Heads the appointment of inferior officers, "it is ordinarily the department head, rather than the President, who enjoys the power of removal." *FEF*, 561 U.S. at 493.

This construct reflects a careful balance, born of compromise, that recognizes the necessity that the Executive be accountable to the People for the actions of federal officers. Accordingly, Congress' checks on the President's power to appoint

and remove executive officers "are limitations to be strictly construed, and not to be extended by implication[.]" *Myers*, 272 U.S. at 163-64.

A. USDA ALJs Are Officers Subject to the Appointments Clause

A straightforward application of *Lucia* dictates that USDA ALJs are subject to the Appointments Clause as Officers of the United States. *See* 138 S. Ct. 2044. SEC ALJs, who hold positions similar to USDA ALJs, are officers and thus subject to the Appointments Clause because they conduct trials, administer oaths, rule on the admissibility of evidence, and "issue decisions containing factual findings, legal conclusions, and appropriate remedies." *Id.* at 2053. An SEC ALJ's decision becomes final and is considered the Commission's decision whenever the Commission declines review of the ALJ's decision. *Id.* at 2054.

Similarly, USDA ALJs, "[r]ule upon motions and requests;" "[s]et the time, place, and manner of a … hearing[;]" "[a]dminister oaths and affirmations;" "[i]ssue subpoenas[;]" "[s]ummon and examine witnesses and receive evidence at the hearing[;]" "[t]ake or order the taking of depositions[;]" "[a]dmit or exclude evidence;" "[h]ear oral argument on facts or law;" and "exclu[de] contumacious counsel or other persons[.]" 7 C.F.R. §1.144.

Further, 15 U.S.C. §1825(b)-(c) authorizes USDA ALJs to levy fines and even disqualify parties from the industry of horse shows and auctions. *Cf. Intercollegiate Broadcasting Sys., Inc. v. Copyright Review Bd.*, 684 F.3d 1332, 1338 (D.C. Cir.

2012) ("[R]ates can obviously mean life or death for firms and even industries."). And like SEC ALJs (who possess "last-word capacity," *Lucia*, 138 S. Ct. at 2054), decisions by USDA ALJs become final without the review of a principal officer within USDA. *See* 7 U.S.C. §2204-2; C.F.R. §§2.35. If this were not enough to elevate USDA ALJs to officer status (and it is), USDA ALJs also exercise authority in the policy-making realm, where they preside over rulemaking proceedings that create the record for the Secretary's rulemaking decisions. 7 C.F.R. §1.815. This Court can conclude comfortably that USDA ALJs are Officers of the United States.

B. Congress Cannot Limit USDA ALJs' Removal with Multiple Levels of Tenure Protection

The Supreme Court has already instructed how to determine the constitutionality of limitations on the Executive's authority to remove an officer. *FEF*, 561 U.S. at 484. *FEF* forbids more than a single layer of tenure protection for officers of the United States:

> We deal with the unusual situation, never before addressed by the Court, of two layers of for-cause tenure. […] [T]wo layers are not the same as one. […] While we have sustained in certain cases limits on the President's removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President's authority in this way.

561 U.S. at 492, 501, 514 (internal citations omitted).

Contrary to CAA's suggestion, courts should not ignore Congress' encroachment on executive power simply because it does not appear to be a

"congressional power grab" or "self-aggrandizement." CAA 20. The multilevel-tenure protections at issue in this case injure Americans in at least two ways. *First*, the scheme knocks off kilter the careful balance constructed by the Framers. That balance, not merely the enumerated inter-branch checks on the power of each branch, is "the foundation of a structure of government that [] protect[s] liberty." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). Because "'power abhors a vacuum,' [] one branch's handicap is another's strength." *FEF*, 561 U.S. at 500 (quoting *FEF*, 537 F.3d 667, 695 n.4 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)). This remains true regardless of whether the Legislature retains the power it arrogates from the Executive. The Legislature simply "must not 'impair another [Branch] in the performance of its constitutional duties." *Id.* (citation omitted). Any legislative attempt to weaken the Executive by "reduc[ing] the Chief Magistrate to a cajoler-in-chief," *id.* at 502, leaves the tri-branch power structure unbalanced and strips safeguards that protect the liberty of the people.

Second, the scheme also jeopardizes the "dependence on the people" on which our Government relies. *FEF*, 561 U.S. at 501 (quoting The Federalist No. 51, at 349 (J. Madison) (J. Cooke ed. 1961)). When Congress diffuses the Executive's power among 'independent' officers across multiple agencies, "[w]ithout a clear and effective chain of command, the public cannot 'determine on whom the blame ... ought really to fall.'" *Id.* at 497 (quoting The Federalist No. 70, at 476 (A.

Hamilton)). This result is particularly pernicious and of wide effect given that citizens are ten times more likely to encounter the government through agency adjudications than in federal court. Jonathan Turley, *The Rise of the Fourth Branch of Government*, THE WASHINGTON POST (May 24, 2013). Multilevel-tenure protection prevents the Executive from holding its officers accountable and, in turn, prevents the People from holding the Executive accountable for its officers.

In defending this unconstitutional scheme, the Government's brief makes the shocking assertion that political accountability is taken care of because the Secretary may "at any time prior to [the] issuance of a decision by the Judicial Officer, instruct the Judicial Officer regarding the disposition of" any adjudicatory proceeding. Resp't 27. This profoundly disturbing admission violates agency rules, 7 C.F.R. §1.151(b) (prohibiting *ex parte* communication), and violates due process, raising glaring fairness concerns—which were the animating principle of the APA reforms. *See Ramspeck*, 345 U.S. at 132. Such brazen defiance of its own rules and of Congress' goal of making agency ALJs less biased in favor of the agency, argues powerfully that only Congress can fix this mess.

This damage to the Constitution refutes CAA's insistence that protecting the status quo is judicially-minimalist. Departing from Congress' "historical" and "provably workable" standard, CAA warns, would be an "unprecedented judicial leap." CAA 1. But the opposite is true. Maintaining the status quo would not only

violate our Constitution, but doing so would require this Court to depart from binding precedent in favor of a newly crafted, loosely defined standard based on some unknown equation that requires judges to decipher the precise percent of adjudications that comprise an officer's executive actions. How many adjudications are enough? CAA does not say—perhaps because there is no basis in the text or history of the Constitution for such a test. *Cf. Myers*, 272 U.S. at 134 (rejecting the premise that the Constitution permits distinguishing between the removal of an executive officer engaged in political duties rather than his or her normal duties).

CAA warns of "staggering" consequences in the world of administrative-law judging. The constitutional requirements under Article II apply only to ALJs who impose legal obligations—not ALJs, such as those in the SSA who dispense benefits. One scholar shows that only 257 ALJs operate outside the SSA,[5] and even then, some of those may not issue binding adjudications and penalties, making the universe of ALJs to which this concern applies even smaller.[6]

CAA's brief is replete with references to "longstanding" "historic" practice to argue in favor of retaining the status quo. Numerous Supreme Court cases, including

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[5] William Funk, *Slip-Slidin' Away—The Erosion of APA Adjudication*, 122 PENN. ST. L. REV. 141, 142 (2017).

[6] *See also Cirko*, 948 F.3d at 159, in which the Third Circuit dispenses with a similar floodgates argument for requiring SSA ALJs to be properly appointed: "But we deal in facts, not hyperbole, and, on inspection, the purported flood is actually a trickle."

Myers, at 272 U.S. at 174-76, recognize that longstanding practice does not make an unconstitutional scheme constitutional—and indeed calls for "sharpened rather than blunted" judicial attention. *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983); *see also Fairbank v. United States*, 181 U.S. 283, 309-11 (1901) ("When the meaning and scope of a constitutional provision are clear it cannot be overthrown by legislative action, although several times repeated and never before challenged.").

III. Removing USDA ALJs' Tenure Protection Does Not Resolve the Constitutional Infirmities in the Adjudicatory Scheme

Severing statutes conferring tenure protection implicates many policy considerations. As a policy matter, Congress may prefer to insulate from political influence the decisions of USDA ALJs by retaining their for-cause removal protection. This would be consistent with a prior iteration of the current scheme, in place from 1946 until 1979, when ALJs had tenure protection but the Civil Service Commission did not. Pets. Supp. 36. Or Congress may prefer that members of the Merit Systems Protection Board ("MSPB") retain for-cause removal protection. Alternatively, Congress could vest supervision and removal authority of in the Secretary of Agriculture who, as the Head of a Department, is already removable at will.

NCLA is agnostic as to which policy Congress should prefer. But this Court is not positioned to determine how Congress would wish to proceed following a determination that the current scheme is unconstitutional. *Bowsher*, 478 U.S. at 734-

35 (reasoning against the Court's severing an unconstitutional provision that "would require th[e] Court to undertake a weighing of the importance Congress attached to the removal provisions in … [two different Acts]."). Severance or "blue lining" a statute is also beyond the judicial office, *see Murphy v. NCAA*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring).

Resolving this case is more difficult than in *Intercollegiate*, *FEF*, or *Lucia*. Severance of provisions in a multipartite statutory scheme, enacted piecemeal over 80 years, would "significantly alter" the offices and may require additional legislation to be constitutional. *Bowsher*, 478 U.S. at 734. An attempt to save the administrative scheme by severing a portion of 5 U.S.C. §7521 implicates other constitutional concerns and affects the rights of parties not before this Court.

A. A Principal Officer Within the USDA Must Adequately Supervise the Department's Inferior Officers

Simply making USDA ALJs removable at will by MSPB is unlikely to render the scheme constitutional because USDA ALJs are not adequately supervised by a principal officer within USDA. This importantly distinguishes USDA ALJs from the SEC ALJs in *Lucia*: SEC Commissioners review decisions by SEC ALJs, 15 U.S.C. §78d-1, but only a designee of the Secretary of Agriculture (the Judicial Officer) reviews decisions by USDA ALJs. 7 U.S.C. §2204-2. A lack of intra-departmental supervision is relevant to whether an officer is a principal or inferior officer. If no principal officer within USDA reviews USDA ALJs' decisions, any

direction or supervision over their decision-making is, by design, "likely to be quite faint." *Intercollegiate*, 684 F.3d at 1339. Inferior officers must be "*directed and supervised* at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond v. U.S.*, 520 U.S. 651, 663 (1997) (emphasis added).

In determining inferiority, there is a tradeoff between a principal officer supervising a subordinate officer's decisions and the Executive's (or principal officer's) ability to control the inferior officer—the less supervision the Executive, through its principal officers, has over an officer, the more stringent the necessity that the officer be removable at will. *FEF*, 561 U.S. at 510 (reasoning that the looming threat of removal at will is a "powerful" way that the President and principal officers can control inferior officers who enjoy broad discretion). An officer who is not removable at will and who is not closely supervised is not sufficiently "inferior" to any principal. *Intercollegiate*, 684 F.3d at 1339.

This Court has made clear that principal-officer status would apply to a quasi-judicial officer who enjoys tenure protection and broad discretion in rendering decisions that are not subject to review by a principal officer within the Executive Branch. *Intercollegiate*, 684 F.3d at 1338-40. The Copyright Royalty Judges ("CRJs") at issue in *Intercollegiate* had significant authority to issue ratemaking decisions with "considerable consequences" on affected parties. 684 F.3d at 1337.

Although the Librarian of Congress and its subordinate (the Register of Copyrights) could supervise CRJs in some respects, the supervision left the CRJs with "vast discretion" to set rates and terms—a power that could "mean life or death for firms and even industries." *Id.* at 1338-39. The Court concluded that the Librarian of Congress' limited supervision of CRJs "f[e]ll short of the kind that would render the CRJs inferior officers." *Id.*

Much like CRJs, USDA ALJs have broad discretion to issue decisions that are not subject to review by a principal officer within the Department.[7] *See* 7 U.S.C. §2204-3 (vesting final decision-making authority in the Judicial Officer). In this case, however, 5 U.S.C. §7521 limits USDA's authority to remove except "for good cause" as determined by MSPB. Even then, the threat of removal would come from MSPB, an agency independent from the President's control and tasked with insulating ALJs from Department control.

This diffusion of responsibility highlights a serious concern about the interplay between *Edmond* and *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935). The Court in *Humphrey's Executor* justified tenure protection for principal officers

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[7] Despite "assurances" by USDA and the Judicial Officer in this case that the Secretary willingly directs the outcome of ongoing cases through *ex parte* communications, JA-324, 349, this intervention is not authorized by statute and violates the due process of law. *See Myers*, 272 U.S. at 135 (explaining that due process prohibits the President from influencing a quasi-judicial officer's decision in a particular case; the President must instead wait until after the decision is rendered to evaluate the subordinate officer's decision).

in "quasi legislative or quasi judicial agencies" if Congress intended such an agency to exist independently of executive control. *Id.* at 629-30; *see also Wiener v. U.S.*, 357 U.S. 349, 353 (1958). Consistent with *Humphrey's Executor*, the MSPB can, in a vacuum, enjoy tenure protection against removal. But when Congress wrests from the Head of a Cabinet Department the ability to remove an officer within that Department, it must ensure that the Department retains other means to sufficiently supervise that officer. *Intercollegiate*, 684 F.3d at 1339. Otherwise the type of diagonal supervision by an 'independent' Department over proper Cabinet Officers moves a step beyond *Humphrey's Executor* and runs afoul of the logic of *Edmond* and its progeny. Given that a principal officer within USDA does not review USDA ALJ decisions, the authority to remove USDA ALJs should likely be vested vertically—within USDA—rather than diagonally with MSPB. Simply severing the for-cause removal protections of USDA ALJs does not, therefore, resolve the constitutional infirmity as it did in *Intercollegiate*.

B. Severance Is Not the Answer

The question of 5 U.S.C. §7521's constitutionality in this case arises from how that statute interacts with other statutes relevant to the authority that USDA ALJs exercise. 561 U.S. at 506-07. Section 7521, however, applies to a variety of ALJs—not only those in USDA. Because the status of ALJs in other agencies (the Social Security Administration, for instance) is not at issue in this case, whether

5 U.S.C. §7521 is unconstitutional as applied to those ALJs is also not before this Court. Excising a portion of 5 U.S.C. §7521 to resolve the case could have a significant (and possibly unnecessary) impact on other federal agencies not before the Court. *Cf. FEF*, 561 U.S. at 508 (severing removal protections that applied only to PCAOB). Given that "many civil servants ... would not qualify as "Officers of the United States," the Supreme Court has "discourage[d] general pronouncements on matters" not at issue in the case. *FEF*, 561 U.S. at 506; *see also Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring) ("[T]he severability doctrine often requires courts to weigh in on statutory provisions that no party has standing to challenge, bringing courts dangerously close to issuing advisory opinions."). To either sever the tenure protection of USDA ALJs or vest the for-cause removal determination in the Secretary of Agriculture rather than MSPB would require re-writing Congress's scheme rather than just declaring a portion unconstitutional.

Resolving the matrix of constitutional infirmities in the broader scheme of administrative adjudications is not required to dispose of the present controversy. This Court should only decide the case before it and leave the remedy to Congress.

CONCLUSION

For the foregoing reasons, the Petitioners should prevail in this action.

Respectfully,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman font, a plain, roman style.

I further certify that this brief complies with the type-volume limitations set out in this Court's Order on December 6, 2019, which limited Amicus Curiae Briefs to 4,550 words. This brief contains 4,550 words.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this Amicus Curiae Brief with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on March 5, 2020. NCLA also filed paper copies of the brief with the Court as required by Court Rules. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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