No. 20-2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

K & R CONTRACTORS, LLC,
Petitioner,

v.

MICHAEL D. KEENE, and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for Review of a Final Order of the Benefits Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT

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BRIEF FOR THE FEDERAL RESPONDENT

This appeal concerns retired miner Michael D. Keene's claim for benefits under the Black Lung Benefits Act ("BLBA"), 30 U.S.C. §§ 901-44. Administrative Law Judge ("ALJ") William Barto held a hearing on Mr. Keene's claim, but subsequently became unavailable. The case was then reassigned to ALJ Francine Applewhite, who issued a decision finding Mr. Keene entitled to benefits and finding K & R Contractors, LLC ("K & R") liable to pay those benefits. The

Benefits Review Board affirmed. K & R does not contest ALJ Applewhite's entitlement or liability findings. Rather, K & R's sole argument on appeal is that ALJ Barto and ALJ Applewhite's appointments and removal protections are invalid under the Appointments Clause. The Director, Office of Workers' Compensation Programs ("OWCP"), United States Department of Labor ("DOL") responds: Both ALJs were properly appointed by the Secretary of Labor when they presided over Mr. Keene's BLBA claim, and their removal protections are not unconstitutional when interpreted in accordance with the canon of constitutional avoidance. Thus, the Court should deny K & R's petition for review.

STATEMENT OF JURISDICTION

This Court has both appellate and subject matter jurisdiction over K & R's petition for review under 33 U.S.C. § 921(c).[1] ALJ Applewhite issued a final decision on January 29, 2019. Joint Appendix ("J.A.") 24. K & R filed a timely notice of appeal with the Benefits Review Board on February 12, 2019. J.A. 43-45; 33 U.S.C. § 921(a). Thus, the Board had jurisdiction to review the ALJ's decision under 33 U.S.C. § 921(b)(3). The Board issued its decision on April 23, 2020. J.A. 84. K & R filed a timely motion for reconsideration on May 12, 2020.

[1] The BLBA incorporates various sections of the Longshore Act and Harbor Workers' Compensation Act, including § 21, 33 U.S.C. § 921. 30 U.S.C. § 932(a).

J.A. 93-100; 20 C.F.R. § 802.407(a). The Board denied the motion on August 31, 2020. J.A. 101. This Court received K & R's petition for review on September 22, 2020, within sixty days of the Board's August 31, 2020 order. 33 U.S.C. § 921(c); 20 C.F.R. § 802.406; Fed. R. App. 25(a)(2)(A)(i). Moreover, the "injury" contemplated by 33 U.S.C. § 921(c)—Mr. Keene's exposure to coal mine dust—occurred in Virginia, within this Court's territorial jurisdiction. J.A. 12.

STATEMENT OF THE ISSUES

1. Was ALJ Barto's appointment properly ratified by the Secretary of Labor, where the Secretary had the authority to appoint him, had knowledge of all the material facts, and made a detached and considered judgment?

2. Was ALJ Applewhite properly appointed when the Secretary of Labor openly and unequivocally signed a letter appointing her?

3. 5 U.S.C. § 7521 provides that an ALJ may be removed by the employing agency "only for good cause established and determined by the Merit Systems Protection Board," whose members are themselves removable by the President "only for inefficiency, neglect of duty, or malfeasance in office," *id.* § 1202(d). K & R argues that § 7521 is unconstitutional, but the case law it cites simply does not apply to DOL ALJs like ALJs Barto and Applewhite. Has K & R shown that it is impossible to reasonably interpret § 7521 in a constitutionally sound manner, as required to invalidate an act of Congress?

STATEMENT OF THE CASE

I. Legal background

A. Constitutional provisions

The Appointments Clause provides that Congress may authorize inferior officers to be appointed by "the President," the "Courts of Law," and the "Heads of Departments." U.S. Const. art. II, § 2, cl. 2. Appointments are "evidenced by an open and unequivocal act." *Marbury v. Madison*, 5 U.S. 137, 157 (1803). If an agency's action is found to be invalid due to a failure to comply with the Appointments Clause, the action can be made valid by the proper decision-maker later ratifying the action. *See, e.g.*, *Moose Jooce v. FDA*, 981 F.3d 26, 28-30 (D.C. Cir. 2020); *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 212-14 (D.C. Cir. 1998), *superseded by statute on other grounds*, Federal Vacancies Reform Act of 1998, Pub. L. No. 105-277, 122 Stat. 2681 (1998); *see also, e.g.*, *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (Recess Appointments Clause case); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 602-03 (3d Cir. 2016) (same); *CFPB v. Gordon*, 819 F.3d 1179 (9th Cir. 2016) (same).

By vesting in the President "[t]he executive Power" of the United States, U.S. Const. art. II, § 1, cl. 1, and charging him with the duty to "take Care that the Laws be faithfully executed," *id.* § 3, Article II of the Constitution "confers on the

President 'the general administrative control of those executing the laws,'" including the power to remove officers. *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (quoting *Myers v. United States*, 272 U.S. 52, 164 (1926)).

B. Administrative Procedure Act and Black Lung Benefits Act

The ALJ position was created by the Administrative Procedure Act ("APA"). 5 U.S.C. § 556(b)(3). Each agency appoints as many ALJs as necessary to conduct APA hearings. *Id.* § 3105. An ALJ may be removed by the employing agency "only for good cause established and determined by the Merit Systems Protection Board." *Id.* § 7521(a). The MSPB's members are themselves removable by the President "only for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 1202(d).

Black lung benefits hearings are conducted in accordance with the APA, by ALJs appointed under 5 U.S.C. § 3105. 33 U.S.C. § 919(d) as incorporated by 30 U.S.C. § 932(a); 20 C.F.R. § 725.452(a).

II. Relevant facts

A. DOL appointment of ALJs[2]

Before *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Office of Personnel Management (OPM) conducted a competitive examination and ranking process to identify entry-level ALJ candidates. Agencies could then select from the top-ranked candidates. *See* 5 C.F.R. § 930.201(e). Alternatively, an agency could use various methods to hire experienced ALJs, including by arranging for an ALJ's transfer from another agency. *See id.* § 930.204(h). ALJ Barto, who was originally an ALJ at the Social Security Administration, transferred to DOL as an ALJ in 2016. *See* Barto Resume.[3] DOL's hiring of ALJ Barto was effectuated without a direct Secretarial appointment.

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[2] Most of the documents regarding DOL ALJs' appointments on which the parties and the Board have relied are publicly available on DOL's website. *See* https://www.dol.gov/agencies/oalj/topics/information/Proactive_disclosures_ALJ_appointments. For ease of reference, direct links to specific documents cited in this section are provided in the footnotes.

[3] *Available at* https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Attachment_to_Memorandum_on_Ratification_of_Administrative_Law_Judges_(Dec_20_2017).pdf.

Before *Lucia*, OPM classified ALJs within the "competitive service" due in part to the competitive selection process through which entry-level ALJs are selected. 5 C.F.R. § 930.201(b).[4] However, the *removal* of ALJs was (and still is) specifically governed by 5 U.S.C. § 7521, which does not distinguish between ALJs in the competitive or excepted service.[5]

DOL's ALJ appointment process changed starting in 2017, while *Lucia* was pending before the Supreme Court. On December 20, 2017, DOL's Chief ALJ recommended to the Secretary of Labor that he ratify the appointments of incumbent DOL ALJs in light of the *Lucia* litigation. The memorandum recommending ratification attached the ALJs' resumes and "draft letters of

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[4] Besides referring to the competitive examination process, classification in the competitive service affects other aspects of employment such as eligibility for reinstatement, transfer, promotion, reassignment, or demotion to other competitive service jobs (including non-ALJ jobs) without having to go through another competitive examination. 5 C.F.R. §§ 212.101, 212.301, 212.401.

[5] In contrast to 5 U.S.C. § 7521, under which ALJs can only be removed for good cause and after an opportunity for a hearing, most other federal employees can be removed "for such cause as will promote the efficiency of the service" after being given thirty days' advance written notice and at least seven days to respond. 5 U.S.C. § 7513. Also unlike § 7521, § 7513 expressly covers employees in the competitive service or excepted service, with some exceptions. *Id.* § 7511.

appointment." Memorandum for the Secretary at 1 (Dec. 20, 2017).[6] The memorandum included a page to document the Secretary's decision, with spaces for the Secretary to indicate whether he approved the recommendation to ratify the appointments or wanted to discuss it. The Secretary approved the recommendation. *Id.* at 2. The next day, the Secretary issued signed letters ratifying the appointments of ALJ Barto and the other incumbents. Barto Ratification Letter (Dec. 21, 2017).[7]

DOL also adopted new interim procedures for appointing new ALJs. DOL posted a job vacancy announcement in April-May 2018, seeking applications from individuals with prior experience as ALJs for ALJ positions at the AL-3 pay level.

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[6] *Available at* https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Memorandum_on_Ratification_of_Appointment_of_USDOL_ALJs_(Dec_20_2017).pdf.

[7] *Available at* https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Secretarys_Ratification_of_ALJ_Appointments_12_21_2017.pdf.

Memorandum for the Secretary at 1 (Sept. 12, 2018)[8]; Job Vacancy Announcement (April-May 2018) (Attachment A to Dir.'s Mot. for Leave to File Supp. Material, Feb. 4, 2021);[9] *see also* 5 U.S.C. § 5372 (describing pay levels for ALJs). DOL received forty-two applications, including one from ALJ Applewhite, who was then working at the Social Security Administration. Applewhite Resume.[10] Pursuant to the interim hiring procedures, four high-level DOL officials interviewed the candidates and recommended eleven of them (including ALJ Applewhite) to the Secretary. The recommendation memorandum attached the candidates' resumes and reminded the Secretary that it was his "prerogative to select some, none or all of these individuals." *Id.* at 1-2. The decision page for

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[8] *Available at* https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Secretarys_Decision_Appointment_of_ALJs_09_12_2018_posted_Redacted.pdf.

[9] As indicated, contemporaneous with the filing of this response brief, the Director has filed a motion requesting permission to attach this document and one other to the brief as supplemental material.

[10] *Available at* http://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Resumes_Alford_thru_Wang_posted_Redacted.pdf.

this memo included spaces for the Secretary to indicate whether he approved, disapproved, or wanted to discuss the recommended course of action. The Secretary decided to appoint the recommended candidates, including ALJ Applewhite, as ALJs at DOL. *Id.* at 4. He accordingly issued an appointment letter for each on September 12, 2018, to be effective upon transfer to DOL. *See* Applewhite Appointment Letter (Sept. 12, 2018).[11] Thus, ALJ Applewhite's appointment became effective on October 28, 2018, her start date at DOL. *See* J.A. 25. Upon being appointed as a DOL ALJ, ALJ Applewhite was placed in the excepted service as a Schedule E employee, consistent with recently-issued Executive Order 13,843. *See* Job Vacancy Announcement at 1 (April-May 2018) (advertising for ALJs at "AL 03" pay level); DOL AL-3 Position Description at 1 (Aug. 30, 2018) (Attachment B to Dir.'s Mot. for Leave to File Supp. Material, Feb. 4, 2021) (explaining in box 2 that the position description was "adjusted for Schedule E Appointments" and marking "Excepted" in box 10 to indicate position status).

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[11] *Available at* https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Appointment_Letters_Alford_thru_Wang_09_12_2018_posted_Redacted.pdf.

In the meantime, *Lucia* was decided in June 2018. 138 S. Ct. 2044. A month later, the President issued Executive Order 13,843, discontinuing the OPM examination process for entry-level ALJs and directing OPM to classify all new ALJs in a new category of the excepted service, Schedule E. Exec. Order No. 13,843 §§ 1, 2, 3(iv), 83 Fed. Reg. 32,755, 32,755-57 (July 13, 2018); *see also* OPM, Memorandum for Heads of Executive Departments and Agencies at 1-2 (July 10, 2018) ("OPM Memorandum").[12] The Executive Order specified, however, that ALJs currently in the competitive service would remain in the competitive service as long as they remained in their current positions. Exec. Order No. 13,843 § 3(iii), 83 Fed. Reg. at 32,757. Also, while the Executive Order changed the hiring process for ALJs going forward, it did not change the ALJs' removal protections under 5 U.S.C. § 7521. OPM's memorandum regarding the Executive Order accordingly explicitly recognized that 5 U.S.C. § 7521 continues

[12] *Available at* https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/OPM_Memo_on_Executive_Order_Excepting_Administrative_Law_Judges_from_the_Competitive_Service_(July_10_2018).pdf.

to apply to ALJs regardless of whether the ALJ is in the competitive or excepted service. OPM Memorandum at 3.[13]

In response to the Executive Order, the Secretary issued an Order on August 30, 2018, finalizing permanent procedures for selecting ALJs at DOL. Secretary's Order 07-2018, Procedures for Appointment of Administrative Law Judges for the Department of Labor, 83 Fed. Reg. 44,307 (Aug. 30, 2018). The final procedures were largely consistent with the interim process used to appoint ALJ Applewhite. On the same day, DOL modified the position description for ALJs at the AL-3 level (the level to which ALJ Applewhite was appointed when she started at DOL two months later) to indicate that they would be in the excepted service. DOL AL-3 Position Description (Aug. 30, 2018).

B. Mr. Keene's BLBA claim

Michael Keene worked in coal mines for over 34 years, the last three years for K & R. Due to his many years of coal mine dust exposure, he is totally disabled due to pneumoconiosis (black lung disease). J.A. 28-29, 38. Mr. Keene filed his claim for BLBA benefits with an OWCP district director on February 28,

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[13] The Executive Order amended 5 C.F.R. § 6.4 to state that the Civil Service Rules and Regulations would not apply to removals from positions listed in Schedule E (i.e., to ALJs), but the regulation retained the same qualification—"[e]xcept as required by statute." Exec. Order No. 13,843 § 3(iii), 83 Fed. Reg. at 32,757; 5 C.F.R. § 6.4 (2020). Thus, 5 U.S.C. § 7521 still applies to ALJ removals.

2017. The district director awarded benefits and found K & R responsible for paying them. At K & R's request, the case was transmitted on February 9, 2018, to DOL's Office of Administrative Law Judges for a hearing. J.A. 25.

On June 28, 2018, ALJ Barto issued a notice scheduling a hearing on August 28, 2018. *See* J.A. 25. Although the Secretary had ratified ALJ Barto's appointment back in December 2017, K & R nonetheless filed a motion arguing that DOL ALJs were improperly appointed under the Appointments Clause and seeking reassignment to a properly appointed ALJ. J.A. 7-10. ALJ Barto denied K & R's motion at the August 28, 2018 hearing, on the ground that the Secretary had previously reappointed him and that he had not taken any "substantial action" in the case before then. J.A. 12.

On January 17, 2019, ALJ Applewhite notified the parties that Mr. Keene's case had been reassigned to her. J.A. 15.[14] In a motion dated January 29, 2019, K & R argued that all current DOL ALJs' appointments, including ALJ

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[14] Earlier in January 2019, the Secretary appointed ALJ Barto as chair of the Administrative Review Board, an administrative tribunal within the Department that issues final agency decisions in cases involving "a wide range of employee protection laws" (but not black lung claims like this one). Press Release, U.S. Dep't of Labor, U.S. Department of Labor Announces Appointments to the Administrative Review Board (Jan. 8, 2019), *available at* https://www.dol.gov/newsroom/releases/osec/osec20190108. As a result, ALJ Barto was no longer available to hear Mr. Keene's claim.

Applewhite's, violated the Appointments Clause and requested that the claim be held in abeyance or that K & R be dismissed from the case. J.A. 17-21. Also on January 29, 2019, ALJ Applewhite issued a Decision and Order awarding benefits to Mr. Keene and finding K & R liable for those benefits. J.A. 24-42. Regarding the Appointments Clause, she noted that she was appointed by the Secretary of Labor on October 28, 2018 (her start date), prior to issuing her decision. J.A. 25.

K & R appealed to the Benefits Review Board, arguing that the decision below should be overturned because both ALJ Barto's and ALJ Applewhite's appointments and removal protections violated the Appointments Clause. J.A. 43-50, 56-63. The Board rejected these arguments and affirmed. The Board held that the Secretary properly ratified ALJ Barto's appointment and properly appointed ALJ Applewhite in the first instance. J.A. 85-89. The Board declined to address the removal issue because K & R failed to adequately brief the issue. In so holding, the Board specifically noted that K & R failed to adequately explain how *Free Enterprise Fund* and *Lucia*—the two cases K & R cited—supported its removal argument. J.A. 89-30 & n.10.

K & R filed a motion for reconsideration, which the Board denied. J.A. 94-101. K & R then appealed to this Court. J.A. 102-04.

STANDARD OF REVIEW

K & R's Appointments Clause arguments are subject to de novo review. *United States v. Smith*, 962 F.3d 755, 762 (4th Cir. 2020); *see also Harman Min. Co. v. Dir., OWCP*, 678 F.3d 305, 310 (4th Cir. 2012) ("We review the legal conclusions of the Board and the ALJ de novo.").

SUMMARY OF ARGUMENT

The Court should reject K & R's challenges to ALJ Barto's and ALJ Applewhite's appointments. ALJ Barto was properly appointed by the time Mr. Keene's BLBA claim was assigned to him in 2018 because the Secretary's December 2017 ratification of his appointment cured any defect in the original appointment. Courts have held that ratification can cure invalid appointments in situations like this one, where the Secretary had the authority to appoint ALJs at the time of ratification, he knew all the material facts, and he made a detached and considered judgment. Under the presumption of regularity, it is K & R's burden to show that ratification was ineffective, and it has not done so.

ALJ Applewhite was also properly appointed before she was assigned Mr. Keene's claim in 2019. The Secretary openly and unequivocally signed a letter appointing her as a DOL ALJ in 2018. That she initially became an ALJ at another agency through OPM's competitive examination process is irrelevant because she

was later properly appointed to a wholly different position as a DOL ALJ under a different, constitutional process.

The Court should also reject K & R's challenge to the ALJs' removal protections under 5 U.S.C. § 7521. K & R has not raised a viable constitutional challenge to that statute. Under the canon of constitutional avoidance, K & R must show that § 7521 is incapable of being interpreted in a constitutionally-sound manner. But it has not done so. The cases it cites simply do not apply to DOL ALJs or are otherwise not controlling. Accordingly, this Court should summarily reject K & R's arguments against § 7521.

Regardless, § 7521 can be interpreted in a constitutionally sound manner. Under § 7521, an ALJ may be removed by the employing agency "only for good cause established and determined by" the MSPB, whose members are themselves removable by the President "only for inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. § 1202(d). The statute stays within constitutional bounds when "good cause" is broadly construed to permit the Department Head to remove an ALJ for misconduct, poor performance, or failure to follow lawful directions, and the MSPB's role is narrowly cabined to adjudicating whether factual evidence exists to support the employing agency's proffered, good-faith grounds for cause.

This construction of § 7521 would eliminate any Article II concerns that implicate the rights of private parties appearing before ALJs. Department Heads

would ultimately have the constitutionally necessary power to remove ALJs—officers entrusted with exercising a significant portion of the executive power—for certain types of misbehavior, although they still could not remove ALJs at will and would be somewhat constrained in the lawful directions that they could give ALJs. Such constraints, however, are consistent with the Supreme Court's longstanding conclusion that Article II permits some limits on executive control of inferior adjudicative officers, *see Myers*, 272 U.S. at 127, 135, while being far afield of the "unusually high" removal standard invalidated in *Free Enterprise Fund*, 561 U.S. at 502-03.

ARGUMENT

I. The Secretary of Labor properly ratified ALJ Barto's appointment.

Although ALJ Barto was not properly appointed when he began working for DOL in 2016, the Secretary properly ratified ALJ Barto's appointment on December 21, 2017. Thus, ALJ Barto was properly appointed when Mr. Keene's BLBA claim was assigned to him in 2018.

"Ratification occurs when a principal sanctions the prior actions of its purported agent." *Doolin*, 139 F.3d at 212. A valid ratification "operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally." *Marsh v. Fulton Cty.*, 77 U.S. 676, 684 (1870); *see also United States v. Heinszen & Co.*, 206 U.S. 370, 382 (1907). Courts have held that

ratification can cure the improper appointment of a government official where the ratifier: (1) had the authority to take the action to be ratified, at the time of ratification, (2) had "knowledge of all the material facts relating to the decision they are making"; and (3) made a "detached and considered judgment." *Advanced Disposal*, 820 F.3d at 602-03 (quoting *Bauman v. Eschallier*, 184 F. 710, 711 (3d Cir. 1911), and *Doolin*, 139 F.3d at 213); *see also Wilkes-Barre Hosp.*, 857 F.3d at 371. Under the presumption of regularity, an agency's ratification is presumed to be regular. The burden is on the challenger to prove the contrary. *Advanced Disposal*, 820 F.3d at 604; *see also United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.").

Here, the Secretary ratified an action taken by his staff—the appointment of ALJ Barto. The first requirement for ratification, regarding the Secretary's authority to appoint ALJs, is easily met. The Secretary had the authority to appoint ALJs both in 2016 when ALJ Barto first became a DOL ALJ and on December 21, 2017, when the Secretary ratified ALJ Barto's appointment. 5 U.S.C. § 3105 ("Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with [the APA]."); 20

C.F.R. § 725.452(a) (requiring BLBA hearings to be conducted by an ALJ and in accordance with the APA). K & R has not suggested otherwise.

The second element—knowledge of the material facts—is also met. The recommendation memo to the Secretary regarding ratification of ALJ appointments attached the ALJs' resumes and the Chief ALJ's assessment of their work. Memorandum to the Secretary at 1 (Dec. 20, 2017).[15] The recommendation memo discussed the pending litigation in *Lucia* and explicitly noted the government's position that SEC ALJs were inferior officers, not mere employees. *Id*. The memo accordingly recommended ratification of DOL ALJs' appointments in order "to address any claim that administrative proceedings . . . presided over by[] administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution." Barto Ratification Letter (Dec. 21, 2017).[16] Given these explicit references to *Lucia* and the Appointments Clause, K & R's assertion that the Secretary did not know the issues surrounding the previous

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[15] *Available at* https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Memorandum_on_Ratification_of_Appointment_of_USDOL_ALJs_(Dec_20_2017).pdf.

[16] *Available at* https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Secretarys_Ratification_of_ALJ_Appointments_12_21_2017.pdf.

ALJ selection process, Opening Br. ("OB") at 14, is baseless, and certainly does not overcome the presumption of regularity. *Chem. Found.*, 272 U.S. at 15 (presumption of regularity includes presumption that a government official acted with knowledge of the material facts).

Finally, the third element—a "detached and considered judgment"—is satisfied. The third requirement can be established through acts of express ratification, "in which the ratifier conduct[s] an independent evaluation of the merits." *Advanced Disposal*, 820 F.3d at 603 (quoting *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 117 (D.C. Cir. 2015)). In *Advanced Disposal*, the court found the second and third elements met because the NLRB expressly "confirm[ed], adopt[ed], and "ratif[ied]" its previous actions and "specifically considered the relevant supporting materials before reauthorizing" the selection of a regional director. 820 F.3d at 604 (alterations in original); *see also Wilkes-Barre Hosp.*, 857 F.3d at 371 (upholding the same ratification decision). Here, the Secretary's letter ratifying ALJ Barto's appointment similarly states that, "after due consideration," he "ratif[ied] the Department's prior appointment of

[ALJ Barto] as an Administrative Law Judge."[17] Moreover, the Secretary reviewed "the relevant supporting materials," namely, the ALJs' resumes, the Chief ALJ's evaluation of their work, and the Chief ALJ's explanation of the *Lucia* litigation and why the Secretary should ratify the ALJs' appointments. Memorandum to the Secretary at 1 (Dec. 20, 2017).[18] Finally, the decision page of the recommendation memorandum provided spaces for the Secretary to indicate whether he approved or wanted to discuss the matter further. *Id*. at 2. Evidencing his "detached and considered judgment," he chose to sign the approval line. *Id.* at 2.

K & R alleges that the Secretary "rubberstamped" the decision because the Secretary signed the recommendation memo on the same day it was sent to him. OB at 14-15. The Secretary's prompt action, rather than reflecting a lack of consideration, demonstrates the importance of the matter as well as the incumbent ALJs' qualifications. Regardless, courts generally do not inquire into an agency's

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[17] *Available at* https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Secretarys_Ratification_of_ALJ_Appointments_12_21_2017.pdf.

[18] *Available at* https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Memorandum_on_Ratification_of_Appointment_of_USDOL_ALJs_(Dec_20_2017).pdf.

internal deliberations regarding a ratification decision based on a mere allegation that it was rubberstamped. *See Fed. Election Comm'n v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996); *see also Gordon*, 819 F.3d at 1191 (agency ratification of prior decision can satisfy the Appointments Clause even if the ratifier's review is "nothing more than a 'rubberstamp'"). Moreover, K & R cites no legal authority for the nonsensical proposition that the ratifier must wait several days in order to prove detached and considered decision making.

K & R also contends more generally that ALJ Barto was initially appointed through a diffuse process and that an unlawful appointment cannot be ratified. OB at 13-14. But courts have held that ratification by the proper decision-maker can cure invalid appointments. *Wilkes-Barre Hosp.*, 857 F.3d at 371 (upholding NLRB's ratification of a regional director's appointment by an improperly-constituted NLRB); *Advanced Disposal*, 820 F.3d at 604 (same).

The legal authority that K & R relies on does not support its argument to the contrary. The first case it cites, *Hardin County v. Trunkline Gas Co.*, 330 F.2d 789, 791-92 (5th Cir. 1964), is about two Texas state constitutional provisions that prohibited the Texas legislature from authorizing payments by counties to private parties if the county's underlying contract was unlawful. *Hardin County* says nothing about the Appointments Clause in the U.S. Constitution or the ratification of federal officer appointments. In *United States v. L.A. Tucker Truck Lines, Inc.*,

344 U.S. 33 (1952), K & R's second case, the Supreme Court held that a trucking company forfeited its argument that an Interstate Commerce Commission hearing examiner was improperly appointed under the APA because the company failed to object during the administrative proceedings. *Id.* at 34-37. The Court further rejected the notion that the appointment defect was a jurisdictional defect that nullified the Commission order even without a timely objection. *Id.* at 38. *L.A. Tucker* does not address ratification at all.

Thus, the Court should reject K & R's arguments and affirm the Board's conclusion that the Secretary's ratification of ALJ Barto's appointment was effective.

II. The Secretary of Labor properly appointed ALJ Applewhite.

The Secretary also properly appointed ALJ Applewhite in 2018 before she was assigned Mr. Keene's BLBA claim in 2019. An appointment by the Secretary need only be "evidenced by an open, unequivocal act." *Marbury*, 5 U.S. at 157. Here, the Secretary signed a letter unequivocally appointing ALJ Applewhite "as an Administrative Law Judge in the U.S. Department of Labor, authorized to execute and fulfill the duties of that office according to law and regulation and to

hold all the powers and privileges pertaining to that office. U.S. Const. art. II § 2, cl. 2; 5 U.S.C. § 3105." Applewhite Appointment Letter (Sept. 12, 2018).[19]

K & R argues that ALJ Applewhite's appointment was defective because she allegedly remained in the competitive service after transferring to DOL. OB at 15-16. As a factual matter, ALJ Applewhite did not remain in the competitive service. She became part of the excepted service after she became an ALJ at DOL. Job Vacancy Announcement at 1 (April-May 2018); DOL AL-3 Position Description at 1 (Aug. 30, 2018).[20]

Nevertheless, even if ALJ Applewhite remained in the competitive service, K & R's arguments are unpersuasive because they are based on faulty assumptions

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[19] *Available at* https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Appointment_Letters_Alford_thru_Wang_09_12_2018_posted_Redacted.pdf.

[20] K & R incorrectly assumes that ALJ Applewhite remained in the competitive service because she "transferred" to DOL from another agency. OB at 11. Although the term "transfer" can connote moving from one competitive service job to another, *see* OPM Memorandum at 2, "transfer" can also mean simply moving from one agency to another, without regard to competitive/excepted service status, *see* 5 C.F.R. § 210.102 ("Transfer means a change of an employee, without a break in service of 1 full workday, from a position in one agency to a position in another agency."). *Cf. Carrow v. MSPB*, 564 F.3d 1359, 1361-64 (Fed. Cir. 2009) (holding that a federal employee lost his permanent, competitive service status when he was appointed to a temporary, excepted service job at another agency, even though some of his paperwork described the move as a "transfer").

about the competitive service and the Appointments Clause. For instance, K & R assumes that simply being in the competitive service violates the Appointments Clause. But its sole legal authority, Executive Order 13,843, does not support its position. *See* Exec. Order No. 13,843 § 1, 83 Fed. Reg. at 32,755. The Executive Order, while eliminating the competitive examination process and placing newly appointed ALJs in the excepted service going forward, specified that incumbent ALJs would remain in the competitive service as long as they stayed in their current positions. *Id.* § 3(iv), 83 Fed. Reg. at 32,757. The Executive Order therefore does not support K & R's proposition that remaining in the competitive service necessarily renders an ALJ's appointment unconstitutional.

To the extent that K & R believes that staying in the competitive service gives ALJs additional removal protections, that assumption is wrong. All ALJ removals are subject to the same "good cause" standard, 5 U.S.C. § 7521, regardless of whether the ALJ is in in the competitive or excepted service. (The § 7521 "good cause" standard itself is constitutional. *See infra* pp. 30-46.)

K & R also seems to assume that alleged defects in ALJ Applewhite's appointment to her previous job at the Social Security Administration have some sort of continuing effect on her current position, even though she was appointed anew as a DOL ALJ in 2018. However, K & R is challenging ALJ Applewhite's authority to decide a BLBA case, not a Social Security case. Whether she had that

authority depends on whether the Secretary of Labor properly appointed her, not on how she was appointed to a different position in a different agency.

Relatedly, to the extent K & R is suggesting that the pre-*Lucia* competitive service selection process—where ALJs were selected by agency staff after going through OPM's competitive examination process—was too diffuse, OB at 5-11, ALJ Applewhite was not appointed by DOL under that process. Furthermore, DOL's process for selecting and appointing ALJ Applewhite was not diffuse; the appointment buck clearly stopped with the Secretary.[21] *See supra* pp. 8-10 (detailing process, explaining that Secretary reviewed applicants' resumes, staff recommendations, and made ultimate decision); *Bandimere v. SEC*, 844 F.3d 1168, 1181 (10th Cir. 2016); *see also United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393-94 (1868) (defendant's appointment by the assistant treasurer, "with the approbation of the Secretary of the Treasury," was consistent with the Appointments Clause).

Accordingly, the Court should reject K & R's arguments and affirm the Board's conclusion that the Secretary validly appointed ALJ Applewhite.

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[21] If K & R is suggesting that the President or a Department Head must personally review every application and interview every candidate for every inferior officer position in the executive branch to satisfy the Appointments Clause, it has offered no legal authority for such an absurd suggestion.

III. 5 U.S.C. § 7521's removal protections do not deprive DOL ALJs of authority to adjudicate black lung claims.

A. K & R has not met its burden of demonstrating that § 7521 is incapable of being interpreted in a constitutionally sound manner.

In addition to challenging the way ALJ Barto and Applewhite were appointed, K & R also challenges their removal protections under 5 U.S.C. § 7521. K & R contends that § 7521 is unconstitutional because the Secretary of Labor must be able to remove DOL ALJs at will in order to satisfy the separation of powers doctrine and the Appointments Clause. OB at 17-20. This argument fails for the simple reason that K & R has not shown, as it must under the canon of constitutional avoidance, that § 7521 is incapable of being reasonably construed in a constitutionally sound manner.

When an act of Congress is challenged as unconstitutional, "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Moreover, congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.").

Here, K & R has not come close to showing that § 7521 cannot be reasonably interpreted to comply with the Constitution. K & R relies on *Free Enterprise Fund*, 561 U.S. 477, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), and *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *cert granted,* 141 S. Ct. 551 (2020), to make its case. OB at 17-19. But these decisions do not concern § 7521 and offer K & R no support.[22]

In *Free Enterprise Fund*, the Supreme Court held that Congress violated Article II of the Constitution by protecting members of the Public Company Accounting Oversight Board ("PCAOB") from removal. In doing so, however, the Court expressly noted that its holding did not address ALJs. 561 U.S. at 507 n.10. And it emphasized that it was not making a "general pronouncement[]" that "two levels of good-cause tenure" are *always* unconstitutional. *See id.* at 505-06. Significantly, *Free Enterprise Fund* also involved far more stringent removal criteria than those imposed by § 7521. *Compare id.* at 486, 496 (PCAOB member can only be removed for willful violation of Sarbanes-Oxley Act, the securities laws, or the PCAOB's rules; willful abuse of authority; or failure to enforce compliance with the statutes, rules, or PCAOB standards "without reasonable

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[22] K & R also cites Justice Breyer's concurring opinion in *Lucia*, OB at 18, but Justice Breyer's view was not adopted by the majority of the Court, which declined to address removal. 138 S. Ct. at 2050 n.1.

justification or excuse.") *with* 5 U.S.C. § 7521 (ALJs may be removed for good cause).

Seila Law likewise does not support K & R's argument. *Seila Law* addressed the removal protections of the Director of the Consumer Financial Protection Bureau ("CFPB"), a principal officer and sole Head of a Department, not an inferior officer like the ALJs at issue here. 140 S. Ct. at 2200-01. Moreover, the statutory grounds for the CFPB Director's removal were limited to "inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. § 5491(c)(3), which were narrower and textually distinct from the broad and general "good cause" language in 5 U.S.C. § 7521. *Seila Law* simply does not address ALJs, and accordingly does not help K & R here.

Arthrex offers no support for K & R's position either. That case involved Administrative Patent Judges (APJs) who were subject to a different removal statute, 5 U.S.C. § 7513. The Federal Circuit expressly noted that § 7521, the removal provision applicable to DOL ALJs, did not apply to APJs. 941 F.3d at 1333 n.4. Moreover, the court considered the APJ removal provision in the context of determining whether APJs were principal or inferior officers. *Id.* at

1328-35.[23] It did not address whether § 7513 was inherently unconstitutional. *Arthrex* certainly says nothing about whether § 7521 is constitutional, particularly as applied to inferior officers like ALJs.

K & R has therefore failed to make the required showing that there is no reasonable and constitutional way to interpret § 7521. The Court should summarily reject K & R's argument on that basis alone.

B. 5 U.S.C. § 7521 can—and constitutionally must—be construed to allow the Secretary broad authority to remove ALJs.

Alternatively, the Court should hold that § 7521 is constitutional by construing it to give the Secretary broad authority to remove ALJs and to limit the MSPB's role in reviewing such removals.

1. Under Article II, Department Heads accountable to the President must be able to remove inferior officers like ALJs for misconduct, poor performance, or failure to follow lawful directions.

The Constitution vests in the President alone "[t]he executive power" of the United States and obligates him to "take Care that the Laws be faithfully executed." U.S. Const., art. II, §§ 1, cl. 1, 3. As James Madison explained during the First Congress, "if any power whatsoever is in its nature Executive, it is the

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[23] The principal versus inferior officer question is pending review at the Supreme Court. *Arthrex*, 141 S. Ct. 551.

power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789) (Joseph Gales ed., 1834). Likewise, the Supreme Court has long recognized that, as "the President alone and unaided could not execute the laws," it is "essential" that his executive power include authority both in the "selection of administrative officers" *and* in "removing those for whom he cannot continue to be responsible." *Myers*, 272 U.S. at 117. The "power to oversee executive officers through removal" is a "traditional executive power," *Free Enterprise Fund*, 561 U.S. at 492, because "[o]nce an officer is appointed, it is only the authority that can remove him . . . that he must fear and, in the performance of his functions, obey," *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (quotation marks omitted).

The Constitution's vesting of executive power and responsibility in the President protects individual liberty through political accountability. "The Framers created a structure in which '[a] dependence on the people' would be the 'primary control on the government.'" *Free Enterprise Fund*, 561 U.S. at 501 (alteration in original) (citation omitted). As "[t]he people do not vote for the 'Officers of the United States,'" they must "look to the President to guide the 'assistants or deputies . . . subject to his superintendence.'" *Id.* at 497-98 (citation omitted). For "those who are employed in the execution of the law," it is thus imperative that "the chain of dependence be preserved; the lowest officers, the middle grade, and

the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Cong., at 499 (Madison). This "clear and effective chain of command" is necessary so that the people can "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." *Free Enterprise Fund*, 561 U.S. at 498 (citation and internal quotations omitted). Restricting the President's power to effectuate the removal of subordinate officers therefore creates the risk that the Executive Branch "may slip from the [Chief] Executive's control, and thus from that of the people." *Id.* at 499.

The Supreme Court has held that principal officers answering directly to the President generally must be removable at will by the President himself, with the sole exception of the heads of certain "quasi-legislative and quasi-judicial" independent agencies. *See id.* at 493, 513-14 (citing *Humphrey's Executor v. United States*, 295 U.S. 602, 627-29 (1935)). But as for non-Senate-confirmed "inferior" officers—subordinate officials "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate," *Edmond v. United States*, 520 U.S. 651, 663 (1997)—the Court has three times held that Congress may vest removal authority in a Department Head rather than the President personally, and may put limited restrictions on that authority that do not place such officers beyond adequate presidential control. *See Free Enterprise Fund*, 561 U.S. at 493-95.

First, in *United States v. Perkins*, 116 U.S. 483 (1886), the Court upheld a removal restriction that required the Secretary of the Navy to make a misconduct finding or convene a court-martial before removing a naval cadet-engineer during peacetime. *Id.* at 485. Notably, though, it was undisputed that the cadet there was discharged solely for want of a vacancy, not for any reason related to misbehavior. *Id.* at 483. The Court thus did not consider what sort of behavior would warrant removal under the terms of the statute and Article II. *Cf. Free Enterprise Fund*, 561 U.S. at 507 ("Military officers are broadly subject to Presidential control through the chain of command and through the President's powers as Commander in Chief.").

Second, in *Morrison v. Olson*, 487 U.S. 654 (1988), the Court upheld a statute that allowed the Attorney General to remove only for "good cause" an independent counsel appointed to investigate and prosecute serious crimes committed by certain high-ranking executive officers. *Id.* at 685-93. The Court declined to decide "exactly what is encompassed within the term 'good cause,'" but stressed its understanding that "the Attorney General may remove an independent counsel for 'misconduct.'" *Id.* at 692 (citation omitted). Through that removal authority, the Court asserted, the President "retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities." *Id.* The Court also emphasized that its conclusion rested in part

on the independent counsel's "limited jurisdiction and tenure and lack[of] policymaking or significant administrative authority." *Id.* at 691. Although the independent counsel did exercise "discretion and judgment" in carrying out his responsibilities, the Court concluded that "the President's need to control the exercise of that discretion [was not] so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." *Id.* at 691-92.

Finally, in *Free Enterprise Fund*, the Court invalidated a statutory provision that imposed stringent limitations on the removal of inferior officers (the members of the PCAOB) by the principal officers of an agency (the Securities and Exchange Commission ("SEC")) who themselves were assumed to be subject to removal restrictions. In particular, PCAOB members could be removed by SEC commissioners only for willfully violating specific laws, willfully abusing their authority, or unreasonably failing to enforce certain rules, and it was assumed that SEC commissioners could be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office" and not "simple disagreement with the [Commission's] policies or priorities." 561 U.S. at 486-87, 502-03. The Court concluded "the dual for-cause limitations" were unconstitutional, as that "novel" and "rigorous" structure meant that "the President [was] no longer the judge of the

[PCAOB]'s conduct" because he lacked "the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee." *Id.* at 492, 496.

Article II's mandate that inferior executive officers remain accountable to the President and their Department Heads through the removal power applies to ALJs. As the Supreme Court held in *Lucia*, ALJs like those used by DOL are inferior officers exercising "significant authority" under the laws of the United States. *See* 138 S. Ct. at 2052. They can "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." *Id.* at 2048 (quotation marks omitted); *see also* 20 C.F.R. § 725.351(b) (outlining powers of DOL ALJs in black lung proceedings); 29 C.F.R. § 18.12 (setting forth the powers of DOL ALJs generally). At the conclusion of black lung proceedings, DOL ALJs also render decisions containing factual findings, conclusions of law, and remedies, which become final unless appealed to the Benefits Review Board. 20 C.F.R. §§ 725.477, 725.479, 725.481; 33 U.S.C. § 921(b)(3) as incorporated by 30 U.S.C. § 932(a); *see also* 29 C.F.R. § 18.95 (generally providing for review of DOL ALJs' decisions according to "[t]he statute or regulation that conferred hearing jurisdiction"). Absent adequate means to remove ALJs for misbehavior, the Secretary of Labor would lack the ability "to control [these] inferior officer[s]" who exercise significant executive authority on his and the President's behalf, *Free Enterprise Fund*, 561 U.S. at 504,

rendering them "immune from Presidential oversight, even as they exercised power in the people's name," *id.* at 497.

2. The MSPB's construction of § 7521 would, if accepted, violate Article II.

Accordingly, depending on how it is construed, the statute providing that ALJs may be removed by their employing agency "only for good cause established and determined by" the MSPB, 5 U.S.C. § 7521, could pose serious constitutional problems. In particular, the MSPB's view that § 7521 "reserves to itself" both "the final decision on good cause" as well as "the appropriate penalty if it finds good cause," *Soc. Sec. Admin. v. Glover*, 23 M.S.P.R. 57, 64 (1984), would, if accepted, violate Article II for two reasons.

First, the MSPB's understanding of the standard for "good cause" is too high. The MSPB has never made clear that misconduct, poor performance, or failure to follow lawful directions always constitute "good cause" justifying removal of an ALJ. To the contrary, while it has sometimes found cause to exist in particularly egregious instances of such misbehavior, *see, e.g.*, *Soc. Sec. Admin. v. Anyel*, 58 M.S.P.R. 261, 265, 269 (1993) (removal warranted for a "large proportion" of "significant" adjudicatory errors or for "ignor[ing] binding agency interpretations of law"), it also has sometimes made it too difficult to show cause. *Compare, e.g.*, *Soc. Sec. Admin. v. Goodman*, 19 M.S.P.R. 321, 331 (1984) (ALJ

could not be disciplined for productivity far below national averages in absence of specific evidence that ALJ's docket was comparable to those of peers), *with Shapiro v. Soc. Sec. Admin.*, 800 F.3d 1332, 1338 (Fed. Cir. 2015) (declining to follow *Goodman* as it established "a virtually insurmountable burden of proof"). If an ALJ cannot be removed for misconduct, poor performance, or insubordination, that would be the type of "unusually high standard" for removal that was invalidated in *Free Enterprise Fund*, 561 U.S. at 503, and would be at odds with *Morrison*, which upheld a "good cause" removal standard based on the understanding that the inferior officer could be removed for misconduct. 487 U.S. at 692. Nor would such a rigorous standard be supported by *Perkins*, where the Court did not address what type of behavior would justify removal. *See* 116 U.S. at 483-85.

Second, the MSPB's understanding of its role in "establishing and determining" good cause is too expansive. Rather than merely adjudicating whether factual evidence exists to support the employing agency's proffered good-faith grounds for cause to remove an ALJ, the independent MSPB has usurped the employing agency's policy determination whether the appropriate discipline for misbehavior that concededly exists is removal or a lesser sanction. *See* 5 C.F.R. § 1201.140(b) (the MSPB "will specify the penalty to be imposed"); *see also, e.g.*, *Soc. Sec. Admin. v. Brennan*, 27 M.S.P.R. 242, 248, 251 (1985), *aff'd,* 787 F.2d

1559 (Fed. Cir. 1986) (ALJ's pattern of "disruptive conduct," including refusal to follow office procedures, supported only a 60-day suspension rather than removal); *Glover*, 23 M.S.P.R. at 80 (ALJ's "intemperate" remarks to supervisor supported 120-day suspension without pay but not removal). Forcing a Department Head to retain inferior officers who have engaged in sanctionable conduct merely because the independent MSPB believes that removal is excessive would cause "a diffusion of accountability" by eliminating the "clear and effective chain of command" required by Article II. *Free Enterprise Fund*, 561 U.S. at 497-98. Moreover, as the members of the MSPB are protected by the *Humphrey's Executor* removal standard that is generally understood to prevent the President from removing them based on policy disagreements, *see* 5 U.S.C. § 1202(d); *Free Enterprise Fund*, 561 U.S. at 502, allowing the MSPB to exercise policy judgment about whether an ALJ's misbehavior warrants removal, even after good-faith factual evidence of cause for removal is provided, would create the type of "two layers of good-cause tenure" that *Free Enterprise Fund* rejected. *See* 561 U.S. at 497.

In sum, Article II does not permit Congress either to prevent the removal of ALJs who have engaged in misconduct, poor performance, or insubordination, or to vest the policy judgment whether to remove such misbehaving ALJs in the independent MSPB. Where an agency provides factual evidence to the MSPB to support its good-faith determination that an ALJ has, for example, violated binding

agency rules governing adjudications, failed to meet deadlines or quotas for issuing decisions, or engaged in unacceptable behavior for a government official, Department Heads must have the ability to remove that ALJ in order to ensure that they and the President have sufficient control over the exercise of the significant executive function of agency adjudication. Section 7521 can and must be construed in this manner, as it would be plainly unconstitutional otherwise.

3. It is fairly possible to construe § 7521 to render ALJs sufficiently accountable under Article II.

This Court not only has "the power to adopt [a] narrowing construction[]" of § 7521 "to avoid constitutional difficulties," but an affirmative "duty" to do so if "fairly possible." *Boos v. Barry*, 485 U.S. 312, 330-31 (1988) (avoiding First Amendment concerns with a statute that appeared to prohibit "*any* congregation within 500 feet of an embassy for *any* reason after being ordered to do so by the police," by construing the statute to allow dispersal only if the congregation's activities are "directed at an embassy" and "the police reasonably believe that a threat to the security or peace of the embassy is present"). As *Boos* demonstrates, a "fairly possible" construction for constitutional-avoidance purposes need not be "the most natural interpretation" of the statute. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563 (2012) (opinion of Roberts, C.J.); *see id.* at 562-63

(refusing to adopt "[t]he most straightforward reading" of the Affordable Care Act's individual mandate).

Indeed, the imperative to avoid "constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of government." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989); *see id.* at 465-66 (rejecting "a straightforward reading of 'utilize'" in the Federal Advisory Committee Act in light of (among other things) the "decisive[]" consideration that such a reading would raise "formidable constitutional difficulties" under Article II); *see also Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 231 (D.C. Cir. 2013) (construing the statutory term "agency records" not to include White House visitor records possessed by the Secret Service, in order to "avoid substantial separation-of-powers questions"). Accordingly, if a narrowing construction of statutory "[g]ood-cause limits" for "non-principal officers and adjudicators" is available that ensures constitutionally adequate supervision by the Department Head and President, then courts should "interpret the statutory requirements" of such limits "alongside [the applicable] constitutional concerns." *See* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1250-51 (2014).

Here, it is, at a minimum, "fairly possible" to construe § 7521 to avoid any Article II concerns that implicate the rights of private parties to adjudications

conducted by ALJs. That is so for each of the two critical elements of the government's construction.

First, § 7521's "good cause" standard can reasonably be read as broadly authorizing a Department Head to remove ALJs for misconduct, poor performance, or failure to follow lawful directions, but not for reasons that are invidious or otherwise improper in light of their adjudicatory function. *See Black's Law Dictionary* 822 (4th ed. 1951) (defining "good cause" to include "any ground which is put forward by authorities in good faith and which is not arbitrary, irrational, unreasonable or irrelevant to the duties with which such authorities are charged"); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 110-11 (1994) ("Purely as a textual matter, the words 'good cause' . . . seem best read to" allow removal of officers for "lack of diligence, ignorance, incompetence, or lack of commitment to their legal duties."); *Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting) ("*for cause* . . . would include, of course, the failure to accept supervision"). Indeed, the Supreme Court has squarely held that, while Congress did not intend for hearing examiners (the initial term for ALJs) to be removed "at the whim or caprice of the agency or for political reasons," the agency could remove them for "legitimate reasons" even if those would not justify removal of Article III judges. *See Ramspeck v. Fed. Trial Exam'rs Conference*, 345 U.S. 128, 142-43 (1953); *see also Cal. Trout v.*

FERC, 572 F.3d 1003, 1027 (9th Cir. 2009) (Gould, J., dissenting) ("[T]he phrase 'good cause' is used throughout our legal system, and often it means little more than that there is a good reason for the action proposed to be taken."); *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1258-59 (9th Cir. 2010) (Good cause is "a non-rigorous standard").

Under the foregoing construction of the "good cause" standard, an ALJ would still be protected from removal for invidious reasons otherwise prohibited by law. *See*, *e.g.*, 42 U.S.C. § 2000e-16(a) ("All personnel actions affecting employees . . . in executive agencies . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."). And the President, acting through his principal officers, would be restrained from removing an ALJ in order to influence the outcome in a particular adjudication. As *Myers* explained, "there may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control." 272 U.S. at 135. But *Myers* also made clear that "even in such a case," the President "may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised." *Id.*

Second, the MSPB's power to "establish[] and determine[]" the existence of "good cause" under § 7521 can reasonably be read to limit the MSPB's role to adjudicating whether factual evidence exists to support the employing agency's proffered, good-faith grounds for cause, rather than making the policy determination whether those grounds warrant removal as opposed to a lesser sanction. Textually, the statute authorizes the MSPB only to "determine" whether the employing agency has provided good cause for removing the ALJ and to "establish" the factual basis (or lack thereof) in a written opinion. *Cf. Ramspeck*, 345 U.S. at 142 (holding that the original version of § 7521 "leaves with the agency the responsibility" to determine whether unneeded hearing examiners should be discharged, subject to appeal to MSPB's predecessor to "prevent any devious practice by an agency which would abuse" that power). Alternatively, the phrase "established and determined" could be read to refer to MSPB's adjudicatory responsibility, as a "doublet[] - two ways of saying the same thing that reinforce its meaning," which are common throughout the U.S. Code. *Doe v. Boland*, 698 F.3d 877, 881-82 (6th Cir. 2012) (collecting examples); *see also Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013) (presumption against surplusage "is not an absolute rule").

This construction of § 7521 is consistent with *Free Enterprise Fund*. There, unlike here, the statutory grounds for removing PCAOB members were both

unusually high and unambiguously delineated: members were removable only if they "willfully violated" certain laws, "willfully abused [their] authority," or "without reasonable justification or excuse . . . failed to enforce compliance with" specified rules or standards. 15 U.S.C. § 7217(d)(3); *see Free Enterprise Fund*, 561 U.S. at 486-87, 502-03. Moreover, DOL ALJs, in many subject areas, have been delegated the statutory authority vested in the Department Head to adjudicate matters within the agency's jurisdiction, subject to final review and decision by the Secretary or another delegatee,[24] so it is eminently reasonable for the Secretary of Labor to expect compliance with his "policies or priorities." *Id.* at 502.

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[24] DOL ALJs "hear and decide cases arising from over 80 [ ] labor-related statutes, Executive Orders, and regulations." Mission Statement of the Department of Labor Office of Administrative Law Judges, https://www.dol.gov/agencies/oalj/about/ALJMISSN. Whether their authority to decide a case derives from the Secretary or comes directly from congressional enactment depends on the type of case they are adjudicating. In claims for black lung benefits, as here, Congress authorized an ALJ hearing and decision, followed by Board review, *see* 33 U.S.C. §§ 919(d), 921(b)(3), as incorporated by 30 U.S.C. § 932(a). But there are others areas where an ALJ's decisional power stems from the Secretary's. *See, e.g.*, 29 C.F.R. § 6.19 (implementing 41 U.S.C. § 6507). The Secretary has also delegated to the DOL Administrative Review Board his final authority to review a wide range of ALJ decisions. Secretary's Order 01-2020, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 85 Fed. Reg. 13,186 (Mar. 6, 2020).

Accordingly, there is no legal impediment to construing § 7521 as authorizing Department Heads to remove an ALJ who has engaged in misconduct, poor performance, or insubordination, while limiting MSPB's role to adjudicating whether the employing agency has provided good-faith factual support for removal under that standard. That construction eliminates any Article II concerns that implicate the rights of private parties appearing before ALJs. Although Department Heads still could not remove ALJs at will or for invidious or other improper reasons in light of their adjudicatory function, those limitations would be consistent with Article II, because the broad removal grounds identified above give the Department Heads and the President sufficient ability to supervise and control the exercise of executive adjudication. *See supra* pp. 41-43.[25] Nor is there an additional level of tenure protection under our construction solely because the

[25] This is true even where, unlike here, the Department Heads themselves have for-cause protection from removal by the President. Although that would constitute a "second level of tenure protection" with respect to the policy judgment whether to initiate removal proceedings against an ALJ who has engaged in misbehavior, it would not be as "rigorous" as the structure invalidated in *Free Enterprise Fund*, given the much broader power of the Department Head to remove the ALJ. *See* 561 U.S. at 496. Nor would it be as "novel," *see id.*, given the long history of providing tenure protection to inferior adjudicative officers even at independent agencies, *see, e.g.*, *Zitserman v. FTC*, 200 F.2d 519, 520-21 (8th Cir. 1952). And notably, *Free Enterprise Fund* emphasized that it was not making a "general pronouncement[]" that "two levels of good-cause tenure" are *always* unconstitutional. 561 U.S. at 505-06.

independent MSPB must adjudicate claims under the "good cause" removal standard, as construed above. The Supreme Court has repeatedly upheld "cause" restrictions on removal of inferior officers that were subject to judicial review by federal courts, *see Morrison*, 487 U.S. at 663-64; *Perkins*, 116 U.S. at 484-85, and the President has *greater* control over the MSPB than the courts. So long as the MSPB is limited to adjudicating whether the employing agency has provided good-faith factual support for "good cause" under the broad legal standard identified above, rather than second-guessing the agency's policy judgment whether to remove an ALJ where evidence of good cause exists, the MSPB's role in the review process does not alone create an Article II problem with the President's ability to supervise and control ALJs.

Finally, if this Court nonetheless rejects the proffered statutory construction of § 7521, then the Court would be left with a question of how to remedy the constitutional infirmity. In that event, it would be appropriate to sever whatever portion or portions of § 7521 cannot be interpreted, even under principles of constitutional avoidance, to accord agency heads appropriate supervision of ALJs as inferior officers within their agencies. That remedy would be consistent with the "normal rule" that "partial, rather than facial, invalidation is the required course." *Free Enterprise Fund*, 561 U.S. at 508 (quotation marks omitted).

CONCLUSION

For these reasons, the Court should affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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