PUBLIC

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

In the matter of **H&R BLOCK INC.,** a corporation, **HRB DIGITAL LLC,** a limited liability company, and **HRB TAX GROUP, INC.,** a corporation.	**DOCKET NO. 9427** **PUBLIC DOCUMENT**

RESPONDENTS' MOTION TO DISQUALIFY THE ADMINISTRATIVE LAW JUDGE

Pursuant to Rule 3.42(g)(2) of the Commission's Rules of Practice, 16 C.F.R. § 3.42(g)(2), Respondents H&R Block, Inc., HRB Digital LLC, and HRB Tax Group, Inc. move to disqualify the Administrative Law Judge (ALJ)—and all other FTC ALJs. FTC ALJs have three layers of insulation from removal by the President. The Commission cannot remove them except "for good cause established and determined by the Merit Systems Protection Board," 5 U.S.C. § 7521(a); and in turn, neither MSPB members nor FTC Commissioners are removable by the President except "for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 1202; 15 U.S.C. § 41; *Humphrey's Executor v. United States*, 295 U.S. 602, 619, 632 (1935). This scheme is unconstitutional and deprives FTC ALJs of valid authority to participate in this adjudication.

ARGUMENT

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

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

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

In the late 19th century, the Court upheld a rule preventing the Secretary of the Navy from discharging a low-ranking cadet-engineer during peacetime without finding misconduct or convening a court-martial. *United States v. Perkins*, 116 U.S. 483, 483-85 (1886). A century later, the Court upheld a "good cause" restriction on the Attorney General's ability to remove an independent counsel specially appointed to investigate and prosecute, under DOJ policy, certain crimes by high-ranking officials. *Morrison v. Olson*, 487 U.S. 654, 691-92 (1988).

Not only were these offices limited in scope, but the removal restrictions were relatively modest. In *Morrison*, the Court observed that the Attorney General could remove the counsel for

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

The Supreme Court has rejected removal restrictions for inferior officers that exceed the "limited restrictions" in *Perkins* and *Morrison*. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 495 (2010). *Free Enterprise Fund* addressed inferior officers shielded by *two levels* of removal protections: Public Company Accounting Oversight Board (PCAOB) members were removable by the SEC only in extreme situations, and SEC Commissioners were assumed to have removal protection. *Id.* at 486-87. The Court held that this "added layer of tenure protection" unconstitutionally withdrew "from the President any decision" on whether cause existed to remove a PCAOB member, creating "a Board that is not accountable to the President, and a President who is not responsible for the Board." *Id.* at 495-96.

B. The FTC's ALJs Are Officers That Fit Neither Of The Narrow Exceptions To Article II's General Rule Of Unrestricted Removal

FTC ALJs are concededly officers. *Axon Enter., Inc.*, 2020 WL 5406806, at *3 n.7 (F.T.C. Sept. 3, 2020) (citing *Lucia v. SEC*, 585 U.S. 237 (2018)). Thus, under *Seila Law*, the threshold inquiry is whether they fall within either exception to the rule of *at-will* Presidential removal. And the *Humphrey's Executor* exception for certain principal officers clearly does not apply; FTC ALJs are inferior officers, as "superior executive officer[s]" (the Commissioners) may generally "review" their actions. *Arthrex*, 141 S. Ct. at 1981.

So the real question is whether the *Morrison/Perkins* exception applies: Do ALJs exercise "limited duties *and* no policymaking *or* administrative authority"? *Seila Law*, 140 S. Ct. at 2199-2200 (emphases added). On every prong, the answer is "no," so Article II requires they be removable at will.

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

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

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

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

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

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

interferes with the ALJ's ability to function as an independent and impartial decision maker." *Dep't of Labor v. Avery*, 120 M.S.P.R. 150, 153 (2013); *see also id.* at 155 (precluding action "for a reason that interferes with [their] qualified judicial independence"). Thus, only rarely can poor adjudicatory performance, such as adjudicatory errors or failure to follow adjudicatory instructions, be "good cause" for discipline. *See, e.g.*, *Abrams v. SSA*, 703 F.3d 538, 545 (Fed. Cir. 2012) ("failure to follow instructions" qualifies only if "unrelated to their decisional independence"). And even when the MSPB agrees an ALJ committed sanctionable misconduct, it can insist on lesser sanctions than removal. *See, e.g.*, *SSA v. Brennan*, 27 M.S.P.R. 242, 248, 251 (1985), *aff'd*, 787 F.2d 1559 (Fed. Cir. 1986) ("disruptive conduct" did not warrant removal); *SSA v. Levinson*, 2023 M.S.P.B. 20, ¶¶ 40-41 (July 12, 2023) (reaffirming factors for reviewing scope of sanction). As the restrictions in *Perkins* and *Morrison* were modest and allowed removal for insubordination, *supra* at 2-3, ALJs' stronger protections transgress "the outermost constitutional limits" for inferior officers. *Seila Law*, 140 S. Ct. at 2200.

The second and third layers are the icing on this poisoned cake. The President cannot remove at will *either* the FTC Commissioners who must seek an ALJ's removal *or* the MSPB members who must approve such removal. 5 U.S.C. § 1202(d); 15 U.S.C. § 41. This thick insulation directly violates *Free Enterprise Fund*. ALJs' "[multiple] for-cause [removal] limitations" deprive the President of "the ability to oversee [ALJs] or to attribute [their] failings to those whom he *can* oversee." 561 U.S. at 492, 496. The scheme "not only protects [ALJs] from removal except for good cause, but withdraws from the President any decision on whether that good cause exists." *Id.* at 495. "That decision is vested instead in [the FTC and MSPB]," and "if the President disagrees with [their] determination[s], he is powerless to intervene—unless th[e] determination is so unreasonable as to" itself constitute cause. *Id.* at 495-96. "The result is [ALJs

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

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

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

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

In *Axon*, the Commission leaned heavily on a footnote in *Free Enterprise Fund*. *See Axon*, 2020 WL 5406806, at *3. But the footnote merely stated that the Court's holding did "not address" ALJs either way, 561 U.S. at 507 n.10, as part of a broader disavowal of "general pronouncements on matters neither briefed nor argued," *id.* at 506. The footnote further observed that ALJs' "officer" status was then unsettled, in part because their powers are "adjudicative" and sometimes "recommendatory," *id.*, but the Court has since held that ALJs *are* officers, *Lucia*, 585 U.S. at 248-51, that executive adjudication exercises executive power all the same, *Seila Law*, 140 S. Ct. at 2198 n.2, and that "unrestricted removal" is the "general rule," *id.* at 2198.

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

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

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

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

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

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

In enacting the APA in 1946, Congress chose "to make hearing examiners a special class of semi-independent subordinate hearing officers." *Ramspeck*, 345 U.S. at 132 (cleaned up). Thus, until 1978, ALJs were "removable by the agency in which they [were] employed only for good cause established and determined by the Civil Service Commission." Administrative Procedure Act, Pub. L. No. 79-404, § 11, 60 Stat. 237 (1946). But Civil Service Commission members were removable at will by the President, 5 U.S.C. § 632 (1946), spawning objections that the Commission was susceptible to political pressure. So in the Civil Service Reform Act of 1978, Congress further insulated ALJs, replacing the Commission with the MSPB, 5 U.S.C. § 7521(a), and protecting the MSPB from removal under the *Humphrey's Executor* standard, *id.* § 1202(d).

That history distinguishes this case from those where invalid removal restrictions can be severed because "Congress would have preferred" an officer removable by the President to no officer at all. *Seila Law*, 140 S. Ct. 2210. Half a loaf is *not* better than none when the bread is moldy. In enacting the relevant removal protections, Congress was not creating a new system of executive adjudication, but *reforming* the old system to cure well-known "complaints." *Ramspeck*, 345 U.S. at 131. Severing ALJs' removal protections would turn them back into the very agency foot-soldiers that Congress deliberately sought to replace. Especially because Congress considered "[s]everal proposals" *besides* tenure protection to reform the pre-APA system, including constitutional ones like "a completely separate 'examiners' pool," *Ramspeck*, 345 U.S.

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

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

CONCLUSION

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

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

Respectfully submitted,

By: /s/ Antonio F. Dias

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PUBLIC

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

In the matter of **H&R BLOCK INC.,** a corporation, **HRB DIGITAL LLC,** a limited liability company, and **HRB TAX GROUP, INC.,** a corporation.	**DOCKET NO. 9427** **PUBLIC DOCUMENT**

AFFIDAVIT OF HASHIM M. MOOPPAN IN SUPPORT OF RESPONDENTS' MOTION TO DISQUALIFY THE ADMINISTRATIVE LAW JUDGE

Pursuant to 16 C.F.R. 3.42(g)(2), I, Hashim M. Mooppan, hereby affirm under penalty of perjury, as follows:

1. I am one of the counsel for Respondents in the above-captioned matter.
2. Respondents contend that the Administrative Law Judge (ALJ) should be disqualified because he lacks constitutional authority to participate in this adjudication, as do all other FTC ALJs.
3. Respondents' grounds for this contention, which are purely legal in nature, are set forth below.
4. First, pursuant to federal statute, FTC ALJs have three layers of insulation protecting them from at-will removal by the President: The Commission cannot remove them except "for good cause established and determined by the Merit Systems Protection Board," 5 U.S.C. § 7521(a); and in turn, neither MSPB members nor FTC Commissioners are removable by the President except "for inefficiency, neglect of

duty, or malfeasance in office." *Id.* § 1202(d); 15 U.S.C. § 41; *Humphrey's Executor v. United States*, 295 U.S. 602, 619, 632 (1935).

5. Second, Respondents contend that this multi-level removal protection violates Article II of the Constitution, relying on authorities including *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192, 2199-2200 (2020), *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 495-96 (2010), and *Jarkesy v. SEC*, 34 F.4th 446, 463-65 (5th Cir. 2022).

6. Finally, Respondents contend that FTC ALJs' unconstitutional removal protections are non-severable from the powers granted to them, and thus they do not have valid authority to participate in this adjudication, relying on authorities including *Murphy v. NCAA*, 584 U.S. 453, 481-82 (2018), *Ramspeck v. Fed. Trial Examiners Conf.*, 345 U.S. 128, 130-32 (1953), and *Collins v. Yellen*, 141 S. Ct. 1761, 1788 & n.23 (2021).

FURTHER AFFIANT SAYETH NOT.

/s/ _____

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JAMES E. CALLAWAY NOTARY PUBLIC EXP. 4-30-28 DISTRICT OF COLUMBIA

SWORN AND SUBSCRIBED
before me this 26th day of March 2024.

_____ (SEAL)
Notary Public
My commission expires: April 30, 2028

PUBLIC

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

In the matter of **H&R BLOCK INC.,** a corporation, **HRB DIGITAL LLC,** a limited liability company, and **HRB TAX GROUP, INC.,** a corporation.	**DOCKET NO. 9427**

[PROPOSED] ORDER ON RESPONDENTS' MOTION TO DISQUALIFY THE ADMINISTRATIVE LAW JUDGE

Upon consideration of Respondents' Motion to Disqualify the Administrative Law Judge, it is HEREBY ORDERED that the motion is GRANTED and the undersigned Administrative Law Judge is disqualified for lack of constitutionally valid authority to preside. Because all FTC ALJs are disqualified for the same reason, the Commission must conduct further proceedings in this matter.

SO ORDERED.

Jay L. Himes
Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document to be filed on March 20, 2024 (without the supporting affidavit), and re-filed on March 26, 2024 (with the supporting affidavit), electronically using the FTC's E-Filing system, which will send notification of such filing to:

April Tabor
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The Honorable Jay L. Himes
Administrative Law Judge
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I further certify that I caused the foregoing document to be served on March 20, 2024 (without the supporting affidavit), and re-served on March 26, 2024 (with the supporting affidavit), via email to:

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Dated: March 26, 2024

Respectfully submitted,

By: /s/ Erika Whyte
Erika Whyte

STATEMENT OF CONFERENCE

Pursuant to the Scheduling Order entered on March 22, 2024, I hereby state that, on March 26, 2024, Carol Hogan and I (counsel for Respondents) conferred with Claire Wack, Christopher Brown, and Simon Barth (counsel supporting the Complaint), in an effort in good faith to resolve by agreement the issues raised by Respondents' Motion to Disqualify the Administrative Judge. We were unable to reach such an agreement, however, as the motion raises a constitutional objection to an ALJ's participation in this FTC adjudication.

Dated: March 26, 2024

Respectfully submitted,

By: /s/ Hashim M. Mooppan
Hashim M. Mooppan