

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

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

**In the matter of**

**H&R BLOCK INC.,**  
a corporation,

**HRB DIGITAL LLC,**  
a limited liability company, and

**HRB TAX GROUP, INC.,**  
a corporation.

**DOCKET NO. 9427**

**COMPLAINT COUNSEL’S RESPONSE TO RESPONDENTS’ MOTION TO  
DISQUALIFY THE ADMINISTRATIVE LAW JUDGE**

On March 26, 2024, Respondents H&R Block Inc., HRB Digital LLC, and HRB Tax Group, Inc., (collectively, “H&R Block”) filed a Motion to Disqualify the Administrative Law Judge (“Motion”) pursuant to Federal Trade Commission (“FTC”) Rule 3.42(g)(2). H&R Block moves to disqualify the Administrative Law Judge (“ALJ”) on constitutional grounds, arguing that all FTC ALJs are impermissibly insulated from removal by the President. Mot. at 1. First, H&R Block asserts that the Constitution requires that ALJs be removable at will by the President. Second, H&R Block argues that the role of the Merit System Protection Board (“MSPB”) in determining whether “good cause” exists for removal of ALJs under 5 U.S.C. § 7521 constitutes “untenable” removal protection. The Commission has previously considered and rejected H&R Block’s arguments numerous times. *See, e.g., In re Axon Enter., Inc.*, 2020

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WL 5406806 (FTC 2020); *In re Otto Bock HealthCare N. Am., Inc.*, 2019 FTC Lexis 79, \*146-155 (Nov. 1, 2019); *In re 1-800 Contacts, Inc.*, 2018 FTC LEXIS 184, \*167 (Nov. 7, 2018).

**I. FTC ALJs are Inferior Officers with Quasi-Judicial Duties Subject to Permissible Removal Protections**

Despite H&R Block's assertions, Mot. at 3, FTC ALJs fall squarely within the removal exception recognized by the Supreme Court "for inferior officers with limited duties and no policymaking or administrative authority." *See Seila Law v. CFPB*, 140 S. Ct. 2183, 2199-2200 (2020). FTC ALJs are quasi-judicial officers; removal protections are likely appropriate because "Congress might be more inclined to find that a degree of independence from the Executive, such as that afforded by a 'good cause' removal standard, is necessary to the proper functioning of the agency." *Morrison v. Olson*, 487 U.S. 654, 691 n.30 (1988); *see also Collins v. Yellen*, 141 S. Ct. 1761, 1783 n.18 (2021) (distinguishing removal protections for "an adjudicatory body," which has "a unique need" for "freedom from Executive interference" (citing *Wiener v. United States*, 357 U.S. 349, 352 (1958))).

H&R Block disagrees and asserts that FTC ALJs wield administrative authority, emphasizing the term "administrative" in their title and asserting that ALJs shape the administrative record. Mot. at 4. However, this bald assertion and focus on title ignores the actual duties of an FTC ALJ, who "does not engage in enforcement or policymaking but rather performs adjudicative functions[;]... does not bring enforcement matters or initiate investigations or cases[;]... and does not establish agency policies or priorities." *Axon*, 2020 WL at \*4. Further, the FTC ALJs issue only recommended decisions, which are reviewed by the Commission, which may shape the record by its ability to request additional information or views if the Commission determines they are necessary for purposes of determining the form and content of

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rules or orders to be issued. 16 C.F.R. § 3.54(b). Only the Commission enters the Opinion and Final Order for a Part 3 case.

Further, “[t]he ALJ’s limited participation in Commission rulemakings ... does not place him in the role of a policymaker; that role is reserved for the Commission.” *Axon*, 2020 WL at \*5 (citing 16 C.F.R. § 1.13). H&R Block relies on a 1991 memorandum drafted by the Department of Justice’s Office of Legal Counsel (“DOJ”) addressing the Drug-Free Schools and Communities Act Amendments of 1989 to assert that FTC ALJs exercise policymaking authority. Mot. at 4. H&R Block’s reliance on this document is misplaced. That memorandum analyzes duties of ALJs under Section 22 of the Drug-Free Schools and Communities Act Amendments of 1989 and addresses, specifically, “[t]he duties of ALJs *under Section 22*” and the consequences of construing Section 22 so that certain ALJ decisions “were the conclusive determinations of an executive branch department.” Sec’y of Educ. Review of ALJ Decisions, 15 U.S. Op. O.L.C. 8, at 15 (emphasis added).

While the DOJ memo states that such a situation would present “serious constitutional questions,” that is not the question presented when analyzing the duties of FTC ALJs. As stated above, FTC ALJs issue recommended decisions that must be reviewed by the Commission, which may adopt, modify, or set aside all aspects of the recommended decisions. Additionally, while some FTC ALJ determinations may have limited policy ramifications, those ramifications do not mean FTC ALJs wield policymaking authority. This is analogous to judicial review by federal judges, which *also* may have limited policy ramifications but does not turn them into “policymakers.”

Finally, H&R Block’s assertion that the Commission should proceed without an ALJ in this administrative proceeding fails for this same reason. H&R Block cites *U.S. v. Athrex*, where

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an executive tribunal within the Patent and Trademark Office ("PTO"), made up of inferior officers removable only "for such cause that will promote the efficiency of the service," had "the final word within the Executive Branch on the validity of a challenged patent" because neither the Director of the PTO nor the Secretary of Commerce had direct review of that tribunal's decisions. 141 S. Ct. 1970, 1981-82 (2021). In contrast, the parties to an administrative action within the FTC are "left with ... a transparent decision for which a politically accountable officer must take responsibility." *Athrex*, 141 S. Ct. at 1982. This is because the Commission must review the recommended decision before issuing adopting, modifying, or setting it aside and, additionally, can grant review of ALJ decisions. 16 C.F.R. §§ 3.52, 3.53, 3.54.

## **II. The Removal Protections are Long-Standing and Precedented**

H&R Block next attempts to force an extra layer into its "poison cake" and asserts that FTC ALJs benefit from untenable insulation to removal because of involvement by the MSPB in the "good cause" removal for ALJs under 5 U.S.C. § 7521, Actions against administrative law judges. Mot. at 4-6. In *Seila Law* the Court noted, "Perhaps the most telling indication of a severe constitutional problem ... is a lack of historical precedent." *Seila*, 140 S. Ct. at 2201 (omitting citations). In contrast, the interplay of the FTC and MSPB in the removal process for FTC ALJs is far from unprecedented, having been added to the US Code in 1978 and most recently amended in 1989. Additionally, as the Commission stated in *Axon*, where the standard for removal is good cause, construed as here to include "an ALJ's failure to perform adequately or to follow agency policies, procedures or instructions," and "the MSPB's role is limited to determining whether a factual basis exists for the agency's proffered grounds for removal," then "the President wields a constitutionally adequate degree of control over the ALJs ...." *Axon* at 7 (citing *Otto Bock*, 2019 FTC Lexis 79).

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Finally, the appropriate remedy, should a court find section 7521 unconstitutional, is to sever the relevant removal provision and render FTC ALJs removable at will by the Commission. “Generally speaking, when confronting a constitutional flaw in a statute,” courts “sever[] [the] problematic portions while leaving the remainder intact.” *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508 (2010). Absent an express “nonseverability clause,” severance of the unconstitutional provisions is appropriate if the court “determine[s] that the remainder of the statute is capable of functioning independently and thus would be fully operative as a law.” *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2350–52 (2020) (plurality op.). There is a “strong presumption of severability,” *id.* at 2350, and “it is fairly unusual for the remainder of a law not to be operative,” *id.* at 2352; *see also Seila Law*, 140 S. Ct. at 2210–11 (“We think it clear that Congress would prefer that [courts] use a scalpel rather than a bulldozer in curing [a] constitutional defect”). Because the remaining provisions governing those ALJs would be “capable of functioning independently” (*Barr*, 140 S. Ct. at 2350–52) the FTC ALJ could continue to oversee administrative proceedings even without that removal provision.

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**CONCLUSION**

For the foregoing reasons, the Commission should deny H&R Block's Motion to Disqualify the Administrative Law Judge.

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By: s/Claire Wack  
Claire Wack, MD Bar No. 1312190275  
Simon Barth, MA Bar No. 706122  
Christopher E. Brown, VA Bar No. 72765  
Joshua A. Doan, DC Bar No. 490879  
Federal Trade Commission  
600 Pennsylvania Ave., NW, CC-6316  
Washington, DC 20580  
(202) 326-2836 / cwack@ftc.gov  
(202) 326-3317 / sbarth@ftc.gov  
(202) 326-2825 / cbrown3@ftc.gov

Counsel Supporting the Complaint  
Federal Trade Commission

## CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2024, I filed the foregoing document electronically using the FTC E-File system, and sent courtesy copies of such filing to:

April Tabor  
Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue NW  
Suite CC-5610  
Washington, DC 20580  
ElectronicFilings@ftc.gov

The Honorable Jay L. Himes  
600 Pennsylvania Avenue NW  
Room H-110  
Washington, DC 20580  
OALJ@ftc.gov

I hereby certify that on April 5, 2024, I caused the foregoing document to be served via email on:

Antonio F. Dias  
Jones Day  
600 Brickell Avenue  
Suite 3300  
Miami, FL 33131  
afdias@jonesday.com

Courtney L. Snyder  
Jones Day  
500 Grant Street  
Suite 4500  
Pittsburgh, PA 15219  
clsnyder@jonesday.com

Erika Whyte  
Jones Day  
600 Brickell Avenue  
Suite 3300  
Miami, FL 33131  
ewhyte@jonesday.com

Carol A. Hogan  
Jones Day  
110 North Wacker Drive  
Suite 4800  
Chicago, IL 60606  
chogan@jonesday.com

Hashim M. Mooppan  
Jones Day  
51 Louisiana Avenue NW  
Washington, DC 20001  
hmmooppan@jonesday.com

*Attorneys for Respondents, H&R Block, Inc.  
HRB Digital LLC, and HRB Tax Group, Inc.*

/s/ Claire Wack  
Claire Wack