[ORAL ARGUMENT SCHEDULED FOR APRIL 17, 2020]
Nos. 17-1246, 17-1249, 17-1250 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOE FLEMING, SAM PERKINS, AND JARRETT BRADLEY,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

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

REPLY BRIEF OF COURT-APPOINTED *AMICUS CURIAE*

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GLOSSARY

AALJ ..... Association of Administrative Law Judges

ALJ ..... Administrative Law Judge

APA ..... Administrative Procedure Act

FALJC ..... Federal Administrative Law Judges Conference

FTC ..... Federal Trade Commission

MSPB ..... Merit Systems Protection Board

PCAOB ..... Public Company Accounting Oversight Board

USDA ..... United States Department of Agriculture

INTRODUCTION AND SUMMARY OF ARGUMENT

The statutory provisions governing removal of administrative law judges (ALJs) are critical features of a finely wrought, decades-old legislative compromise that ensures political accountability while protecting the fairness interests of regulated parties subject to administrative adjudication. Nothing in the supplemental briefs filed by Petitioners or the government—and certainly nothing in Supreme Court precedent—warrants toppling that longstanding balance.

In fact, the government's supplemental brief reveals much common ground with the Court-appointed *amicus*. Significantly, the government agrees that: (i) "the Supreme Court has squarely held that *** 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"; (ii) there is a "long history of providing tenure protection to inferior adjudicative officers"; (iii) the Supreme Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010) (*PCAOB*), "emphasized that it was not making a general pronouncement that two levels of good-cause tenure are *always* unconstitutional"; and (iv) in *PCAOB*, "unlike here, the statutory grounds for removing PCAOB members were both unusually high and unambiguously delineated." Suppl. Br. for Resp't ("Gov't Suppl. Br.") 31, 33-34 (internal quotation marks and brackets omitted).

The government nevertheless insists that the Court must (as a matter of constitutional avoidance) reject the prevailing interpretation of "good cause," as reflected in decisions of the Merit Systems Protection Board (MSPB), in favor of a "broad[]" interpretation that includes removability for "failure to follow lawful directions." Gov't Suppl. Br. 2. But even then, the government's precise position is unclear. On the one hand, the government appears to deny that ALJs can be removed for "political reasons" or for reasons that are "improper in light of [ALJs'] adjudicatory function." *Id.* at 31. On the other hand, the government seems to suggest that ALJs can be removed when an agency head does not believe they "intelligently or wisely exercised" their discretion. *Id.* at 26. Only under the latter, unduly expansive view of "good cause" do the constructions of the government and Court-appointed *amicus* materially diverge.

In any event, neither Petitioners nor the government provides reason to unsettle a statutory scheme that maintains ALJs' decisional independence while safeguarding political accountability. The Supreme Court's removal cases recognize the greater need for enhanced tenure protection for officers who, though exercising executive power, play an adjudicative role. *See, e.g.*, *Wiener v. United States*, 357 U.S. 349, 355-356 (1958). Indeed, in making clear that *PCAOB*'s holding did not extend to ALJs, the Supreme Court pointed to ALJs' adjudicative role as distinguishing them from PCAOB members. *See* 561 U.S. at 507 n.10. ALJs of the

U.S. Department of Agriculture (USDA) are no exception. Even in rulemaking proceedings—the best example Petitioners muster of USDA ALJs' purported policymaking powers—ALJs perform quintessentially adjudicative functions, such as admitting and authenticating evidence. The historically accepted distinction between adjudication and policymaking/enforcement thus applies with full force to USDA ALJs.

Although the current case involves removal restrictions on USDA ALJs, a ruling that the combined effects of 5 U.S.C. §§ 7521 and 1202(d) are unconstitutional risks unsettling administrative adjudication more broadly. The statute that the government (as a fallback remedy) proposes severing, section 7521, applies to ALJs across the board. The potentially destabilizing consequences militate against overturning congressional enactments where, as here, the Constitution does not require it.[1]

[1] Petitioners' supplemental brief reiterates (31-34) their arguments that USDA ALJs are principal officers. Court-appointed *amicus* was not asked to brief that issue. If USDA ALJs are principal officers, then they may be appointed (and, under the "traditional default rule," removed) only by the President. *PCAOB*, 561 U.S. 477, 509 (2010); *see Lucia v. SEC*, 138 S. Ct. 2044, 2051 n.3 (2018). In that case, the constitutionality of the "*combined* removal provisions in [5 U.S.C. § 7521] and 5 U.S.C. § 1202(d)," which *amicus* was appointed to defend, would not matter. Order at 1 (Dec. 6, 2019), Doc. No. 1819040 (emphasis added).

ARGUMENT

I. "GOOD CAUSE" EXCLUDES AN ALJ'S FAILURE TO RENDER DECISIONS CONFORMING TO THE AGENCY'S PREFERRED OUTCOMES

The government leads off with a defense of its proposed interpretation of "good cause." Gov't Suppl. Br. 1-2. According to the government, "good cause" must be construed to "authorize removal of an ALJ for misconduct, poor performance, or failure to follow lawful directions." *Id.* at 2. Court-appointed *amicus*, however, was asked to brief a scenario in which "the government's proposed construction of 5 U.S.C. § 7521 is rejected." Order at 1 (Dec. 6, 2019), Doc. No. 1819040. In that event, the prevailing (plain-text) interpretation of "good cause"—as articulated by, among others, the MSPB and the Federal Circuit—must govern.

That said, those tribunals' understanding of "good cause" overlaps to a significant degree with the proposed construction that the government fleshes out in its supplemental brief. The MSPB and the Federal Circuit, as explained in Court-appointed *amicus*'s opening brief (at 29-31), have interpreted "good cause" "to encompass conduct that 'undermines public confidence in the administrative adjudicatory process.'" *Long v. Social Sec. Admin.*, 635 F.3d 526, 535 (Fed. Cir. 2011) (quoting *Social Sec. Admin. v. Long*, 113 M.S.P.R. 190, 208 (2010)). Accordingly, the MSPB has authorized removal for conduct that falls into the government's categories of "misconduct," *see, e.g.*, *Long*, 113 M.S.P.R. at 208

("physical altercation with [a] domestic partner" resulting in police intervention), and "poor performance," *see, e.g.*, *Shapiro v. Social Sec. Admin.*, 800 F.3d 1332, 1339 (Fed. Cir. 2015) ("fail[ure] to manage *** cases acceptably").

Beyond "misconduct" and "poor performance," the government takes the view that an ALJ's "failure to follow lawful directions"—used synonymously with "insubordination"—also provides "good cause" for removal. Gov't Suppl. Br. 18, 26. But even that cryptic formulation of the standard may not differ materially from the established understanding of "good cause." For example, if an ALJ is ordered to reduce a case backlog, failure to do so would currently support removal. *See, e.g.*, *Abrams v. Social Sec. Admin.*, 703 F.3d 538, 541 (Fed. Cir. 2012). Similarly, because an ALJ lacks the "freedom to ignore binding agency interpretations of law," an ALJ's consistent flouting of agency precedent would also now ground a finding of "good cause." *Social Sec. Admin. v. Anyel*, 58 M.S.P.R. 261, 269 (1993). At bottom, if these are the forms of "insubordination" the government takes to constitute "good cause" for removal, the daylight between the construction of the government and Court-appointed *amicus* shrinks to the vanishing point.

The government's interpretation of "good cause" would change the status quo only to the extent the "lawful directions" at issue interfere with an ALJ's decisional independence. The MSPB and the Federal Circuit have been clear that an agency action "attempt[ing] to influence decisional independence *** cannot be found to be

supported by good cause." *Social Sec. Admin. v. Mills*, 73 M.S.P.R. 463, 468 (1996); *see also Abrams*, 703 F.3d at 545 ("ALJs may be disciplined for failure to follow instructions *unrelated* to their decisional independence.") (emphasis added). This Court has likewise recognized that tenure protections are "designed to safeguard the decisional independence of administrative law judges." *Mahoney v. Donovan*, 721 F.3d 633, 635 (D.C. Cir. 2013). To be sure, an ALJ's decisional independence is "qualified." *Abrams*, 703 F.3d at 545. In particular, ALJs (as noted) must follow binding agency interpretations of applicable law. But ALJs cannot currently be removed for failing to obey agency directions that are "politically-motivated," *Mills*, 73 M.S.P.R. at 468, or that exert "pressure[]" interfering with the ALJ's ability to "exercise[] his independent judgment on the evidence before him," *Abrams*, 703 F.3d at 545.

Whether the government agrees is not clear. The government seems to deny that ALJs can be removed for "political reasons" or for reasons that are "improper in light of [ALJs'] adjudicatory function." Gov't Suppl. Br. 31. At the same time, however, the government's brief could be interpreted to indicate that ALJs can be removed (after they render a decision) when an agency head does not believe they "intelligently or wisely exercised" their discretion. *Id.* at 26. Underscoring the murky nature of the government's position, the government states that a Department Head's consideration of "errors in individual decisions *** *includes* an ALJ's

issuance of an individual decision that fails to comply with general agency rules or policies concerning the conduct of adjudications and the governing law." *Id.* (emphasis added). The term "includes" raises the question what else is covered and, more generally, whether the government's interpretation of "good cause" is actually "broad[er]," *id.* at 2, than the status quo (and the plain meaning of "good cause"). To the extent the government would permit removal for reasons that would compromise an ALJ's decisional independence—specifically, removal for failing to adjudicate disputes in ways that favor the agency's preferred political outcomes—the government's interpretation runs contrary to established doctrine and historical precedent, as outlined below.

II. THE REMOVAL RESTRICTIONS AT ISSUE ARE COMPATIBLE WITH ARTICLE II

The removal restrictions in sections 7521 and 1202(d), when interpreted naturally to safeguard the decisional independence of ALJs, are consistent with Article II and the separation of powers. Despite contrary arguments by Petitioners and (to some extent) the government, that conclusion is firmly rooted in both Supreme Court precedent and historical practice. Neither specific features of USDA ALJs' authority, nor the MSPB's role in determining the existence of "good cause" for removal, undermine the constitutionality of the statutory scheme.

A. Supreme Court Precedent Establishes That Stronger Tenure Protections For Adjudicative Officers, Like USDA ALJs, Comport With The Separation Of Powers

1. The Supreme Court, as recently as PCAOB*, has affirmed the significance of an officer's adjudicative role in the removal analysis.*

In *PCAOB*, the Supreme Court denied that any "of the positions [the dissent] identifies"—which included ALJs—"are similarly situated to the [PCAOB]," 561 U.S. at 506, and pointed to several differences between ALJs and members of the PCAOB, *id.* at 507 n.10. A key distinction was that "[u]nlike members of the [PCAOB], many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions." *Id.* That statement mirrored then-Judge Kavanaugh's observation, in his dissent from the decision under review, that ALJs perform "adjudicatory functions" and would not be "affect[ed]" by a ruling that the removal scheme in *PCAOB* was unconstitutional. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 699 n.8 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

Strikingly, the government's supplemental brief does not even mention *PCAOB*'s reference to adjudication. Petitioners, for their part, do acknowledge *PCAOB*'s distinctions, but they argue that ALJs' adjudicatory function makes no constitutional difference because PCAOB members also engage in adjudication. *See* Pet'rs Suppl. Br. 39. Yet the *dissent* in *PCAOB* made the same point, 561 U.S. at

536 (Breyer, J., dissenting), and the majority did not accept it, *id.* at 507 n.10 (majority opinion). Therefore, contrary to Petitioners' contention, for this Court to credit the Supreme Court's description of ALJs in *PCAOB* would not permit "Footnote 10 *** [to] override *Free Enterprise*'s holding." Pet'rs Suppl. Br. 37. This Court would simply be following the Supreme Court's considered decision to enumerate factors distinguishing ALJs from PCAOB members, among them ALJs' adjudicative role.

2. Longstanding precedent calls for increased insulation of executive officers performing adjudicative functions.

The *PCAOB* Court's spotlight on an ALJ's adjudicative functions accords with decades-old Supreme Court precedent that Petitioners and the government cannot avoid. Most notably, in *Wiener*, the Court held that Commissioners tasked with adjudicating claims "according to law, that is, on the merits of each claim" should not be removable "by the President for no reason other than that he preferred to have on that Commission men of his own choosing." 357 U.S. at 355-356 (internal quotation marks omitted). In *Humphrey's Executor v. United States*, the Court upheld for-cause removal of members of the Federal Trade Commission (FTC), a body that acted "in part quasi legislatively and in part quasi judicially." 295 U.S. 602, 628 (1935).

Petitioners do not even cite *Wiener*, and they resist *Humphrey's Executor* by arguing that "[t]he Constitution vests all legislative power in Congress, executive

power in the President and judicial power in Courts." Pet'rs Suppl. Br. 45. The government seeks to distinguish *Wiener* and *Humphrey's Executor* on the ground that the Supreme Court "upheld freestanding multi-member independent agencies with adjudicatory authority on the ground that they purportedly did not exercise executive power *at all*." Gov't Suppl. Br. 24.

Both arguments fail. As the Supreme Court has since made clear, the activities of agency adjudicators "are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'" *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013). It is hard to see how the officers in *Wiener* or *Humphrey's Executor* could be an exception, especially when the Supreme Court has repeatedly adhered to those precedents despite acknowledging that "the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Morrison v. Olson*, 487 U.S. 654, 689 n.28 (1988). Supreme Court authority thus establishes that, even among officers who wield executive authority (as distinct from legislative or judicial authority), there are different ways in which this authority can be exercised, with some ways requiring more direct presidential control than others. *See, e.g.*, *id.* at 690-691 & n.30; *Wiener*, 357 U.S. at 355-356.[2]

[2] The government's citation of *Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir. 1983), to distinguish *Wiener* and *Humphrey's Executor*, *see* Gov't Suppl. Br. 25, is

The government also cites the statement in *Myers v. United States* that the President "may consider [a] 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." Gov't Suppl. Br. 26 (alteration in original) (emphasis omitted) (quoting 272 U.S. 52, 135 (1926)). Yet the Court has "expressly disapproved of any statements in *Myers* that are 'out of harmony' with the views expressed in *Humphrey's Executor*," and it has "recognized that the only issue actually decided in *Myers* was that 'the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress.'" *Morrison*, 487 U.S. at 687 n.24 (quoting *Humphrey's Executor*, 295 U.S. at 626). Thus, "some dicta in *Myers*" is a weak reed. *Id.* at 687. In the end, the constitutionality of greater insulation for executive officers engaged in adjudication is a settled feature of Supreme Court jurisprudence.[3]

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equally unavailing. The *Kalaris* Court—in a decision pre-dating *Morrison*, 487 U.S. 654, and *City of Arlington*, 569 U.S. 290—justified its view that the FTC was "*outside* the Executive Branch" by referring to that agency as "a member of the so-called 'headless fourth branch,'" 697 F.2d at 395 & n.78 (quoting LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 22 (1965)). Neither the government nor Petitioners endorse that proposition.

[3] The government (Suppl. Br. 24) takes issue with Court-appointed *amicus*'s invocation of the statement that an official who "partakes strongly of the judicial character *** should not hold *** office at the pleasure of the Executive branch of the Government." Court-Appointed *Amicus* Br. 5 (quoting 5 *The Writings of James Madison* 413 (Hunt ed., 1904)). In citing Madison, Court-appointed *amicus* followed the lead of this Court, which used the same quotation—after *PCAOB* and

3. USDA ALJs are executive officers performing adjudication.

USDA ALJs fall firmly into the category of executive officers performing primarily (if not exclusively) adjudicative functions, so as to warrant greater tenure protection in the Supreme Court's removal analysis. Petitioners, in contending that USDA ALJs perform "policymaking functions," make much of their participation in rulemaking proceedings. Pet'rs Suppl. Br. 40. Conspicuously, however, Petitioners' recitation of USDA ALJs' rulemaking tasks (*e.g.*, admitting evidence, hearing oral argument, authenticating documents) describes quintessentially *adjudicative* functions. *See id.*; 7 C.F.R. § 1.806-1.811. The ALJs do not make rulemaking decisions or even *recommended* rulemaking decisions. 7 C.F.R. §§ 1.813, 1.815. Thus, contrary to Petitioners' insistence (Suppl. Br. 40), the ALJs differ markedly from PCAOB members, who "issu[e] *** rules" (subject to SEC approval), among many other policymaking and enforcement functions. *PCAOB*, 561 U.S. at 486. That USDA ALJs participate in "developing a full and fair record" in formal rulemaking proceedings, Br. *Amicus Curiae* of the Fed. Admin. Law Judges Conference (FALJC Br.) 13, does not transform them into policymakers—any more

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while sitting *en banc*—to support the proposition that the Constitution does not always "require that the President have illimitable power of removal." *PHH Corp. v. CFPB*, 881 F.3d 75, 85 (D.C. Cir. 2018) (en banc) (internal quotation marks omitted). The *PCAOB* Court nowhere rejected that proposition or stated that Madison insisted on such expansive presidential power.

than Article III judges engage in "policymaking" or non-adjudicative activity when they make evidentiary calls at trial.

It is unsurprising that Petitioners' example of USDA ALJs' engagement in policymaking boils down to adjudication. ALJs "may not perform duties inconsistent with their duties and responsibilities as administrative law judges," including their duties as impartial adjudicators. 5 U.S.C. § 3105; *see* Corrected Br. of *Amicus Curiae* Ass'n of Admin. Law Judges (AALJ Br.) 16. Thus, USDA ALJs squarely qualify as adjudicators properly subject to greater insulation from presidential removal.

Moreover, USDA ALJs wield nothing like the enforcement and policymaking powers the Supreme Court found problematic in *PCAOB*. The Supreme Court there explained that the PCAOB is "the primary law enforcement authority for a vital sector of our economy," with "expansive powers to govern an entire industry" and to "regulate every detail of an accounting firm's practice." 561 U.S. at 485, 508. For these reasons, PCAOB members exercised "significant executive power." *Id.* at 514. The glaring difference between the PCAOB's role and that of USDA ALJs further supports the constitutionality of removal restrictions on ALJs.

B. This Court Should Not Undo The Well-Grounded APA Compromise

Petitioners and the government give short shrift to the bargain Congress struck with respect to agency adjudicators almost 75 years ago. That bargain's historical

pedigree and well-grounded rationale should give this Court serious pause before it exercises "the gravest and most delicate duty" of invalidating congressional enactments. *Hodge v. Talkin*, 799 F.3d 1145, 1157 (D.C. Cir. 2015).

The APA, passed in 1946, represents a hard-fought compromise that, in its treatment of "hearing examiners" (later ALJs), accommodated both adjudicative fairness and political accountability. *See Ramspeck v. Federal Trial Exam'rs Conference*, 345 U.S. 128, 131-132 (1953); Br. *Amicus Curiae* of Robert Glicksman et al. (Glicksman Br.) 7-11. The basic contours of the APA compromise have existed since 1946: protections for ALJs' decisional independence—chief among them "good cause" removal, *see* pp. 4-7, *supra*—coupled with oversight by executive officials more directly answerable to the President. *See Ramspeck*, 345 U.S. at 132; *see also Iran Air v. Kugelman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993) (noting that ALJs, while "conduct[ing] the cases over which [they] preside[] with *** independence," must apply the agency's legal precedents).

That consistent historical practice receives "significant weight" in the constitutional analysis. *NLRB v. Noel Canning*, 573 U.S. 513, 514 (2014). All the more so given that courts have repeatedly confirmed the strong rationale for "good cause" removal of ALJs: "assur[ing] that [they] exercise[] [their] independent judgment on the evidence before [them]." *Butz v. Economou*, 438 U.S. 478, 513

(1978); *see* Court-Appointed *Amicus* Br. 13-14 (citing numerous decisions of Supreme Court and this Court to similar effect).

Congress's decision in 1978 to vest the "good cause" determination in a newly created MSPB rather than in the Civil Service Commission does not undermine the reasons to respect the APA compromise. *Contra* Pet'rs Br. 35-37. *First*, the only provision any party asks this Court to sever in any part is section 7521. *See* Gov't Suppl. Br. 36. Section 7521's mandate that ALJs be removable "only for good cause established and determined" by another body (first the Civil Service Commission, now the MSPB) has existed for almost 75 years, since passage of the APA in 1946. And "stripping ALJs of the good cause removal protection under 5 U.S.C. § 7521" would "leave[] ALJs without any tenure protections." Br. of *Amicus Curiae* SSA ALJ Collective 16. After all, MSPB review would not help ALJs if the agency were not required to prove "good cause" in the first place. *See id.*

Second, the tenure protection for MSPB members in section 1202(d) serves an important purpose. Though no party asks the Court to sever this provision, it is worth noting (as Petitioners do) that taking this step "would adversely affect more than 1.5 million civil service employees, whose grievances with employing agencies fall under the MSPB's jurisdiction." Pet'rs Suppl. Br. 48.[4] The MSPB's status as

[4] *See* U.S. Merit Sys. Prot. Bd., *Jurisdiction*, https://www.mspb.gov/About/jurisdiction.htm (last visited Mar. 19, 2020)

an "adjudicative body," *Kuretski v. Commissioner of Internal Revenue Serv.*, 755 F.3d 929, 944 (D.C. Cir. 2014); *accord* 5 C.F.R. § 1200.1, provides further reason not to disturb its members' tenure protection. *See* pp. 8-13, *supra*.

Third, the combined removal restrictions in sections 7521 and 1202(d) have been in place for over 40 years—more than enough time to refute Petitioners' statement that "[h]istorically, ALJs did not have dual-level-tenure protection." Pet'rs Suppl. Br. 35. Given that a "practice of at least twenty years duration *** is entitled to great regard," *Noel Canning*, 573 U.S. at 524 (quoting *The Pocket Veto Case*, 279 U.S. 655, 690 (1929)), a practice with a pedigree twice as long cannot be discounted in the constitutional calculus.

Further, the settled removal protections for ALJs have due process underpinnings. The APA compromise embodies a commitment to "fair" adjudication. *Butz*, 438 U.S. at 514. As part of the compromise, agency heads may overturn ALJ decisions and even adjudicate cases themselves. *See* Gov't Suppl. Br. 28. But agencies' increasing reliance on ALJs prompted Congress to provide them with tenure protection, *Ramspeck*, 345 U.S. at 130-131, ensuring that regulated parties receive an initial hearing from an ALJ whose "removal [is] *** subject to

("Approximately 2 million Federal employees, or about two-thirds of the full-time civilian work force, currently have appeal rights to the [MSPB].").

pre-approval by the [MSPB] because of [its] potential to compromise [the ALJ's] independence," *Mahoney*, 721 F.3d at 638.

The government proposes an alternative approach in the form of a revised interpretation of "good cause" that would still bar at-will removal by Department Heads. *See* Gov't Suppl. Br. 33. Congress, however, has already exercised its considered judgment about how to balance adjudicative fairness and political accountability. The Court should not override that congressional judgment.[5]

C. The MSPB's Role In Assessing "Good Cause" For Removal Does Not Tip The Constitutional Balance

Contrary to the government's argument (Suppl. Br. 19), the MSPB's current role in "establish[ing] and determin[ing]" whether good cause exists for removal does not render section 7521 unconstitutional. That provision authorizes agencies to take "actions"—including "removal" and "suspension"—"only for good cause established and determined by the [MSPB]." 5 U.S.C. § 7521. In the cases the government cites, the MSPB did not "second-guess[] the agency's policy judgment whether to remove an ALJ where evidence of good cause" *to remove the ALJ* was present. Gov't Suppl. Br. 19, 34-35. Rather, the MSPB decided that (i) there was

[5] To support its argument that due process is not an issue, the government relies heavily on *Kalaris*. *See* Gov't Suppl. Br. 28-29 (citing 697 F.2d at 381). But this Court in *Kalaris* expressly stated that it was *not* addressing due process allegations: "The removed members have not raised and could not raise such due process allegations here because they cannot be subject to the potential unfairness in adjudication that due process protects against." 697 F.2d at 399 n.91.

"good cause for discipline" and (ii) with respect to the type of discipline, the "good cause" it found supported only a suspension rather than removal. *See Social Sec. Admin. v. Brennan*, 27 M.S.P.R. 242, 249, 251 (1985); *Social Sec. Admin. v. Glover*, 23 M.S.P.R. 57, 63, 80 (1984). The MSPB has not, therefore, exercised freewheeling authority to override an agency's substantiated determination that there is "good cause" for removing an ALJ.

At any rate, the MSPB's determination as to whether removal (as opposed to a lesser statutorily authorized sanction) is warranted would be part and parcel of its adjudicative role, not an infringement of the separation of powers. *See Kuretski*, 755 F.3d at 944; *see also* Court-Appointed *Amicus* Br. 33. Yet even if this Court takes the government's view that the MSPB must defer to the agency's choice of removal as a penalty whenever the MSPB finds "good cause" for *some* penalty (Gov't Suppl. Br. 19-20), the Court need not disturb the MSPB's sound interpretation of "good cause" as excluding an ALJ's failure to follow orders that compromise decisional independence.

III. THIS CASE HAS IMPLICATIONS FOR ALJs BEYOND USDA

As Petitioners observe (Suppl. Br. 34), this case directly involves only removal restrictions on ALJs of the USDA. But the prospect that this Court's holding and/or reasoning could extend to other ALJs, with far-reaching consequences, properly informs its current decision. *See, e.g.*, *AT&T Mobility LLC*

v. Concepcion, 563 U.S. 333, 342 (2011) (providing examples of unjustifiable outcomes that could result from applying a disputed rule). Notably, section 7521 applies to all ALJs appointed under 5 U.S.C. § 3105—approximately 1,900 ALJs as of July 2018. *See* Court-Appointed *Amicus* Br. 20-21; *see also* FALJC Br. 22-23; AALJ Br. 7; Glicksman Br. 9-10.

The government, in proposing a severance remedy if the Court rejects its construction of section 7521, does not ask the Court to strike down parts of section 7521 "as applied" only to USDA ALJs. *See* Gov't Suppl. Br. 36. For good reason: it is unclear how the Court could take this step without effectively rewriting the statute. Unlike in *PCAOB*, where the Court severed removal provisions specifically applicable to the PCAOB, *see* 561 U.S. at 508, section 7521 does not permit a surgical remedy limited to a single agency. The significant consequences that could stem from revising section 7521, or ruling in Petitioners' favor, counsel further in favor of judicial restraint. *See* Court-Appointed *Amicus* Br. 20-22.

CONCLUSION

Assuming the government's proposed construction of 5 U.S.C. § 7521 is rejected, *see* Resp't Br. 38-40, this Court should conclude that the combined removal provisions in that statute and 5 U.S.C. § 1202(d) are not "incompatible with the Constitution's separation of powers" as applied to USDA ALJs. *PCAOB*, 561 U.S. at 506, 507 & n.10.

Respectfully submitted,

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March 19, 2020

CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Times New Roman proportional font and contains 4,428 words, and thus complies with Rule 32(a)(5)-(6) of the Federal Rules of Appellate Procedure and this Court's Order appointing *amicus*.

/s/Pratik A. Shah
Pratik A. Shah

CERTIFICATE OF SERVICE

I hereby certify that, on March 19, 2020, I served the foregoing brief upon counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system.

/s/Pratik A. Shah
Pratik A. Shah