No. 23-2608

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SUN VALLEY ORCHARDS, LLC
Appellant,

v.

UNITED STATES DEPARTMENT OF LABOR
and UNITED STATES SECRETARY OF LABOR,
Appellees.

Appeal from the U.S. District Court for the District of New Jersey
No. 21-cv-16625
Honorable Joseph H. Rodriguez

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 & 29(a)(4)(A), amicus curiae Public Citizen, Inc. states that it is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly held corporation has an ownership interest in it.

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INTEREST OF AMICUS CURIAE[1]

Founded in 1971, Public Citizen is a nonprofit consumer advocacy organization with members in all fifty states. Public Citizen regularly appears before Congress, administrative agencies, and courts to support the enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen has a longstanding interest in issues involving constitutional separation-of-powers principles and often participates as amicus in the Supreme Court and the courts of appeals in cases involving such issues. *See*, *e.g.*, *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024); *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020); *Leachco, Inc. v. CPSC*, 103 F.4th 748 (10th Cir. 2024), *petition for cert. pending*, No. 24-156 (U.S. filed August 9, 2024).

Public Citizen submits this brief to address the appellant's argument that statutory employment protections for Department of Labor (DOL) administrative law judges (ALJs) require vacatur of the

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than Public Citizen made a monetary contribution to the preparation or submission of this brief.

adjudication in this case. As the brief explains, those protections do not violate separation-of-powers principles, and regardless of their constitutionality, they do not justify vacating the decision against the appellant.

BACKGROUND AND SUMMARY OF ARGUMENT

The H-2A visa program enables employers to hire temporary foreign agricultural workers when there are insufficient domestic workers willing and able to perform a given job. In 2015, Appellant Sun Valley Orchards, LLC, a farm in New Jersey, hired H-2A workers to harvest asparagus and peppers. The Administrator of DOL's Wage and Hour Division subsequently determined that Sun Valley had violated requirements of the H-2A program and assessed back wages and civil penalties. Sun Valley requested a hearing, and the case was assigned to an ALJ. The ALJ held a four-day long evidentiary hearing, after which she issued a decision finding that Sun Valley had violated numerous aspects of the H-2A program and assessing back wages and civil penalties in an amount slightly lower than the amount assessed by the Administrator. Sun Valley appealed to DOL's Administrative Review Board, which affirmed the ALJ's decision.

Sun Valley contends that the award against it should be vacated, arguing, among other things, that statutory protections against removing ALJs violate Article II of the Constitution. In particular, Sun Valley points to 5 U.S.C. § 7521(a), which provides that ALJs can be removed "by the agency in which [they are] employed only for good cause established and determined by the Merit Systems Protection Board" (MSPB), and to 5 U.S.C. § 1202(d), which provides that MSPB members can "be removed by the President only for inefficiency, neglect of duty, or malfeasance in office."

Contrary to Sun Valley's arguments, these provisions do not create an "impermissible dual-layer good-cause protection from removal" for ALJs. Sun Valley Br. 3. Because DOL ALJs may be removed for good cause by DOL, not the MSPB, ALJs do not receive dual-layer protection from removal. And because they are tasked with adjudication, not policymaking or the exercise of prosecutorial discretion, that protection would not be impermissible in any event.

Moreover, even when limits on removal of federal officers are unconstitutional, they do not render actions taken by the officers unlawful unless those actions are causally related to the invalid removal

restrictions. Here, there is no reason to believe that, if not for the removal restrictions, the President or the Secretary of Labor would have removed the ALJ. Because there is no nexus between the adjudication and the employment protections provided to DOL ALJs, those protections, regardless of their constitutionality, do not provide a basis for vacating the award against Sun Valley.

ARGUMENT

I. The statutory employment protections for Department of Labor administrative law judges do not violate the Constitution.

"[A]s a general matter," the Constitution gives the President "the authority to remove those who assist him in carrying out his duties." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513–14 (2010). That authority, however, is "not 'all-inclusive'" and "'depend[s] upon the character of the office.'" *Morrison v. Olson*, 487 U.S. 654, 687 (1988) (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 629, 631 (1935)). In particular, as relevant here, the Supreme Court has recognized the constitutionality of removal restrictions for "inferior officers with limited duties and no policymaking or administrative authority." *Seila Law*, 591 U.S. at 218. "[T]he President's need to control"

such officers is not "so central to the functioning of the Executive Branch as to require as a matter of constitutional law that [they] be terminable at will." *Morrison*, 487 U.S. at 691–92.

Sun Valley does not contest that ALJs are inferior officers who can be subject to good cause removal protections without violating the Constitution. Nonetheless, it argues that restrictions on removing DOL ALJs are unconstitutional, relying on *Free Enterprise Fund*, 561 U.S. 477. In *Free Enterprise Fund*, the Supreme Court held that members of the Public Company Accounting Oversight Board (PCAOB) could not be protected against removal without cause when the limited authority to remove PCAOB members was conferred on the Securities and Exchange Commission, whose commissioners themselves can be removed by the President only for good cause. According to Sun Valley, like the members of the PCAOB, DOL ALJs "enjoy impermissible dual-layer good-cause protection from removal." Sun Valley Br. 3. Sun Valley's argument fails for two reasons.

First, DOL ALJs are not protected by dual-layer good cause protections from removal. ALJs are removable for good cause "by the agency in which [they are] employed," 5 U.S.C. § 7521(a)—here, DOL.

And the Secretary of Labor is removable at will by the President. Accordingly, only one level of protected tenure separates the President from the ALJs.

Sun Valley highlights that the Secretary of Labor may remove ALJs only if good cause is determined by the MSPB, 5 U.S.C. § 7521(a), whose members, in turn, may only be removed for good cause, *id.* § 1202(d). As the district court explained, however, "[t]he Board is simply there to make sure the agency properly invoked 'good cause' for removal." Appx.021. The requirement that the MSPB find good cause does not transform DOL's decision to remove an ALJ into an MSPB decision.

Second, *Free Enterprise Fund* addressed the question whether the President could "be restricted in his ability to remove a principal officer, who [was] in turn restricted in his ability to remove an inferior officer, even though that inferior officer *determine[d] the policy and enforce[d] the laws of the United States*." 561 U.S. at 484 (emphasis added). The Supreme Court considered only the permissibility of two-level protection of members of an agency that was "the regulator of first resort and the primary law enforcement authority for a vital sector of our economy." *Id.* at 508. The Court's holding that two-level removal protections are

unconstitutional under such conditions does not extend to inferior officers like ALJs, who have no policymaking or enforcement powers.

Indeed, *Free Enterprise Fund* explicitly denies that its reasoning extends to ALJs. Responding to the dissent's warnings that the majority's analysis might call into question the status of civil servants in the Senior Executive Service, ALJs, and military officers, *see id.* at 541–43 (Breyer, J., dissenting), the Court's opinion states that "none of the positions [the dissent] identifies are similarly situated" to the PCAOB. *Id.* at 506. In particular, the opinion states that its holding does not extend to ALJs, observing that "many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions … or possess purely recommendatory powers." *Id.* at 507 n.10.

Sun Valley contends that the fact that ALJs adjudicate "does not make them any less a part of the Executive Branch." Sun Valley Br. 50. True, but as *Free Enterprise Fund* explains, the President's authority to remove officers who are part of the Executive Branch "is not without limit." 561 U.S. at 483. And whether an executive officer engages in "adjudicative" functions, as opposed to "enforcement or policymaking

functions," *id.* at 507 n.10, is relevant to whether removal restrictions protecting the officer are permissible.

This case also differs from *Free Enterprise Fund* in that, there, the SEC Commissioners' inability to remove PCAOB members at will, together with their inability to exert control over the PCAOB's activities, left the President unable to "hold the [SEC] fully accountable for the Board's conduct." 561 U.S. at 496; *see id.* at 504–05. Here, however, in addition to removing ALJs for good cause, there are other means for the Secretary of Labor to exercise control over—and therefore be held accountable for—ALJ adjudications. At the most basic level, as the district court noted, "the Secretary of Labor does not need to use ALJs at all." Appx.021. "Thus, '[t]he President has broad executive power to order the Secretary of Labor to change DOL's regulatory scheme and remove ALJs from the adjudicatory process.'" *Id.* (quoting *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1134 (9th Cir. 2021)); *see also Free Enter. Fund v. PCAOB*, 537 F.3d 667, 699 n.8 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (in explaining why holding removal restrictions on PCAOB members unconstitutional would not affect "the status of administrative law judges," noting that "an agency has the choice whether to use ALJs

for hearings," and, thus, "Congress has not imposed ALJs on the Executive Branch"), *aff'd in part, rev'd in part, and remanded,* 561 U.S. 477.

Additionally, as demonstrated by this case, ALJ decisions are subject to review by DOL's Administrative Review Board. The Secretary has "authority … to remove any [Review Board] Member at any time prior to the completion of the [Member's] term, consistent with applicable law." DOL, *Secretary's Order 01-2020—Delegation of Authority and Assignment of Responsibility to the Administrative Review Board*, 85 Fed. Reg. 13186, 13188 § 8(b) (Mar. 6, 2020). Furthermore, after the Review Board issues a decision, the Secretary of Labor, "in his or her sole discretion," may "direct the Board to refer [the] decision to the Secretary for review." *Id.* § 6(b)(2). The Secretary can be held fully accountable for the decision whether to review the ARB decision. The Secretary's ability to exercise control over—and be held accountable for—adjudications conducted by ALJs provides an additional reason why the employment protections afforded DOL ALJs are constitutional.

II. Regardless of their constitutionality, the statutory employment protections for administrative law judges do not provide a basis for vacating the award in this case.

Although the employment protections for DOL ALJs are constitutional, this Court does not need to address that issue in this case because, regardless of how that issue is resolved, it does not provide a basis for vacating the award against Sun Valley. In *Collins v. Yellen*, 594 U.S. 220 (2021), the Supreme Court explained that actions taken by properly *appointed* federal officers are not void because of improper statutory limits on their *removal*. *Id.* at 257–58. Unlike improperly appointed officers who "lack[] the authority to carry out the functions of the office," *id.* at 258, officers subject to invalid tenure protections do not exercise "power that [they do] not lawfully possess." *Id.*; *see also id.* at 261 (Thomas, J., concurring) (explaining that the "Government does not necessarily act unlawfully even if a removal restriction is unlawful in the abstract"). Only if the restriction had a causal effect on actions taken by the officer, *Collins* explained, would there be any basis for granting a remedy aimed at those actions. *See id.* at 259; *see also CFPB v. Nat'l Collegiate Master Student Loan Trust*, 96 F.4th 599, 607 (3d Cir. 2024) (explaining that, under *Collins*, "if there is no harm derived from the

President's inability to remove the agency head, then the agency action will not be unwound"), *petition for cert. pending*, No. 24-185 (U.S. filed Aug. 16, 2024). The Supreme Court posited, for example, that a party might be entitled to relief if the President had tried to remove an officer but had been blocked from doing so. *See Collins,* 594 U.S. at 259.

In this case, Sun Valley cannot draw a causal link between the ALJ's removal protections and the award against it. The then-Secretary of Labor did not "attempt[] to remove" the ALJ but find himself "prevented from doing so." *Id*. In fact, the Secretary ratified the ALJ's appointment after she held the hearing and before she decided the case, demonstrating that it is "unlikely that the restriction on the removal of the ALJ prevented the agency from pursuing a different path" with respect to Sun Valley. *Calcutt v. FDIC*, 37 F.4th 293, 319 (6th Cir. 2022), *rev'd on other grounds*, 598 U.S. 623 (2023). Likewise, the Secretary did not "ma[ke] a public statement expressing displeasure with actions taken by" the ALJ and assert a desire to "remove [her] if the statute did not stand in the way." *Collins,* 594 U.S. at 260. And there is no other reason to believe that the removal restrictions "affected the complained-of decision." *Id*. at 274 (Kagan, J., concurring in part and in the judgment).

Attempting to distinguish *Collins*, Sun Valley characterizes its holding on remedy as addressing whether "Congress would have wanted the statutory scheme to flounder just because the removal protections were invalid" and posits that Congress would not "want ALJs to adjudicate monetary liability" absent the removal restrictions that protect them. Sun Valley Br. 52. To begin with, Sun Valley's challenge to the removal restrictions is based on the MSPB's role in determining good cause for removing an ALJ, and Sun Valley provides no reason to think that Congress would want DOL to stop using ALJs if the MSPB could not play that role or if MSPB members were removable at will. More importantly, under *Collins*, the question in determining whether unconstitutional removal restrictions justify setting aside an agency action is whether there is a causal connection between the removal restrictions and the agency action. No such connection exists here.

In short, because there is no nexus between the restrictions on the removal of DOL ALJs and the award against Sun Valley, the removal restrictions—regardless of their constitutionality—provide no basis for vacating that award. *See Rodriguez v. SSA*, 118 F.4th 1302, 1315 (11th Cir. 2024) (explaining that court did not need to address constitutional

challenge to removal protections for ALJs because the plaintiff did not "point[] to any harm he suffered" from the removal protections); *Leachco*, 103 F.4th at 755 (explaining that the plaintiff "is not entitled to relief, even assuming the removal protections [for CPSC commissioners and ALJs] are unconstitutional, unless it can show that the removal protections affected the CPSC's proceedings against it") (capitalizations removed); *K & R Contractors, LLC v. Keene*, 86 F.4th 135, 149 (4th Cir. 2023) (explaining that "regardless of whether the removal protections for DOL ALJs are constitutional," because the plaintiff did not assert any possible harm from the removal protections and nothing in the record demonstrated that the Secretary wanted to remove the ALJs, the plaintiff was not entitled to vacatur of a Benefits Review Board decision affirming an ALJ's order); *Calcutt*, 37 F.4th at 318 ("Even if we were to accept that the removal protections for the FDIC ALJs posed a constitutional problem, [the plaintiff] is not entitled to relief unless he establishes that those protections 'inflict[ed] compensable harm'") (quoting *Collins*, 594 U.S. at 259); *Decker Coal Co.*, 8 F.4th at 1138 (refusing to unwind ALJ decision when there was "no link between the

ALJ's decision … and the allegedly unconstitutional removal provisions").

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Dated: November 13, 2024

Respectfully submitted,

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CERTIFICATES OF BAR MEMBERSHIP, WORD COUNT, IDENTICAL COMPLIANCE OF BRIEFS, AND VIRUS CHECK

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I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on November 13, 2024.

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