ORAL ARGUMENT SCHEDULED FOR APRIL 17, 2020
Nos. 17-1246, 17-1249, and 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 Petition for Review of Orders of the
United States Department of Agriculture

BRIEF OF AMICUS CURIAE AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

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Dated: March 5, 2020

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CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Under Circuit Rule 28(a)(1), the undersigned counsel certifies:

A. Parties and Amici

Petitioners are Joe Fleming, Sam Perkins, and Jarrett Bradley. Respondent is the United States Department of Agriculture ("USDA"). The Court appointed Pratik Shah as *amicus curiae* in December 2019. *Amici curiae* who are known to counsel include: Robert Glicksman, Emily Hammond, Alan B. Morrison, Richard J. Pierce, Jr., Jonathan R. Siegel, the Federal Administrative Law Judges Conference, the Association of Administrative Law Judges, the SSA ALJ Collective, the New Civil Liberties Alliance, and the Cato Institute.

Amicus curiae Americans for Prosperity Foundation is a nonprofit corporation. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

B. Rulings Under Review

References to the rulings at issue appear in the Petitioners' brief.

C. Related Cases

Petitioners' appeals have not previously been before this Court or any other court, and counsel is not aware of any related cases pending in this Court or any other court.

/s/ *Michael Pepson*

CERTIFICATE UNDER CIRCUIT RULE 29(D)

Under Circuit Rule 29(d), undersigned counsel for Americans for Prosperity Foundation ("AFPF") represent that the other *amici curiae* supporting Petitioners, of which it is aware may file, are the New Civil Liberties Alliance and the Cato Institute.

Among *amici* supporting Petitioners, AFPF's brief focuses on the question of the appropriate remedy here. In particular, AFPF's brief addresses (1) the extent to which courts may, consistent with Article III, seek to rewrite federal statutes to comply with the U.S. Constitution; (2) whether the for-cause removal provisions may be severed to save a statute; (3) whether dismissal is the only remedy that affords complete redress here; and (4) the due-process problems caused by a remand.

/s/ *Michael Pepson*

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae Americans for Prosperity Foundation ("AFPF") is a nonprofit corporation. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Under D.C. Circuit Rule 26.1(b), AFPF further states that it is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas are the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts.

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GLOSSARY

ALJ ..... Administrative Law Judge

APA ..... Administrative Procedure Act

CRJ ..... Copyright Royalty Judges

HPA ..... Horse Protection Act

MSPB ..... Merit Systems Protection Board

SSA ..... Social Security Administration

USDA ..... United States Department of Agriculture

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas are the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF has a particular interest in this case because it believes businesses and individuals, like Petitioners, are entitled to a meaningful remedy for the government's separation-of-powers violations that will afford them complete redress under the facts and circumstances of their specific case, as required by Article III of the U.S. Constitution.

SUMMARY OF ARGUMENT

All parties agree that under *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Administrative Law Judge ("ALJ") who presided over Petitioners' cases is an Officer of the United States and thus subject to the Appointments Clause. As

[1] Under FRAP 29(a)(4)(E), *amicus curiae* states that no counsel for a party other than AFPF authored this brief in whole or in part, and no counsel or party other than AFPF made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief. AFPF filed its notice of intent to participate as *amicus curiae* and representation of consent on February 26, 2020.

Petitioners explain, the plain language of the combined for-cause removal provisions in 5 U.S.C. §§ 7521 and 1202(d) violate the separation of powers under *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010). Recognizing as much, the United States Department of Agriculture ("USDA") effectively asks this Court to rewrite Title 5's for-cause provision under the guise of statutory construction. This Article III Court should reject the USDA's invitation to exercise Article I legislative powers. Nor should this Court attempt to "blue-pencil" a provision in Title 5, which is a global statute that applies not just to the USDA but across the federal government. Doing so could potentially impact more than 1,900 ALJs across the federal government. *See Administrative Law Judges*, Office of Pers. Mgmt. (Mar. 2017), http://bit.ly/2uZIiWJ.

Put simply, there is nothing this Court can, or should try to, do to salvage the USDA's unconstitutional administrative process. Only Congress may cure the USDA's constitutional problems, if it chooses to do so. Thus, this Court should focus on the case and controversy before it and provide complete relief to Petitioners. The only meaningful way to redress the harms Petitioners have suffered from the USDA's constitutional violations is to vacate the challenged orders and penalties and dismiss this case without remand.

ARGUMENT

I. This Court Should Not Try to Blue-Pencil Title 5's For-Cause Removal Provision.

As Petitioners ably explain, *Lucia* and *Free Enterprise Fund* render the plain language of the combined removal provisions in 5 U.S.C. §§ 7521 and 1202(d) incompatible with the separation of powers. The USDA appears to recognize as much and implicitly invites this Court to rewrite those provisions. *See* Supp. Resp. Br. for Resp. at 4, 30–31. The USDA would have this Court construe Section 7521's good-cause provision to mean "misconduct, poor job performance, . . . failure to follow lawful directives," or other "appropriate job-related reasons," but not "invidious reasons otherwise prohibited by law." Resp. Br. 38–39. The Court should decline that invitation for at least two reasons.

First, Congress tasked the Merits System Protection Board ("MSPB") and the Federal Circuit—not this Court—with determining what constitutes "good cause" to remove an ALJ under Section 7521. That section states that an action may be taken against an ALJ "only for good cause *established and determined by the Merit Systems Protection Board*[.]" 5 U.S.C. § 7521(a) (emphasis added); *see also Long v. SSA*, 635 F.3d 526, 533 (Fed. Cir. 2011) ("Pursuant to 5 U.S.C. § 7521, the Agency was permitted to remove or suspend Long, an ALJ, 'only for good cause established and determined by the [MSPB].'" (citation omitted)). Not only does "the [MSPB] ha[ve] exclusive rulemaking and adjudicatory authority with respect to section

7521," *Long*, 635 F.3d at 534 (citation omitted), but MSPB final orders can be reviewed only in the U.S. Court of Appeals for the Federal Circuit. *See* 5 U.S.C. § 7703(b)(1)(A). The Federal Circuit has "exclusive jurisdiction . . . of an appeal from a final order or decision of the [MSPB][.]" 28 U.S.C. § 1295(a)(9). That alone should preclude the USDA's effort to have this Court rewrite Tile 5's for-cause removal provision.

Second, the USDA's remedial approach ignores the separation-of-powers-based limitations on Article III courts' ability to "revise" federal statutes—a task Article I vests in Congress alone. *See* Pet. Supp. Br. 46–49. "[C]ourts cannot take a blue pencil to statutes[.]" *Murphy v. NCAA*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring). "Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." *United States v. Rutherford*, 442 U.S. 544, 555 (1979). And courts may "'not rewrite a . . . law to conform it to constitutional requirements.'" *Reno v. ACLU*, 521 U.S. 844, 884–85 (1997) (citation omitted).

Instead, federal courts are tasked with adjudicating discrete "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). This "generally does

not include the legislative power to erase, rewrite, or otherwise 'strike down' statutes[.]" *Collins v. Mnuchin*, 938 F.3d 553, 609 (5th Cir. 2019) (Oldham, J., and Ho, J., concurring in part and dissenting in part). "[T]he judiciary has no power to alter, erase, or delay the effective date of a statute[.]" Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 942 (2018). Instead, the "province of the court is, solely, to decide on the rights of individuals[.]" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). When courts rule for a complaining party, they must focus on providing complete relief to that party, not on rewriting statutes.

Here, the statutory language is a model of clarity: only the MSPB may establish and determine what constitutes "good cause" to remove an ALJ case-by-case, 5 U.S.C. § 7521(a), (b)(1), subject to exclusive review in the Federal Circuit, 5 U.S.C. § 7703; 28 U.S.C. § 1295(a)(9). This Court should reject the invitation to revise these provisions under the guise of statutory construction.

II. Remanding this Case for a Hearing Before a New ALJ is an Improper Remedy Because It Would Not Redress Petitioners' Injuries.

This Court also should reject the USDA's proposal to remand the matter to the agency for a new hearing before an ostensibly properly appointed ALJ. That

remedy that would provide no relief to Petitioners and would leave them worse off.[2] Petitioners are entitled to a remedy that meaningfully redresses their injuries.

As then-Judge Scalia recognized, remedies for constitutional violations must redress the harms to the injured party. When resolving "cases specifically involving incompatible authorization and tenure (or appointment) statutes," courts must focus on providing relief to "the injury-in-fact that confers standing upon the plaintiff." *Synar v. United States*, 626 F. Supp. 1374, 1393 (D.D.C. 1986) (per curiam) (collecting cases), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986); *see also N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 52 (1982) (setting aside exercise of adjudicatory authority *over plaintiff* by bankruptcy judge who lacked Article III life tenure); *Buckley v. Valeo*, 424 U.S. 1 (1976) (setting aside Federal Election Campaign Act provisions granting authority *over plaintiffs* to officials appointed in an improper manner).

Petitioners' injury here is backward-looking: they were harmed because the USDA issued *ultra vires* orders and civil penalties against them through an unconstitutional administrative process. Blue-penciling Title 5 "by deleting the unconstitutional statutory provision . . . affords [Petitioners] no relief whatsoever.

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[2] The remedy in *Lucia*—vacating the decision and remanding the matter to the agency for a new hearing before a properly appointed ALJ, *see Lucia*, 138 S. Ct. at 2055 & nn.5-6—is inapplicable here because it cannot redress the practical harms caused by the constitutional violations at issue. The *Lucia* court pointedly declined to address the constitutional violations presented here. *See id.* at 2050 n.1.

On these facts, editing the statute would not resolve any case or controversy. [Because Petitioners] do not complain about the possibility of future regulatory activity." *Collins*, 938 F.3d at 609 (Oldham, J., concurring in part and dissenting in part).[3] And "in a case seeking redress for past harms such as this one, prospective relief is no relief at all." *Id.* at 609–10. Petitioners' injury is caused by an unconstitutional administrative process, which this Court cannot, and should not try to, fix. *Cf. United Church of Med. Ctr. v. Med. Ctr. Com.*, 689 F.2d 693, 701 (7th Cir. 1982) ("Submission to a fatally biased decisionmaking process is in itself a constitutional injury sufficient to warrant injunctive relief, where irreparable injury will follow in the due course of events, even though the party charged is to be deprived of nothing until the completion of the proceedings.").

As in *Collins*, Petitioners here do not seek prospective relief; they instead seek relief from actions the USDA has already taken. Failing to end the enforcement actions against Petitioners will leave them without a remedy. That result would conflict with the fundamental and longstanding principle that for every right there

[3] By contrast, in *Free Enterprise Fund* "the plaintiffs sought an injunction against future audits and investigations by the unconstitutionally insulated agency. To remedy the plaintiffs' prospective injury-in-fact, the Court refused to apply the statute insulating the officers from removal." *Collins*, 938 F.3d at 610 (Oldham, J., concurring in part and dissenting in part).

must be a remedy.[4] "It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury*, 5 U.S. at 147. This Court should therefore grant the petitions and set aside the USDA orders without remand. *See Noel Canning v. NLRB*, 705 F.3d 490, 515 (D.C. Cir. 2013).

Three more reasons support this result. *First*, as a practical matter, any construction this Court gives to Title 5's for-cause removal provision—whether as a "saving" construction or in an attempt to "sever," *i.e.*, blue-pencil or delete—would be, in effect, an advisory opinion. *Second*, even if this Court could rewrite or delete the offending for-cause removal provision to bring the statutory scheme in line with Article II, in so doing it would create a far worse due-process problem by depriving Petitioners of an impartial, unbiased decisionmaker. *Third*, a remand would wrongly punish Petitioners with undue, burdensome, and extraconstitutional administrative process, creating a perverse *disincentive* for future litigants to defend the constitutional separation of powers.

A. This Court Cannot, as a Practical Matter, Definitively Negate the For-Cause Removal Provision.

The Supreme Court's decision in *Free Enterprise Fund* is binding on all federal courts, resolving the constitutional and statutory questions presented for the

[4] Severance is not "literally" a remedy, because "[r]emedies operate with respect to specific parties, not on legal rules in the abstract." *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring).

entire country. Here, by contrast, if this Court holds Title 5's for-cause removal provision unconstitutional and attempts to sever it, the Court will not definitively redress Petitioners' harm. That is because ALJs would realize that, for all practical purposes, the constitutionality of the tenure protection is still an open question. *Cf. Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986) (rejecting "argument that consideration of the effect of a removal provision is not 'ripe' until that provision is actually used"). That is, if the USDA—through the MSPB—were to remove an ALJ, that ALJ could seek judicial review in the U.S. Court of Federal Claims. *See* 28 U.S.C. § 1491(a). Decisions in that court are appealable to the Federal Circuit, not to this Court. *Id.* § 1295(a)(3). In a case brought by a removed ALJ, the Federal Circuit might conclude either Title 5's for-cause removal protection is constitutional or, if the whole system is unconstitutional, the removal power rather than the tenure protection is inoperative. In conducting that analysis, the Federal Circuit would not be bound by any D.C. Circuit precedent established in this case. This outcome demonstrates why any attempted "blue pencil" remedy here would, at best, be a quasi-advisory opinion. And worse, why a remand following that opinion could not provide Petitioners with concrete relief.

B. Judicial Removal of ALJ Independence Would Create Insoluble Due-Process Problems.

Even if this Court could definitively blue-pencil the unconstitutional for-cause removal provisions and solve the accountability problem, in doing so it would create

an even-greater due-process problem.[5] A remedy should not leave Petitioners worse off—the cure cannot be worse than the disease. Transforming an ALJ into a political appointee deprives Petitioner of the only supposedly independent decisionmaker in the entire administrative process.[6] That result is profoundly unconstitutional.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). That "requirement . . . 'applies to administrative agencies which adjudicate as well as to courts.'" *Utica Packing Co. v. Block*, 781 F.2d 71, 77 (6th Cir. 1986) (quoting *Withrow v. Larkin*, 421 U.S. 35, 46 (1975)). "[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Id.* "Every procedure which would offer a possible temptation to the average man as a judge . . . or which might lead him not to hold the balance nice, clear and true between the

[5] "[T]he separation of powers exists for the protection of individual liberty[.]" *NLRB v. Noel Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring). And "the Appointments Clause is aimed at more than an abstract division of labor between the branches of government: The structural principles secured by the separation of powers protect the individual as well[.]" *Cirko ex rel. Cirko v. Comm'r of Soc. Sec.*, Nos. 19-1772, 19-1773, 2020 U.S. App. LEXIS 2055, at *10 (3d Cir. Jan. 23, 2020) (cleaned up).

[6] As the Federal ALJ Conference explained: "The safeguards on ALJ independence provided by the APA reduce the risk of bias in administrative adjudication and promote due process." Br. Amicus Curiae of Federal Administrative Law Judges Conference at 12, *Lucia v. SEC*, No. 17-130 (S. Ct. filed Feb. 26, 2018).

State and the accused, denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *see also Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 883 (2009) ("[T]he Due Process Clause has been implemented by objective standards that do not require proof of actual bias.").

Severing the for-cause provision to "cure" the separation-of-powers violation for the ALJ would have the perverse effect of further violating the Petitioners' due-process rights by compromising the independence of the ALJ and denying the Petitioners an impartial decisionmaker. "[I]ncreasing presidential control over ALJs would create impartiality concerns under the Due Process Clause. . . . The agencies' ability to appoint ALJs and initiate their removal creates obvious incentives for ALJs to favor agency positions." Kent Barnett, *Resolving the ALJ Quandary*, 66 Vand. L. Rev. 797, 801 (2013). "There is no guarantee of fairness when the one who appoints a judge has the power to remove the judge before the end of proceedings for rendering a decision which displeases the appointer." *Utica Packing Co.*, 781 F.2d at 78. "All notions of judicial impartiality would be abandoned if such a procedure were permitted." *Id.* "[O]ne who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935). Allowing agencies not only to select but also to remove ALJs violates due process by allowing the agency to effectively select the judge in its own cause. "Just as no

man is allowed to be a judge in his own cause, similar fears of bias can arise when . . . a man chooses the judge in his own cause." *Caperton*, 556 U.S. at 886.

That remedy would also require judicial revision of a core provision of the Administrative Procedure Act ("APA"). "Before the APA was enacted, the public expressed significant concern that hearing examiners—as ALJs were then called—were not impartially presiding over agency hearings; rather, the examiners acted as the arms of the agency." Linda D. Jellum, *"You're Fired!": Why the ALJ Multi-Track Dual Removal Provisions Violate the Constitution and Possible Fixes*, 26 Geo. Mason L. Rev. 705, 710 (2019). "The substantial independence that the [APA's] removal protections provide to [ALJs] is a central part of the Act's overall scheme." *Lucia*, 138 S. Ct. at 2060 (Breyer, J., dissenting); *see Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 130–32 (1953) (discussing evolution of ALJ independence). "The [APA] did not go so far as to require a complete separation of investigating and prosecuting functions from adjudicating functions. But . . . the safeguards it did set up were intended to ameliorate the evils from the commingling of functions[.]" *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46 (1950). "[T]he process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him,

free from pressures by the parties or other officials within the agency." *Butz v. Economou*, 438 U.S. 478, 513 (1978).

A judicial rewrite of Title 5's for-cause protection would transform independent ALJs into political appointees beholden to high ranking agency officials who authorize investigations and enforcement actions (and who make final liability determinations). Doing so would vitiate the APA's core due-process-based guarantee of an independent check on the abuse of agency authority.[7] Allowing agencies to hire and fire ALJs based on their decisions would compromise ALJ independence. Political appointees cannot substitute for independent ALJs, for the independence of adjudicators is the essence of fair and impartial decisionmaking.

C. Remand Here Would Not Only Be Unfair and Unduly Burdensome but Also Would Create a Perverse Disincentive to Raise Meritorious Appointments Clause Claims.

As the Supreme Court has made clear, Appointments Clause remedies should "create incentives to raise Appointments Clause challenges." *Lucia*, 138 S. Ct. at 2055 n.5 (cleaned up and citation omitted). The remedy for a violation of the Appointments Clause or separation of powers should advance the structural purpose

[7] "[T]he agency's ability to overrule an ALJ on both fact and law does not mean that an ALJ's decision is meaningless. The ALJ's credibility findings can be very significant, affecting whether substantial evidence exists for an agency's contrary decision on administrative appeal. Indeed, courts review with a more careful eye agency findings that are contrary to ALJs' factual findings." Barnett, *Resolving the ALJ Quandary*, 66 Vand. L. Rev. at 826–27.

of Article II by creating incentives for parties to raise such challenges. *See Ryder v. United States*, 515 U.S. 177, 182–83 (1995). A remand here would have the opposite effect, perversely *disincentivizing* parties from exercising their constitutional rights. *See* Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481, 518–46 (2014).

Consider *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, which involved an Appointments Clause challenge to the Copyright Royalty Board's structure. 684 F.3d 1332 (D.C. Cir. 2012). The basis of the challenge was that Copyright Royalty Judges ("CRJ") were Principal Officers of the United States who had not been properly appointed by the Library of Congress because they were not directly appointed by the President and confirmed by the Senate. *Id.* at 1134, 1336. This Court held the position of CRJ under the statute violated the Appointments Clause. *Id.* at 1134. "To remedy the violation, [this Court] follow[ed] the Supreme Court's approach in *Free Enterprise Fund* . . . by invalidating and severing the restrictions on the Librarian of Congress's ability to remove the CRJs." *Id.* This Court then vacated the challenged determination and remanded the matter.

That remedy did nothing to redress Intercollegiate's injury, perhaps leaving it worse off. *See* Barnett, *To the Victor Goes the Toil*, 92 N.C. L. Rev. at 521–25. This "ill-fitting remedy . . . also created new problems. CRJs are now subject to political pressure when deciding matters because of their ability to be removed at

will by the Librarian of Congress, whom the President, in turn, can remove at will."[8] *Id.* at 524. This "brings the fairness of . . . [copyright-royalty] proceeds into question because political actors can assert more control over the hearings' outcomes." *Id.* at 524–25. That outcome also "fails to deter Congress from creating other unconstitutional appointments in the first instance." *Id.* at 523. In sum, the *Free Enterprise Fund* blue-pencil remedy this Court deployed in *Intercollegiate* "fail[ed] to provide incentive to seek redress for future litigants." *Id.* *But see Lucia*, 138 S. Ct. at 2055 n.5.

This Court therefore must reject any suggestion that the *Free Enterprise Fund* blue-pencil remedy would be appropriate here. "[S]ubjection to an unconstitutionally constituted decisionmaker" constitutes irreparable harm. *United Church of Med. Ctr.*, 689 F.2d at 701. A remand would subject Petitioners to a pointless, burdensome, and hopelessly unconstitutional administrative process. As this Court has previously suggested, it is "aware of no theory that would permit . . . [it] to declare [an agency's] . . . structure unconstitutional without providing relief to the appellants in this case." *Fed. Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993).

[8] The Court should consider the remedy's fairness on the proceedings before the agency. *See* Barnett, *To the Victor Goes the Toil*, 92 N.C. L. Rev. at 525.

III. This Court Should Reject Parade-of-Horribles Arguments Against Providing Petitioners Complete Relief.

The impact if this Court protects Petitioners' constitutional rights and grants them complete relief is overstated. For instance, *amicus* Federal Administrative Law Judges Conference ("FALJC") asserts "that this decision will impact the more than 1930 current administrative law judges who are estimated to currently be handling well over one million pending cases." FALJC Br. at 22. Not so, if the Court focuses on Petitioner and not rewriting Title 5.

Despite the parade-of-horribles handwaving by various *amici*, the scope of the issues presented by this case and controversy is far narrower. As this Court's December 6 Order suggests, the question here is whether the combined for-cause removal provisions violate the separation of powers "as applied to administrative law judges within the Department of Agriculture." The USDA has *two* ALJs—not 1,930. *See About OALJ*, USDA, https://oalj.oha.usda.gov/about. The question of whether ALJs at other agencies are Officers of the United States subject to the Appointments Clause and whether applicable for-cause removal provisions would violate the separation of powers as applied to other agencies is not before the Court. And, as argued above, the Court should not attempt to reach it.

For example, as *amicus* Association of Administrative Law Judges ("AALJ") notes, "over eighty-five percent of ALJs in the federal government serve at" the Social Security Administration ("SSA"). AALJ Br. 6. Whether SSA ALJs are

Officers subject to the Appointments Clause and whether the for-cause removal provisions violate the separation of powers *as applied to the SSA* is not at issue here.

"*Lucia* itself is hardly facially dispositive of whether Social Security ALJs are 'Officers of the United States' subject to the Appointments Clause[.]"[9] *Abbington v. Berryhill*, No. 17-00552, 2018 U.S. Dist. LEXIS 210000, at *17 (S.D. Ala. Dec. 13, 2018). In *Lucia*, the Supreme Court exhaustively catalogued the "extensive powers" SEC ALJs wield, explaining that "an SEC ALJ exercises authority 'comparable to' that of a federal district judge conducting a bench trial." *Lucia*, 138 S. Ct. at 2049 (quoting *Butz*, 438 U. S. 478 at 513). As *amicus* SSA ALJ Collective explains, "[t]he duties, discretion and authority of SSA ALJs dramatically differ from those of the SEC ALJs at issue in *Lucia*[.]"[10] SSA ALJ Collective Br. 9; *see id.* at 9-12 (distinguishing SEC ALJs from SSA ALJs). This Court is not being asked to decide the constitutional status of SSA ALJs or those at any other agency. Resolution of those questions is unnecessary to decide this case and controversy.

The relief here should be confined to redressing *Petitioners'* injuries and meaningfully protecting *their* constitutional rights. "A plaintiff's remedy must be

[9] *Lucia* only addressed the question of whether SEC ALJs are Officers of the United States subject to the Appointments Clause. *See Lucia*, 138 S. Ct. at 2051 ("The sole question here is whether the Commission's ALJs are 'Officers of the United States" or simply employees of the Federal Government.").

[10] "ALJ duties vary tremendously" across agencies. SSA ALJ Collective Br. 5.

tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). Accordingly, all the Court should do here is declare the *USDA's* administrative enforcement scheme unconstitutional as applied to Petitioners, vacate and set aside the challenged orders and civil penalties, and dismiss the cases against Petitioners without remand. This appropriately leaves separate questions impacting different agencies not before the Court for another day, and another concrete Case or Controversy. The sky will not fall.

CONCLUSION

For the above reasons, this Court should grant the petitions and vacate the orders and civil penalties without remand.

Respectfully submitted,

/s/ *Michael Pepson*
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of FRAP 29(a)(5), FRAP 32(a)(7)(B), and the Court's December 6, 2019 Order because it contains 4,341 words. This brief also complies with the typeface and type-style requirements of FRAP 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Times New Roman 14-point font.

Dated: March 5, 2020

/s/ *Michael Pepson*

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2020, I electronically filed the above Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Petitioners with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Michael Pepson*