

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

TANIA NEMER,

Plaintiff,

v.

PAMELA J. BONDI, Attorney General, *et al.*,

Defendants.

Case No. 25-cv-4170 (SLS)

**BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS  
*AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S OPPOSITION  
TO DEFENDANTS' MOTION TO DISMISS**

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## **CORPORATE DISCLOSURE STATEMENT**

*Amicus curiae* Constitutional Accountability Center states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

Constitutional Accountability Center is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution’s text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to protect the rights, freedoms, and structural safeguards that our nation’s charter guarantees. Accordingly, CAC has an interest in this case.

### INTRODUCTION AND SUMMARY OF ARGUMENT

Until February 5, 2025, Tania Nemer was an Immigration Judge (IJ) charged with “conduct[ing] specified classes of proceedings” involving immigration law. On that day, Defendants interrupted her proceedings on the bench and told her that she was terminated “effective immediately.” Compl. ¶ 32. She contends that this termination was based on her sex, national origin, and political affiliation. *Id.* ¶ 6.

In response to these allegations, Defendants introduce a completely novel theory of executive power, arguing that Nemer’s “status as an Officer of the United States . . . means that neither the protections of Title VII or the First Amendment apply to her removal.” MTD 17. In other words, Defendants claim that because of the President’s authority under Article II, all inferior officers are removable at-will, and neither the Constitution nor the Congress can impose any limitations on the Attorney General’s authority to remove IJs, *id.* at 17, 2. This argument is at odds with the text and history of the Constitution, as well as centuries of historical practice. This Court should reject it.

The Constitution’s Framers gave Congress—not the executive—the power to structure

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

the federal government. In the colonial era, British kings had used their power to create offices and fill them with personal favorites to construct a “vast patronage network” that they would then use to “bribe, threaten, and cajole” lawmakers. Michael W. McConnell, *The President Who Would Not Be King: Executive Power under the Constitution* 152 (2020); see also *The Declaration of Independence* para. 12 (U.S. 1776) (“He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people . . . .”). The result was not only tyranny and corruption, but also bad government. Colonists complained that royalists filled the “highest seats of justice with bankrupts, bullies, and blockheads” and eliminated the “most virtuous and exalting” candidates from government office. Gordon Wood, *The Creation of the American Republic, 1776-1787*, at 145 (1972) (quoting Philadelphia Packet, Mar. 4, 1777).

For this reason, when “defining the . . . powers” of the new nation, the Framers firmly denied the President any “prerogative” to create federal offices. 1 *The Records of the Federal Convention of 1787*, at 65 (Max Farrand ed., 1911) (hereinafter *Farrand’s Records*). They instead insisted that Congress would exclusively enjoy this power, and used language that obviated any “doubts that [the President] might appoint officers without a previous creation of the offices by the Legislature.” McConnell, *supra*, at 154 (quoting James Madison). As many early legislators explained, Congress’s power to establish an office “imply[d] every thing relative to its formation, constitution, and termination,” see 1 *Annals of Cong.* 503 (1789) (Joseph Gales ed., 1834) (Rep. Lawrence), and Congress could “direct the[] appointment and removal” of officers “on what terms they pleased,” *id.* at 569 (Rep. Smith).

Congress has long exercised these powers by creating inferior officers and regulating the manner in which they are appointed to and removed from service. In the nineteenth century, it exercised this power to “confirm the judgment of history . . . that federal service should depend

upon meritorious performance rather than political service,” *see U.S. Civ. Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 557 (1973), reflecting the interest in professional, impartial leadership that motivated the Founding generation to give Congress the power to create offices in the first place, *Wood, supra*, at 267. In the twentieth century, lawmakers used this power extensively, first to prohibit the government from firing employees for making political speeches and publicizing government mismanagement, and then to forbid discrimination on the basis of race, color, religion, sex, or national origin. *See infra* Part II.

Although the Supreme Court has suggested that the executive’s need to supervise may require some power of removal over certain “executive officers who exercise that power on his behalf,” *see, e.g., Trump v. Wilcox*, 145 S. Ct. 1415, 1415 (2025), the Court has never extended this power to officers like Ms. Nemer. Even in *Myers v. United States*, 272 U.S. 52 (1926), a high-water mark in the Court’s treatment of presidential removal power, the Court rejected any contention that the President could remove inferior officers he does not appoint, instead describing the removal power as “an incident to [the President’s] specifically enumerated function of appointment by and with the advice of the Senate.” *Id.* at 164. Similarly, the Court explained that Congress’s power to “regulate removals” of inferior officers is “incidental” to its “constitutional power to vest appointments of inferior officers in the heads of departments.” *Id.* at 161.

This treatment of removal makes sense. As the Supreme Court has explained, “[i]nferior officers are those ‘whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.’” *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 761 (2025) (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)). Thus, at-will removal is not necessary for presidential control of inferior

officers because those officers' decisions remain subject to correction by a principal officer. *Id.* at 765 (“if an adjudicative officer’s decisions are reviewable by a superior, then the officer may be considered inferior even if not removable at will”).

Defendants’ argument to the contrary rests on a vision of the Constitution that the Supreme Court has rejected. *See, e.g., Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 494 (2010) (confirming that the Court “has upheld for-cause limitations” on removal of inferior officers). Indeed, the Court has only once limited a removal restriction implicating an officer who was not Senate-confirmed, and that case involved a “highly unusual” statute that insulated officers with significant policymaking authority using “double for-cause removal provisions,” *id.* at 505, 488 (internal quotations omitted). There, the Court limited its ruling to this “novel” provision and confirmed Congress’s general authority to regulate executive officers and employees. *Id.* at 496.

Here, Defendants do not challenge a “highly unusual” scheme without “historical analogue[.]” *Id.* at 505. Courts and commentators have long assumed that IJs and similar adjudicators—officers whose decisions are subject to review and who do not act “largely independently” of their supervisors, *id.* at 504; Pltf’s Br. 29-36—are subject to congressional regulation of their removability. Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1247 (2014) (“Congress may specify removal limits when it vests the appointment of inferior officers in someone other than the President.”). And these federal officers have routinely raised claims regarding their employment under Title VII and other statutes, as well as the First Amendment. Compl. ¶ 26; *see infra* 19. Defendants’ constitutional argument thus takes aim at what has long been a “traditional way[.] of conducting government.”

*Mistretta v. United States*, 488 U.S. 361, 401 (1989) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)). This Court should reject it.

## ARGUMENT

### I. **The Executive Does Not Possess an Illimitable Power of Removal over Inferior Officers.**

A. The Constitution gives Congress great flexibility in determining how best to shape the federal government, as well as a unique authority over inferior officers. While the Framers anticipated the creation of “Departments,” *see* U.S. Const. art. II, § 2, cl. 1, they left unspecified what those departments would be and how they would be organized. Likewise, while the Framers envisioned that “Officers of the United States” would be “established by Law,” *id.* art. II, § 2, cl. 2, they provided few details concerning those officers’ relationship with the President. *Cf. id.* art. II, § 2, cl. 1 (Opinions Clause). Instead, the Framers gave Congress the authority to make laws necessary and proper for carrying into execution “all” powers of “the Government of the United States,” *id.* art. I, § 8, cl. 18, including the authority to “establish all offices,” 2 *Farrand’s Records, supra*, at 345.

It was no accident that the Framers empowered Congress in this way. In England, the King’s ability to create offices and titles of nobility and fill them with hand-selected appointees had allowed monarchs to “‘purchase’ a reliable cadre” of supportive officers. Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 Cornell L. Rev. 1045, 1056 (1994). These “arbitrary exercises of royal power” left an “indelible impression” on the founding generation. *Id.* at 1056-57. Seeking to avoid this type of patronage and the corruption it produced, the Framers ensured that, unlike the British King, the President was not permitted to create executive offices. McConnell, *supra*, at 153; *see The Federalist No. 69*, at 421 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The king of

Great Britain is emphatically and truly styled the fountain of honor. He not only appoints to all offices, but can create offices. . . . There is evidently a great inferiority in the power of the President, in this particular, to that of the British king.”).

Instead, the Framers ensured that Congress should be “first among equals in the construction and definition of the federal government.” E. Garrett West, *Congressional Power over Office Creation*, 128 Yale L.J. 166, 178 (2018). Indeed, by providing that the President’s appointment power extended only to offices “which shall be established *by law*,” U.S. Const. art. II, § 2, cl. 2 (emphasis added), the Framers reiterated that the President would have no role in office-creation, creating a “double-barreled repudiation of any presidential prerogative power to create offices,” McConnell, *supra*, at 154. This would help to implement the founding generation’s interest in a government directed by “disinterested men,” who “would employ their whole time for the public good,” Wood, *supra*, at 59, rather than “obsequious instruments of . . . [presidential] pleasure,” *The Federalist No. 76, supra*, at 458 (Alexander Hamilton).

The Framers also granted Congress a unique power over the appointment of “inferior [o]fficers.” U.S. Const. art. II, § 2, cl. 2. While the Appointments Clause required the President to appoint “Officers of the United States” with the advice and consent of the Senate, it provided that “Congress may by Law vest the Appointment” of “inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” *Id.*

The decision to vest that authority in Congress stemmed from the Framers’ belief that a “degree of flexibility” was “appropriate in providing for the appointment of officers who, by definition, would have only inferior governmental authority.” *Weiss v. United States*, 510 U.S. 163, 186-87 (1994) (Souter, J., concurring); *Kennedy, Inc.*, 606 U.S. at 760 (describing the Framers’ recognition that “requiring all officers of the Federal Government to run the gauntlet of

Presidential nomination and Senate confirmation would prove administratively unworkable”). Moreover, because inferior officers were subject to some amount of supervision by principals, the Framers concluded that allowing Congress additional flexibility in regulating their offices would not disturb “the chain of political accountability that was central to the Framers’ design of the Appointments Clause.” *Kennedy*, 606 U.S. at 794; *Edmond*, 520 U.S. at 662-63 (describing “the views of the first Congress” that “‘inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate”); Rao, *supra*, at 1247 (“Because the appointment of inferior officers by heads of departments depends entirely on statute, Congress has authority to specify the terms of removal. Moreover, for inferior officers properly understood, removal at will may not be essential for control, as these officers will be subordinate to an officer who is within the control and direction of the President.”).

**B.** Congress’s authority to create inferior offices and provide for their appointment necessitated control over their removal. During what would later be called the “Decision of 1789,” the First Congress’s “discussion and decision” about whether the President could remove department heads without the Senate’s approval, *see Myers*, 272 U.S. at 136, legislators explained that Congress’s power to “organise [the government] by creating the necessary offices” entailed the power to “establish[] offices,” and the “authority to declare by whom” officers should be removed, as “shall appear to be most conducive to the public good.” 11 *Documentary History of the First Federal Congress 1789-1791*, at 1021 (Charlene Bangs Bickford et al. eds., 2019) (Rep. Vining). Even lawmakers who disagreed about whether the President could remove department heads without the Senate’s approval agreed that Congress had authority to regulate the removal of inferior officers. Indeed, when Rep. Smith posited that

“the [C]onstitution had left it in the power of the Legislature” to dictate the appointment and removal of inferior officers “on what terms they pleased,” James Madison did not object, instead positing that if Smith agreed “that the Legislature may vest the power of removal, with respect to inferior officers, he must also admit that the constitution vests the President with the power of removal in the case of superior officers; because both powers are implied in the same words.” 1 Annals of Cong. 569 (1789); *accord id.* at 503 (“the establishment of an office implies every thing relative to its formation, constitution, and termination” (Rep. Lawrence)).

Thus, the “debate in 1789” was understood not to disturb Congress’s power to “regulate[] and delegate the appointment of ‘inferior officers’ . . . [and] the manner in which . . . *the removal . . . shall be made.*” 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1531, at 388 (1st ed. 1833) (emphasis added). Rather, it was widely assumed that any presidential power of removal extended only to officers appointed by the President. *See* 1 James Kent, *Commentaries on American Law* 289 (1826) (describing the Decision of 1789 as applying “to every other officer of government *appointed by the president and senate*” (emphasis added)); 3 Story, *supra* § 1531, at 390 n.1 (describing the conclusion that “removal by the executive could not be abridged by the legislature; *at least, not in cases, where the power to appoint was not subject to legislative delegation*” (emphasis added)); *see* 1 Annals of Cong. 637 (the President might not “have the power of dismissal” over the Comptroller because he was “an inferior officer” (Rep. Stone)).

The executive branch itself understood the decision of 1789 to address, at most, “every officer *appointed by the President.*” *The Claim of Surgeon DuBarry for Back Pay*, 4 U.S. Op. Att’y Gen. 603, 612 (1847) (emphasis added). Perhaps this is why Attorney General Wirt assumed that Congress could limit the removal of even a presidentially-appointed inferior

officer, observing when evaluating the tenure of a Register of Wills, that Congress could give such an officer “a more permanent tenure.” *Tenure of the Reg. of Wills*, 1 U.S. Op. Atty. Gen. 212, 213 (1818); *see also Appointment & Removal of Inspectors of Customs*, 4 U.S. Op. Atty. Gen. 165, 166 (1843) (noting that he was “not prepared positively to dissent” from Story’s assessment of Congress’s power to regulate inferior officers, and assuming that “Congress is competent to restrain the Executive in the exercise” of the power to remove inferior officers); *Mil. Power of the President to Dismiss from Serv.*, 4 U.S. Op. Atty. Gen. 1, 1 (1842) (quoting Story).

Even champions of the executive’s removal authority shared these assumptions about Congress’s power over inferior officers. For example, President Jackson, one of the most “vigorous[] defend[ers of] presidential power in the direct context of removal authority,” *see* Steven G Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 Case W. L. Rev. 1451, 1531-59 (1997) (describing the role of removal in the conflict between Jackson and Congress over the Second Bank of the United States), disclaimed a right “to supervise or interfere with the [officers responsible for public money], *unless he be an officer whose appointment, under the Constitution and laws, is devolved upon the President alone or in conjunction with the Senate.*” *See* Letter to Senate, Apr. 21, 1834, in 3 *A Compilation of the Messages and Papers of the Presidents* 1313 (James D. Richardson ed., 1897) (emphasis added); *see also* Letter from Levi Woodbury to John Davis, May 5, 1836, in S. Doc. No. 430, 24th Cong., 1st Sess. 26, 30-31 (1836) (noting that Jackson’s Secretary of the Treasury was “far from feeling objection to further legislation” on the subject of selecting “candidates for inferior employments” and believed that “the power of original appointment and removal in all these cases should be vested in Congress”); *see also* Andrew Johnson, Message to the Senate, Mar. 2,

1867, in *8 Messages & Papers, supra*, at 3694 (noting that the power to remove “applies equally to every other officer of the government *appointed by the President, whose term of duration is not specially declared*”).

\* \* \*

The Framers of the Constitution believed Congress should have the authority to regulate federal offices and dictate the terms on which the removal of inferior officers could be made. They exercised this power to prevent patronage, preserve free speech, and ensure equal treatment in federal employment, as the next Section discusses.

## **II. Congress Has Regulated the Appointment and Removal of Inferior Officers Since the Founding.**

A. The removal of inferior officers has long been the subject of congressional regulation. In the early years of this nation’s history, both Congress and the President understood that the removal power was something to be granted—it had to be specified or it did not exist. Thus, despite the “dominant pattern” of legislative silence on removal in the early Republic, Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 Harv. L. Rev. 1756, 1776 (2023), whenever Congress gave officers fixed terms, it took pains to specify that they were removable at “pleasure,” *see* Act of Sept. 4, 1789, ch. 20, § 27, 1 Stat. 73, 87; *see also* Act of Feb. 27, 1801, ch. 15, § 7, 2 Stat. 103, 106; Act of May 15, 1820, ch. 102, § 1, 3 Stat. 582, 582; Act of July 2, 1836, ch. 270, § 33, 5 Stat. 80, 87-88. Presidential commissions for these officers also indicated that service was “during pleasure.” *See generally* Christine Kexel Chabot, *The Interstitial Executive: A View from the Founding* 52 B.Y.U. L. Rev. (forthcoming 2027), <https://dx.doi.org/10.2139/ssrn.6156786>. And when presidents issued commissions for the few officers who were not removable at pleasure, such as the commissioners of the Revolutionary

War debt, they removed the “during pleasure” language and instead indicated that the officers would serve for a fixed term. *Id.* at 28-29.

As the nineteenth century progressed, Congress began regulating removals more frequently. It conferred tenure “during good behaviour,” Act of Feb. 24, 1855, ch. 122, § 1, 10 Stat. 612, 612 (Court of Claims judges), demanded “reasons” for removals, Act of June 3, 1864, ch. 106, § 1, 13 Stat. 99, 100 (Comptroller of the Currency), required court-martials before removal, Act of July 13, 1866, ch. 176, § 5, 14 Stat. 90, 92 (military officers), and even conditioned the removal of certain principal officers on specific causes, Act of Feb. 4, 1887, ch. 104, § 11, 24 Stat. 379, 383 (Interstate Commerce Commission).

After the Civil War, Congress took aim at the “spoils system,” in which lawmakers “us[ed] the public offices openly and continuously as ammunition in party warfare,” and distributed appointments as “spoils” to the victors of political contests. Carl Russell Fish, *The Civil Service and the Patronage* 155, 79 (1905); Cong. Globe, 41st Cong., 3d Sess. 68-77 (1871) (speech of Carl Schurz) (describing the “system” in which “the offices of the Government” were seen as “spoils” for “public plunder, . . . instead of being regarded as the places of duty” and were distributed to party loyalists with each changing administration). By many accounts, the system produced a predictable diminution of public services, and imposed burdens of “intolerable proportions” on the presidency, causing “unrelenting pressure brought by seekers of public office,” Paul P. Van Riper, *History of the United States Civil Service* 50-51 (1958), and leading the chief executive to cede control of many appointments to party leaders, Fish, *supra*, at 165.

It was this situation that led Congress to develop the civil service system. Van Riper, *supra*, at 51. In the Pendleton Act of 1883, then, legislators sought to limit the “mixing of

partisan politics and routine federal service,” *Nat’l Ass’n of Letter Carriers, AFL-CIO*, 413 U.S. at 557, providing that prospective employees should be evaluated by competitive exam, prohibiting political discharges for covered employees, and barring employees from “coerc[ing] the political action of any person or body,” Pendleton Act, Pub. L. No. 47-27, §§ 7, 2, 22 Stat. 403, 404-06 (1883). By many reports, the law within decades produced results, creating “more equal sharing of positions between the different states and parties.” Fish, *supra*, at 236.

**B.** As the civil service system developed, Congress, prompted by the executive, endeavored to protect inferior officers and employees from arbitrary removal. The Pendleton Act addressed the removal of covered employees in only limited fashion, by prohibiting termination for political reasons and requiring termination when an employee habitually used intoxicating beverages. *Id.* §§ 8, 13, 22 Stat. at 406-07. As the civil service expanded, covered employees were further protected against arbitrary removal. In 1897, President McKinley issued an executive order preventing removals of civil servicemembers without “just cause,” notice, and “opportunity to make defense.” *United States v. Wickersham*, 201 U.S. 390, 398 (1906); *see id.* (concluding that the removal of a covered employee in violation of the Order “was without legal effect”); Task Force on Personnel and Civil Service, *Report on Personnel and Civil Service Prepared for the Commission on Organization of the Executive Branch of the Government* 187, 188 n.30 (1955) (describing a rule preventing removal for “political reasons” applicable even to positions that were exempt from examination).

Soon, Congress wrote these protections into law. In 1912, seeking to prevent removal of federal employees for “protesting,” 48 Cong. Rec. 10732 (1912) (Sen. LaFollette), publicizing government mismanagement, *id.*, and petitioning Congress, *id.* at 10728 (Sen. Reed), Congress passed the Lloyd-LaFollette Act. That Act provided that “no person in the classified Civil

Service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing.” *Bush v. Lucas*, 462 U.S. 367, 383 (1983) (quoting Lloyd-La Follette Act of 1912, Pub. L. No. 62-336, § 6, 37 Stat. 539, 555 (1912)). The statute also entitled employees to notice of charges regarding their removal and an opportunity to contest those charges in writing—an important component of the Act’s protection against “politically-motivated removals,” *id.* at 382, and “the right of free speech,” *id.* at 384 (quoting H.R. Rep. No. 62-388, at 7 (1912)).

In addition to protecting federal employees from politically-motivated removal, Congress also prevented discrimination in federal employment decisions. In 1966, it instructed the President to use his “existing authority” to prevent “discrimination because of race, color, religion, sex, or national origin” in federal employment, An Act to enact title 5, § 7151, Pub. L. 89-554, 80 Stat. 378, 523 (1966), an authority that the executive then used to ensure that decisions based on “factors not relevant to job performance . . . be completely eradicated from Federal employment,” S. Rep. No. 92-415, at 11-13 (1972) (quoting memorandum of President Nixon). In 1972, Congress reiterated the need for “all personnel actions involving Federal employees [to] be free from discrimination,” S. Rep. No. 92-681, at 20 (1972) (Conf. Rep.), granting federal employees the right to remedy employment discrimination in federal court, Equal Employment Opportunity Act of 1972, § 11, Pub. L. 92-261, 86 Stat. 103, 111. Although Congress indicated its interest in preserving the executive’s “discretionary authority” when it was “reposed in agency heads by . . . statute . . . for national security reasons,” S. Rep. No. 92-681, at 21 (1972), it expressed no concerns about limiting any executive authority to remove inferior officers, *see generally* Subcomm. on Labor of the S. Comm. on Labor & Pub. Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*

(Comm. Print 1972). Instead, lawmakers emphasized the desire to “accord Federal employees the same rights and impartial treatment which the law seeks to afford employees in the private sector,” H.R. Rep. No. 92-238, at 23 (1972); S. Rep. No. 92-415, at 12 (1972) (noting that the federal government was the “single largest employer in the Nation”), and to write into law the “prohibition against discrimination by the Federal government” in the Fifth Amendment’s Due Process Clause, *id.* at 12-13 (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

Congress later expanded these protections to apply to additional federal officers, including those individuals—unlike Ms. Nemer—who were appointed by the president, without registering any concern about the executive’s removal power. In 1991, it explicitly clarified the application of Title VII to presidential appointees, *see* Civil Rights Act of 1991, Pub. L. No. 102-166, § 320, 105 Stat. 1071, 1096-97 (excepting those appointees “whose appointment is made by and with the advice and consent of the Senate”). And several years later, it extended these protections to employees in executive branch offices, “whether appointed by the President or by any other appointing authority,” *see* Presidential and Executive Office Accountability Act, Pub. L. No. 104-331, § 2, 110 Stat. 4053, 4055-57 (excepting only those employees “whose appointment is made by and with the advice and consent of the Senate,” and providing a damages remedy). Significantly, while lawmakers did indicate a possible “constitutional problem” with extending certain remedies to executive employees appointed and terminated by the President, they noted that this was the “single” aspect of the application of Title VII to executive officials that might cause constitutional problems. *See* H.R. Rep. No. 104-820, pt. 1, at 29 (1996) (describing the executive branch’s perception that “giving courts or administrative bodies the power to order the President to rehire or promote an employee presented a very serious constitutional problem” and stating that Congress therefore “remove[d] the single

remedy, injunctive relief, that could violate the Constitution”).

### **III. The Supreme Court Has Confirmed Congress’s Power to Govern the Removal of Inferior Officers and Employees.**

A. Consistent with this long history, the Supreme Court has repeatedly recognized Congress’s power to pass laws governing the removal of inferior officers and employees. In *Ex parte Hennen*, 38 U.S. 230 (1839), the Court differentiated between the President’s power to remove principal and inferior officers. *Id.* at 260. *Hennen* concerned a judge’s removal of a clerk who was appointed under a statute that did not specify how the clerk could be removed. *Id.* at 257. The Court distinguished the clerk from “officers appointed with the concurrence of the Senate,” *id.* at 259, and disavowed any suggestion that the President could presumptively remove inferior officers, *id.* at 260 (“the President has certainly no power to remove”). The removal of inferior officers, the Court explained, depends “upon the authority of law,” and thus entails “an inquiry into the meaning and intention of the statute” creating the office. *Id.* The Court then supplied a default rule that would apply “[i]n the absence of . . . statutory regulation”: unless Congress provided otherwise, the Court would “consider the power of removal as incident to the power of appointment,” so that the appointing officer would have unlimited power to remove. *Id.* at 259.

In *United States v. Perkins*, 116 U.S. 483 (1836), the Court reiterated Congress’s power to “limit and restrict the power of removal as it deem[ed] best for the public interest” in the case of inferior officers. *Id.* at 485. There, the Court upheld a statute providing that certain inferior officers could not be dismissed “except upon” the “sentence of a court-martial.” *Id.* at 484. Once again, the Court distinguished Congress’s power to regulate the removal of an inferior officer from “the power of removal . . . of those officers who are appointed by the president by and with the advice and consent of the senate.” *Id.* It explicitly denied the existence of any

“constitutional prerogative of appointment to offices independently of the legislation of congress,” confirming that Congress’s authority to “vest the appointment [of inferior officers] implies authority to limit, restrict, and regulate the[ir] removal.” *Id.* at 485; *Shurtleff v. United States*, 189 U.S. 311, 316 (1903) (the removal power could be “limited by constitution or statute”).

The Court has affirmed the continuing relevance of the *Perkins* rule. In *Myers*, it explained that the “legislative power” to regulate “removals in the case of inferior executive officers” flows from the Appointments Clause itself. 272 U.S. at 127. Just as the “power to remove” is traditionally considered “an incident of the power to appoint,” “the power of Congress to regulate removals” is “incidental to the exercise of its constitutional power to vest appointment[.]” of officers in the heads of departments. *Id.* at 161; *Morrison v. Olson*, 487 U.S. 654, 689 n. 27 (1988) (“*Myers* itself expressly distinguished cases in which Congress had chosen to vest the appointment of ‘inferior’ executive officials in the head of a department” and citing *Perkins*); *id.* at 724 n.4 (Scalia, J., dissenting) (“*Perkins* is in no way inconsistent with my views”).

Even in the more recent cases upon which Defendants rely, the Supreme Court has confirmed that any presidential power of removal does not extend to inferior officers. In *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020), for example, the Court held that a for-cause removal restriction on the head of the Consumer Financial Protection Bureau (CFPB) violated the separation of powers because the Bureau was “led by a single Director and vested with significant executive power.” *Id.* at 220. Distinguishing the cases of inferior officers, who had “limited jurisdiction and tenure and lack[ed] policymaking or significant administrative authority,” *id.* at 217-18 (citation omitted), the Court held that Congress could not restrict the

removal of the director of a single-director agency, reasoning that the single-director structure posed an “impediment to the President’s oversight of the Executive Branch,” by “foreclos[ing] certain indirect methods of Presidential control” and depriving some presidents of “any opportunity to shape [the agency’s] leadership,” *id.* at 225; *see also Collins v. Yellen*, 594 U.S. 220, 250-51, 256 (2021) (declining to “revisit our prior decisions” involving inferior officers when invalidating removal provision concerning “the head of an agency with a single top officer” (quotation marks omitted)).

The Supreme Court has only once invalidated a removal restriction on an inferior officer who was not subject to Senate confirmation. *Free Enter. Fund*, 561 U.S. at 494-95. In *Free Enterprise Fund*, the Court invalidated a “highly unusual” statute that “commit[ed] substantial executive authority” to inferior officers who could only be removed for cause by Securities Exchange Commission commissioners who themselves enjoyed for-cause removal protection. *Id.* at 505; *id.* at 484 (explaining that the President was “restricted in his ability to remove a principal officer, who [was] in turn restricted in his ability to remove an inferior officer”). There, the Court focused on the “unusually high standard” protecting the officers from removal, as well as the “significant independence” and authority that they enjoyed, *id.* at 503, 505-06. It was these features that led the Court to conclude that the scheme was invalid because the inferior officer could not be held “fully accountable” by the executive. *Id.* at 496.

Given the “novel” and “unusual” nature of the statute, the Court took pains to cabin its decision to cases in which inferior officers wield “substantial executive authority” and enjoy “significant” powers.” *Id.* at 505-07; *see also FCC v. Consumers’ Rsch.*, 606 U.S. 656, 696 (2025) (describing *Free Enterprise Fund* as concerning officers with “super-charg[ed] . . . independence”). Indeed, it explicitly confirmed that Congress generally has the “power to

impose good-cause restrictions” on the removal of inferior officers. *Consumers’ Rsch.*, 606 U.S. at 696; *see also United States v. Arthrex*, 594 U.S. 1, 26 (2021) (considering a scheme in which inferior officers with for-cause removal protection made unreviewable decisions, and declining to adopt an approach where “at-will removal by the Secretary would cure the constitutional problem,” but instead holding the statute unenforceable insofar as it prevents a principal officer from reviewing an inferior officer’s decisions).

**B.** Despite all of this, Defendants read the Supreme Court’s case law to prevent Plaintiff from bringing these claims under Title VII and the First Amendment. They are wrong.

As an initial matter, Defendants do not even attempt to show that the application of Title VII and the First Amendment to firing decisions limits the Attorney General’s ability to “direct[] and supervise[]” IJs. *Arthrex*, 594 U.S. at 13 (citation omitted). Nor could they. These proscriptions are significantly less constraining than the “rigorous” limitations on removal at issue in *Free Enterprise Fund*—the one case in which the Court invalidated a provision restricting the removal of non-principal officers. *Free Enter. Fund*, 561 U.S. at 503. There, the Act provided that inferior officers could not be removed except for willful violations of certain laws, willful abuses of authority, or “unreasonable failure to enforce compliance—as determined in a formal Commission order.” *Id.* (referencing 15 U.S.C. §§ 7217(d)(3), 78y(a)). Its unique standard was borrowed from statutes “concerning private organizations like the New York Stock Exchange.” *Id.* (adding that “a removal standard appropriate for limiting government control over private bodies may be inappropriate for officers wielding the executive power of the United States”).

The antidiscrimination requirement of Title VII and the protections of the First Amendment do not represent a “novel” or “rigorous” removal standard. *Id.*; *see also Arthrex*,

594 U.S. at 26 (declining to invalidate provision protecting patent judges against removal except “for such cause as will promote the efficiency of the service”). They do not require principal officers to “alter[] the budget or powers of an agency as a whole,” and engage in notice-and-comment rulemaking to control inferior officers who failed to faithfully execute the law. *Free Enter. Fund*, 561 U.S. at 503. All they ask is that principal officers refrain from removal decisions that violate the Constitution or federal law.

Indeed, if Defendants were right, the Court would have been wrong in *Arthrex* to vacate a decision invalidating a for-cause removal protection for patent judges. There, the Court held that those judges could “properly function as inferior officers” so long as a principal officer had a statutory “means of reviewing” their decisions. *Arthrex*, 594 U.S. at 25. That type of “control” exists here. *Id.* at 20 (referencing the Executive Office for Immigration Review as an example of an agency in which inferior officers’ decisions are subject to review by a “superior executive officer”); Pltf’s Br. 29-36. Indeed, “‘higher-level agency reconsideration’ by the agency head is the standard way to maintain political accountability and effective oversight for adjudication,” even if adjudicating officers are protected by the First Amendment and Title VII. *Id.* Until this case, courts routinely adjudicated Title VII claims from patent judges, IJs, and other adjudicators without a hint of concern about presidential power. *See, e.g., Downing v. Lee*, No. 1:16-CV-1511, 2017 WL 3082664, at \*1 (E.D. Va. July 18, 2017), *aff’d sub nom. Downing v. Matal*, 724 F. App’x 226 (4th Cir. 2018) (antidiscrimination claim regarding patent judge position); *Bain v. Off. of Att’y Gen.*, 648 F. Supp. 3d 19, 64 (D.D.C. 2022) (Title VII claim involving a terminated IJ).

\* \* \*

Defendants argue that the Attorney General has the constitutional authority under Article II to remove inferior officers without regard to protections against arbitrary, political, and discriminatory firing that stem from the Constitution and federal law. In doing this, they ignore not only Supreme Court precedent and “historical practice,” *NLRB v. Noel Canning*, 573 U.S. 513, 549 (2014), but also Congress’s authority over inferior offices. This Court should reject their argument.

### CONCLUSION

For the foregoing reasons, the Motion to Dismiss should be denied.

Respectfully submitted,

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