

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

MAURENE COMEY,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF
JUSTICE, *et al.*,

Defendants.

Case No. 1:25-cv-97625 (JMF)

Honorable Jesse M. Furman

**BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND CROSS-
MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**

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INTEREST OF *AMICUS CURIAE*¹

Constitutional Accountability Center (CAC) 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 preserve the rights, freedoms, and structural safeguards that it guarantees. CAC accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution’s Framers gave Congress—not the executive—the power to determine the structure of the federal government. In the colonial era, British kings had used their power to create and fill offices to construct a “vast patronage network” that they then used 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 (1998) (quoting *Speech of William Livingston*, Phila. Pa. Packet (John Dunlap ed., 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*

¹ No person or entity other than *amicus* and its counsel assisted in or made a monetary contribution to the preparation or submission of this brief. Plaintiff consents to the filing of this brief, and Defendants take no position.

Convention of 1787, at 65 (Max Farrand ed., 1911) (hereinafter *Farrand's Records*). They instead insisted that Congress alone would enjoy this power. *See generally* E. Garrett West, Note, *Congressional Power over Office Creation*, 128 Yale L.J. 166 (2018). And as early legislators explained, Congress's power to establish an office "implied every thing relative to its formation, constitution, and termination." *See* 1 Annals of Cong. 503 (1789) (Joseph Gales ed., 1834) (Rep. Laurance). Legislators' power over the creation of offices meant that they could "direct the[] appointment and removal" of officers "on what terms they pleased." *Id.* at 569 (Rep. Smith).

For over a century, Congress has exercised this power by regulating the manner in which employees and inferior officers are appointed to and removed from service. In the nineteenth century, lawmakers took aim at the "spoils system" in federal employment, convinced 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). The civil service laws that they created embodied the longstanding interest in professional, impartial leadership that so motivated the Founding generation, Wood, *supra*, at 180-81. Congress made clear that those laws apply to Assistant United States Attorneys (AUSAs), thereby protecting them against "arbitrary action, personal favoritism, or coercion for partisan political purposes," and placing modest limits on the Attorney General's ability to remove them. Compl. ¶¶ 9, 70-75 (citing 5 U.S.C. § 2301(b)(8)(A)); *infra* Part IIB. This development contributed to the "growing tendency of assistant U.S. attorneys to treat their government positions as more permanent careers." Todd Lochner, *Strategic Behavior and Prosecutorial*

Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants, 23 Just. Sys. J. 271, 292 (2002); *see infra* Part II.

Defendants now argue that these historic protections are unconstitutional and that Congress cannot provide them to any officer or employee on whom the President relies when exercising “quintessentially executive function[s].” Defs.’ Mot. for Judgment on the Pleadings (“Mot.”) 5 (quoting *Trump v. United States*, 603 U.S. 593, 620 (2024) (alteration in original)). This argument would imperil centuries-old civil-service protections for wide swaths of federal employees, paving the way for the return of the spoils system and government by royally-appointed “bullies” and “blockheads,” Wood, *supra*, at 145.

Fortunately, Defendants are wrong. The Supreme Court has long recognized that any illimitable presidential power of removal does not apply to inferior officers and employees. Indeed, although the Court recently invalidated a statutory restriction on the President’s ability to remove commissioners of federal agencies, the historical sources on which the Court relied addressed only the President’s power to remove certain “principal officers,” *Trump v. Slaughter*, No. 25-332, 2026 WL 1855612, at *19 (U.S. June 29, 2026) (quoting 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1531, at 390 n.1 (1st ed. 1833)); *see also id.* at *18 (explicitly declining to “determine the fate” of inferior officers). Moreover, the Court relied heavily on *Myers v. United States*, its “best word” on the subject of the President’s removal power, *see Slaughter*, 2026 WL 1855612, at *12, and Justice Taft’s “scholarly opinion” in *Myers*, *id.* at *11, explicitly rejected the contention that the President could remove inferior officers he does not appoint, *see Myers*, 272 U.S. 52, 164 (1926) (describing the removal power as “an incident to [the President’s] specifically enumerated function of appointment by and with the advice of the Senate”). Instead, *Myers* 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.

Chief Justice Taft’s 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. *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”).

Moreover, nothing Defendants cite comes close to supporting the argument that the Attorney General has an illimitable power of removal over AUSAs, who are inferior officers, if they are officers at all. *See* Defs.’ Mot. 18 (positing that *Free Enterprise Fund* “ma[de] clear that restrictions on removal by Heads of Department can violate Article II”). In *Free Enterprise Fund*, for example, the Court explained that it had “upheld for-cause limitations” on the power of a department head to remove an inferior. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 493 (2010). It invalidated removal protections for inferior officers only because they were part of a “highly unusual” scheme that used “two layers of for-cause removal,” *Free Enter. Fund*, 561 U.S. at 505, unlike the statutory scheme at issue here. And while Defendants make much of the suggestion that AUSAs exercise “the President’s ‘conclusive and preclusive’

executive power,” *see* Defs.’ Mot. 1, 6, 10, their argument by implication—that anyone who exercises such power must be removable at will—has no purchase in history or precedent.

Indeed, courts and commentators have long assumed that Congress can regulate the removability of employees and inferior officers generally—and AUSAs specifically. *See, e.g.,* 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.”); *Termination of an AUSA on Grounds Related to His Acknowledged Homosexuality*, 7 U.S. Op. O.L.C. 46, 47 (1983) (removal of AUSAs is “tempered” by statute). Defendants’ argument, if accepted, would unsettle what has long been a “traditional way[] of conducting government.” *Mistretta v. United States*, 488 U.S. 361, 401 (1989); *Slaughter*, 2026 WL 1855612, at *11 (relying on “the universal practice of the Government” to determine presidential removal power (citation omitted)). This Court should reject it.

ARGUMENT

I. Congress Has the Power to Regulate the Appointment and Removal of Inferior Officers and Employees.

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 system, the Framers ensured that, unlike the British King, the President was not permitted to create executive offices. McConnell, *supra*, at 153. Instead, the Framers made Congress the “first among equals in the construction and definition of the federal government.” West, *supra*, at 178. 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, providing 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,” devoted to “the public good,” Wood, *supra*, at 59 (citations omitted), rather than “obsequious instruments of ... [presidential] pleasure,” *The Federalist No. 76*, at 458 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The Framers also granted Congress a unique power over the appointment of “inferior Officers.” 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). 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 (“[F]or 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 debate about whether the President could remove the heads of executive departments without the Senate’s approval, *see Slaughter*, 2026 WL 1855612, at *9-10, many legislators took the position that Congress’s power to “organise [the government] by creating the necessary offices” included 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); *see generally Slaughter*, 2026 WL 1855612, at *9 (describing the position of Rep. Sedgwick and others).

And even lawmakers who saw the President’s power to remove department heads as a constitutional imperative, rather than a legislative grant, *see id.* at *9-10, 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 responding 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 502-03 (Rep. Laurance) (appointing power could remove an inferior officer unless a “particular limitation was determined by the law”); *cf. id.* at 637 (Rep. Stone) (the President might not “have the power of dismissal” over the Comptroller because he was “an inferior officer”).

Furthermore, because the debate concerned the removability of department secretaries, there was little discussion of any presidential power to remove anyone else, and many of the strongest advocates of presidential removal made arguments that only applied to Senate-confirmed officers. Madison, for example, emphasized that the President would be required to “consult the Senate” and obtain confirmation before a removed officer could be replaced, so the President could not use removal to appoint “unworthy favorite[s]” as officers. 11 *Documentary History*, at 897 (Rep. Madison); *id.* at 968 (Rep. Boudinot) (“If he removes a good officer, he can not appoint his successor without the consent of the senate; and ... the evil will be small.”); *id.* at 981-82 (Rep. Ames) (similar); 16 *id.* at 828-29 (Rep. Madison) (describing the appointments

power as a limit on the removal power); 1 Annals of Cong. 508-09 (Rep. Clymer); *id.* at 500 (Rep. Hartley).

Thus, the “Decision of 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 Story, *supra* § 1531, at 388 (emphasis added). Rather, it was widely assumed by the commentators who described the Decision of 1789 as “settling” the issue in the preceding decades, *see Slaughter*, 2026 WL 1855612, at *10 (citing 5 John Marshall, *The Life of George Washington* 199-200 (1807); 1 James Kent, *Commentaries on American Law* 289-290 (1826), and 3 Story, *supra* § 1537, at 395), that any presidential power of removal extended only to officers appointed by the President and confirmed by the Senate. *See* 1 Kent, *supra*, at 289 (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)); Marshall, *supra*, at 196 (the decision concerned the manner in which “high officers ... should be removeable”). Indeed, when Daniel Webster twice observed that the President’s removal power was “settled,” *Slaughter*, 2026 WL 1855612, at *11, he underscored that the power existed over officers who were confirmed by the Senate. *See* 11 Cong. Deb. 461-69 (1835) (Sen. Webster) (emphasizing that the Decision of 1789 concerned officers for whom “it is the President and the Senate, and not the Senate alone, who hold the power of appointment”); Cong. Globe, 31st Cong., 1st sess. 1126 (1850) (Sen. Webster) (describing the practice of presidential removal of officers *covered by the Recess Appointments Clause*); *cf.* Cong. Globe App. 31st Cong., 1st sess. 1042 (1850) (Sen. Webster) (describing the

perception that “the President possesses the power of removal” until “a law shall have passed [and] the power is restrained”).

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 and observed when evaluating the tenure of a Register of Wills that Congress could give such an officer “a more permanent tenure.” *Duty of President as to a Reg. of Wills*, 1 U.S. Op. Att’y Gen. 212, 213 (1818); *see also Appointment & Removal of Inspectors of Customs*, 4 U.S. Op. Att’y Gen. 165, 166 (1843) (noting that the Attorney General 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. Att’y Gen. 1, 1 (1842) (quoting Story on inferior officers).

Presidents, too, understood the removal power to be applicable only to higher-level offices. According to the Supreme Court, “[e]arly Presidents ... hewed to the Decision of 1789,” *see Slaughter*, 2026 WL 1855612, at *12; *but see* Andrea Scoseria Katz & Jane Manners, “*Lost to History*”: *Uses and Abuses of the Past in Slaughter and Cook*, Just Security (July 10, 2026) (suggesting that “the figures [*Slaughter*] enlists in support of an at-will removal power neither argued for it nor exercised it”), but many of these Presidents described that decision as applicable only to Senate-confirmed officers. For example, when James Madison described the President’s power over “subordinates,” *see Slaughter*, 2026 WL 1855612, at *10 (referencing 2 *Papers of James Madison* 192 (David Mattern et al. eds., 2013)), he was describing officers who were

appointed by “the joint act of the President & Senate.” 2 Madison Papers, *supra*, 192; *see also* 4 *Writings of James Madison* 78-79 (Gaillard Hunt ed., 1908) (opining in discussion of the President’s removal power that “the heads of departments at least, who are at once the associates and the organs of the Chief Magistrate, ought to be ... not independent of him”). And John Adams, when describing his support for the “President[’s] Power of Removal,” *see Slaughter*, 2026 WL 1855612, at *10 (citing 20 *Papers of John Adams* 150-51 (Sara Georgini et al. eds., 2020) (alteration in original)), referred only to the department heads at issue in the Decision of 1789, *see* 20 *Adams Papers*, *supra*, at 150 (noting his “[v]ote for the Presidents [sic] Power of Removal”).

Even champions of the executive’s removal authority shared these assumptions about the limits of the Decision of 1789. President Jackson, who was unsparing in his use of the removal power, *see Slaughter*, 2026 WL 1855612, at *11, disclaimed a right “to supervise or interfere with” the officers whose appointment was not “devolved upon the President alone or in conjunction with the Senate.” Letter to Senate, Apr. 21, 1834, in 3 *A Compilation of the Messages and Papers of the Presidents* 1313 (James D. Richardson ed., 1897); Letter to Senate, Apr. 15, 1834, in 3 *id.* at 1306 (“[T]he constitutional right of the President to appoint, control, and remove the *head of the Treasury as well as all other Departments* seems to have been universally conceded.” (emphasis added)); 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 and removing “candidates for inferior employments”); *see also* Andrew Johnson, Message to the Senate, Mar. 2, 1867, in 5 *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*” (emphasis added)).

* * *

The Framers of the Constitution believed Congress should have the authority to regulate federal offices and dictate the conditions under which inferior officers and employees could be removed. Congress has used its power over inferior officers and employees to prevent patronage, protect employees’ free speech, and create a professional corps of AUSAs, as the next Section discusses.

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

A. The removal of inferior officers has long been the subject of congressional regulation. Early in the 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. 24, 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>. 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 30-34; *id.* at 2 (describing historical support for “tenure protections for inferior officers without power to issue final decisions”).

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), and required court-martials before removal, Act of July 13, 1866, ch. 176, § 5, 14 Stat. 90, 92 (military officers).

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 public offices as “spoils” to the victors of political contests. Carl Russell Fish, *The Civil Service and the Patronage* 155, 79 (1905). By many accounts, the system had produced a predictable diminution of public services. It also 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, 66-69. In the Pendleton Act of 1883, legislators sought to limit the “mixing of partisan politics and routine federal service,” *Letter Carriers*, 413 U.S. at 557, providing that prospective employees should be evaluated by a 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 produced results within decades, creating “more equal sharing of positions between the different states and parties.” Fish, *supra*, at 236.

That Act laid the foundation for the modern civil service and provided the mechanisms for its growth. It allowed the President and the Civil Service Commission to designate which positions would fall within the civil service. Pendleton Act, § 6, 22 Stat. at 406; *see also* Act of March 3, 1871, ch. 114, § 9, 16 Stat. 495, 515. As a result of various exercises of this authority, nearly half of federal positions were included within the civil service merit system by 1896, so that “the spoils system was on the defensive.” Van Riper, *supra*, at 130.

As the civil service system expanded, the executive further protected inferior officers and employees from arbitrary removal. In 1897, President McKinley issued an executive order preventing removals of civil service members without “just cause,” “full 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) (explaining that a rule preventing removal for “political reasons” was applicable even to positions that were exempt from examination).

Soon, Congress wrote these protections into law. In 1912, seeking to prevent the removal of federal employees for “protesting,” 48 Cong. Rec. 10732 (1912) (Sen. La Follette), publicizing government mismanagement, *id.*, and petitioning Congress, *id.* at 10728 (Sen. Reed), Congress passed the Lloyd-La Follette 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.” *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 382-83, and preservation of “the right of free speech,” *id.* at 384 (quoting H.R. Rep. No. 62-388, at 7 (1912)).

These developments were buttressed by the passage of the Civil Service Reform Act of 1978 (CSRA). In that Act, Congress sought to “balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration.” *United States v. Fausto*, 484 U.S. 439, 445 (1988); *see* Civil Service Reform Act, Pub. L. No. 95-454, §§ 7503, 7513, 92 Stat. 1111, 1135-36 (1978). It required agency heads, including the Attorney General, to prevent “prohibited personnel practices,” including “arbitrary action, personal favoritism, or coercion for partisan political purposes.” *Id.* §§ 2302, 2301, 92 Stat. at 1117, 1114. When removing an employee, agencies would generally need to use the “efficiency of the service” standard to justify removals, although they could use a more streamlined set of procedures for actions based on an employee’s “unacceptable performance.” *Fausto*, 484 U.S. at 446-48. In this way, the Act sought to “simplify and expedite” the procedures for dismissing ineffective federal employees while protecting against arbitrary or politically motivated removal. *See* S. Rep. No. 95-969, at 2-9 (1978) (describing a desire for treatment “on the basis of competence rather than political or personal favoritism”).

B. Congress has also regulated the appointment and removal of attorneys responsible for representing the United States in court. Indeed, the Attorney General’s power over these officers is a relatively recent phenomenon. The Judiciary Act of 1789 provided for the appointment of an Attorney General but did not give the Attorney General supervisory authority over attorneys for

the United States. See Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 Duke L.J. 561, 585-89 (1989). For decades, Congress resisted efforts by the Attorney General to exercise such authority, despite calls for a “fixed relation” between lower-level attorneys and the Attorney General. *Id.* at 585 (quoting Edmund Randolph); see also Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 Am. U. L. Rev. 275, 289 (1989) (concluding that Congress deliberately “withheld the means necessary to enable the Executive to coordinate effective control over criminal law enforcement”). It was only after the Civil War that the Attorney General received statutory supervisory authority over the “various attorneys for the United States,” Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 Ohio St. J. Crim L. 369, 395 (2009) (quoting An Act to establish the Department of Justice, Pub. L. No.41-97, ch. 150, § 16, 16 Stat. 162, 164 (1870)), and only in the mid-twentieth century that Congress granted the Attorney General the power to remove AUSAs, see Act of June 25, 1948, Pub. L. No. 80-773, ch. 646, § 504, 62 Stat. 869, 909, now codified at 28 U.S.C. § 542.

The presence of statutory removal authority has never rendered AUSAs completely removable at will. In the 1970s, the Office of Legal Counsel acknowledged that the Attorney General’s statutory removal authority could be “tempered” by both statute and regulation. *Termination of an AUSA, supra*, at 47 n.3 (describing a 1970 Memorandum from then-Assistant Attorney General William Rehnquist, Office of Legal Counsel). Accordingly, despite Section 542, and although AUSAs were viewed as members of the “excepted service” who were statutorily exempt from most of the CSRA’s removal provisions, the authority to remove AUSAs was constrained by Department of Justice and Office of Personnel Management regulations, as

well as statutes pertaining to the employment of veterans. *Id.*; *Lochner*, *supra*, at 283-84. These developments led observers to conclude that AUSAs had “quasi-civil-service status” by the 1980s, a development that contributed to growing “careerism” among federal prosecutors. *Lochner*, *supra*, at 283-84.

In 1990, lawmakers wrote these executive practices into statute. In the Civil Service Due Process Amendments, Congress clarified that employees in the excepted service, including AUSAs, would receive the tenure protections described in the CSRA. *See* Pub. L. No. 101-376, § 2, 104 Stat. 461, 462 (1990) (amending 5 U.S.C. § 7511). It planned for federal employees who were exempt from competitive examination to “feel no less secure in their positions than competitive service employees,” and enjoy “the same right to be free from arbitrary removal.” H.R. Rep. No. 101-328, at 4 (1989). Lawmakers explicitly described the application of these amendments to “attorney[s] ... at the Department of Justice,” *id.* at 3, confirming the longstanding assumption that Congress could regulate the appointment and removal of AUSAs.² Since then, courts and commentators have assumed that the CSRA’s statutory protections apply to AUSAs. *See, e.g., Hamlett v. Dep’t of Justice*, 90 M.S.P.R. 674, 675 (Merit Sys. Prot. Bd. 2002) (an AUSA is not “precluded, by operation of 28 U.S.C. § 542, from being an ‘employee’ with Board appeal rights”); 1 Cyc. of Federal Proc. § 1:67 (3d ed. 2026) (same); Pl.’s Br. 22-33.

III. The Removal Protections that Congress Conferred on AUSAs Are Constitutional.

Congress has the authority to make laws relating to inferior officers and employees and has done so since the Founding. Nevertheless, Defendants claim that Article II renders Congress

² Defendants cite then-Judge Ginsburg’s observation that Section 542 gives the Attorney General a firing power that “parallel[s]” the President’s. *See* Defs.’ Mot. 8-9 (referencing *In re Sealed Case*, 838 F.2d 476, 528 n.30 (D.C. Cir. 1988) (Ginsburg, J., dissenting)). But because that observation preceded the passage of the 1990 amendments, it has little relevance to determining how Section 542 intersects with the CSRA.

unable to regulate the removal of AUSAs—and any other employees who exercise “executive function[s],” Defs.’ Mot. 5 (alteration in original). This is wrong.

A. As an initial matter, the Supreme Court has repeatedly recognized Congress’s power to govern the removal of inferior officers. In *Ex parte Hennen*, 38 U.S. 230 (1839), the Court distinguished between the President’s power to remove principal officers and his power to remove 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.” *Id.* at 259.

In *United States v. Perkins*, 116 U.S. 483 (1886), 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.

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 inferior officers in the heads of departments. *Id.* at 161; *see also* Amy J. Wildermuth & Peyton C. Baker, *Protecting Perkins: Removal, Supervision, and Article II*, at 38 (Mar. 19, 2026 draft), <https://dx.doi.org/10.2139/ssrn.6447918> (describing Chief Justice Taft’s rejection of a colleague’s repeated suggestion that he “explicitly hold” in *Myers* that Congress could not regulate the removal of inferior officers appointed by heads of departments); *Morrison v. Olson*, 487 U.S. 654, 689 n.27 (1988) (observing that “*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”); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 218 (2020) (describing an exception for inferior officers, who have “limited jurisdiction and tenure and lack[] policymaking or significant administrative authority” (quoting *Morrison*, 487 U.S. at 691)).

And while the Supreme Court in *Slaughter* overruled the precedent holding that Congress can create “expert agencies led by a *group* of principal officers removable by the President only for good cause,” *see id.* at 204 (emphasis in original), it explicitly declined to “determine the fate of officials not before [it],” *Slaughter*, 2026 WL 1855612, at *18; *id.* at *22 (Gorsuch, J.,

concurring) (“the President must have the ability to remove principal officers who exercise executive power in his name”). Moreover, the theory and history that *Slaughter* embraced—that the President’s removal power stems from *Myers*, the Decision of 1789, and the government practice that followed—provides no basis for extending that power to inferior officers supervised by the Attorney General. *See supra* Part II.B; *cf.* Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 Stan. L. Rev. 175, 232-33 (2021) (describing historical support for a “residual royal prerogative” to remove “chief ministers” but not for a corresponding power to remove “officers of the central government,” “prosecutors, [or] law enforcement officers”).

B. With no foothold in precedent, Defendants rely on a misreading of *Free Enterprise Fund*. They claim that the case “mak[es] clear that restrictions on removal by Heads of Department can violate Article II,” Defs.’ Mot. 8 (referencing *Free Enter. Fund*, 561 U.S. at 496-97), but the opposite is true. In *Free Enterprise Fund*, the Court took pains to cabin its decision to the “highly unusual” situation in which 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.” *Free Enter. Fund*, 561 U.S. at 505, 484. The second layer of tenure protection was constitutionally significant, the Court explained, because it “transform[ed]” the inferior officers’ independence and “change[d] the nature of the President’s review.” *Id.* at 496; *id.* at 495 (“The added layer of tenure protection makes a difference.”). When only “one level of protected tenure separate[s] the President from an officer exercising executive power,” Article II is satisfied. *Id.* (emphasis added); *id.* at 493 (“this Court has upheld for-cause limitations” on the power of a department head to remove an inferior). So long as it is “the President—or a subordinate he could remove at will—who decide[s] whether [an] officer’s conduct merit[s] removal under the

good-cause standard,” *id.* at 495, the inferior officer can still be held “fully accountable” by the President, *id.* at 496.

Moreover, section 7513’s “efficiency-of-the-service” standard is significantly less constraining than the “rigorous” limitations on removal at issue in *Free Enterprise Fund*. *Id.* at 503 (noting that the statutory scheme provided that inferior officers could only be removed upon willful violations of certain laws, willful abuses of authority, or “unreasonable failure to enforce compliance—as determined in a formal Commission order”). Nor does section 7513 create a “novel” standard with no “historical precedent.” *See Free Enter. Fund*, 561 U.S. at 505 (quotation marks omitted); *Arnett v. Kennedy*, 416 U.S. 134, 160 (1974) (“the language ‘such cause as will promote the efficiency of the service’ ... does not appear on a clean slate”).

C. Defendants make much of the fact that AUSAs exercise what they call “conclusive and preclusive authority,” Defs.’ Mot. 5, 19, but that fact—even if true—provides no reason to invalidate the removal protections at issue here. To be sure, the Supreme Court has described the threatened removal of an Acting Attorney General as “implicat[ing] ‘conclusive and preclusive’ Presidential authority.” *Trump*, 603 U.S. at 620-21. But the Court there was discussing a principal officer, over whom the President enjoys some constitutional power of removal. When, as here, the President has no such removal power, there is no “conclusive and preclusive” authority at play. *Cf.*, *Trump v. Cook*, No. 25A312, 2026 WL 1855613, at *7 (U.S. June 29, 2026) (rejecting the argument that a principal officer’s removal was “wholly unreviewable”).

Furthermore, “[a]ssertions of exclusive and preclusive power leave the Executive in the least favorable of possible constitutional postures,” and must be “scrutinized with caution.” *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 62 (2015) (Roberts, C.J., dissenting) (internal quotations omitted). Such caution is doubly merited here, where Defendants’ slapdash

invocation of a conclusive and preclusive power could call into question foundational assumptions—embraced by proponents of a robust executive power from William Howard Taft to Theodore Olson—about Congress’s ability to regulate the employment of inferior officers and employees. And while the Court has described “[i]nvestigative and prosecutorial decisionmaking [a]s the special province of the Executive Branch,” *Trump*, 603 U.S. at 620 (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)), it has never held that the President’s “absolute discretion” over prosecution implies an illimitable power to remove all employees who take part in prosecutorial activities. *United States v. Nixon*, 418 U.S. 683, 693-97 (1974) (the President’s discretion over prosecution does not deprive Special Prosecutor of standing to enforce subpoena against President, because court was “bound to respect and to enforce” Department of Justice regulations creating the Special Prosecutor); *cf. Heckler*, 470 U.S. at 832-33 (agency’s refusal to act is “presumptively unreviewable,” but the presumption may be rebutted in certain circumstances).

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' motion for judgment on the pleadings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word-count limitations of Local Civil Rule 7.1(c) and Rule 4.C of this Court's Individual Practices because it contains 6,680 words, not counting the portions of the brief exempted by Rule 7.1(c).

Dated: July 24, 2026

/s/ David H. Gans
David H. Gans

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2026, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: July 24, 2026

/s/ David H. Gans
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