ORAL ARGUMENT SCHEDULED ON APRIL 17, 2020

Case No. 17-1246, Consolidated with 17-1249 and 17-1250

IN THE

United States Court of Appeals for the District of Columbia Circuit

JOE FLEMING, SAM PERKINS, AND JARRETT BRADLEY, individuals,
Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

On Appeal from the United States District Court
for the District of Columbia

BRIEF *AMICUS CURIAE* OF THE CATO INSTITUTE IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org
Counsel for Amicus Curiae

March 4, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel certifies:

Parties and Amici:

a. Petitioners are Joe Fleming, Sam Perkins, and Jarrett Bradley. Respondent is the United States Department of Agriculture. The Court appointed Pratik A. Shah as *amicus curiae* by order date December 6, 2019.

b. The Cato Institute is a not-for-profit corporation, exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3); it has no parent corporation; and no publicly held company has a 10% or greater ownership interest in the Cato Institute.

Rulings Under Review: On October 31, 2017, the Judicial Officer issued a decision and order as to Sam Perkins, 2017 WL 9473091. On November 1, 2017, the Judicial Officer issued a decision and order as to Jarrett Bradley, 2017 WL 9473092. On November 6, 2017, the Judicial Officer issued a decision and order as to Joe Fleming, 2017 WL 9473093. In all three decisions, the Judicial Officer affirmed the orders involving petitioners and imposed sanctions for violating the Horse Protection Act.

Related Cases: Counsel is not aware of any other related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Ilya Shapiro
Ilya Shapiro

CERTIFICATION REGARDING SEPARATE BRIEFING

Pursuant to Circuit Rule 29 and Federal Rule of Appellate Procedure 29, counsel certifies that a separate brief is necessary to make clear that the constitutional ramifications of this case are limited to the USDA's unique enforcement program.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus Curiae the Cato Institute is a nonprofit corporation. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public. Pursuant to D.C. Circuit Rule 26.1(b), the Cato Institute states that it is a 501(c)(3) nonprofit organization dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty.

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GLOSSARY

ALJ ..... Administrative Law Judge

USDA ..... U.S. Department of Agriculture

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Cato Institute, established in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books, studies, and the annual *Cato Supreme Court Review*, and conducts conferences and forums.

This case interests Cato because the Appointments Clause is among the Constitution's most significant structural safeguards for the protection of individual liberty. Cato has filed numerous briefs in cases involving the separation of powers. *See*, *e.g.*, Br. for the Cato Institute as *Amicus Curiae* in Support of Petitioner, *Seila Law LLC v. Consumer Fin. Protection Bureau*, No. 19-7 (U.S. Dec. 16, 2019).

SUMMARY OF ARGUMENT AND INTRODUCTION

This Court must not be cowed into inaction by unfounded warnings of "widespread and destabilizing consequences across federal agencies." *See* Br. of Court-appointed *Amicus Curiae*, at 20 ("*Amicus* Br."); *see also* Br. *Amicus Curiae* of the Federal Administrative Law Judges Conference in Support of Court-

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *amicus* contributed money intended to fund the brief's preparation or submission.

Appointed *Amicus Curiae*, at 22 ("Over one million pending cases may be impacted."). Indeed, to truly "destabilize" the administrative state, the Court would have to blind itself to controlling precedent. The Supreme Court rejects "rigid categories" when addressing Appointments Clause controversies and instead performs a contextual investigation into whether constitutional accountability has been "impede[d]." *See Morrison v. Olson*, 487 US 654, 689-91 (1988); *see also Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 506-07 (2010) (observing that "the very size and variety of the Federal Government . . . discourage general pronouncements"). Under this case-by-case framework, the Department of Agriculture's ("USDA") unconstitutional enforcement regime is an aberration.

It may assist the court to compare the population of federal ALJs to a Russian nesting doll. The outer layers represent types of ALJs that categorically do not offend the separation of powers. Only the miniature toys near the center—tiny fractions of the whole—reflect judges that potentially raise constitutional concerns. In that core, the most diminutive doll represents extraordinary ALJs, including those at the Agriculture Department ("Agriculture ALJs"), who unquestionably play important roles in both "enforcement" *and* "policymaking." *Cf. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.* ("*PCAOB*"), 561 U.S. 477, 507 n.10 (2010) (indicating "adjudicative" ALJs require less political accountability than those who perform "enforcement" *or* "policymaking" responsibilities); *see also* Office of Mgmt. &

Budget, *ALJs by Agency*, https://bit.ly/2I3HumJ (identifying 0.2% of 1,931 federal ALJs as serving in the USDA) (last visited Feb. 29, 2020).

In an unintended way, court-appointed *amicus* ("Amicus") is correct to predict that "invalidating tenure protections" for Agriculture ALJs "would have far-reaching legal and practical consequences." *Amicus* Br. at 15. By recognizing that Agriculture ALJs are "inferior officers"—as it must—this court would compound existing concerns about constitutional accountability at the USDA's enforcement program.

The USDA operates a highly unusual enforcement program. In virtually every other federal agency, principal officers review initial decisions made by ALJs. At the USDA, however, an ALJ's initial decisions are reviewed by an *inferior* officer. In and of itself, the agency's chain of command raises important constitutional questions about the diffusion of political accountability. But its novel arrangement also constrains the Court's remedial options here. If Agriculture ALJs are "inferior officers"—and they are—then the USDA's entire enforcement program necessarily violates constitutional structure, which forbids sideways decision making whereby "inferior officers" review determinations by other "inferior officers."

It's a constitutional Catch-22. By rightly recognizing that Agriculture ALJs are "inferior officers," this Court would incur other constitutional harms. The only way forward is to rule for the petitioners and send the USDA's broken enforcement scheme back to the Congress, the lone constitutional actor able to fix this mess.

ARGUMENT

I. The Agriculture Department's Three Judges Stand Out Among Almost 2,000 Federal ALJs

Amicus warns of "staggering" consequences were petitioners to prevail, *Amicus* Br. at 21, but this is "staggering" hyperbole. It's simply not true that "a wide swath of ALJs would be thrust into constitutional jeopardy," *id.*, because the vast majority of agency adjudicators poses no threat to the separation of powers.

According to government data, there are 1,931 federal ALJs. *See* Office of Mgmt. & Budget, *ALJs by Agency*. More than 85% of them preside over *non*-adversarial adjudications. *Id.* (identifying 1,655 ALJs at the Social Security Administration). These "inquisitorial" judges are civil servants rather than "officers," as persuasively argued elsewhere. *See* Br. of *Amicus Curiae* SSA Administration ALJ Collective in Support of Court-Appointed *Amicus Curiae*, 8-13.

Like those before the Supreme Court in *Lucia*, Agriculture ALJs are among the minority of agency adjudicators who exercise "significant discretion" in a *trial-like* setting. *Compare Lucia v. SEC*, 138 S. Ct 2044, 2053-54 (2018) (describing ALJ duties at the Securities and Exchange Commission) *with* 7 C.F.R. §§ 1.141, 1.142(c), 1.144, 1.148, 1.149 (endowing Agriculture ALJs with equivalent authorities). Yet even within this small subset, there is tremendous diversity, and only a further fraction has the potential to upset the separation of powers.

For example, a tenth of trial-like ALJs do not implicate constitutional

concerns because they operate within idiosyncratic institutional frameworks at the Federal Mine Safety and Health Review Commission (15 ALJs) and the Occupational Safety and Health Review Commission (12 ALJs). *See* Office of Mgmt. & Budget, *ALJs by Agency*. Under these two "split enforcement" programs, prosecution and adjudication functions are siloed in different agencies; the Labor Department prosecutes, while the commissions adjudicate. S*ee generally* George R. Johnson Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 Admin. L. Rev. 315 (1987) (describing the creation and performance of these regimes). By congressional design, these two-of-a-kind commissions are "purely" adjudicative and, therefore, are outside the scope of the Supreme Court's prohibition on double tenure for executive branch officers. *C.f. PCAOB*, 561 U.S. at 507 n.10 (distinguishing "adjudicative" ALJs from those with "enforcement or policymaking functions").

Again, however, the residual is far from uniform, and many would fail to "score high" enough on "significance of authority," which is the key "metric" for distinguishing constitutional officers from lesser functionaries. *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1337 (D.C. Cir. 2012). To wit, only a minority of the remaining judges—including Agriculture ALJs—preside over agency adjudications resulting directly in civil fines and restrictions on private conduct. *Compare* 15 U.S.C § 1825(b), (c) (authorizing USDA to impose civil

penalties and prohibit participation at horse shows) *with* 29 U.S.C. §160(e) (requiring the National Labor Relations Board to petition the court of appeals to enforce its remedial orders for unfair labor practices); *see also* Office of Mgmt. & Budget, *ALJs by Agency* (identifying 34 ALJs at the Board).

Amicus's dire forecast is misplaced. By scratching the surface of ALJ variety, this brief so far has demonstrated that almost 90% of agency adjudicators are insulated from the controversy at hand. This court would have to ignore categorical distinctions among ALJs before it could "unsettl[e] administrative processes across the federal government," as worried by Amicus. Br. at 15.

Beyond the low-hanging fruit, a more granular analysis would reveal further material distinctions among the leftover ALJs. *Compare* 7 C.F.R. § 1.144(b) (permitting Agriculture ALJs to rule on a motion for their own disqualification) *with* 12 C.F.R. § 1081.105(c) (requiring Consumer Protection Finance Bureau judges to certify disqualification motions to the Director for a "prompt determination"). For this case, however, a deeper dive into the details is unnecessary, because Agriculture ALJs preside over an uncommon policymaking function that puts them in rare air.

What sets Agriculture ALJs apart is their crucial role in setting prices for entire markets. *See* 7 U.S.C. § 608(c)(3) (requiring formal rulemakings before rate-setting orders); 5 U.S.C. §§ 553, 556-57 (establishing minimum procedures for formal rulemakings); 7 C.F.R. Subpart P §§ 1.800 *et seq*. (setting forth rules

governing the USDA's formal rulemakings). Though once more common across agencies, ALJ participation in legislative rulemakings "has become almost extinct." Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 Ohio St. L.J. 237, 253 (2014); *see also* Christopher J. Walker & Kent Barnett, *Chevron in the Circuit Courts*, 116 Mich. L. Rev. 1, 28 (2017) (finding four out of 1,558 surveyed agency actions were formal rulemakings).

Amicus tries to diminish these decidedly *non*-judicial powers by describing Agriculture ALJs as performing "(almost exclusively) adjudicative functions." *Amicus* Br. at 4. But a parenthetical cannot hide the obvious, and the task of "fixing rates" falls squarely in the "legislative realm." *United States v. Morgan*, 313 U.S. 409, 417 (1941).

Nor can Amicus wave away an ALJ's rate-setting role by arguing that "the task of issuing *decisions* falls to other officials." *Amicus* Br. at 27. Left unsaid is that the USDA's "decisions" are based on a record created by an ALJ. *See* 7 C.F.R. § 1.815. To this end, Agriculture ALJs possess broad discretion to shape what the decisionmaker knows. *See id.* §§ 1.1806(b)(4), 1.1809(d)(1)(iii), 1.1809(d)(4) (authorizing judges to find facts, exclude evidence, and limit cross-examination). It is, therefore, a false dichotomy to distinguish the USDA's ALJs from its "decision-makers" in rate-setting. By formulating the exclusive record on which final decisions must be based, Agriculture ALJs exert a crucial influence on price-fixing for entire

markets. *See, e.g.*, U.S. Dep't of Agric., 83 Fed. Reg. 26,547 (June 8, 2018) (promulgating final pricing provisions for milk market in entire state of California).

In sum, the Supreme Court's watershed decisions in *PCAOB* and *Lucia* have raised important concerns about the constitutionality of a small minority of federal ALJs. For some ALJs, Article III courts will have to draw difficult distinctions that necessitate an exacting legal analysis. But the answer is easy for Agriculture ALJs. In addition to presiding over adversarial adjudications that result in private party sanctions, Agriculture ALJs are among the ultra-few to assist in the development of law-like regulations. Plainly, they are constitutional officers.

II. The Unconstitutionality of Agriculture ALJs Cannot Be Severed from the USDA's Other Constitutional Infirmities

Amicus gets it half right with his claim that "invalidating for-cause removal protections on ALJs" would "create a host of other constitutional and pragmatic concerns." *Amicus* Br. at 1. While there would be cascading "concerns," the fallout wouldn't reach the administrative state *writ* large. Instead, this court would throw into stark relief the existing constitutional quagmire at the USDA's anomalous enforcement regime.

For almost all formal adjudications performed by the federal government, an ALJ's initial decision is reviewed by a principal officer (typically the head of the agency). *See* 5 U.S.C. § 557(b) (setting forth a framework for review of initial

decisions by constitutional officers). The Department of Agriculture is different. There, an *inferior* officer performs this function. *See* 7 C.F.R. §§ 1.145, 2.35 (delineating review powers delegated by the Secretary to the Judicial Officer).

This unusual design stems from an historical accident. In the 1930s, the Supreme Court upended the USDA's enforcement program by effectively precluding the Secretary from adopting his subordinates' factual findings. *See Morgan v. United States*, 298 U.S. 468, 481 (1936) (reversing because Secretary had not personally heard the evidence); *Morgan v. United States*, 304 U.S. 1, 20-22 (1938) (holding that the officer who makes the determination must appraise the evidence which justifies them). As explained by one prominent scholar, "Congress responded to *Morgan* I and II by enacting a statute that created a new position in [the Department] called the Judicial Officer." *See* Richard J. Pierce Jr., *The Collision Between the Constitution of the 1930s and the Constitution of 2020*, Notice & Comment (Dec. 18, 2019), https://bit.ly/3agVC8b (referring to the 1940 Schwellenbach Act, 7 U.S.C. § 2204-1 *et seq.*). It turns out that Congress acted rashly because, one year later, the Supreme Court changed its mind on the case that had compelled lawmakers into action. *See United States v. Morgan*, 313 U.S. at 421-22 (refusing to probe extent to which Secretary relied on subordinates). Thus, the USDA's enforcement regime was conceived in response to a brief window of confusion at the Supreme Court, which is why it's singular.

In practice, the USDA's unusual organization makes it impossible for the public to "determine on whom the blame . . . ought really to fall" for "pernicious measures." Federalist No. 70 (Hamilton) (discussing importance of constitutional structure for political accountability). Does the buck stop with the Judicial Officer that reviews an ALJs initial decision? Or does it stop with the Secretary, who can initiate removal proceedings against ALJs? *See* 5 U.S.C. § 7521(a). Or does it stop with the Merit System Protection Board, which renders the final determination on an ALJs removal? *Id.* By "diffusing" power, the USDA's uncertain chain of command undermines the Constitution's "structural integrity." *Freytag v. Commissioner*, 501 US 868, 878 (1991).

In struggling to address these criticisms, the USDA sinks deep into constitutional quicksand. According to the government's initial brief, political accountability is of no concern because the Secretary all along has been influencing adjudicators behind the scenes through *ex parte* contacts. Resp't Br. at 27 (claiming that the Secretary may "at any time prior to [the] issuance of a decision" influence "the disposition of any adjudicatory proceeding"). Yet the USDA's stunning admission defies its own rules, 7 C.F.R. § 1.151(b) (barring *ex parte* contacts), and raises obvious due process concerns, Pet'rs Br. 50-53. For that matter, it boggles the mind that the agency has revealed a secret and extralegal influence over ongoing

adjudications. Pet'rs Suppl. Br. 32-33 (expressing confoundment that *amici* did not question the Secretary's "secret instructions").

The ALJ question cannot be separated from the USDA's other accountability problems; rather, they're flip-sides of the same unconstitutional coin. Agriculture ALJs are "inferior officers" whose decisions are reviewed by "inferior officers," which the Constitution forbids. *See Edmond v. United States*, 520 US 651, 663 (1997) ("[W]e think it evident that 'inferior officers' are officers whose work is directed . . . by others who were appointed by Presidential nomination with the advice and consent of the Senate.").

Assuming this court recognizes that Agriculture ALJs are executive branch officers, then the only available remedy is to strike the USDA's entire enforcement program. The regime's constitutional flaws are too interconnected to allow for half measures, such as severing Agriculture ALJs' removal protections. "Fixing" the ALJ matter in isolation would exacerbate the threat presented by USDA's horizontal chain of command. "Solving" these accountability problems, in turn, would incur obvious due process concerns.

These unconstitutional interactions are too complicated to allow for a judicial remedy. To fix everything with one order, the Court would have to rewrite the law. Addressing the USDA's unconstitutional enforcement scheme is a job for lawmakers, not judges. Pet'rs Suppl. Br. at 49 ("Here, the only meaningful remedy

is dismissal of Petitioners' cases."). This Court cannot salvage the agency's enforcement regime, which is rife with constitutional errors. *Cf. Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., respecting the denial of *cert.*) (noting an openness to considering the constitutionality of certain regulatory regimes, as a whole, pursuant to a different separation of powers doctrine).

CONCLUSION

In a controversy that mirrored this one, the Supreme Court suggested that removal restrictions for "*many*" ALJs don't threaten constitutional accountability because they "perform adjudicative rather than enforcement or policymaking functions." *PCAOB*, 561 U.S. at 507 n.10 (emphasis added). The unmistakable inference is that "some" ALJs *do* contravene the separation of powers, and among these select few are the three adjudicators at the USDA's enforcement program.

But the Court would miss the forest for the trees if it focused solely on the unconstitutionality of Agriculture ALJs. The USDA's enforcement system raises multiple threats to constitutional structure that cannot be addressed independently.

For these reasons, the Court should dismiss the USDA's enforcement actions, thus spurring Congress into action.

Respectfully submitted,

/s/ Ilya Shapiro
ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org
Counsel for Amicus Curiae

March 4, 2020

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limits of Fed. R. App. P. 32(a)(7) and Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,492 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

/s/ Ilya Shapiro
Ilya Shapiro

CERTIFICATE OF SERVICE

I certify that on March 4, 2020, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Ilya Shapiro
Ilya Shapiro