IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF ADMINISTRATIVE LAW JUDGES,

Plaintiff,

v.

FEDERAL SERVICE IMPASSES PANEL, and MARK ANTHONY CARTER, in his official capacity as Chairman of the Federal Service Impasses Panel,

Defendants.

Case No. 1:20-cv-01026-ABJ

The Honorable Amy Berman Jackson

ASSOCIATION OF ADMINISTRATIVE LAW JUDGES' MOTION FOR PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and constitutional provisions

Other authorities

ASSOCIATION OF ADMINISTRATIVE LAW JUDGES' MOTION FOR PRELIMINARY INJUNCTION

The Association of Administrative Law Judges—the union that represents the federal administrative law judges who preside over Social Security hearings nationwide—urgently seeks an injunction to prevent implementation of extreme, draconian restrictions imposed on the Association on April 15 by the Federal Service Impasses Panel. Shortly after 5pm yesterday (Thursday, April 23), the Association learned that the Social Security Administration intends to move swiftly and aggressively to implement the Panel's new restrictions, initiating a process on Monday, April 27 that will lead to implementation by Tuesday, May 5. If these restrictions are not stayed or enjoined by May 5, the Association's operations will be effectively shut down—causing grievous, incurable damage to both the Association and its members.[1]

The Association brings this case to vindicate just one claim—a constitutional challenge to the Panel's authority—and it is highly likely to succeed on the merits. The Constitution's Appointments Clause, which provides "the exclusive means" for appointing officers of the United States, *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2051 (2018), requires that principal officers first be nominated by the President and then confirmed to their positions "by and with the Advice and Consent of the Senate," U.S. Const. Art. II, § 2, Cl. 2. The ten current members of the Impasses Panel were all appointed by President Trump—after he fired all of the previous members and replaced them with anti-union appointees. Yet not one of those members has been confirmed by the Senate. Their appointment thus violates "a critical structural safeguard" in our "constitutional scheme." *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017) (internal quotations omitted). Despite this serious

[1] To give this Court adequate time to decide this motion before the restrictions go into effect, the Association requested today that the Panel agree through its counsel to stay its order pending the Court's resolution of the motion. Counsel declined. The Association is therefore moving for an expedited briefing schedule to facilitate this Court's timely decisional process, and reserves the right to seek a temporary restraining order if necessary.

constitutional defect, the Panel is wielding substantial federal power: It is asserting jurisdiction over unions, issuing final orders that are purportedly binding on those unions, and imposing long-term contract provisions on the unions against their will—including restrictions that go even further than the employers themselves request. The Panel's unconstitutional exercise of these broad powers is more egregious because, unlike most federal agencies, its actions are unchecked—the merits of its decisions are not subject to any administrative or judicial review.

Lacking a plausible defense to this straightforward Appointments Clause challenge, the Panel invokes the unchecked nature of its power as a point in *its* favor: It contends that federal district courts lack jurisdiction to hear even constitutional challenges to the FSIP's authority. Not so. This Court is the proper—indeed, the only—forum in which this Appointments Clause claim can be vindicated. The Supreme Court has held that a district court has jurisdiction to review a regulated entity's Appointments Clause challenge to an agency body (like this challenge), even where the relevant statute (like this statute) does not provide for such review. *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 489–91 (2010). That decision controls here. And if there were any doubt, the D.C. Circuit has specifically rejected the "broad[]" proposition that district courts lacks power to adjudicate "any question about the jurisdiction of the FSIP—even one that does not entail reviewing a decision of the Panel." *Nat'l Air Traffic Controllers Ass'n v. Fed. Serv. Impasses Panel*, 606 F.3d 780, 787 (D.C. Cir. 2010). A contrary rule, the D.C. Circuit has observed, would impermissibly allow the government to "strip the court of jurisdiction over issues concerning the reach of the FSIP's authority." *Id.* at 788.

Likelihood of success on the merits is the "most important factor" in deciding whether to grant a preliminary injunction. *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014). Because the Panel is constituted in clear violation of the Appointments Clause, and because this Court has jurisdiction over this constitutional challenge, the Court should grant the Association's motion.

The equitable considerations are equally, if not more, compelling. Among other things, the restrictions imposed by the Panel would limit the Association to roughly *one twentieth* of the "official time" it has historically spent representing its members. Just yesterday evening, the Social Security Administration notified the Association's leadership that it intends to implement this union-busting restriction, and numerous others, by May 5, 2020—in *less than two weeks*. The Association's members—busy judges responsible for millions of Americans' Social Security benefits—now have just over ten days to prepare for a radically changed working environment and agency-employee relationship, in the midst an unprecedented pandemic.

Make no mistake: The imminent threat to the Association here is an existential one. Once the Panel's extreme restrictions are implemented, the Association will effectively be incapacitated. As the President of the Association of Administrative Law Judges explains in detail in her accompanying declaration, the Panel's final decision will "effectively shut down" the Association's operations unless immediate injunctive relief is granted. Declaration of Melissa McIntosh ¶ 1. The Panel's *ultra vires* restrictions, she explains, "will eviscerate our ability to perform representational duties required by law, deny our members their rights to receive representation by the Association, force us to hire a single outside business manager to perform those core representational functions on a very limited basis, and cause severe adverse individual effects for our members. All of these harms cut to the core of the independence and continued existence of our bargaining unit." *Id.* Seemingly by design, "the practical result of the Panel's order is nothing short of the elimination of this union." *Id.*

The Association respectfully requests that the Court grant it the preliminary injunctive relief necessary to avoid these catastrophic consequences, all of which stem from the Panel's flagrantly unconstitutional exercise of unchecked federal-government authority.

STATUTORY AND FACTUAL BACKGROUND

1. Congress establishes a statutory framework for federal labor relations.

As part of the Civil Service Reform Act of 1978, Congress enacted a comprehensive framework governing labor relations between federal agencies and their employees, known as the Federal Service Labor-Management Relations Statute. *See* 5 U.S.C. §§ 7101–7135. "The Statute grants federal agency employees the right to organize, provides for collective bargaining, and defines various unfair labor practices." *Nat'l Fed'n of Fed. Employees v. Dep't of Interior*, 526 U.S. 86, 88 (1999).

Congress specifically found that "labor organizations and collective bargaining in the civil service are in the public interest," and that protecting employees' right to self-organize "facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment." 5 U.S.C. § 7101(a)(1)(c).

To "provide leadership in establishing policies and guidance relating to matters" under this statute, Congress created the Federal Labor Relations Authority. *Id.* § 7105(a)(1). The Authority is composed of three members who are appointed by the President and confirmed by the Senate for five-year terms, and a member can be removed "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 7104(a)–(c). As an independent agency, the Authority is authorized to promulgate regulations and guidance; assist federal agencies and unions in understanding their rights and responsibilities under federal labor law; and adjudicate disputes arising under the Civil Service Reform Act, including appeals from unfair-labor-practice disputes and grievance-arbitration awards. *See id.* § 7105. Any person "aggrieved by any final order" of the FLRA may petition for judicial review in the federal circuit court in which the person resides or transacts business, or in the D.C. Circuit. *Id.* § 7123(a).

The same statutory provision creating the Authority also created its Office of the General Counsel, which is responsible for investigating and prosecuting alleged unfair labor practices. *See id.* § 7104(f). Like the Authority, the General Counsel must be appointed by the President with the advice and consent of the Senate. The Office of the General Counsel has been vacant since November 16, 2017.

2. Congress creates the Federal Services Impasses Panel as an independent multimember body charged with resolving federal-sector labor impasses.

The Federal Service Labor-Management Relations Statute also established the Federal Services Impasses Panel as an independent entity within the Authority, "the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives." 5 U.S.C. § 7119(c)(1). "The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations." *Id.* § 7119(c)(2).

When an agency and its employees' labor representative reach an impasse in negotiations, either party may request that the Panel resolve the dispute. *Id.* § 7119(b)(1).[2] The Panel must "promptly investigate any impasse presented to it," *id.* § 7119(c)(5)(A), and then "either (1) [d]ecline to assert jurisdiction in the event that it finds that no impasse exists or that there is other good cause for not asserting jurisdiction" or "(2) [a]ssert jurisdiction," 5 C.F.R. § 2471.6(a). Upon exercising jurisdiction, the "Impasses Panel may use any of a number of dispute resolution techniques—such as informal conferences, additional mediation, fact finding, written submissions, recommendations

[2] Although not at issue here, the parties alternatively may "agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by the Panel." 5 U.S.C. § 7119(b)(2).

for settlement, and mediation-arbitration—to resolve a bargaining impasse." *U.S. Dep't of Justice Fed. Bureau of Prisons Fed. Corr. Complex Coleman, Fla. v. FLRA*, 737 F.3d 779, 787 (D.C. Cir. 2013) (citing 5 U.S.C. § 7119(c); 5 C.F.R. §§ 2471.1, 2471.6).

If the parties still can't reach a settlement, the Panel may "take whatever action is necessary and not inconsistent with this Chapter to resolve the impasse," including imposing contract terms on the parties. 5 U.S.C. § 7119(5)(B)(ii); *see Patent Office Prof'l Ass'n v. FLRA*, 26 F.3d 1148, 1150 (D.C. Cir. 1994). The Panel's final action "shall be binding on [the] parties during the term of the agreement, unless the parties agree otherwise," 5 U.S.C. § 7119(5)(C), and an agency's or labor organization's failure to comply with a Panel decision constitutes an unfair labor practice, *see id.* § 7116(a)(6), (8), (b)(6), (8).

3. Congress forecloses administrative or judicial review of Panel orders. Although "section 7123 specifically provides for judicial review of orders by the Authority, there is no provision for such review of Panel orders, and Panel orders are not appealable even to the Authority." Council of Prison Locals v. Brewer, 735 F.2d 1497, 1499 (D.C. Cir. 1984).

Nevertheless, though courts generally "lack[] jurisdiction to review the decisions of the FSIP," the D.C. Circuit has rejected the "broad[]" proposition that a district court lacks the power to adjudicate "any question about the jurisdiction of the FSIP—even one that does not entail reviewing a decision of the Panel." *Nat'l Air Traffic Controllers Ass'n v. Fed. Serv. Impasses Panel*, 606 F.3d 780, 787 (D.C. Cir. 2010) ("*National Air II*"). A contrary interpretation of the statute, the D.C. Circuit has observed, would impermissibly allow the government to "strip the court of jurisdiction over issues concerning the reach of the FSIP's authority." *Id.* at 788.

4. President Trump fires every member of the Panel and replaces them with ten appointees representing exclusively anti-union perspectives. Several months into his administration, in May 2017, President Trump removed all seven members of the Federal

Services Impasses Panel. He has replaced them with his own appointees over the last three years. As of today, the Panel consists of ten members, including Chairman Mark Anthony Carter, all of whom were appointed without the Senate's advice or consent.

Every one of the current members of the Panel represents a management-side or anti-union perspective. Many have dedicated their careers to anti-union efforts, and efforts to harm public-sector unions in particular. For example, David R. Osborne is President and General Counsel of the Fairness Center, a "nonprofit public-interest law firm" he helped launch that "offer[s] free legal services to those hurt by public employee union officials."[3] Patrick Wright, another member, is the Vice President for Legal Affairs at the Mackinac Center for Public Policy and director of the Mackinac Center Legal Foundation, which advertises its "strategic litigation" against public-employee unions on its website.[4] A third member, F. Vincent Vernuccio, is a full-time "labor policy consultant" and a senior fellow at the Mackinac Center. He has written numerous articles and op-eds criticizing labor unions, even while serving as a Panel member. For example, in March 2020, he published a blog post on the Mackinac Center's website attacking recent coronavirus-relief legislation for providing "a handout to unions."[5]

The remaining Panel members all practice management-side labor law or are similarly affiliated with other self-described "free market," "limited government," and "libertarian" research organizations and advocacy groups, many of which have express anti-union platforms. These include the Mercatus Center and Law & Economics Center at George Mason University, the Freedom Foundation, and the Goldwater Institute.

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[3] *Federal Service Impasses Panel Biographies*, Fed. Lab. Relations Auth. (attached as Exhibit A to Declaration of Deepak Gupta, filed simultaneously with this motion).

[4] *See* Mackinac Center Legal Foundation, https://www.mackinac.org/litigation (last visited Apr. 23, 2020).

[5] F. Vincent Vernuccio, *Union Handout in the Coronavirus Stimulus Act*, Mackinac Center for Public Policy (Gupta Decl., Ex. B).

Some commentators have included President Trump's appointment of these Panel members as part of the Trump Administration's "recent changes to personnel that will likely impact a union's ability to bargain effectively." Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 Cal. L. Rev. 1821, 1847 (2019). Others have observed that the current iteration of the Impasses Panel "has handed down mostly pro-management decisions."[6] And the Panel members' appointments were made in the broader context of a series of administration policies and directives "restricting the role of unions in the federal workplace and giving agencies the maximum discretion in taking disciplinary actions against employees."[7]

5. The Association of Administrative Law Judges reaches impasse with the Social Security Administration. The Association of Administrative Law Judges was first founded in 1974 as a professional association of federal administrative law judges and has served since 1999 as the exclusive representative for non-management administrative law judges at the Social Security Administration. Since its inception, AALJ has enjoyed a robust membership of judges dedicated to defending judicial independence and due process in administrative hearings and advancing the professionalism of administrative law judges. In 1999, AALJ was certified as a local of the International Federation of Professional and Technical Engineers, AFL-CIO, joining other judges and professional employees to advocate for its members. McIntosh Decl. ¶ 2.

Today, AALJ represents approximately 1,200 administrative law judges across 163 offices who preside in Social Security disability hearings throughout the United States. These administrative law judges adjudicate over 700,000 cases each year, primarily appeals from denials

[6] Erich Wagner, *Labor Groups and Lawmakers Vow to Fight 'All-out Assault' on Unions and Federal Employee Rights*, Gov't Exec. (Sept. 24, 2019), https://perma.cc/VSF9-PY4L.

[7] Eric Yoder, *Trump administration tells agencies to restrict unions in the workplace*, Wash. Post (Oct. 7, 2019), https://perma.cc/TZN8-6GXW.

of benefits—critical proceedings for the 8.2 million Americans who received more than $140 billion of Social Security disability benefits in 2019.[8]

In early 2019, the Association and the Social Security Administration spent a total of seven weeks over several months negotiating the terms of a successor collective-bargaining agreement. The parties agreed on numerous articles of the new contract, but were unable to reach agreement on nine of them. In June 2019, the Federal Mediation and Conciliation Service certified the parties' negotiations on the remaining articles at impasse. McIntosh Decl. ¶ 5.

6. *The Panel asserts jurisdiction, rejecting the Association's constitutional objections under the Appointments Clause.* A few months later, in October 2019, the Social Security Administration requested that the Federal Service Impasses Panel assert jurisdiction over the dispute. Gupta Decl., Ex. C. The Association objected, arguing that the Panel lacked authority to assert jurisdiction or to otherwise issue a decision because the Panel members' appointments violated the Constitution's Appointments Clause. Gupta Decl., Ex. D. In its response, the Social Security Administration argued that "[t]he Union's Constitutional argument is not properly before the Panel, as the Panel is not empowered to render a decision on such an issue." Gupta Decl., Ex. E at 1.

On January 9, 2020, the Association received an email from a Panel attorney-advisor asserting jurisdiction over the impasse. Gupta Decl., Ex. F. The email did not acknowledge any of the Association's jurisdictional objections. The following day, the Association filed a motion with the Federal Labor Relations Authority to stay the proceedings before the Panel. Gupta Decl., Ex. G. The Association also asked the Panel's Executive Director to refrain from taking any further actions in the case until the Authority ruled on the motion to stay, but the Panel simply responded

[8] Center for Budget and Policy Priorities, *Chart Book: Social Security Disability Insurance* (Sept. 6, 2019).

that it continued to retain jurisdiction. Gupta Decl., Ex. H. Despite the Association's repeated objections, the Panel issued a formal procedural determination letter to the parties the following week in which it officially asserted jurisdiction over the impasse. Gupta Decl., Ex. I. Once again, the Panel's letter did not address any of the Association's jurisdictional arguments. McIntosh Decl. ¶ 5.

At the end of March, the Federal Labor Relations Authority denied the Association's request for a stay. *See* 71 FLRA No. 123 (March 31, 2020) (Gupta Decl., Ex. J). In its order, the Authority acknowledged the Association's objection that "the Panel's members are not constitutionally appointed" but declined to address it. *Id.* at 652.[9]

7. The Panel issues a binding and unreviewable final decision that is inflicting immediate and irreparable harms on the Association. On April 15, 2020, the Panel issued its final decision on the impasse, which imposes binding and unreviewable contract articles on the Association. In the Matter of U.S. Social Security Administration Office of Hearings Operations, Case No. 20 FSIP 001 (Apr. 15, 2020) (Gupta Decl., Ex. K) ("Panel Decision").

In its decision, the Panel states that it "considered and rejected all of the Union's objections prior to asserting jurisdiction over this matter," including the argument that "the Panel's composition violates the Appointments Clause of the United States Constitution." *Id.* at 2 n.2. Yet the decision provides no reasoning or explanation for why the Panel rejected the Association's argument.

[9] While the FLRA was considering the Association's motion to stay, the Association also petitioned the Fourth Circuit to review the Panel's exercise of jurisdiction and to stay the administrative proceedings. The Fourth Circuit granted the government's motion to dismiss without opinion or explanation. *See* Order, *Ass'n of Admin. Law Judges v. Fed. Labor Relations Auth.*, No. 20-1110 (4th Cir. Mar. 9, 2020).

The Panel adopted the Social Security Administration's proposals on the majority of the key disputed terms. For example, the Association had proposed that the duration of the new collective-bargaining agreement be three years, consistent with the parties' two previous agreements, one lasting three years and the other four years. *See id.* at 3–4. But, accepting the agency's proposal, the Panel imposed a seven-year contract simply because the agency asserted that a shorter contract would require it to spend more money on negotiations. *Id.* at 4–5. This was so even though the Association proposed that successor contracts be negotiated by remote means in an effort to lessen fiscal impact, which would entirely avoid the actual costs associated with negotiations, all of which are travel-related.

Likewise, the Association had proposed that administrative law judges be permitted to telework when they are not in the office conducting hearings, as permitted by the Telework Enhancement Act of 2010, 5 U.S.C. § 6501 et seq. Yet the Panel adopted the agency's proposal to allow judges to telework only at the agency's discretion, limiting and possibly eliminating a critical tool that judges use to manage their arduous caseload. *See* Panel Decision at 23–26.

In one of the contract articles, the Panel imposed terms that went even further than those proposed by the Social Security Administration. In accordance with governing law, the Association had proposed that the agency's employees should be afforded a "reasonable amount of official time" to perform union-representation activities. *Id.* at 11. The agency, by contrast, urged the Panel to impose a 2,000-hour annual cap on official time in their last best offer and to authorize the agency to dictate the amount of time that each individual union official could use to represent employees. *Id.* at 10. But the Panel ultimately imposed a 1,200-hour annual cap on official time—far less than what even the agency had proposed. *See id.* at 13–15. Given that the agency's yearly official-time allowance for the past 19 years has ranged between 18,200 and 22,000 hours, the Panel's decision renders the Association incapable of meaningfully representing its members or

performing its statutory duties as a labor representative. McIntosh Decl. ¶¶ 12–13, 16–17. And it would effectively reduce the number of union officials that the Association would have to represent its members or perform its statutory duties from 10 full-time equivalents to one-half of a full-time equivalent. *Id.* ¶ 13.

The Panel's decision has had immediate, negative consequences for the Association. As a result of the decision, the Association's leadership has taken immediate steps to plan how they will operate under the new collective-bargaining regime. *Id.* ¶ 15. In light of the drastic reduction in hours permitted for employee representation and official union work, the Association has had to weigh eliminating official time for most of its officers' representational activities and statutory duties; prioritizing which statutory duties it is able to perform; cutting back on other authorized activities; and hiring a business agent at considerable expense to the Association. *Id.* ¶¶ 13–18. All of this will drastically reduce its ability to effectively represent its members in critical proceedings like grievances and arbitrations—now and for the next seven years. *Id.* ¶ 16–18. It likewise has to dedicate its time and efforts to developing guidance about the Panel's decision and meeting with its members to address their concerns about the Panel's onerous new restrictions on telework, reassignment, and leave. *Id.* ¶ 22. These changes will not only require the Association to undertake significant restructuring of its own mission and organization, but they will significantly impair the Association's ability to meet its statutory duty to provide effective membership to its members. *Id.* ¶ 23.

Just yesterday, the Social Security Administration notified the Association's leadership that it intends to implement the Panel's decision on May 5, 2020—in *less than two weeks*. *Id.* ¶ 7. This development has only accelerated the significant harms that the Association was already experiencing. And the Association's leadership and members—busy administrative law judges—have just over 10 days to prepare for a completely different working environment and agency-

employee relationship—in the midst of the coronavirus pandemic. *Id.* ¶ 15. The Social Security Administration's plan to implement the Panel's decision has raised concerns among the Association's members that they will suffer retaliation if they do not vote to ratify the new contract's remaining twenty articles. *Id.* ¶ 8. And the Association's bargaining power has been severely weakened should it need to return to the bargaining table with the Social Security Administration on any of these articles—which may lead to members revoking their membership or even decertification. *Id.* ¶¶ 8–9. In other words, the Association could "cease to exist at all as a result of the Panel's order." *Id.* ¶ 9.

ARGUMENT

A plaintiff seeking a preliminary injunction must show "(1) a likelihood of success on the merits; (2) a likelihood of irreparable harm absent such relief; (3) that the equities favor the plaintiff's position; and (4) that the injunction is in the public's interest." *Atlas Air, Inc. v. Int'l Bhd. of Teamsters*, 928 F.3d 1102, 1112 (D.C. Cir. 2019) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). All of the preliminary-injunction factors are satisfied here.

I. The Association's Appointments Clause claim is likely to succeed.

The Appointments Clause requires that principal officers be appointed by the President only "by and with the Advice and Consent of the Senate." U.S. Const. Art. II, § 2, cl. 2. Principal officers, in turn, are those who are not "directed and supervised" by other Senate-confirmed officers—in other words, officers who operate without significant oversight, possess final decision-making authority, and are removable only by the President. *Edmond v. United States*, 520 U.S. 651, 663 (1997).

The members of the Impasses Panel perfectly fit that description. They have the power to issue final orders imposing immediate, binding, and long-term contract provisions—including restrictions that go even further than those requested by employers—on unions representing

millions of federal employees. Unlike nearly every agency, the merits of the Panel's actions are unreviewable, either by the Authority or federal courts. And the statute creating the Panel specifies that only the President has the power to remove its members. 5 U.S.C. § 7119(c)(3). In short, the Panel members are principal officers. Yet not one of them was appointed with the Senate's advice and consent. Their appointment thus undermines one of the Constitution's foundational structural safeguards—which protects the interests not of "one branch of Government but of the entire Republic." *Freytag v. Comm'r*, 501 U.S. 868, 880 (1991).

This Court is the proper—indeed, the only—forum in which this Appointments Clause claim can be vindicated. In *Free Enterprise Fund v. Public Company Accounting Board*, the Supreme Court made clear that a regulated entity that cannot "meaningfully pursue" its Appointments Clause claim through an exclusive statutory-review scheme should bring its claim in district court. 561 U.S. 477, 490 (2010). That is the case here: The only way that the Association could theoretically raise its claim under the statute is to refuse to comply with the Panel's decision and incur an unfair labor practice charge. But this is not "a meaningful avenue of relief," especially considering that the FLRA General Counsel, whose role is currently vacant, would have unfettered discretion over the unfair-labor-practice process. *Id.* at 490–91. Requiring the Association to pursue this fool's errand, the D.C. Circuit recognized, would impermissibly allow the government to "strip the court of jurisdiction over issues concerning the reach of the FSIP's authority." *Nat'l Air Traffic Controllers Ass'n v. Fed. Serv. Impasses Panel*, 606 F.3d 780, 788 (D.C. Cir. 2010). This Court thus has jurisdiction over this challenge to the reach of the FSIP's authority.

Because the Association has established its likelihood of success on the merits—the "most important factor"—a preliminary injunction is warranted. *Aamer*, 742 F.3d at 1038.

A. All of the Panel's members were unconstitutionally appointed.

The U.S. Constitution provides "the exclusive means" for appointing officers of the United States. *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2051 (2018). Specifically, the Constitution's Appointments Clause requires that principal officers first be nominated by the President and then confirmed to their positions "by and with the Advice and Consent of the Senate." U.S. Const. Art. II, § 2, cl. 2.

The Senate's advice-and-consent power "is a critical 'structural safeguard [ ] of the constitutional scheme.'" *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017) (quoting *Edmond v. United States*, 520 U.S. 651, 659 (1997)). It "serves both to curb Executive abuses of the appointment power . . . and 'to promote a judicious choice of [persons] for filling the offices of the union.'" *Edmond*, 520 U.S. at 659 (quoting The Federalist No. 76, pp. 386–87 (M. Beloff ed. 1987) (A. Hamilton)). Indeed, "[t]he Framers envisioned it as 'an excellent check upon a spirit of favoritism in the President and a guard against 'the appointment of unfit characters . . . from family connection, from personal attachment, or from a view to popularity." *SW Gen.*, 137 S. Ct. at 935 (quoting The Federalist No. 76, p. 457 (C. Rossiter ed. 1961) (A. Hamilton)).

1. The Panel members are officers, not employees.

To begin with, there can be no dispute that the Impasses Panel members are officers of the United States, rather than employees, who "who fall outside the Appointments Clause's ambit." *Lucia*, 138 S. Ct. at 2050. In fact, the Panel already conceded as much. *See* Gov't's Reply in Supp. of Mot. to Dismiss at 5, No. 20-1110 (4th Cir. Feb. 26, 2020).

Two seminal Supreme Court decisions—*United States v. Germaine*, 99 U.S. 508 (1879) and *Buckley v. Valeo*, 424 U.S. 1 (1970)—set out the "basic framework for distinguishing between officers and employees." *Lucia*, 138 S. Ct. at 2051. In the former decision, the Court "made clear that an individual must occupy a 'continuing' position established by law to qualify as an officer." *Id.* (quoting *Germaine*, 99 U.S. at 511). And, in the latter, the Court added that the constitutional

inquiry also "focuse[s] on the extent of power an individual wields in carrying out his assigned functions," asking whether the individual "'exercis[es] significant authority pursuant to the laws of the United States.'" *Id.* (quoting *Buckley*, 424 U.S. at 126).

Here, the Panel members serve on an ongoing basis (five-year terms) and their responsibilities and means of appointment are set out by statute at 5 U.S.C. § 7119. Thus, they easily satisfy *Germaine*'s requirement that their duties be "continuing and permanent." 99 U.S. at 511–12. And though the *Buckley* "standard is no doubt framed in general terms," the Panel members unquestionably wield "significant authority pursuant to the laws of the United States." *Lucia*, 138 S. Ct. at 2051. In *Freytag*, for example, the Supreme Court held that special trial judges of the United States Tax Court were officers under the Appointments Clause, even though they could only "prepare proposed findings and an opinion" for a regular Tax Court judge to consider; they could not issue a final decision. 501 U.S. at 873. It was enough that the judges were authorized to "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders," and that they "exercise[d] significant discretion" in carrying out these functions. *Id.* at 881–82.

Similarly, the Impasses Panel has substantial discretion to employ an array of dispute-resolution techniques to resolve an impasse, including fact finding, written submissions, recommendations for settlement, mediation-arbitration, hearings, depositions, and subpoena power. *See, e.g.*, 5 U.S.C. § 7119(c)(5)(B); 5 C.F.R. §§ 2471.1, 2471.6. But the Panel members' authority is far greater than that of the special trial judges in *Freytag*: They have the power to issue final and binding decisions affecting the entire federal workforce, none of which can be reviewed by the FLRA or even a federal court. This sweeping authority alone makes clear that the Panel members are officers for purposes of the Constitution. Only one question then remains: What *kind* of officers are they?

2. Because the Panel members are principal officers, their appointments must be confirmed by the Senate.

The Appointments Clause contains a crucial distinction: "Only the President, with the advice and consent of the Senate, can appoint a principal officer; but Congress (instead of relying on that method) may authorize the President alone, a court, or a department head to appoint an inferior officer." *Lucia*, 138 S. Ct. at 2051 n.3; *In re Grand Jury Investigation*, 916 F.3d 1047, 1052 (D.C. Cir. 2019). Although "[t]he prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers," the Framers gave Congress the power to bypass the Senate-confirmation process to promote "administrative convenience." *Edmond*, 520 U.S. at 660 (citing *Germaine*, 99 U.S. at 510). But "that convenience was deemed to outweigh the benefits of the more cumbersome procedure *only* with respect to the appointment of 'inferior Officers.'" *Id.* (emphasis added).

The "dispositive feature" identifying whether a federal official is a principal officer, as opposed to an "inferior" officer, is whether the officer is directed and supervised by others who were appointed by presidential nomination with the advice and consent of the Senate. *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 821 F.3d 19, 38 (D.C. Cir. 2016). In short, "[w]hether one is an 'inferior' officer depends on whether he has a superior." *Edmond*, 520 U.S. at 662. But "[i]t is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude"; the officer must *actually* be directed and supervised by Senate-confirmed officers. *Id.* at 662–63. What's more, "[w]hile some officers may be principal even if they have a supervisor, it is common ground that an officer without a supervisor must be principal." *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 63–64 (2015) (Alito, J., concurring).

a. The D.C. Circuit has distilled *Edmond*'s reasoning into "three factors to determine whether an officer was inferior: degree of oversight, final decision-making authority, and

removability." *In re Grand Jury Investigation*, 916 F.3d at 1052; *see Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1338 (D.C. Cir. 2012). All factors point toward finding the Panel members to be principal officers.

First, the Panel operates without any significant oversight. Although the statute creates it as an "entity within the Authority," 5 U.S.C. § 7119(c)(1), neither the FLRA nor any other agency body oversees the Panel's works. The Panel is authorized to appoint its own Executive Director and "any other individuals it may from time to time find necessary for the proper performance of its duties." *Id.* § 7119(c)(4). The Panel is also empowered to "prescribe rules and regulations to carry out the provisions of this chapter applicable to" its operations. *Id.* § 7134.[10] And the Authority has concluded that the statute precludes its "direct review of Panel orders," giving it no power to direct or even influence the substance of the Panel's determinations. *Nat'l Treasury Emps. Union and U.S. Dep't of Homeland Security*, 63 F.L.R.A. 183, 187 (Mar. 31, 2009).

In fact, the Panel's independence from oversight far exceeds that of the Copyright Royalty Judges that the D.C. Circuit held to be principal officers in *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*. Unlike the Panel, the Royalty Judges are "supervised in some respects by the Librarian [of Congress] and by the Register of Copyrights," who have the power to, among other things, approve the Judges' procedural regulations, issue ethical rules governing the Judges, and oversee "various logistical aspects of their duties." 684 F.3d at 1338. The Register also has "the authority to interpret the copyright laws" and provide written opinions that bound the Royalty Judges in their determinations; the Register also "reviews and corrects any legal errors in the CRJs' determinations." *Id.* at 1338–39. Notwithstanding the "the Register's power to control the CRJs'

[10] Section 7134 authorizes the Panel to promulgate its own rules and regulations alongside other entities like the FLRA and the General Counsel—all Senate-confirmed principal officers. That itself is strong evidence that the Panel members are principal officers.

resolution of pure issues of law," the court held the Judges principal officers because they retained "vast discretion" over the setting of rates and terms. *Id.* at 1339. By contrast, the Panel has unbounded discretion over not only their substantive decisions but also their administrative staffing and procedural regulations, all of which confirm the Panel members' principal status. *See Edmond*, 520 U.S. at 665; *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1332 (Fed. Cir. 2019) (emphasizing that "authority to promulgate regulations" identifies a principal officer).

Second, the Panel members have final (indeed, absolute) decision-making power. In *Edmond*, the Supreme Court held that judges of the Coast Guard Court of Criminal Appeals are inferior officers in part because they "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." 520 U.S. at 664. On the other hand, the D.C. Circuit held that Royalty Judges are principal officers because their "rate determinations are not reversible or correctable by any other officer or entity within the executive branch." *Intercollegiate Broadcasting*, 684 F.3d at 1340. That is true here as well: The Panel's decisions are not reviewable by the FLRA or any other executive-branch agency. And like the Royalty Judges' determinations, the Panel's decisions "have considerable consequences"—they set the terms governing the relations between millions of federal employees and their employer agencies, for years at a time. *Id.* at 1337–38.

But the finality of the Panel's decisions far exceeds even those of the Royalty Judges in one critical respect. The Royalty Judges' determinations could at least be directly appealed to the D.C. Circuit. *See id.* at 1335 (citing 17 U.S.C. § 803(d)(1)). Here, however, "Congress precluded direct judicial review of Panel orders." *Brewer*, 735 F.2d at 1498. In other words, the Panel's decisions are not just final, but unreviewable. That alone strongly indicates that the Panel members are principal officers.

Third, the removability factor also weighs in favor of finding them to be principal officers. "The power to remove officers . . . is a powerful tool for control." *Edmond*, 520 U.S. at 664. Consequently, if a Senate-confirmed official has the ability to remove an officer without cause, it the officer is likely inferior. *See In re Grand Jury Investigation*, 916 F.3d at 1052 (noting that an inferior officer "effectively serves at the pleasure of an Executive Branch officer who was appointed with the advice and consent of the Senate"); *Intercollegiate Broadcasting*, 684 F.3d at 1338. But here, the statute authorizes only the President to remove the Panel members. *See* 5 U.S.C. § 7119(c)(3). And officials who "are answerable to and removable only by the President" are principal officers who must be "appointed by the President, by and with the advice and consent of the Senate." *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 860–61 (1st Cir.), *cert. granted sub nom. on other questions*, 139 S. Ct. 2735 (2019).

b. President Trump's recent memorandum purporting to delegate his power to remove Panel members under section 7119(c)(3) to the FLRA does not alter the conclusion that the Panel members are principal officers. *See* Presidential Memorandum on the Delegation of Removal Authority Over the Federal Service Impasses Panel, 84 Fed. Reg. 63789–63790 (Nov. 12, 2019) (Gupta Decl., Ex. L). Initially, the Department of Justice's Office of Legal Counsel has concluded that the power to remove officers is among the "handful of presidential functions [that] are understood to be nondelegable" to the President's subordinates. Hanah Metchis Volokh, *A Read-the-Bill Rule for Congress*, 76 Mo. L. Rev. 135, 155 (2011) (citing *Presidential Succession and Delegation in Case of Disability*, 5 U.S. Op. Off. Legal Counsel 91, 94-95 (1981)). Thus, under the executive branch's own precedent, the President's memorandum is invalid.

More critically, even if the President's attempted subdelegation of his removal authority were valid, he cannot create an inferior officer where Congress chose not to. "[A]n executive order cannot supersede a statute." *Marks v. CIA*, 590 F.2d 997, 1003 (D.C. Cir. 1978). Yet that is what

the presidential memorandum purports to do here—it attempts to override Congress's express mandate that the President (and the President alone) has the power to remove members of the Panel. But the Appointments Clause that officers of the United States "shall be established by Law," and that "Congress may by Law vest the Appointment of such inferior Officers." U.S. Const., Art. 2, § 2, cl. 2. If the President's memorandum could change the Panel members' officer status, it would mean that any president could toggle between principal and inferior officers, regardless of Congress's intent, simply by issuing orders subdelegating his presidential removal authority. That simply cannot be squared with the Framers' purpose in drafting the Appointments Clause.

Finally, to the extent that the memorandum could be read to indirectly bestow on the FLRA the authority to review the Panel's decisions, that subdelegation would similarly be unlawful. Section 1(b) of the memorandum provides: "In exercising the authority delegated by this section, the FLRA shall consider the extent to which decisions of members of the FSIP are consistent with the requirements of Chapter 71 of title 5, United States Code, with particular attention to whether the decisions are consistent with the requirement of an effective and efficient Government, as those terms are used in 5 U.S.C. 7101(b), in addition to any other factors that the FLRA may consider appropriate." Gupta Decl., Ex. L. The Presidential Subdelegation Act, under which the President issued this memorandum, permits the President to delegate "(1) any function which is vested in the President by law, or (2) any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President." 3 U.S.C. § 301. But, under the Federal Service Labor-Relations Management Act, *no one* has the authority to review the merits of the Panel's decisions—not the FLRA, not a federal court, and not even the President. The President simply has no power to delegate a responsibility that he himself does not have.

For the above reasons, the Association is likely to establish that the Panel members are principal officers who were unconstitutionally appointed without Senate confirmation.[11]

B. This Court has jurisdiction over the Association's constitutional claim.

In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Supreme Court specifically held that a district court has jurisdiction to review a regulated entity's Appointments Clause challenge to an agency body, even where the relevant statute does not provide for such review. *See* 561 U.S. at 489–91. And in this particular statutory context, the D.C. Circuit has held that challenges to the Impasses Panel that do "not entail reviewing a decision of the Panel"—such as this one—are properly brought in district court. *National Air II*, 606 F.3d at 787. "Indeed if every such question had to be framed as an unfair labor practice charge and resolved first by the FLRA," as the government contends, "then it would be the General Counsel who, by her exercise of unreviewable discretion not to issue a complaint, could strip the court of jurisdiction over issues concerning the reach of the FSIP's authority." *Id.* at 788. Congress could not have "intended" for the agency "to exercise such control over [federal courts'] jurisdiction." *Id.* These decisions settle the jurisdictional question here.

1. The* Free Enterprise *factors all weigh in favor of jurisdiction here.

"Provisions for agency review do not restrict judicial review unless the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Free Enterprise*, 561 U.S. at 489 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212 (1994)). Whether Congress intended

[11] Here, because the merits issues are purely legal, the Court may wish to consolidate this preliminary-injunction motion with the ultimate merits, to advance the speedy termination of the case. *Trump v. Mazars USA, LLP,* 940 F.3d 710, 718 (D.C. Cir.), *cert. granted*, 140 S. Ct. 660 (2019); *see L.M.-M. v. Cuccinelli*, No. CV 19-2676-RDM, 2020 WL 985376, at *8 (D.D.C. Mar. 1, 2020) (employing this procedure in an Appointments Clause challenge).

to preclude initial judicial review is determined from "the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review." *Thunder Basin*, 510 U.S. at 207 (citation omitted); *see also Jarkesy v. S.E.C.*, 803 F.3d 9, 15–16 (D.C. Cir. 2015).

Here, the statute's language and structure admittedly indicate that Congress generally intended to preclude courts from reviewing decisions of the Federal Service Impasses Panel. But this Court nonetheless has jurisdiction over the Association's Appointment Clause claim because this constitutional claim is not "the type Congress intended to be reviewed within this statutory structure." *Thunder Basin*, 510 U.S. at 212.

Free Enterprise Fund shows why. In that case, the plaintiffs claimed that the Public Company Accounting Oversight Board was unconstitutionally structured in violation of the Appointments Clause. 561 U.S. at 487. The Sarbanes-Oxley Act, which created the Board, authorizes the SEC to review any Board rule or sanction, and any aggrieved party can then challenge the Commission's final action in the court of appeals. *See id.* at 489. The government argued that this statutory framework set out "an exclusive route to review," depriving the district court of jurisdiction. *Id.*

Rejecting that argument, the Court first reasoned that the plaintiffs could not "meaningfully pursue their constitutional claims under the Government's theory," because the statute "provides only for judicial review of *Commission* action, and not every Board action is encapsulated in a final Commission order or rule." *Id.* at 490. The Court also disagreed with the government's proposal that the plaintiffs "raise their claims by appealing a Board sanction"—in other words, that they incur a sanction for noncompliance, let that sanction be affirmed by the Commission, and then access judicial review in the court of appeals. As the Court explained: "We normally do not require plaintiffs to bet the farm . . . by taking the violative action before testing the validity of the law, . . . and we do not consider this a meaningful avenue of relief." *Id.* at 490–

91 (quotation marks and citations omitted). Finally, the Court concluded that the "constitutional claims are also outside the Commission's competence and expertise." *Id.* at 491. The claims did not implicate the agency's specific "expertise," and "the statutory questions involved do not require technical considerations of [agency] policy." *Id.* (quotation marks omitted). "They are instead standard questions of administrative law, which the courts are at no disadvantage in answering." *Id.*

As the D.C. Circuit has observed, *Free Enterprise* articulates a three-party inquiry for determining whether "a claim will be found to fall outside of the scope of a special statutory scheme"—namely, when "(1) a finding of preclusion might foreclose all meaningful judicial review; (2) the claim is wholly collateral to the statutory review provisions; and (3) the claims are beyond the expertise of the agency." *Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 500 (D.C. Cir. 2018) (citing *Free Enterprise.*, 561 U.S. at 489). "These three considerations do not comprise 'a strict mathematical formula, but instead are 'general guideposts useful for channeling the inquiry into whether the particular claims at issue fall outside an overarching congressional design.'" *Bombardier, Inc. v. United States Dep't of Labor*, 145 F. Supp. 3d 21, 34 (D.D.C. 2015) (quoting *Jarkesy*, 803 F.3d at 17). All three considerations weigh in favor of district-court jurisdiction over the Association's claims here.

a. The Association cannot meaningfully pursue its constitutional claim within the statutory-review process.

The problem here is straightforward: The statutory scheme affords the Association absolutely no means by which to assert its Appointments Clause claim. To be sure, the statute permits circuit-court review of the *Authority's* final orders. *See* 5 U.S.C. § 7123. But the Association "is not seeking review of a final order of the FLRA—indeed, the FLRA has issued no final order." *National Air II*, 6060 F.3d at 788. Instead, the Association is challenging the constitutionality of the

Panel's appointment. And there is no statutory mechanism by which the Association can access judicial review of the Panel's orders. *See Brewer*, 735 F.2d at 1499.

Because FLRA has likewise recognized that the statute precludes its "direct review of Panel orders," *NTEU & DHS*, 63 F.L.R.A. 183, 187 (Mar. 31, 2009), the only "available" option under the statute is for the Association to refuse to comply with the Panel's decision, thereby committing an unfair labor practice—not to mention subjecting union officials and individual judges to disciplinary action. *See* 5 U.S.C. § 7116(a)(6), (b)(6). Because a party's "[r]efusal to follow the Panel's directive constitutes an unfair labor practice," it is theoretically possible that the "Panel's decision is reviewable, first before the Authority, then in court, in an unfair labor practice proceeding." *Dep't of Treasury v. FLRA*, 707 F.2d 574, 577 n.7 (D.C. Cir. 1983).

But requiring a regulated entity "to manufacture a dispute or provoke a sanction" just to obtain federal-court review, *Jarkesy*, 803 F.3d at 20, is not "a meaningful avenue of relief," *Free Enterprise*, 561 U.S. at 490–91. What's more, the availability of review through even the unfair-labor-practice process is entirely hypothetical. The FLRA's General Counsel, "who is appointed by the President, with Senate approval, independent of the Authority members," is the only official "given authority to issue unfair labor practice complaints." *Turgeon v. FLRA*, 677 F.2d 937, 939 n.4 (D.C. Cir. 1982); *see* 5 U.S.C. §§ 7104(f)(1), 7118. And "the General Counsel's decision whether to issue a complaint is not subject to judicial review." *National Air II*, 606 F.3d at 783. Thus, assuming that the Association could somehow refuse to comply with Panel-imposed terms, and the Social Security Administration filed an unfair-labor-practice charge, the General Counsel could still decline to issue an unfair-labor-practice complaint, thereby preventing the Authority (and, in turn, the court of appeals) from ever reviewing the Association's claim challenging the Panel's composition. Even worse, the General Counsel position has been unfilled since November 2017—

meaning that, aside from this lawsuit, there is *no* possibility in the foreseeable future that the Association's Appointments Clause claim will be heard.

Even if there were a properly appointed General Counsel, the unfair-labor-practice process would likely take years to unfold. The steps are many: (1) the Association would have to refuse to comply with the Panel's terms; (2) the agency would have to file an unfair-labor-practice charge, (3) the General Counsel would have to investigate the charge, (4) the General Counsel would have to decide whether to file a complaint, and (5) if the General Counsel did file a complaint, the Authority would have to hold a hearing. *See* 5 U.S.C. § 7118. As then-Judge Ginsburg observed, "th[is] road, as experience reveals, is a long one." *Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 778 F.2d 850, 866 (D.C. Cir. 1985) (Ginsburg, J., dissenting). "[B]y the time the Authority addresses the issue it might lose its immediate, practical vitality even if the union's appeal could survive a mootness challenge." *Id.* "Moreover, the time lapse itself generates losses that cannot always be compensated by retroactive relief: for example, the loss of procedural protections or beneficial working conditions during the years when the contract should have been in force." *Id.* Not to mention that "the decision to defy an existing labor contract—even if the relevant contract term were imposed by a Panel order—is not to be taken lightly. Such defiance could subject the union to prolonged administrative proceedings, followed perhaps by a cease and desist order, before judicial review could be available." *Brewer*, 735 F.2d at 1502 n.9. The Association need not "erect a Trojan-horse challenge . . . or 'bet the farm' by subjecting [itself] to unnecessary sanction" to access judicial review. *Jarkesy*, 803 F.3d at 20.

Finally, the ability to seek meaningful judicial review is even more critical when the claim at issue is constitutional, rather than statutory, in nature. *See Thunder Basin*, 510 U.S. at 215 (noting that adjudicating constitutional challenges have "generally been thought beyond the jurisdiction of administrative agencies"). That is because "[c]onstitutional questions obviously are unsuited to

resolution in administrative hearing procedures and, therefore, access to courts is essential to the decision of such questions." *Califano v. Sanders*, 430 U.S. 99, 109 (1977); *see also Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 965 (D.C. Cir. 1996) (holding that the district court has "general federal question jurisdiction to consider a facial challenge to a statute's constitutionality so long as that challenge is not raised in a suit challenging the validity of agency action taken pursuant to the challenged statute or in a suit that is collateral to one challenging the validity of such agency action").[12]

In sum, because the statutory scheme bars the Association from "meaningfully pursu[ing] [its] constitutional claims," jurisdiction is proper in this Court. *Free Enterprise*, 461 U.S. at 490.

b. The Association's constitutional challenge is wholly collateral from the merits of the Panel's decision and does not require agency expertise.

As numerous courts have observed, "the most critical thread in the case law is the first *Free Enterprise Fund* factor: whether the plaintiff will be able to receive meaningful judicial review without access to the district courts." *Bebo v. S.E.C.*, 799 F.3d 765, 774 (7th Cir. 2015); *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 630 (4th Cir. 2018); *see also Am. Fed'n of Gov't Employees, AFL-CIO v. Trump*, 929 F.3d 748, 759 (D.C. Cir. 2019) (noting that "the two considerations [wholly collateral and meaningful review] are sometimes analyzed together"). As just shown, the Association has

[12] That the D.C. Circuit has recognized that agency exhaustion may be required when a challenger's "statutory and constitutional claims are 'premised on the same facts'"—that is, "when an alleged constitutional violation 'is intertwined with a statutory one, and Congress has provided machinery for the resolution of the latter'"—suggests that a case (like this one) involving only constitutional claims need not proceed through the administrative-rive process. *Nat'l Treasury Employees Union v. King*, 961 F.2d 240, 243 (D.C. Cir. 1992) (quoting *Steadman v. Governor, U.S. Soldiers and Airmen's Home*, 918 F.2d 963, 963 (D.C. Cir. 1990)); *see also Nat'l Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 940 (D.C. Cir. 1987) (stating it is "absolutely clear that civilian federal employees may seek to enjoin government actions that violate their constitutional rights"); *Andrade v. Lauer*, 729 F.2d 1475, 1492 (D.C. Cir. 1984) (noting that "the requirement that plaintiffs exhaust administrative remedies takes on a somewhat different cast when applied to appellants' constitutional claim than it had when applied to their personnel and statutory claims").

established that factor here. Nevertheless, the second and third *Free Enterprise* factors also support this Court's exercise of jurisdiction.

On the second factor: the Association's constitutional claim is "wholly collateral to the statutory review provisions." *Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 500. It challenges the constitutionality of the method by which the Panel members are appointed, a question entirely separate from the merits of the Panel's decision. As in *Free Enterprise*, the Association "object[s] to the [Panel's] existence, not to any of its" specific orders or actions. 561 U.S. at 490.

Finally, on the third factor, resolving the Appointments Clause claim is "beyond the expertise of the agency." *Arch Coal*, 888 F.3d at 500. Again, as in *Free Enterprise*, the issues presented "do not require technical considerations of [agency] policy"; "[t]hey are instead standard questions of administrative law, which the courts are at no disadvantage in answering." 561 U.S. at 491. Indeed, the constitutional question is one that an Article III court is particularly well-suited to resolve.

1. **Free Enterprise, *not* Elgin, *controls here*.**

In *Free Enterprise*, the Court could "not see how petitioners could meaningfully pursue their constitutional claims" within the statute's exclusive-review process. 561 U.S. at 490. That is precisely the case here: The only statutory mechanism by which the Association can obtain review of its Appointments Clause claim is by refusing to comply with the Panel's decision, thus committing an unfair labor practice. But, as explained, this process is far from the "meaningful review" required under *Free Enterprise* and *Thunder Basin*—it allows "the General Counsel . . . , by her exercise of unreviewable discretion not to issue a complaint, [to] strip the court of jurisdiction over issues concerning the reach of the FSIP's authority." *National Air II*, 606 F.3d at 788.

Thus, this is not a case in which the statutory scheme "simply channels judicial review of a constitutional claim to a particular court." *Elgin v. Dep't of Treasury*, 567 U.S. 1, 9 (2012). In *Elgin*,

federal employees discharged for failing to register with the Military Selective Service under 5 U.S.C. § 3328 filed an action in district court challenging the law as an unconstitutional bill of attainder and sex-based discrimination. 567 U.S. at 6–7. But the Civil Service Reform Act creates a "comprehensive system" of review that the government argued deprived the district court of jurisdiction—namely, an employee against whom adverse action has been taken is supposed to appeal to the Merit System Protection Board, and then to the Federal Circuit. *See id.* at 5–7. The Court held that this statutory review scheme "precludes district court jurisdiction over petitioners' claims even though they are constitutional claims for equitable relief." *Id.* at 8. In particular, the Court reasoned that, under *Thunder Basin*, "the Federal Circuit is fully capable of providing meaningful review." *Id.* at 10, 16. That the agency "lacks authority to declare a federal statute unconstitutional" was immaterial to the Court, because the Federal Circuit itself is "fully competent to adjudicate" constitutional claims on review. *Id.* at 17.

The situation here, of course, is very different. In *Elgin*, the plaintiffs could obtain *direct* review in the courts of appeals of their constitutional claims through the statutory-review scheme; indeed, Elgin *did* appeal his removal to the Merit Systems Protection Board. *See id.* at 7. Instead of petitioning for review to the Federal Circuit, he chose to challenge the Board's adverse decision against him by filing an original action in district court. *See also Jarkesy*, 803 F.3d at 20 (noting that "the petitioner was "already properly before the Commission by virtue of his alleged violations of [the security] laws" and that "the existence of the enforcement proceedings gave rise to Jarkesy's challenges"). Here, by contrast, the administrative proceedings have concluded—the Panel has issued its final decision. And the statutory scheme provides no direct route for the Association to seek review of that decision. Like the plaintiffs in *Free Enterprise*, the Association is no longer "*in* [the administrative-review] scheme at all." *Jarkesy*, 803 F.3d at 23.

Indeed, to obtain review of a constitutional claim through the statute would require a union like the Association to violate a Panel decision and then leaves the decision whether to proceed with an unfair-labor-practice charge to the General Counsel's unfettered (and unreviewable) discretion. Particularly given that there currently is no General Counsel, the statute so understood would arguably "deny *any* judicial forum for a colorable constitutional claim," thereby raising "'serious constitutional question[s].'" *Webster v. Doe*, 486 U.S. 592, 603 (1988) (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681, n.12 (1986)) (emphasis added). When confronted with those difficult constitutional questions, courts should instead conclude that the constitutional claims at issue are not "the type Congress intended to be reviewed within this statutory structure." *Thunder Basin*, 510 U.S. at 212.

This case likewise resembles *Free Enterprise* more than *Elgin* with respect to the other two factors. As to the wholly-collateral factor: In *Elgin*, the Court held that the constitutional claims were not "wholly collateral" under *Thunder Basin* because they were "the vehicle by which [the plaintiffs] seek to reverse the removal decisions, to return to federal employment, and to receive the compensation they would have earned but for the adverse employment action." 567 U.S. at 22. Here, to challenge the Panel's decision, even under the government's theory, the Association would have to commit an unfair labor practice by refusing to comply with the Panel decision. The Appointments Clause claim would be entirely collateral in that separate proceeding.

Nor does *Elgin*'s reasoning on the agency's expertise apply here. There, the Court found that even though the agency had no particular constitutional expertise, the plaintiffs "overlook[ed] the many threshold questions that may accompany a constitutional claim and to which the [agency] can apply its expertise." *Id.* at 23. Indeed, "preliminary questions unique to the employment context"—which "f[ell] squarely within the MSPB's expertise"—had the potential to "obviate the need to address the constitutional challenge" altogether. 567 U.S. at 22–23. But this

case involves no potential preliminary questions, nor "other statutory or constitutional claims that the [agency] routinely considers." *Id.* at 22. The Association asserts a single claim against the Panel: that the Panel members were appointed in violation of Article II of the Constitution. Unlike in *Elgin*, the Panel cannot "alleviate" the Association's "constitutional concerns" by adopting a particular statutory construction, or otherwise "dispose of the case." *Id.* In short, the Association's claim is "outside the agency's expertise." *Thunder Basin*, 510 U.S. at 212. Accordingly, the statutory scheme does not bar this Court's exercise of jurisdiction.

II. The Association is already suffering—and will continue to suffer—irreparable harm without preliminary injunctive relief.

The Panel's imposition of union-busting contract terms have already caused the Association to suffer actual irreparable harm. And, absent injunctive relief, it is a certainty that this harm will continue to accrue. The Social Security Administration has made clear its intention to implement the Panel's decision in less than two weeks. Once that occurs, the Association will effectively be "eviscerate[d]," depriving its members of the representation to which they are entitled under law. McIntosh Decl. ¶ 1.

This therefore is not a case where the alleged irreparable injury is merely the "delay involved in conducting an administrative proceeding," *Nat'l Treasury Employees Union v. King*, 961 F.2d 240, 244 n.4 (D.C. Cir. 1992), or "[t]he burden of defending oneself in an unlawful administrative proceeding," *Bennett v. SEC*, 844 F.3d 174, 184 (4th Cir. 2016); *see FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 244 (1980). Rather, the Panel's final decision is "binding" on the Association, 5 U.S.C. § 7119(5)(C), and the Association has no option to appeal its decision to any agency or court, *see Brewer*, 735 F.2d at 1499. In other words, starting on May 5, the Association's relationship with the Social Security Administration *will* be governed by the final terms that the Panel imposed—terms that will critically wound the Association's ability to represent its members

and prevent its members from accessing vital tools and benefits that allow them to manage their demanding caseloads. And these contract terms will remain in effect for an unprecedented *seven* years. The irreparable harm is thus manifest and severe.

The Association began to suffer irreparable harm immediately after the Panel's decision. For example, the Panel's order sets an annual official-time cap of 1,200—less than ten-percent of the hours that the Association previously had available to it to conduct union-representation activities. McIntosh Decl. ¶¶ 12–14. The Association thus has been forced to consider immediate changes to prepare for this new environment, including the elimination of official time for most of its officers' representational activities and statutory duties, cutbacks affecting other activities, and the hiring of a business agent at considerable expense to the Association. *Id.* ¶¶ 11, 13–19, 23. Additionally, the Association's leadership has had to devote a significant amount of its limited time and efforts to developing guidance about the Panel's decision and aiding its members with the new requirements. *Id.* ¶ 22. All of this will drastically reduce the Association's ability to effectively represent its members for the next seven years. *Id.* ¶¶ 1, 13, 23.

These harms will only grow once the Social Security Administration formally implements the Panel's decision. The onerous new contract terms require the Association's leadership to shift its focus away from other critical representational activities it performs for its members, such as representation in grievances, arbitrations, formal discussions, and *Weingarten* (investigatory) examinations because it will not have the time to represent them in these matters. *Id.* ¶ 18. The new restrictions also "will immediately silence [the Association's] advocacy" for its members' due-process rights in important fora, including Congress. *Id.* ¶ 14. Instead, the handful of hours given to the Association will have to be devoted to major issues like bargaining-unit-wide concerns related to decisional independence and disciplinary actions against judges, and even then, it does not have enough official-time hours to handle these critical functions. *Id.* ¶¶ 16–19. As a result, the

Association's *members* will suffer severe and irreparable harm as well, because they will be denied their statutory right to effective representation. And the members will face additional individual harms from the Panel's imposition of restrictive new telework, reassignment, and leave requirements, which "disable judges' ability to meet the agency's onerous goals," "impact judges' ability to provide family care," and "eliminate[] the ability of members to transfer to offices by seniority." *Id.* ¶¶ 20–21.

Further, under the parties' bargaining rules, the Association must soon initiate a ratification process for the remainder of the new contract—i.e., the twenty articles on which the agency and the union had previously agreed. Following the Panel's order, members have expressed serious concerns to the Association's leadership that they are afraid that if they do not vote to ratify the new contract, the Social Security Administration will make it "even worse for us" or retaliate against judges. *Id.* ¶ 8. Should their members not ratify the pending agreement, they will be forced back to the bargaining table on these remaining articles. *Id.* But the Association's bargaining power has been critically weakened because of the Panel's decision, giving the Agency an unfair advantage at the bargaining table in any future negotiations and "irreparably taint[ing]" the bargaining-unit judges' freedom. *Id.* Even worse, the Association now faces the possibility that judges will revoke their membership due to the union's weakened bargaining position and their dissatisfaction with the agency's immediate implementation of the Panel's order. *Id.* ¶ 9. The Social Security Administration could then move to decertify the Association based on a purported "good faith belief" that it no longer has majority support. *Id.* Thus, "the practical result of the Panel's order is nothing short of the elimination of" the Association. *Id.* ¶ 1.

All of these harms are "beyond remediation" and therefore constitute irreparable injury justifying injunctive relief. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). And that is even more so because the Association has suffered "injuries of constitutional

magnitude." *Ramirez v. U.S. Customs & Border Prot.*, 709 F. Supp. 2d 74, 83 (D.D.C. 2010). As *Free Enterprise* makes clear, "structural protections against abuse of power" like the Appointments Clause are "critical to preserving liberty." 561 U.S. at 501; *see also Freytag*, 501 U.S. at 880 ("The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic."). Just like federalism, "[s]eparation-of-powers principles" serve to "protect[] the liberty of the individual from arbitrary power." *Bond v. United States*, 564 U.S. 211, 222 (2011).

The government may argue that the Association's harm is nonetheless reparable because it might obtain review by committing an unfair labor practice by refusing to comply with the Panel's decision. But, as explained, that statutory-review process is entirely illusory. *See* Section I.B.1, *infra*. In any event, "[t]he Supreme Court has long recognized that federal courts possess a 'traditional power to issue injunctions to preserve the status quo" even "while administrative proceedings are in progress.'" *Jackson v. Dist. of Columbia*, 254 F.3d 262, 268 (D.C. Cir. 2001) (quoting *FTC v. Dean Foods Co.*, 384 U.S. 597, 604 (1966)). Here, of course, the administrative proceedings *have* ended—in the Panel's draconian and unreviewable final order. What's more, the D.C. Circuit has "made it absolutely clear that civilian federal employees may seek to enjoin government actions that violate their constitutional rights," even where (unlike here) there is an available statutory-review scheme. *Weinberger*, 818 F.3d at 940. Indeed, district courts "clearly retain" jurisdiction to issue injunctive relief where "the administrative proceeding has left the constitutional injury unremedied, and when an administrative proceeding cannot adequately redress the alleged constitutional violation"—both of which are true here. *King*, 961 F.2d at 243.

As the Association's President explains, if the Panel's decision is implemented on May 5, "the bell cannot be unrung—the damage will become incurable." McIntosh Decl. ¶ 23. Because the Association has suffered and will continue to suffer irreparable harm absent this Court's

intervention, the Court should exercise its traditional equitable power and preliminarily enjoin the Panel from operating in violation of the Appointments Clause.

III. The balance of the equities and the public interest weigh in favor of a preliminary injunction.

Finally, the balance of the equities and the public interest also favor the Association. These inquiries typically "merge into one factor when the government is the non-movant," as here. *Ramirez v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 7, 32 (D.D.C. 2018) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

As just shown, the Association and its members are already suffering irreparable harm as a result of the Panel's decision, and that harm will continue absent preliminary injunctive relief. The Association is preparing to reduce many of its activities and operations, to hire additional staff to address the Panel's order, and to shift resources away from representing its members in grievances and arbitrations. McIntosh Decl. ¶¶ 1, 9, 12–18, 21, 23. And, because of the changes imposed by the Panel, the Association's members will not only be effectively deprived of their statutory right to union representation in critical proceedings like grievance arbitration, but they also will be forced to comply with onerous new requirements for telework, reassignment, and leave. *Id.* ¶¶ 13, 19–21.

By contrast, the requested relief will not cause any injury to the Panel. Far from it—a preliminary injunction would bring the Panel into compliance with "a critical structural safeguard [ ] of the constitutional scheme." *SW Gen.*, 137 S. Ct. at 935 (quotation marks omitted). And it is never in "the public interest for the Constitution to be violated." *Ironridge Glob. IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294, 1317 (N.D. Ga. 2015) (issuing preliminary injunction on Appointments Clause claim challenging appointment of SEC administrative law judges).

As the Supreme Court has made clear, the Appointments Clause "not only guards against [separation-of-powers] encroachment but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag*, 501 U.S. at 878. In this sense, the balance of the equities and the public interest here are "essentially derivative of the parties' arguments on the merits of the case,"—thus, "it follows that the public interest factor of the preliminary injunction test should weigh in favor of whoever has the stronger arguments on the merits." *See Am. Meat Inst. v. U.S. Dep't of Agric.*, 968 F. Supp. 2d 38, 83 (D.D.C. 2013), *judgment reinstated*, 760 F.3d 18 (D.C. Cir. 2014). Here, that is the Association.

In short, the public interest is not served by permitting an unconstitutionally constituted government body to continue to wield sweeping, unchecked, and illegitimate power. A preliminary injunction is therefore warranted.

CONCLUSION

The Association's motion for a preliminary injunction should be granted.

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Respectfully submitted,
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