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' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Because the members of the Federal Service Impasses Panel wield substantial, unsupervised power—because they "resolve any impass[es]" by issuing decisions that are "binding" on private parties without further review—they are principal officers. *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 821 F.3d 19, 37 (D.C. Cir. 2016). The Appointments Clause requires principal officers to be nominated by the president and confirmed by the Senate. The members of the Panel were all appointed by President Trump. But they were not confirmed by the Senate.

Last November, shortly after these appointments were first challenged in court, the White House recognized this obvious constitutional flaw and rushed out an attempted fix: a presidential memorandum purporting to delegate, to the Senate-confirmed members of the Federal Labor Relations Authority, the president's power to remove the Panel's members. Through a stroke of the presidential pen, this memo sought to transform Panel members from principal officers (who are subject to Senate confirmation) to inferior officers (who are not).

Although the government now stakes its defense on it, the memo cannot accomplish this feat of constitutional alchemy. It "violates the basic principle that the President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 496–97 (2010). The delegation-of-removal-power gambit thus manages to be both unprecedented and, at the same time, foreclosed by precedent. The D.C. Circuit has specifically held that the president's "exercise of his appointment and removal power" is "a quintessential and nondelegable Presidential power." *In re Sealed Case*, 121 F.3d 729, 752–53 (D.C. Cir. 1997). "[T]he President himself must directly exercise the presidential power of appointment or removal." *Id.* That has also been the fixed position of the U.S. Department of Justice for two centuries. In 1855, the Department described the power to "appoint[] and remove[] . . . officers of the United States, in the cases and with the qualifications indicated by the Constitution," as

among those functions that "he, the man discharging the presidential office, and he alone" must perform, and "not another man . . . or anybody else, by delegation of the President." 7 U.S. Op. Att'y Gen. 453, 464–65 (1855). The Office of Legal Counsel has repeatedly recognized that "the President's removal power" is "a power that has long been understood not to be delegable." 26 Op. O.L.C. 22, 25 (2002). A wall of judicial and executive precedent holds that removal must "be performed by the President personally" and "may not be delegated." *McElrath v. United States*, 102 U.S. 426, 436 (1880). Because the power of appointment "carries with it, as a necessary incident, the power of removal," at least where Congress specifies no contrary rule, "the President has the exclusive power of removing executive officers of the United States whom he has appointed." *Myers v. United States*, 272 U.S. 52, 106, 126 (1926).

So President Trump cannot cure his unconstitutional appointments with a stroke of his own pen. Otherwise, presidents would always have a strong incentive to use delegations to "find a way around, or to otherwise evade, the operation of the Appointments Clause," and with it, the Senate's "check on the powers of the executive." Tuan Samahon, *The Czar's Place in Presidential Administration,* 2011 U. Chi. L. F. 169, 193 (2011). That check cannot be so easily evaded.

The government has now filed a total of 57 pages of briefing on the merits. But it is all question-begging. The government's reasoning is as follows: (1) the Panel members are inferior officers because they are removable by the Authority; (2) they are removable by the Authority because of the presidential memo; and (3) the presidential memo is lawful because the officers are inferior. That reasoning is hopelessly circular. The logical sequence is instead to ask: *First*: Are the Panel members principal or inferior officers? If they are principal officers, their appointments violated the Constitution. *Second*: If their appointments did violate the Constitution, can President Trump's memo lawfully cure those violations? *Third*, and finally: If the memo cannot cure the violations, what is the appropriate remedy? We answer each question in turn.

ARGUMENT

I. As the government all but admits, without the President's memorandum, the Panel members are principal officers.

1. Only three undisputed facts are relevant to the Association's Appointments Clause claim: (1) President Trump appointed ten people to serve as members of the Federal Service Impasses Panel; (2) none of those members were confirmed by the Senate; and (3) after litigation challenging the constitutionality of the Panel members' appointment was filed, the President issued a memo purporting to delegate his authority to remove those officials to the Federal Labor Relations Authority. The only question is whether these appointments were lawful. As this Court has already explained, the "issues in this case are purely legal." Minute Order (Apr. 28, 2020).[1]

The government effectively concedes that its merits position turns on the validity of that third event: President Trump's purported delegation of his removal authority. The government explains that whether an officer can be removed at will by a Senate-confirmed officer "carries particularly significant weight" in the principal-officer inquiry—indeed, it is the "[m]ost critical[]" factor. SSA Br. (ECF 26) 2, 9. Hence, the government reasons, "[t]hat the Authority members may freely remove Panel members at any time leaves no doubt that Panel members are validly-appointed Inferior Officers." FSIP Br. (ECF 23-1) 1. And the government takes pains to stress that because the Authority's purported at-will removal power is such a "powerful" tool to control the Panel members, it "alone" is enough to conclude that Panel members are inferior officers. SSA Br. 7, 13–14, 18.

[1] We agree with the DOJ that our claim presents a "pure question of law given to resolution without factual findings." ECF 26-1 at 1. Though the Panel suggests otherwise, submitting nearly ten pages of purported factual material in support of its cross-motion, this material largely recites general statutory and regulatory background or impermissible legal argument. *See* ECF 24-2 at ¶¶ 2–4, 6–18; ECF 24-3 at ¶¶ 2–5, 7–10. The Panel's filing of an "administrative record" (ECF 21) under Local Rule 7(h)(2) is also unwarranted. As the Court is well aware, this case challenges the constitutionality of the Panel's appointment—it doesn't seek review of the merits of any Panel decision or action.

We agree that "removability" is "the key" to determining whether an officer should be "deemed principal or inferior." SSA Br. 12. But here, of course, the statute gives the Authority no removal power. The Authority's newfound power over the Impasses Panel, on the government's theory, dates back to November 12, 2019—the day the President issued his delegation memo. That was just six days after the Panel sought an extension to file a brief that would address the merits of the Appointments Clause issue for the first time. *See* Consent Mot. (ECF 24), *AFGE-HUD v. FSIP*, No. 1:19-cv-01934 (D.D.C. Nov. 6, 2019). Through the memo, the Administration handed itself a defense for an otherwise indefensible litigation position.

2. Three straightforward propositions resolve this case. *First*, Panel members "may be removed by the President"—and only the President. 5 U.S.C. § 7119(c)(3). The President's attempted delegation (which, as we will explain, violates centuries of case law and executive-branch precedent) cannot lawfully alter that clear command. *Second*, the Panel has the "power to render a final decision on behalf of the United States" that is immediately binding on private parties, without any approval "by other Executive officers." *Edmond v. United States*, 520 U.S. 651, 665 (1997); *see* 5 U.S.C. § 7119(c)(5)(C). *Third*, the Panel's decisions are not directly reviewable by the FLRA, or anyone else. *See Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1499 (D.C. Cir. 1984). The Panel members, in other words, are not "directed and supervised" by any Senate-confirmed officers. *Edmond*, 520 U.S. at 663. Thus, they are principal officers.

As we have shown, controlling Appointments Clause precedent requires this result. ECF 8 at 17–20. In *Association of American Railroads v. U.S. Department of Transportation*, the D.C. Circuit considered the status of an arbitrator with the power to issue "binding" decisions "to resolve [] impasse[s]" without further review. 821 F.3d 19, 37 (D.C. Cir. 2016). Although the arbitrator's position was "banal," the D.C. Circuit observed, the conclusion that he was a principal officer was "inescapable." *Id.* at 39. And, in *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*,

the D.C. Circuit held that Copyright Royalty Judges were principal officers even though the Librarian of Congress controlled the Judges' procedural rules and the Register of Copyrights had the "power to control the [Judges'] resolution of pure issues of law." 684 F.3d 1332, 1338–39 (D.C. Cir. 2012). Yet these "supervision functions still f[e]ll short of the kind that would render the [Judges'] inferior officers." *Id.* at 1339.

The government disputes none of this. Instead, it asserts that the FLRA exercises sufficient oversight of the Panel simply by virtue of its generic statutory authority to issue policy guidance. SSA Br. 14, 18–23 (citing 5 U.S.C. § 7101(b), 7105(a)). 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." *Edmond*, 520 U.S. at 662–63. The government cannot identify a single case that comes close to suggesting that exercising such general policy-setting responsibilities constitutes "substantial supervision and oversight of" inferior officers. *Intercollegiate*, 684 F.3d at 1338.[2] Likewise, the government admits that the FLRA lacks the power to directly review the Panel's decisions. Yet again, it attempts to invoke the unfair-labor-practice process as a potential means of review. SSA Br. 24–28; FSIP Br. 8–9, 16–17. But we have already explained why this process is hypothetical at best—and unconstitutional at worst. ECF 8 at 22, 25–28; ECF 25 at 4–5, 8–14. More to the point, because only *one of the parties* can trigger this process, it does not provide the *Authority* with any meaningful control over the Panel. *See* 5 U.S.C. § 7118(a)(1).

Finally, contrary to the government's assertion, the Panel's inability to formally "enforce" its orders is irrelevant. FSIP Br. 1–2, 8, 16–17, 20–21. Copyright Royalty Judges, for example, do not enforce their ratemaking determinations, yet the D.C. Circuit had little trouble finding them

[2] The government's suggests (SSA Br. at 19–20) that the FLRA can control the Panel by "stay[ing] certain Panel decisions entirely." But "[t]he Authority has found, only once, that a stay of a Panel order was warranted," and only because the same parties were involved in pending litigation in federal court on the same issues. *IFPTE v. Dep't of Navy*, 70 F.L.R.A. 24, 24 (2016). Thus, contrary to what the government says, this is further evidence of the *absence* of oversight.

to be principal officers. *See Intercollegiate*, 684 F.3d at 1338–40; *Soundexchange, Inc. v. Muzak, LLC*, 167 F. Supp. 3d 147, 148 (D.D.C. 2016), *rev'd on other grounds by* 854 F.3d 713 (D.C. Cir. 2017) (noting that the statute and regulations designate a nonprofit to "distribut[e] statutory royalties and enforc[e] statutory licenses"). More obviously, judicial officers (whether Article III or not) necessarily depend on others to enforce their decisions, but their lack of enforcement power has no bearing on whether they are principal officers. *See, e.g.*, *Masias v. Sec'y of Health & Human Servs.*, 634 F.3d 1283, 1293 (Fed. Cir. 2011) (Court of Federal claims judges are "principal officers"); *Samuels, Kramer & Co. v. Comm'r*, 930 F.2d 975, 985 (2d Cir. 1991) ("the judges of the Tax Court are plainly principal officers within the meaning of Article II").

That the Panel's unreviewable decisions are immediately binding on private parties—in other words, that the Panel "mak[es] law without supervision"—is enough to conclude that its members are principal officers. *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 64 (2015) (Alito, J., concurring). The only remaining question, then, is whether the President's memo purporting to give the FLRA the power to remove Panel members alters that conclusion.

II. The President's memorandum delegating removal authority to the FLRA is unlawful under centuries of case law and executive-branch precedent.

More than a century ago, the Supreme Court recognized that "[t]here are, undoubtedly, official acts which the Constitution and laws require to be performed by the President personally, and the performance of which may not be delegated to heads of departments, or to other officers in the executive branch of the Government." *McElrath v. United States*, 102 U.S. 426, 436 (1880). The president's "exercise of his appointment and removal power," the D.C. Circuit has held, is one such "quintessential and nondelegable Presidential power." *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997). In the years since, the D.C. Circuit has reaffirmed Judge Wald's holding that "the appointment and removal power" is "a non-delegable duty of the President under Article II,

Section 2 of the Constitution." *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1115 (D.C. Cir. 2004) (citing *Sealed Case*, 121 F.3d at 734–35). And this Court, too, has repeatedly recognized that principle. *See, e.g.*, *Protect Democracy Project, Inc. v. U.S. Dep't of Def.*, 320 F. Supp. 3d 162, 174 (D.D.C. 2018); *Judicial Watch, Inc. v. CFPB*, 60 F. Supp. 3d 1, 13 (D.D.C. 2014); *Ctr. for Effective Gov't v. Dep't of State*, 7 F. Supp. 3d 16, 25 (D.D.C. 2013).[3]

The President's November 2019 memo purports to delegate to the FLRA his "authority under 5 U.S.C. 7119(c)(3) to remove the Chairman and any other member of the [Panel] appointed by the President." 84 Fed. Reg. at 63,789. Yet the government offers not one word explaining how this is allowed under binding precedent. It cannot: the delegation is unlawful.

Nor can the government's position be squared with more than 150 years of the executive branch's *own* precedent As far back as 1855, the President's legal advisor recognized "the general rule that the functions vested in the President by the Constitution are not delegable and must be performed by him." *Presidential Succession and Delegation in Case of Disability*, 5 Op. O.L.C. 91, 94 (1981) (citing 7 U.S. Op. Att'y Gen. 453, 464 (1855)). Attorney General Cushing put it simply: Some "specific things must be done by the President himself." 7 U.S. Op. Att'y Gen. at 464. Cushing first pointed to the President's pardon power as an example: "[H]e, the man discharging the presidential office, and he alone, grants reprieves and pardons for offences against the United States, not another man, the Attorney General or anybody else, by delegation of the President." *Id.* at 456. He then grouped in the same category the President's power to "appoint[] and

[3] *Sealed Case*'s holding, since reaffirmed, cannot be dismissed as mere passing dicta. That the documents sought by the plaintiffs in that case concerned the President's "nondelegable" appointment-and-removal powers was central to the D.C. Circuit's ruling that the presidential-communications privilege applied. Because "the President *himself* must directly exercise the presidential power of appointment or removal," the court was "assured" that the communications were "intimately connected to his presidential decisionmaking." 121 F.3d at 753 (emphasis added); *see also Judicial Watch*, 365 F.3d at 1139 (Randolph, J., dissenting) (explaining that *Sealed Case*'s "dividing line is clear"—it distinguishes between "advice about 'a quintessential and nondelegable Presidential power,'" and advice that is not).

remove[] ambassadors and other officers of the United States, in the cases and with the qualifications indicated by the Constitution." *Id.*

About a century later, the Department of Justice's Office of Legal Counsel (OLC) prepared an internal study listing the "nondelegable functions of the President." *Presidential Succession & Delegation in Case of Disability*, 5 Op. O.L.C. at 94 (discussing *Memorandum re: Delegation of Presidential Functions*, Office of Legal Counsel (Sept. 1, 1955)). Among these functions the OLC included: (1) "[t]he power to nominate and appoint the officers of the United States to the extent provided in Article II, § 2, clause 2 of the Constitution"; and (2) "[t]he power to remove purely executive presidential appointees," which it observed "is vested in the President as an incident of his appointment power." *Id.* As Assistant Attorney General Theodore Olson explained during the Reagan Administration, this list of nondelegable functions underscored "the general rule that the President may not delegate inherent powers that are conferred on him by the Constitution." *Id.* at 95. Further, he concluded that "[a]n unmistakable congressional intent to prohibit delegation may also be inferred from statutes that impose on the President a duty or power to exercise a nondelegable function." *Id.* at 97. Based on this opinion, the OLC during the Clinton Administration concluded that only the President, not the Attorney General, could "undertake the actual removal of the United States Marshal." *Suspension of a United States Marshal*, 17 Op. O L.C. 75, 76 (1993).

Years later, Deputy Assistant Attorney General John Yoo—not someone known for advocating limitations on presidential power—again reiterated the OLC's view that "acts performable by the President[] as prescribed by the Constitution are not susceptible of delegation." *Centralizing Border Control Policy Under the Supervision of the Attorney Gen.*, 26 U.S. Op. O.L.C. 22, 24 (2002) (quoting *Memorandum re: Delegation of Presidential Functions*, Office of Legal Counsel (Sept. 1, 1955)). Citing Cushing's 1855 opinion, Yoo noted that "the Executive Branch has

always understood that" the President may not "delegate his power to appoint and remove Executive Branch officials." *Id.* Several years further into the Bush Administration, another OLC opinion recited the Office's "long held [] view that the President's power to appoint officers requiring Senate confirmation must be exercised by the President and may not be delegated." *Assignment of Certain Functions Related to Military Appointments*, 29 Op. O.L.C. 132, 134 (2005).

The OLC's longstanding approach, which "substantially coheres" with D.C. Circuit law, makes clear that the President cannot delegate his power to remove principal officers. *See* Samahon, *The Czar's Place in Presidential Administration, and What the Excepting Clause Teaches Us About Delegation*, 2011 U. Chi. L. F. at 185. And both the D.C. Circuit's holding and the OLC's position are also consistent with longstanding separation-of-powers jurisprudence. As the Supreme Court explained a century ago, "the power of appointment to executive office carries with it, as a necessary incident, the power of removal." *Myers*, 272 U.S. at 126. For this reason, at least absent some specific command to the contrary, "the President has the *exclusive* power of removing executive officers of the United States whom he has appointed." *Id.* at 106 (emphasis added).

The government has no meaningful answer to any of this precedent. Instead, the government seeks refuge in the Presidential Subdelegation Act, which generally authorizes the President to delegate "any function which is vested in the President by law" to a Senate-confirmed officer. 3 U.S.C. § 301; *see* SSA Br. 14–15; FSIP Br. 23–24. But, as explained, the executive branch itself has concluded that the Act doesn't permit the president to delegate his constitutional powers, including his power to remove officers. Instead, the Act applies only "to the President's statutory duties." *Centralizing Border Control Policy*, 26 Op. O.L.C. at 24; *see also Presidential Succession & Delegation*, 5 Op. O.L.C. at 94–95. This accords with the Act's text and history. The Act covers the delegation of functions "vested in the President *by law*," 3 U.S.C. § 301, and since its enactment, the OLC has interpreted "by law" as "intended only to authorize

the delegation of functions vested in the President by statute." *Waiver of Claims for Damages Arising Out of Coop. Space Activity*, 19 Op. O.L.C. 140, 155 (1995). The House Report, too, cautioned "that the functions, as set out in this bill, refer to those vested in the President by statutory authority, rather than those reposing in the President by virtue of his authority under the Constitution of the United States." *Id.* (quoting H.R. Rep. No. 1139, 81st Cong., 1st Sess. 2 (1950)); *see also* Glendon Schubert, *The Presidential Subdelegation Act of 1950*, 13 J. Politics 647, 658 (1951) (predicting, based on the Act's text and history, that courts will "have no difficulty in equating 'law' in this context to 'statutory law'"). And, of course, it is no answer to say that the president has been delegated the power to appoint and remove a particular officer by statute and may therefore freely subdelegate that power to others. Any such statute is always subject to "the qualifications indicated by the Constitution." 7 U.S. Op. Att'y Gen. at 465.

The government's only remaining argument is even more brazen. The government contends that the "the Executive Branch has consistently concluded that the President may delegate his authority to appoint inferior officers to a department head, without running afoul of the Appointments Clause"—in other words, that the President's delegation is somehow permissible because Congress "just as well could have assigned such power to the Authority." SSA Br. 15–17. Of course, the problem is that Congress didn't. The government's logic is fatally circular: Starting with the assumption that the Panel members are inferior officers, it concludes that President's delegation doesn't violate the Appointments Clause because the Panel members are inferior officers. And, again, the OLC has already rejected it: "Under such a (tautological) reading, the Clause would require a certain means of appointment only for persons appointed by that means." *Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 116 (2007). Indeed, "the rule for which sorts of positions have been 'established by Law' such that they amount to offices subject to the Appointments Clause cannot be whether a position was

formally and directly created as an 'office' by law," for "[s]uch a view would conflict with the substantive requirements of the Appointments Clause." *Id.* at 117.

In effect, the government seeks to collapse the Appointments Clause inquiry into a simple statutory question—what did Congress say about Senate confirmation? Under this theory, if Congress expressly provides for Senate confirmation, the officer is principal; if it doesn't, the officer is inferior. That novel rule would deprive the Appointments Clause of any independent meaning. "The Appointments Clause could, of course, be read as merely dealing with etiquette or protocol in describing 'Officers of the United States,' but the drafters had a less frivolous purpose in mind." *Buckley v. Valeo*, 424 U.S. 1, 125 (1976). The Supreme Court has always described the Appointments Clause inquiry as a functional one: To be an inferior officer, one must be "directed and supervised" by another Senate-confirmed officer. *Edmond*, 520 U.S. at 663. Indeed, even if "the Senate *voluntarily* relinquished its advice-and-consent power" in the statute (which it did not do here), that "does not make this end-run around the Appointments Clause constitutional." *N.L.R.B. v. SW Gen.*, Inc., 137 S. Ct. 929, 949 (2017) (Thomas, J., concurring).

Even worse, the government's logic reflects deep antipathy to the Appointments Clause, one of the most "significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659. "The Clause is a bulwark against one branch aggrandizing its power at the expense of another branch." *Ryder v. United States*, 515 U.S. 177, 182 (1995). The Appointments Clause ensures that "congressional input into the president's nomination serves as a check on the powers of the executive and a way of balancing the powers of the executive and legislature. The Senate may deny the president's appointment, seek guarantees and promises from particular nominees, or force the president to moderate his ideal choice of personnel." Samahon, *The Czar's Place in Presidential Administration*, 2011 U. Chi. L. F. at 194. But, if accepted, the government's position here would incentivize presidents to use impermissible delegations of their appointment and removal

powers to "find a way around, or to otherwise evade, the operation of the Appointments Clause." *Id.*; *see* ECF 8 at 20–21. The Impasses Panel accepts that this is the consequence of its arguments; the Social Security Administration simply refuses to engage. *See* FSIP Br. 24–25; SSA Br. 14–18. Regardless, D.C. Circuit and OLC precedent, constitutional logic, and common sense all point in one direction: The delegation cannot stand.

III. Declaring the Panel members' appointments unconstitutional and issuing a corresponding injunction is the only appropriate remedy for the Appointments Clause violations here

Once the Court has concluded that the appointments at issue violated the Constitution, the only remaining question is one of remedy. Throughout its briefing, the government fundamentally misreads the relevant precedents, conflating their reasoning on the Appointments Clause violation at issue with their analysis of the appropriate remedy. The government suggests that *Free Enterprise Fund*, *Intercollegiate Broadcasting*, and *Arthrex* held that officers who are removable at-will by other Senate-confirmed officers are inferior officers. *See* SSA Br. 10–13, 25–26; FSIP Br. 2–4, 17–22. But those cases in reality held that the officers were *principal* officers, based on the lack of oversight and supervision as well as statutory restrictions on the officers' removal. Only *after* concluding that the officers' appointments violated the Appointments Clause did the courts sever and invalidate the statutes' removal restrictions to cure the constitutional violations it had identified. *See Intercollegiate*, 684 F.3d at 1341 ("[T]he inability of the Librarian to remove the CRJs, coupled with the absence of a principal officer's direction and supervision over their exercise of authority, renders them principal officers—but obviously ones not appointed in the manner constitutionally required for such officers."); *Arthrex v. Smith & Nephew*, 941 F.3d 1320, 1335 (Fed. Cir. 2019) ("12onclude[ing] that APJs are principal officers . . . [who] must be appointed by the President and confirmed by the Senate"); *see also Free Enter. Fund*, 561 U.S. at 510 (holding that

Board members were inferior officers only after striking for-cause removal protections as a violation of separation of powers).

That sort of remedy is unavailable here, for two key reasons. *First*, the government's reliance on the cited cases' remedial analysis stems from a mistaken belief that we are "asking this court to declare this act of Congress unconstitutional." SSA Br. 28. We are not. The Appointments Clause claim in this case challenges solely the *appointment* of the Panel members—not any statute. The statute does not foreclose Senate confirmation; it is silent on the question. *Second*, unlike in *Free Enterprise*, *Intercollegiate Broadcasting*, or *Arthrex*, the governing statute in this case doesn't impose restrictions on the Authority's ability to remove Panel members—it gives them no removal power whatsoever. And, again, the statute is silent on Senate confirmation. In other words, the severability question that arose in the cited cases is not implicated here at all, because there's no challenge to any statute and nothing to sever regardless.

The relief that we do seek is a declaration that the Panel, as currently constituted, is unconstitutionally appointed, and an injunction barring its actions from taking effect with respect to the Association. The Supreme Court has recognized that this is the proper remedy for an unconstitutional appointment. As the Court has held, "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to . . . whatever relief may be appropriate if a violation indeed occurred." *Ryder v. United States*, 515 U.S. 177, 177, 182–83 (1995); *see Lucia v. S.E.C.*, 138 S. Ct. 2044, 2055 (2018) (holding that "the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official"). "Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable . . . appointments." *Id.*at 183.

The relief that we seek is also the only appropriate and permissible way to redress the structural harms that the Framers intended the Appointment Clause to guard against. "In

answering critics of the Constitution who felt that the President should have the sole authority to appoint federal officials, Hamilton pointed out that the nomination and confirmation process did vest the power of choice in the President because 'no man could be appointed but on his previous nomination, [and] every man who might be appointed would be, in fact, his choice.'" *Williams v. Phillips*, 360 F. Supp. 1363, 1371 (D.D.C. 1973) (quoting The Federalist No. 76, at 89 (Tudor Pub. Co. ed. 1947)). But "Hamilton also left no doubt that the role of ultimate approval assigned to the Senate was vital." *Weiss v. United States*, 510 U.S. 163, 185 n.1 (1994) (Ginsburg, J., concurring). "[T]he necessity of their concurrence would have a powerful, though in general a silent operation," he believed, serving as "an excellent check upon a spirit of favoritism in the President" and "to prevent the appointment of unfit characters." The Federalist No. 76, at 89 (Tudor Pub. Co. ed. 1947). The Court should enforce this critical safeguard and hold that the Panel members are principal officers in need of confirmation by the Senate.

CONCLUSION

The Association's motion for summary judgment should be granted, and the government's cross-motions for summary judgment should be denied. The Court should (1) declare that all of the current members of the Federal Service Impasses Panel were appointed in violation of the Appointments Clause of the U.S. Constitution; (2) declare that any decisions issued or actions taken by the Panel with respect to the Association of Administrative Law Judges are null and void in violation of the U.S. Constitution; and (3) enjoin the defendants Federal Service Impasses Panel and its Chairman, and any persons or entities acting in concert or participation with the defendants or acting pursuant to any order of the defendants, from issuing, giving effect to, or otherwise enforcing any decision, order, or action of the Federal Service Impasses Panel with respect to the Association of Administrative Law Judges.

May 15, 2020

Respectfully submitted,

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