UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

Statement of Chair Lina M. Khan
Joined by Commissioner Alvaro M. Bedoya
Concurring in the Denial of the Motion
In the Matter of H&R Block, Inc., et al.
Docket No. 9427

October 18, 2024

I write to underscore the flaws in Commissioner Ferguson's partial dissent and to note that it evinces a troubling lack of restraint increasingly evident across a growing number of his writings.

In this matter, H&R Block is facing trial for allegedly coercing customers into purchasing more expensive tax preparation services than they would have preferred and for allegedly deceptively marketing its products as "free" even though many customers do not meet the criteria H&R Block has established for the "free" version of its product.[1] H&R Block filed a motion challenging the constitutionality of the FTC's Administrative Law Judges (ALJs) and seeking to disqualify them from participating in this adjudication.[2] Specifically, H&R Block charges that Congress has improperly shielded the ALJs from removal by the President, infringing on Article II of the Constitution.[3]

Despite having had several opportunities to resolve the question, the Supreme Court has not held that the statutory restrictions on removing ALJs are unconstitutional.[4] Undeterred, Commissioner Ferguson concludes that they are—and that Congress violated the Constitution by placing limits on how easily ALJs can be fired.

Commissioner Ferguson states that "*Free Enterprise Fund* and its progeny resolve the constitutional question before us."[5] But his argument involves several leaps that sidestep the limiting language in the Court's opinions. *Free Enterprise Fund* centered on statutory provisions limiting the removability of members of the Public Company Accounting Oversight Board (PCAOB), a multi-member body that operates within the Securities and Exchange Commission (SEC).[6] PCAOB members were protected by "dual for-cause limitations" on their removal: they could only be removed for-cause by the SEC, and SEC Commissioners, in turn, could only be

[1] Complaint, H&R Block, Docket No. 9427 (Feb. 23, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/d09427hrblockadmincomplaintpublic.pdf [hereinafter *Complaint*] at 9.
[2] Respondents' Motion to Disqualify the A.L.J., H&R Block, Docket No. 9427 (Mar. 26, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/610107_motion_to_disqualify.pdf.
[3] *Id.*
[4] *See, e.g.*, *Lucia v. SEC*, 585 U.S. 237 (2018); *SEC v. Jarkesy*, 144 S.Ct. 2117 (2024).
[5] Statement of Commissioner Andrew N. Ferguson Dissenting in Part and Concurring in the Denial of the Motion In the Matter of H&R Block, Inc. (Oct. XX, 2024) [hereinafter Ferguson Statement] at 7.
[6] *Free Enter. Fund*, 561 U.S. 477 (2010).

removed for-cause by the President. Closely reviewing the PCAOB's specific authorities and the "highly unusual"[7] removal statute governing its members, the Court held that the PCAOB's removal protections were unconstitutional because "Congress cannot limit the President's authority" by providing "two levels of protection from removal for those who … exercise significant executive power."[8]

The Court expressly stated that its holding did not "address that subset of independent agency employees who serve as administrative law judges" and identified three factors that distinguished ALJs from PCAOB members.[9] First, the Court said it was unclear whether ALJs were "officers of the United States."[10] Second, the Court noted that "unlike members of the board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions…or possess purely recommendatory powers."[11] And third, the Court noted that ALJs do not "enjoy the same significant and unusual protections from Presidential oversight as members of the Board."[12]

Commissioner Ferguson acknowledges that *Free Enterprise Fund* itself did not reach the question of whether removal protections for ALJs are unconstitutional but claims that "any lingering doubt over the constitutional status of ALJs has dissipated"[13] in light of the Court's decision in *Lucia v. SEC*.[14] This is plainly at odds with what the Court said in *Lucia.* The majority's opinion explicitly noted it was *not* reaching the question of whether removal protections for the SEC's ALJs are constitutional—even though the U.S. Government asked the Court to address the issue on two separate occasions while the case was being briefed.[15] Justice Breyer's partial concurrence further underscored this fact by discussing extensively the majority's silence on the question of ALJ removal.[16]

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[7] *Id.* at 505.
[8] *Id.* at 514.
[9] *Id.* at 507 n.10. *See also Lucia*, 585 U.S. 237, 256 (Breyer, J., concurring in part).
[10] *Free Enter. Fund*, 561 U.S. 477, 507 n.10.
[11] *Id.*
[12] *Id.* at 506.
[13] Ferguson Statement at 9.
[14] *Lucia*, 585 U.S. 237 (holding that ALJs qualify as "officers" for purposes of the Appointments Clause and thus can only be appointed by the President, "Courts of Law," or "Heads of Department").
[15] *Lucia*, 585 U.S. 237, n.1 ("In the same certiorari-stage brief, the Government asked us to add a second question presented: whether the statutory restrictions on removing the Commission's ALJs are constitutional. See Brief in Response 21. When we granted certiorari, we chose not to take that step. See 583 U. S. 1089, 138 S.Ct. 736, 199 L.Ed.2d 602 (2018). The Government's merits brief now asks us again to address the removal issue. See Brief for United States 39–55. We once more decline. No court has addressed that question, and we ordinarily await 'thorough lower court opinions to guide our analysis of the merits.' *Zivotofsky v. Clinton*, 566 U. S. 189, 201 (2012).").
[16] *Lucia*, 585 U.S. at 237, 266 (Breyer, J., concurring in part) ("I would not answer the question whether the Securities and Exchange Commission's administrative law judges are constitutional 'Officers' without first deciding the pre-existing Free Enterprise Fund question— namely, what effect that holding would have on the statutory "for cause" removal protections that Congress provided for administrative law judges."). Justice Breyer noted that the *Free Enterprise* Court emphasized that Board members were "inferior officers" of purposes of the Appointments Clause, but that the "significance of that fact to the Court's analysis is not entirely clear." *Id.* at 258. He also noted that establishing ALJs as "inferior officers" does not conclusively answer the removability question, as the *Free Enterprise* majority identified two other points of distinction between PCAOB members and ALJs. *Id*. at 261 ("*Free*

The Court had yet another opportunity to support Commissioner Ferguson's preferred conclusion when it took up *Jarkesy* last term. Once again, the Court took a pass—even while reviewing a case that squarely presented the question of whether removal protections for the SEC's ALJs are unconstitutional.[17]

Still, Commissioner Ferguson races ahead, unburdened by the presumption of constitutionality.[18] He chides the Commission for holding back from unilaterally concluding that Congress violated the Constitution when it placed limits on how easily ALJs can be fired.

This is hardly the first time Commissioner Ferguson has rushed to steer the law in a new direction. Within a month of joining the FTC, Commissioner Ferguson declared that Section 5 of the FTC Act, the founding authority of our organic statute, is an unconstitutional delegation by Congress—a position no court has taken.[19] He claimed that Section 6(g) of the FTC Act does not provide substantive rulemaking authority, even though the D.C. Circuit has said that 6(g) does.[20] And in a matter involving discriminatory lending practices by a major auto-dealer, Commissioner Ferguson laid out an argument for why disparate-impact liability may not be cognizable under the Equal Credit Opportunity Act (ECOA)—a position at odds with every court that has reviewed disparate-impact claims under ECOA.[21]

Strikingly, these positions all point in the direction of undermining the FTC and its authorities. Some already map on to arguments that parties in litigation against the FTC are advancing—while others provide an invitation and roadmap for advocates to take up.[22] While disagreement and debate among Commissioners is a longstanding FTC tradition, never in

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Enterprise Fund's holding may not invalidate the removal protections applicable to the Commission's administrative law judges *even if* the judges are inferior officers of the United States' for purposes of the Appointments Clause.") (emphasis added).

[17] *SEC v. Jarkesy*, 144 S.Ct. 2117 (2024).

[18] *See United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds. With this presumption of constitutionality in mind, we turn to the question whether § 13981 falls within Congress' power under Article I, § 8, of the Constitution.").

[19] Commissioner Ferguson has repeatedly claimed that the Commission's Section 5 authority reflects an improper delegation of Congress's power in violation of the "nondelegation doctrine." Oral Statement of Comm'r Andrew N. Ferguson, In the Matter of the Non-Compete Clause Rule (April 23, 2024) at 5 ("If Congress has in fact conferred on the Commission the power it today asserts, that conferral is an unconstitutional delegation of legislative power."). *See also*, Dissenting Statement of Comm'r Andrew N. Ferguson Joined by Comm'r Melissa Holyoak In the Matter of the Non-Compete Clause Rule (June 28, 2024) at 24 ("The nondelegation problem with Section 5 is obvious.").

[20] *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973). As part of legal challenges to the FTC's Non-Compete Clause rule, three separate courts have freshly reviewed this question. Two out of three of those courts have said during preliminary injunction rulings that Section 6(g) does confer substantive rulemaking authority on the FTC, a rejection of Commissioner Ferguson's statutory arguments. *See ATS Tree Services, LLC v. FTC*, 2024 WL 3511630 (E.D. Pa. July 23, 2024); *Properties of the Villages, Inc. v. FTC*, 2024 WL 3870380 (M.D. Fl. Aug. 15, 2024).

[21] Concurring and Dissenting Statement of Comm'r Andrew N. Ferguson In the Matter of Coulter Motor Company, LLC (Aug. 15, 2024); *see also* Joint Statement of Chair Lina M. Khan, Comm'r Rebecca Kelly Slaughter, & Comm'r Alvaro M. Bedoya In the Matter of Coulter Motor Company, LLC (Aug. 15, 2024).

[22] *See, e.g.,* Defendant's Answer to Plaintiffs' Amended Complaint, *FTC v. Amazon.com, Inc.*, No. 2:23-cv-01495-JHC (W.D. Wash. Oct. 15, 2024) at 80 (arguing that Section 5 is an unconstitutional delegation by Congress).

modern history has a Federal Trade Commissioner gone to such lengths to declare that core institutional features of the FTC are unconstitutional.

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