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Post-*Loper Bright*, *Jarkesy*, And The Major Questions Doctrine: The Impact Of Recent SCOTUS Decisions On Franchising

Pratik A. Shah
James E. Tysse
Akin Gump Strauss Hauer & Feld LLP
Washington, D.C.

Stephanie Maloney
Chamber of Commerce of the United States
Washington, D.C.

Cheryl Stanton
BrightStar Franchising, LLC
Bannockburn, IL

Angelo Spinola
Polsinelli PC
Atlanta, GA

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I. Introduction

For the last 40 years, some legal constants seemed unavoidable in the franchising industry. Agencies had the primary power of interpreting statutes that were less than crystal clear, and the President rarely removed an agency's officers. But after *Loper Bright*, courts now have the responsibility to determine what interpretation is "best." And after the Supreme Court's decision in *Seila Law* and the Fifth Circuit's undisturbed decision in *Jarkesy* (among others), which interpret the President's removal powers broadly, agency officers can no longer assume their statutory protections will avoid Presidential removal.

These and other decisions in recent terms (such as the announcement of the "major questions" doctrine in *West Virginia v. EPA*) mean that agencies enjoy significantly less regulatory authority and independence than they did just a few years ago. Conversely, these precedents have given greater power to those interested in challenging agency action—including those in the franchising industry—by opening up new avenues and arguments for attacking both agency regulations and the structure of the agency itself.

Litigants have stronger grounds to challenge agency action on multiple fronts. All regulations (even old ones) are fair game. Not only are regulations subject to greater levels of scrutiny, but agency regulations previously thought safe are now at risk, too. Under *Corner Post*, any business injured by a regulation for the first time within the prior six years may bring a facial challenge—even if the regulation was first promulgated decades ago. Not just agency actions, but agency structures and procedures are at risk. Although *Loper Bright* and *Corner Post* involved challenges to specific agency actions, *Seila Law* and *Jarkesy* open the door to challenging the agency's structure—specifically, by allowing a collateral attack focused on the appointment and removal of an agency's officers.

This paper explores these issues. First, we will examine changes to agency deference doctrines and how we got here. Then we will consider the President's historical removal powers and how these powers have evolved. For each, we will survey recent cases with long-term implications for the franchising industry, particularly at the intersection with labor and employment law.

II. Changes To Agency Deference Doctrines At The Supreme Court

A. Deference to Agency Interpretation of Statutes

1. From *Chevron* to *Loper Bright*

In June 2024, the U.S. Supreme Court overturned its 1984 landmark law precedent, *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), which instructed courts to defer to an agency's reasonable interpretation of an ambiguous statute.

a. Chevron

Under *Chevron*, courts engaged in a two-step inquiry: (1) Did Congress speak to the question directly in the statute at issue? If yes, then the court must rule according to Congress's direction. (2) If the statute is silent or ambiguous, then the court should defer to the agency's regulatory interpretation if it was reasonable. *See* 467 U.S. 843-844.

Chevron deference was originally conceptualized as an effort to foster respect for the U.S. Constitution's separation of powers. In the Court's view, requiring the judiciary to defer to federal agencies would ensure that policy decisions are left to the politically accountable branches which specialize in particular subject matters. It also would allow Congress to draw on the comparative advantages and expertise of the Executive Branch by allowing administrative agencies to fill in the gaps of complex statutes. *See* 467 U.S. at 843, 865-866.

Later, the Court framed it in terms of "congressional intent: namely, 'that Congress, when it left ambiguity in a statute' administered by an agency, 'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013) (quoting *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 740-741 (1996). As the Court saw it, *Chevron* "provide[d] a stable background rule against which Congress can legislate: Statutory ambiguities w[ould] be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." *Id.*

Over the years, though, many questioned both the scope of and limits on *Chevron* deference. At a minimum, they argued that for agency deference to be consistent with (i) the legislative power to make law, (ii) the judicial duty to "say what the law is," and (iii) the executive obligation to faithfully execute it, the courts must exhaust the traditional tools of statutory construction more rigorously to inquire whether the text of the statute written by Congress answers the question presented. *See Marbury v. Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *see also* 5 U.S.C. § 706 (requiring courts to resolve "all relevant questions of law" in Administrative Procedure Act ("APA") cases).

Lower courts, however, often did not undertake this intensive analysis—leaving the deference afforded agencies unbounded. As then-Judge Gorsuch put it:

> [W]hatever the agency may be doing under *Chevron*, the problem remains that courts are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them. A duty expressly assigned to them by the APA and one often likely compelled by the Constitution itself. That's a problem for the judiciary. And it is a problem for the people whose liberties may now be impaired not by an independent decisionmaker seeking to declare the law's meaning as fairly as possible—the decisionmaker promised to them by law—but by an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day.

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152-1153 (10th Cir. 2016). Indeed, many argued that *Chevron* deference posed a threat to the tripartite scheme of government that the Supreme Court had intended to protect.

Chevron also caused practical problems for businesses. Once courts reached the second step of the *Chevron* inquiry (which was often), the agencies usually won because the bar for reasonableness is not high. It did not matter if the regulated entity had the better or best interpretation of the statute.

Moreover, in order to make effective strategic and investment decisions, businesses must operate in a regulatory environment that remains relatively consistent over time and enables them to know their legal obligations in advance. But the *Chevron* regime had evolved to undermine predictability and stability for businesses because they could not ascertain their regulatory obligations based on the statutes themselves. Rather, regulatory obligations would turn on unstable agency statutory interpretations, through shifting rules or even sub-regulatory guidance. This instability hampered productivity, investment, and innovation due to the unpredictable future state of interpretation of laws and regulations. Businesses could not effectively plan for the future when agencies are free to unilaterally change the basic rules of the road.

b. Loper Bright

Fast forward to the October 2023 Term, during which the Court agreed to hear two cases—*Relentless v. Department of Commerce* and *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024)—revisiting *Chevron*, and ultimately overruled it. As Chief Justice Roberts explained for the 6-3 majority:

> Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the [Administrative Procedure Act (APA)] requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. . . . But courts need not and

> under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 412-413 (2024); *see also id.* at 448 (Gorsuch, J., concurring) ("*Chevron* deference is inconsistent with the directions Congress gave us in the APA. It represents a grave anomaly when viewed against the sweep of historic judicial practice. The decision undermines core rule-of-law values ranging from the promise of fair notice to the promise of a fair hearing. Even on its own terms, it has proved unworkable and operated to undermine rather than advance reliance interests, often to the detriment of ordinary Americans. And from the start, the whole project has relied on the overaggressive use of snippets and stray remarks from an opinion that carried mixed messages.").

Despite the sea-change in its jurisprudence, the Court also noted some limits on the reach of its holding abrogating *Chevron* deference. It pointed out that, in some instances, Congress does "'expressly delegate[]' to an agency the authority to give meaning to a particular statutory term," or "empower[s] an agency to prescribe rules to 'fill up the details' of a statutory scheme." *Loper Bright*, 603 U.S. at 394-395. Similarly, Congress may give agencies flexibility to regulate with use of the terms "appropriate" or "reasonable." *Id.* In these instances, where the court determines a statute delegates discretionary authority to an agency, the court's task is to ensure that the agency has engaged in reasoned decision making within the boundaries of the delegation and in accordance with the APA. *Id.*

The Court also distinguished between questions of law and questions of fact or policy. The former must be resolved by courts without deference to agency interpretation, while the latter fall more squarely within the agency's bailiwick and deserve deference. Relatedly, the Court noted that agency interpretations based on their "body of experience and informed judgments" and "factual premises within the agency's expertise" are factors that may inform courts' interpretations of a statute. *Id.* at 402.

At bottom, the Supreme Court's decision reflects the current Court's formalistic approach to the separation of powers between the branches of government and to statutory interpretation. It also reflects the Court's willingness to check the power of executive branch agencies and to overrule major longstanding precedent.

As a practical matter, the Court's overruling of *Chevron* should not have as significant of an impact on agency litigation in the Supreme Court itself because parties (including the Solicitor General) have not been relying on *Chevron* in recent years given the Court's growing hostility to agency deference. But *Loper Bright* will matter in lower federal courts across the country, where judges have continued to rely on *Chevron* to resolve difficult and close cases involving challenges to agency regulation, both big and small. Regulated parties will be better positioned to attack federal regulations as exceeding statutory authority across agencies and subject matters. To the extent that courts will be offering more definitive interpretations of statutes, the decision may also constrain agencies from altering regulations when administrations change.

Finally, on Capitol Hill, Congress may look to tap outside expertise on the front end rather than simply rely on an agency to fill statutory gaps on the back end—or at least be more explicit about how much interpretive discretion it intends to confer on a particular agency.

2. Impact of the Supreme Court's Decision in *Corner Post*

Meanwhile, overruling *Chevron* introduced a new and important question: What would happen to longstanding regulations?

The Court in *Loper Bright* said that overruling *Chevron* does not necessarily undercut the many prior judicial decisions upholding "specific agency actions" based on *Chevron* deference. *Loper Bright*, 603 U.S. at 412. Those cases, the Court explained, "are still subject to statutory *stare decisis* despite our change in interpretive methodology," and "[m]ere reliance on *Chevron* cannot constitute a 'special justification' for overruling such a holding." *Id.*

But that statement only goes so far. For starters, if an agency has flipped from a previously upheld regulation to a different interpretation and back again—as agencies often do—the newest edition could likely be challenged without *stare decisis* concerns. That is because the "specific agency action[]" in question would be different, even if it did functionally the same thing as the upheld action. *Loper Bright*, 603 U.S. at 412. The Sixth Circuit recently explained exactly that in a case challenging the Federal Communication Commission's most recent net neutrality order. *In re MCP No. 185*, 124 F.4th 993, 1002-1003 (6th Cir. 2025) ("The 'specific agency action' that the Court approved in *Brand X* was the FCC's 2002 Internet Over Cable Declaratory Ruling. The specific action before us here is the FCC's 2024 Safeguarding Order, which came 22 years later. The Safeguarding Order therefore is not the 'specific agency action' that the Court approved in *Brand X*. And that means we are not bound by *Brand X*'s holding as a matter of statutory *stare decisis*.").

The Court's recent decision in *Corner Post, Inc. v. Board of Governors of Federal Reserve System*, 603 U.S. 799 (2024), further opens the door to new challenges. There, the Court rejected the government's argument that facial challenges to final agency actions (including regulations) are subject to a general six-year statute of limitations that begins running on the day the agency action becomes final. Instead, the Court held that the limitations period begins running when a plaintiff is injured, even if that injury did not occur until many years after the agency action became final. The Court reasoned that a right of action "accrues" when a plaintiff has a right to file suit, and, under the APA, a plaintiff cannot bring suit until it suffers an injury from final agency action. *See id.* at 809 ("The Board contends that an APA claim 'accrues' when agency action is 'final' for purposes of § 704—injury, it says, is necessary for the suit but irrelevant to the statute of limitations. We disagree. A right of action 'accrues' when the plaintiff has a 'complete and present cause of action'—i.e., when she has the right to 'file suit and obtain relief.' An APA plaintiff does not have a complete and present cause of action until she suffers

an injury from final agency action, so the statute of limitations does not begin to run until she is injured.") (internal citation and footnote omitted).

As a practical matter, that means that any party injured for the first time by a regulation within the past six years, such as new market entrants, may now file a facial challenge to most agency regulations (even regulations that have been on the books for decades). And given the Court's decision in *Loper Bright*, the agencies cannot rely on *Chevron* deference to save their regulations.

B. The "Major Questions" Doctrine

The Supreme Court has recently restrained agency authority another way as well—using what has been dubbed the "major questions" doctrine.

In *West Virginia v. EPA*, 597 U.S. 697 (2022), the Supreme Court in a 6-3 decision "announce[d] the arrival" (in the dissent's words) of the "major questions doctrine"—a new substantive presumption that overrides ordinary statutory construction principles in certain "extraordinary" cases. In a nutshell, the majority (authored by Chief Justice Roberts, and joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett) describes the doctrine as a "reluctan[ce] to read into ambiguous statutory text" a delegation of broad agency authority—even where such "regulatory assertions ha[ve] a colorable textual basis." *Id.* at 723. Founded on "both separation of powers principles and a practical understanding of legislative intent," the doctrine thus requires Congress to legislate particularly clearly when authorizing an agency to make "decisions of vast economic and political significance." *Id.* at 716, 723. Although the Supreme Court had arguably applied a form of the "major questions doctrine" in various cases over the years, it had never used that specific phrase nor had it fleshed out its contours in such detail until then.

Application of the "major questions doctrine" is a two-step inquiry: (i) does the case trigger the "major questions doctrine," and, if so, (ii) can the agency point to "clear congressional authorization" to regulate in the proposed manner?

As to the first inquiry, the opinion sets forth several (apparently non-exhaustive) considerations to help decide whether a case implicates the "major questions doctrine":

- Whether the agency discovered in a "long-extant statute an unheralded power" that significantly expands or even "transform[s]" its regulatory authority;

- Whether the agency's claimed authority derives from an "ancillary," "gap-filler," or otherwise rarely used provision of the statute; and

- Whether the agency adopted a regulatory program that Congress had "conspicuously and repeatedly declined to enact itself."

West Virginia, 597 U.S. at 710, 724.

Justice Gorsuch's concurrence, joined by Justice Alito, adds a few other "non-exclusive" factors:

- Whether the agency claims the power to resolve a matter of great "political significance;"
- Whether the agency attempts to regulate "a significant portion of the American economy" or require massive spending by regulated parties; and
- Whether the agency's rulemaking seeks to "intrud[e] into an area that is the particular domain of state law."

West Virginia, 597 U.S. at 743-744.

As to the second inquiry, the Supreme Court did not offer much guidance on precisely how "clear" Congress must speak to permit a rulemaking in a "major questions" case. But it found such a clear statement lacking in *West Virginia v. EPA* despite the textual plausibility of EPA's assertion. Specifically, the Court held that language in Section 111(d) of the Clean Air Act authorizing EPA to devise the "best system of emission reduction" did not permit EPA to "devise emissions caps based on . . . generation shifting," *i.e.*, shifting generation away from existing coal-fired power plants by requiring them to "reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources." For such a measure to fall within EPA's authority, the Court demanded a more-specific congressional mandate. Thus, although the Court did not overturn *Massachusetts v. EPA*, 549 U.S. 497 (2007), or otherwise bar the agency from regulating greenhouse gases generally, it did place real limits on the type of regulations the agency can promulgate.

With the doctrine's contours seemingly outlined, the Court invoked it again just one term later in *Biden v. Nebraska*, 600 U.S. 477 (2023), to hold that the Department of Education lacked statutory authority to provide its proposed student loan relief plan. Specifically, in August 2022, to ease the pandemic-induced pause on student loan payments back to repayment, the Department of Education announced it would provide loan forgiveness of up to $20,000 for Pell Grant recipients and up to $10,000 for non-Pell Grant recipients with student loans held by the Department of Education.

The Biden administration argued that the HEROES Act of 2003, which authorized the Secretary of Education to modify requirements and regulations applicable to student financial assistance programs for individuals in the military or who suffered economic hardship as a result of a national emergency, would permit their plan to relieve student debt. The administration argued that the COVID-19 pandemic was a national emergency that met that criterion and allowed for the forgiveness plan.

But the Court's conservative majority rejected that argument. The same 6-3 majority (again authored by Chief Justice Roberts, and joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett) found that Congress had not clearly given the executive branch authority to cancel student loan principal in such a sweeping manner, instead finding that the Department of Education's powers were limited to waiving or modifying "existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act"—a more modest authority. At bottom, the Court said, the Secretary cannot "rewrite the statute from the ground up." *Nebraska*, 600 U.S. at 494.

Notably, Justice Barrett concurred to describe her own view of the "major questions" doctrine—stressing that the doctrine is a tool of statutory interpretation, not a substantive canon that "advances values external to a statute['s text]." *Nebraska*, 600 U.S. at 508 (Barrett, J., concurring). Justice Barrett explained that:

> Some have characterized the major questions doctrine as a strong-form substantive canon designed to enforce Article I's Vesting Clause. On this view, the Court overprotects the nondelegation principle by increasing the cost of delegating authority to agencies—namely, by requiring Congress to speak unequivocally in order to grant them significant rule-making power. In addition or instead, the doctrine might reflect the judgment that it is so important for Congress to exercise "[a]ll legislative Powers," Art. I, § 1, that it should be forced to think twice before delegating substantial discretion to agencies—even if the delegation is well within Congress's power to make. (So the doctrine would function like the rule that Congress must speak clearly to abrogate state sovereign immunity.) No matter which rationale justifies it, this "clear statement" version of the major questions doctrine "loads the dice" so that a plausible anti-delegation interpretation wins even if the agency's interpretation is better.

Id. at 510 (internal citations omitted). But Justice Barrett says she does not read the Court's cases that way. Rather, she sees the "major questions" doctrine "as an interpretive tool reflecting 'common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.'" *Id.* at 511. But, she says "the doctrine should not be taken for more than it is—the familiar principle that we do not interpret a statute for all it is worth when a reasonable person would not read it that way." *Id.* at 521.

Regardless of how the doctrine is deployed, though, the implications of its adoption are far-reaching, both for administrative rulemakings (whether pending or new) and for administrative litigation in the federal courts. Regulated parties have and will undoubtedly continue to invoke the doctrine to argue against broad assertions of Executive Branch authority during the notice-and-comment process and, if unsuccessful, in ensuing court challenges under the Administrative Procedure Act.

To be sure, presumably only a relatively small number of rulemakings will fall within the "major questions" bucket. But those rulemakings are, by definition, going to be "major"

ones—*i.e.*, “extraordinary” matters implicating broad or “transformative” assertions of Executive Branch power, great political significance or large sums of money. Moreover, such cases will arise “from all corners of the administrative state,” not just from EPA. The *West Virginia* opinion itself cites the following historical examples:

- The U.S. Food and Drug Administration’s attempt to regulate or ban tobacco products, *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000);

- The Attorney General’s attempt to rescind licenses of physicians who assisted patient suicides, *Gonzalez v. Oregon*, 549 U.S. 243 (2006);

- The Centers for Disease Control and Prevention’s attempt to impose an eviction moratorium in response to the COVID-19 pandemic, *Alabama Assn. of Relators v. Department of Health and Human Servs.*, 594 U.S. 758 (2021) (per curiam); and

- The Occupational Safety and Health Administration’s attempt to impose a vaccine or testing mandate, *National Federation of Independent Business v. Occupational Safety and Health Administration*, 595 U.S. 109 (2022) (per curiam).

C. The Effect of Changes in Agency Deference Doctrines on the Franchise Industry

These changes have already impacted federal agencies that regulate the franchising industry. Cases challenging regulations under the National Labor Relations Act, the Fair Labor Standards Act, and the Federal Trade Commission Act—with still more challenges on the horizon—have called into question the amount of deference afforded to agency interpretations.

1. NLRB Joint Employer Rule

One such challenge went to the heart of the franchise industry—the National Labor Relations Board’s “joint employer” rule. The rule adopted a broad interpretation of who is a joint employer under the National Labor Relations Act—imposing joint-and-several liability on virtually every entity that collaborates with a third party of any kind in achieving common goals that have a potential or indirect effect on the third party’s employees. To be sure, the rule made it seemingly nearly impossible for franchisors and franchisees to maintain separate relationships with their respective employees. In *Chamber of Commerce, et al. v. National Labor Relations Board*, 723 F. Supp. 3d 498 (N.D. Tex. 2024), the United States District Court for the Eastern District of Texas rejected that interpretation and vacated the Board’s rule.

Well before promulgating the rule, the Board recognized that two entities can sometimes be considered “joint employers” of particular employees—making each

employer obligated to bargain collectively with those employees under the NLRA. But the NLRA does not define "joint employer." Instead, Congress expected the Board and the courts to apply common-law agency principles.

For decades, the Board drew from the common law a straightforward framework: firms were "joint employers" if they exercised "direct," "immediate" and "substantial" control over the same employees' essential terms of employment. Things changed in 2015, however, when the Board decided in *Browning-Ferris Industries*, 362 NLRB 1599 (2015) that "compelling policy reasons" warranted a different approach. The Board announced a new test allowing a "joint employer" finding whenever a firm exercised "indirect" control over the terms of employment for another firm's employees, or even if it possessed just potential control.

The D.C. Circuit later reversed, holding that the Board (i) provided no blueprint for what counts as indirect control, (ii) failed to differentiate between the aspects of indirect control relevant to status as an employer and common-law third-party contract relationships, and (iii) never delineated what terms and conditions of employment the two entities needed to control to make collective bargaining "meaningful." *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1220-1222 (D.C. Cir. 2018). Although the Court found that indirect and reserved control were relevant to determining joint employer status, it expressly declined to decide whether such indirect or reserved control alone would be sufficient.

In response to the D.C. Circuit's decision, the Board in 2020 largely reinstated the longstanding joint-employer standard that had been in place for decades until 2015. *See* 85 Fed. Reg. 11,184 (Feb. 26, 2020), codified at 29 C.F.R. § 103.40. The 2020 rule required that a joint employer must possess and exercise substantial direct and immediate control with a regular or continuous consequential effect on an essential term or condition of employment so as to "meaningfully" permit collective bargaining.

Just two years later, a newly constituted Board proposed to rescind and replace the 2020 rule on the ground that the common law purportedly conferred joint-employer status based solely on indirect or reserved control over a third party's employees. *See* 87 Fed. Reg. 54,641 (Sept. 7, 2022). Yet that action had detractors. In addition to thousands of critical comments, one of the Board's own members opined that it was foreseeable that long-accepted practices in the franchise industry—"countless" franchise systems that require "monitoring of franchisees' cleanliness and hygiene protocols" and franchising agreements that allow franchisors to control their marks—would make franchisors joint employers of their franchisees' employees under the Board's new rule. 88 Fed. Reg. at 74,001. That same Board member worried that the rule would displace the franchise model altogether by requiring franchisors to "distance their franchisees" or by "turning previously independent owners of franchisees into glorified managers." *Id.*

The Eastern District of Texas agreed with the dissent, holding that the new rule violated the Administrative Procedure Act. In particular, the court found that the rule "would treat virtually every entity that contracts for labor as a joint employer because

every contract for third-party labor has terms that impact, at least indirectly, at least one of the specified 'essential terms and conditions of employment.'" *Chamber*, 723 F. Supp. 3d at 516. Given that reality, the court concluded, the rule "exceeds the bounds of the common law and is thus contrary to law." *Id.*

The Board defended the new rule, arguing that it established two steps for determining whether an entity is a joint employer: first, the purported joint employer must qualify as a common-law employer of the disputed employees, and second, it must also have control over one or more essential terms and conditions of employment of the same employees. But the court declined to defer to the Board's interpretation. After all, the court reasoned, the second step served no filtering function because it was "coextensive with or a superset of the first" step. *Id.* at 513.

Even if the Board's "preferred interpretation" of the rule was correct, the court explained, that interpretation "appears" arbitrary and capricious as no more "predicable than common-law adjudication." *Id.* at 517. The court further explained that the Board "backhanded" the "disruptive impact of the new rule on various industries" and failed to "explain how the rule does anything other than mandate piecemeal bargaining that will likely promote labor strife rather than peace." *Id.* However, the court ultimately concluded that there was no need to resolve these arbitrary and capricious arguments given its "conclusion on the unlawfulness of the rule's sweep beyond common-law limits." *Id.* For that reason, the court set aside the rule.

Although the Board had not directly invoked *Chevron* deference in defense of its joint-employer rulemaking (as it had already been established that no deference applied in this particular context), such that *Loper Bright* did not have a direct impact, the clear trajectory of the Supreme Court's jurisprudence treating agency interpretations more skeptically no doubt influenced the Court's willingness to strike down the rule.

2. FTC Non-Compete Rule

Just before the NLRB's joint employer rule was set aside, the Federal Trade Commission issued a rule prohibiting "employers from entering into non-compete clauses with workers" and requiring employers to "rescind existing non-compete clauses." 88 Fed. Reg. 3482-01. Although the rule did not apply to agreements between franchisors and franchisees, the rule did restrict non-competes with their employees. Those agency restrictions suffered the same fate as the NLRB rule.

In *Ryan, LLC, et al. v. Federal Trade Commission*, 746 F. Supp. 3d 369 (N.D. Tex. 2024), the United States District Court for the Northern District of Texas vacated the FTC rule. The court reviewed the "text, structure, and history of the [Federal Trade Commission] Act," and concluded that the FTC "lacks the authority to create substantive rules" like the agency's prohibition on non-competes. *Id.* at 384.

The FTC had argued that its rulemaking authority arose out of Section 6 of the Act, which "gives the FTC the power "to make rules and regulations for the purpose of carrying

out the provisions of this subchapter." *Id.* (quoting 15 U.S.C. § 46(g)). But, citing *Loper Bright*, the court declined to adopt the FTC's interpretation of its own authority to promulgate rules. Instead, the court examined the Act independently and found that Section 6 "does not expressly grant the Commission authority to promulgate substantive rules regarding unfair methods of competition." *Ryan*, 746 F. Supp. 3d at 384. And while Section 18 of the Act "empowers the FTC to prescribe 'interpretive rules,'" the court read that section as limiting "the FTC's ability to make rules dealing with *unfair or deceptive practices*—not *unfair methods of competition*." *Id.* (quoting 15 U.S.C. § 57a).

Because the non-compete rule was undisputedly "substantive" and, by its terms, dealt with "unfair methods of competition," the court concluded that the FTC exceeded its authority in promulgating the rule. In reaching that conclusion, the court explained:

> Agencies are creatures of Congress—an agency literally has no power to act unless and until Congress confers power upon it. It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated [to it] by Congress. As the question to be answered is not what the Commission thinks it should do but what Congress has said it can do, the Court must look to what Congress explicitly gave the FTC the authority to do. The Court concludes that the structure and the location of [the Federal Trade Commission Act] indicate that Congress did not explicitly give the Commission substantive rulemaking authority. . . .

Id. at 384 (citations and internal quotations omitted).

The court also found the rule arbitrary and capricious. In promulgating the rule, the FTC "relied on a handful of studies that examined the economic effects of various state policies toward non-competes." *Id.* at 388. But, in the court's view, the FTC's "lack of evidence as to why they chose to impose such a sweeping prohibition—that prohibits entering or enforcing virtually all non-competes—instead of targeting specific, harmful non-competes, renders the Rule arbitrary and capricious." *Id.*

So too was the FTC's failure to "sufficiently address alternatives to issuing the Rule." *Id.* at 389. It made no difference that the FTC *wanted* "to address non-competes' tendency to negatively affect competitive conditions." *Id.* According to the court, the FTC's rejections of "any possible alternatives" was enough to render the rule arbitrary and capricious. The court thus vacated the FTC rule.

3. Overtime and Minimum Wage Exemption Salary Thresholds

The Department of Labor's interpretation of its authority to raise salary thresholds for overtime and minimum wage exemptions under the Fair Labor Standards Act suffered a similar fate. Most franchising relationships involve some exempt employees. But through a 2024 rule, the Department of Labor made it harder and considerably more expensive for employers to claim an exemption. In *Texas v. United States Department of*

Labor, --- F. Supp. 3d ---- 2024 WL 4806268 (E.D. Tex. Nov. 15, 2024), the court stopped the Department in its tracks and set aside the rule.

The FLSA exemptions follow a simple test buried in a long history of regulatory tussling. To qualify for an exemption (and therefore not receive overtime and minimum wage protections), an employee must meet certain tests regarding their job duties—bona fide administrative, professional, executive, computer, and outside sales employees. Under the Department of Labor's regulations, exempt employees must also be paid on a salary basis at a certain threshold. In 2024, the Department of Labor promulgated a rule that would have increased the salary threshold by more than a third. Had the rule gone into effect the Department calculated that more than "one million exempt employees" would "wake up [on the effective date] non-exempt—i.e., entitled to overtime pay." *Texas v. Dep't of Labor*, 738 F. Supp. 3d 807, 822 (E.D. Tex. 2024).

The rule never launched after facing up against two simultaneous challenges in the United Stated District Court for the Eastern District of Texas. Citing *Loper Bright*, the court held the rulemaking "exceeded the authority delegated by Congress" to the Department. *Texas*, 2024 WL 4806268, at *13. The court based that conclusion not on any interpretation by the Department, but on the text of the FLSA. The FLSA, by its terms, exempts from minimum-wage and overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). The Department created the current three-part test described above, which considers duties, method of payment, and salary. But, according to the court, that test had to be tethered to the statutory terms.

Under the court's reading, "Congress elected to exempt employees based on the capacity in which they are employed"—"it's their duties and not their dollars that really matter." *Id.* (quoting *Hewitt v. Helix Energy Sols. Grp*., 15 F.4th 289, 315 (5th Cir. 2021) (en banc) (Jones, J., dissenting)). Although the Department had "authority to define and delimit" the exemption's terms, that authority was "not unbounded." *Id.* The Department could not "enact rules that replace or swallow the meaning" of the plain statutory terms. *Id.* And, in the court's view, the statutory terms "all relate to an employee's functions or duties"—not salary. *Id.* at 16.

Marking these textual boundaries, the court held that the Department's rule used salary as a "proxy" to displace the duties test for a "significant percentage" of otherwise exempt employees. *Id.* at 19. This, said the court, conflicted with the statutory text: "When a third of otherwise exempt employees who the Department acknowledges meet the duties test are nonetheless rendered nonexempt because of an atextual proxy characteristic—the increased salary level—something has gone seriously awry." *Id.* That conflict alone was enough for the court to set aside the Department's salary threshold rule.

III. Changes To Removal Jurisprudence At The Supreme Court

The shifting landscape of administrative law has disrupted another feature of the agencies that regulate the franchising industry: Recent decisions have struck down statutory restrictions on presidential removal of agency leaders and other officers. Those decisions have either challenged the constitutionality of entire agencies or compromised their ability to operate. Before delving into those decisions, we first will examine the constitutional moorings of the President's removal powers and how the Supreme Court has endeavored to reconcile those powers with the administrative state.

A. Overview of the President's Removal Power

Article II of the Constitution begins with the declarative sentence: "The executive power shall be vested in a president of the United States of America." And it charges the President to "take Care that the Laws be faithfully executed."

Recognizing that the President cannot carry out these executive duties alone, there is widespread agreement that the Framers envisioned a "chain of dependence" in the executive branch, where "the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President." 1 Annals of Congress 499 (1789). The Vesting Clause protects the President's ability to supervise executive officers who wield that authority by endowing the President with plenary power to direct those officials' execution of the laws. As James Madison explained, "if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws." *Id.* at 463. That oversight power has sometimes been understood to "generally include[ ] the ability to remove executive officials." *Seila Law LLC v. CFPB*, 591 U.S. 197, 213 (2020) (quoting *Myers v. United States*, 272 U.S. 52, 117 (1926)).

Founding-era history included debates over the proper scope of the President's appointment and removal powers. The first Congress debated the question directly in what the Supreme Court would later describe as "contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument." *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986). In particular, the President's removal power came up "during consideration of a bill establishing certain Executive Branch offices and providing that the officers would be subject to Senate confirmation and removable by the President." *Free Enterprise Fund v. PCAOB*, 537 F.3d 667, 691 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (quoting *Myers*, 272 U.S. at 111).

In debating the bill, the House of Representatives considered different theories, including that Congress could specify the President's removal authority on an office-by-office basis, that officers could be removed only through impeachment, that removal required the advice and consent of the Senate, and the "executive power" conferred plenary removal authority to the President. Aditya Bamzai & Saikrishna Prakash, The Executive Power of Removal, 136 Harv. L. Rev. 1756, 1774 (2023).

James Madison is believed to have advocated the last view, arguing that the "executive power included a power to oversee executive officers through removal." *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 492 (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789)). That view ultimately prevailed, and the House deleted the bill's provision making officers "removable by the President." *Myers*, 272 U.S. at 113-14. The Supreme Court later described the outcome of this debate as "a legislative declaration that the power to remove officers appointed by the President and the Senate [is] vested in the President alone." *Id.* at 114 (noting debate of 1789 "has ever been considered as a full expression of the sense of the legislature on this important part of the American constitution" (quoting 5 John Marshall, The Life of George Washington 200 (1807)). But the scope of the President's *unilateral* removal power remained a topic of debate.

Following the 1789 debate, the President routinely dismissed officers at will, usually over political disagreements. George Washington removed almost twenty officers, including a consul, diplomats, tax collectors, surveyors, and military officers. John Adams removed Secretary of State Timothy Pickering over a disagreement about relations between the United States and France. James Madison "compelled the resignation of" Secretary of War John Armstrong following the War of 1812. Andrew Jackson removed Treasury Secretary William Duane for his refusal to withdraw federal deposits from the Bank of the United States. John Tyler removed dozens of officials appointed by Andrew Jackson. *See* Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive 62, 79 (2008).

Debates nevertheless persisted—no one claimed the President's removal power was absolute. Congress sometimes protested the President's removals, most notably through the enactment of the Tenure of Office Act of 1867. The Act required the President to obtain Senate approval before removing executive officers. When Andrew Johnson removed Secretary of War Edwin Stanton without first seeking Senate approval, the House impeached Johnson. Much of Johnson's defense centered on a constitutional challenge to the Act, a view the Supreme Court later adopted in *Myers v. United States*. *See Calabresi & Yoo*, The Unitary Executive, at 185 (citing *Myers*, 272 U.S. at 176).

B. Removal Powers Precedent

Myers began a century of judicial grappling with the permissible sweep of Congress to encumber the President's power to remove executive officers. Over that century, the Supreme Court has attempted to frame the "outermost constitutional limits of permissible congressional restrictions on the President's removal power" under its precedents. *Seila Law LLC v. CFPB*, 591 U.S. 197, 203 (2020) (quoting *PHH Corp. v. CFPB*, 881 F.3d 75, 196 (D.C. Cir. 2018) (Kavanaugh, J., dissenting)). The Court in *Myers* affirmed the President's unilateral removal power, and has since recognized only two circumstances in which Congress may limit that power. One of those exceptions, described in *Morrison v. Olson*, 487 U.S. 654 (1988), is for inferior officers with limited duties and no policymaking authority. The other, recognized in *Humphrey's Executory v. United States*, 295 U.S. 602 (1935), applies to restrictions on the President's ability to remove principal officers of multimember expert agencies that do not wield substantial

executive power. Neither exception has been expanded over the years and, by some measure, each has been construed narrowly—and increasingly so by the current Supreme Court.

1. *Myers*

In 1920, President Woodrow Wilson removed postmaster Frank Myers from office. Myers challenged his removal, relying on the Tenure of Office Act. President Wilson did not dispute that he had not obtained Senate approval before removing Myers. So the question before the Supreme Court was whether the Constitution permitted Congress to require the President to obtain Senate approval before removing executive officers.

The Court, reviewing the history of the President's removal powers, concluded that the Act was "in violation of the Constitution and invalid." *Myers*, 272 U.S. at 176. The Court relied on four guideposts from the Constitution's text and structure.

First, the Court stressed the importance of the President's supervisory power over officers to the separation of powers: "If there is any point in which the separation of the legislative and executive powers ought to be maintained with great caution, it is that which relates to officers and offices." *Id.* (quoting 1 Annals of Congress 581 (1789)).

Second, the Court explained that a Senate veto of a removal "is a much greater limitation upon the executive branch, and a much more serious blending of the legislative with the executive, than a rejection of a proposed appointment." *Id.* at 121.

Third, the Court noted that the "legislative power" is "limited to" the powers "enumerated" under Article I of the Constitution, while the "executive power" is a "more general grant." *Id.* at 128. And so it was "reasonable to suppose" that if the Founders "intended to give to Congress power to regulate or control removals," they would have included those powers "among the specifically enumerated legislative powers in article 1, or in the specified limitations on the executive power in article 2." *Id.*

Finally, the Court explained that when the President "loses confidence in the intelligence, ability, judgment, or loyalty of any one of [his subordinates], he must have the power to remove him without delay," or else faithfully executing the laws could become "difficult or impossible." *Id.* at 131.

2. *Humphrey's Executor*

Humphrey's Executor came 15 years later. It reaffirmed the basic holding of *Myers* that the President has "unrestrictable power . . . to remove purely executive officers." *Humphrey's Executor*, 295 U.S. at 628. But the Court in *Humphrey's* nevertheless upheld the constitutionality of a statute prohibiting removal of Federal Trade Commissioners absent "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 623.

According to the Court in *Humphrey's*, *Myers* did not control because the Commissioner at issue was "an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President." *Id.* at 632. Instead, the Court understood the Federal Trade Commission to be a "body" that "carr[ied] into effect legislative policies" and "perform[ed] other specified duties as a legislative or as a judicial aid." *Id.* at 628. Those duties "c[ould] not in any proper sense be characterized as an arm or an eye of the executive." *Id.* In the Court's view, the FTC was not designed to exercise executive power at all, but rather act "in part quasi legislatively and in part quasi judicially." *Id.* On that understanding, the Court upheld the statutory restrictions on removal of FTC Commissioners.

The Court acknowledged a potential "field of doubt" between *Myers* and *Humphrey's Executor*. *Id.* at 628. But rather than clarify the boundaries separating those decisions, the Court deferred that task for "future consideration and determination." *Id.* at 632.

Nevertheless, after *Humphrey's Executor* was decided, it was rarely applied across the Executive Branch. For example, in 1938, Attorney General Robert Jackson explained that *Humphrey's Executor* did not apply to the Tennessee Valley Authority, which "does not exercise quasi-legislative or quasi-judicial functions," and the President could therefor exercise his "ordinary power to remove executive officers appointed by him." *Power of the President to Remove Members of the Tennessee Valley Authority from Office*, 39 Op. Att'y Gen. 145, 146-47 (1938). Nor were the statutory removal protections of most multimember agencies ever challenged. But in one—and only one—case, the Supreme Court applied *Humphrey's Executor* and sustained the removal restrictions for a member of another agency: in *Wiener v. United States*, 357 U.S. 349 (1958).

3. Wiener

In *Wiener*, the Court held that the President lacked authority to remove a member of the War Claims Commission—a temporary agency created solely to hear and adjudicate compensation claims for "internees, prisoners of war, and religious organizations" who suffered injury "at the hands of the enemy" in World War II. *Wiener*, 357 U.S. at 353.

The Court assumed the Commission was purely an adjudicatory body, which consisted of "receiv[ing] and adjudicate[ing] . . . three classes of claims" defined by statute—no more. *Id.* at 354 (quoting War Claims Act of 1948, Pub. L. No. 80-896, ch. 826, § 3, 62 Stat. 1240, 1241 (codified at 50 U.S.C. § 4102)). Based on those facts alone, the Court in *Wiener* held that the *Humphrey's Executor* exception to the President's removal powers remained unchanged: Officers of agencies that do not exercise executive power may be insulated from presidential removal. And so the Commission did not run afoul of Article II.

4. *Free Enterprise Fund*

The Court declined to extend *Humphrey's Executor* in *Free Enterprise Fund v. PCAOB*. That case involved a challenge to the Public Company Accounting Oversight Board's double-layer removal protections in the Sarbanes-Oxley Act. The Board's members were removable only for cause by Securities and Exchange Commissioners who themselves were only removable for cause.

The Act "not only protect[ed] Board members from removal except for good cause, but withdr[ew] from the President any decision on whether that good cause exists." *Free Enterprise Fund*, 561 U.S. at 495. The Act vested the determination "instead in other tenured officers—the [SEC] Commissioners—none of whom is subject to the President's direct control." *Id.* As a result, the Board was "not accountable to the President" by any direct measure. *Id.*

The added layer of tenure protection made a difference. The Court reasoned that if "the Commission could remove a Board member at any time"—not just for cause—then the President could "hold the Commission to account for its supervision of the Board, to the same extent that he may hold the Commission to account for everything else it does." *Id.* at 495, 496. The second level of tenure protection changed the nature of the President's review: the Commission was "only responsible for their own determination of whether the Act's rigorous good-cause standard is met." *Id.* at 496. And, according to the Court, the President was "powerless to intervene—unless th[e Commission's] determination [wa]s so unreasonable as to constitute 'inefficiency, neglect of duty, or malfeasance in office.'" *Id.* (quoting *Humphrey's Executor*, 295 U.S. at 620).

That arrangement, in the Court's view, was contrary to Article II's vesting of the executive power in the President. According to the Court,

> Without the ability to oversee the Board, or to attribute the Board's failings to those whom he can oversee, the President is no longer the judge of the Board's conduct. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. This violates the basic principle that the President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch."

Id. at 496-97 (quoting *Clinton v. Jones*, 520 U.S. 681, 712–713 (1997) (Breyer, J., concurring in judgment).

Thus, the Court held the Board did not fall under the *Humphrey's Executor* exception to the President's removal power. Specifically, the Court rejected the argument that the Board's double-layer removal protections were "the kind of practical accommodation between the Legislature and the Executive that should be permitted in a

‘workable government.’” *Id.* at 497 (quoting *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991)). It made no difference whether Congress intended to “rest[ ] agency independence upon the need for technical expertise.” *Id.* at 498. Although the Board was designed to provide such “expertise,” so too was much of the “vast and varied federal bureaucracy.” *Id*. It was a step too far to limit that power to officers who exercised a “purely political” function, as opposed to the Board whose mission was “said to demand both ‘technical competence’ and ‘apolitical expertise.’” *Id.* at 498-499.

5. Seila Law

The Court again declined to extend *Humphrey’s Executor* in *Seila Law LLC v. CFPB.* There, the Court held that the for-cause restriction on the President's executive power to remove Consumer Financial Protection Bureau’s single Director violated constitutional separation of powers.

Congress established the CFPB as an independent agency tasked with regulating consumer debt products. But, instead of placing the agency under the leadership of a board with multiple members, Congress provided that the CFPB would be led by a single Director, who served for a longer term than the President and could not be removed by the President except for “inefficiency, neglect, or malfeasance.” *Seila Law*, 591 U.S. at 203. Notwithstanding this statutory independence, the Director wielded rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy.

This agency structure, the Court said, violated the separation of powers. Endorsing the “President’s prerogative to remove executive officials,” the Court explained that there remained only “two exceptions to the President’s unrestricted removal power”—one, recognized in *Humphrey’s Executor*, “for multimember expert agencies that do not wield substantial executive power,” and one described *in Morrison* for “inferior officers with limited duties and no policymaking or administrative authority.” *Seila Law*, 591 U.S. at 216, 217. The CFPB Director’s insulation from removal fell under neither exception.

The Court singled out three features of the CFPB that distinguished it from the FTC in *Humphrey's Executor:*

- *First*, the CFPB was led by a single Director who could not be described as a “body of experts” and could not be considered “non-partisan” in the “same sense as a group of officials drawn from both sides of the aisle.” *Id.* at 218.

- *Second*, while the staggered terms of the FTC Commissioners prevented complete turnovers in agency leadership and guaranteed that there would always be some Commissioners with expertise, the CFPB’s single-Director structure and five-year term “guarantee[d] abrupt shifts in agency leadership and with it the loss of accumulated expertise.” *Id.*

- *Third*, in the Court’s view, the CFPB Director was “hardly a mere legislative or judicial aid,” but rather possessed the authority “to promulgate binding rules

fleshing out 19 federal statutes, including a broad prohibition on unfair and deceptive practices in a major segment of the U.S. economy." *Id.* And instead of submitting recommended dispositions to an Article III court, the Director was empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications" and seek "daunting monetary penalties"—a "quintessentially executive power." *Id.* at 219.

The Court also rejected the argument that the CFPB Director was an inferior officer with limited duties. Unlike the independent counsel *Morrison v. Olson*, who lacked policymaking or administrative authority, the Director had the sole responsibility to administer 19 separate consumer-protection statutes that covered everything from credit cards and car payments to mortgages and student loans. The CFPB Director "had the authority to bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions." *Seila Law*, 591 U.S. at 220.

The Court thus declined to extend either exception to the "new situation" of "an independent agency led by a single Director and vested with significant executive power." *Id.*

6. Collins

In *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the Court applied *Seila Law*'s holding to another independent agency led by a single top officer—the Federal Housing Finance Authority. In doing so, the Court may have gone even further than *Seila Law* in affirming the *Myers* default rule. *Id*. at 1801 (Kagan, J., concurring in the judgment) (noting the majority jettisoned "significant executive power" from the test in *Seila Law*).

First, the Court rejected the argument that FHFA's more limited authority justified its removal protection. Instead, the Court reaffirmed the President's removal power as serving "vital purposes" regardless of an agency's scope or power. *Id*. at 1784.

Second, the Court rejected the argument that the FHFA does not exercise executive power given its role as a conservator or receiver, in which it sometimes acts as "a private party." To the contrary, the FHFA was tasked with interpreting and implementing a federal statute—the Housing and Economic Recovery Act—"the very essence of execution of the law." *Id.* at 1785. The FHFA's ability to issue binding orders further confirmed that it "clearly exercises executive power." *Id.*

Third, the Court asked whether an agency that does not regulate "purely private actors" might avoid the presidential removal rule. *Id.* Again, the Court answered in the negative. The Court emphasized the "important purposes" served by the removal power, regardless of whether an agency regulates private actors directly. *Id.* In this case, the FHFA's "control over Fannie Mae and Freddie Mac can deeply impact the lives of millions of Americans by affecting their ability to buy and keep their homes." *Id.*

Finally, the Court addressed whether the "modest" nature of the FHFA director's tenure protection warranted a different outcome. *Id.* at 1786. The director could be removed if he "disobey[ed] a lawful [Presidential] order," including one about the Agency's policy discretion. *Id.* But again, the Court rejected the distinction, holding that the Constitution "prohibits even 'modest restrictions'" on the President's removal power. *Id.* at 1787 (quoting *Seila Law*, 140 S. Ct. at 2205).

7. Jarkesy

The Fifth Circuit may have ventured the farthest from *Humphrey's Executor* in *Jarkesy v. Securities and Exchange Commission*, 34 F.4th 446 (5th Cir. 2022). In *Jarkesy*, the Fifth Circuit held that the statutory removal restrictions for the Securities and Exchange Commission's administrative law judges were unconstitutional.

The SEC has statutory authority to institute an administrative proceeding to enforce federal securities laws. Although the SEC may itself preside over such a proceeding, it also may, and typically does, delegate that task to an ALJ. As the Fifth Circuit explained, "SEC ALJs are inferior officers" who "can only be removed by the SEC Commissioners if good cause is found by the Merits Systems Protection Board," *and* "SEC Commissioners and MSPB members can only be removed by the President for cause." *Id.* at 463-464. In short, the statutory framework ensures SEC ALJs are "insulated from the President by at least two layers of for-cause protection from removal." *Id.* at 464.

The Fifth Circuit held this statutory framework was "unconstitutional under *Free Enterprise Fund.*" *Id.* According to the Fifth Circuit, SEC ALJs are "inferior officers" under the Appointments Clause over whom "the President must have adequate control." *Id.* SEC ALJs exercise power over administrative case records "by controlling the presentation and admission of evidence" and their decisions are often "final and binding." *Id.* But because of their "two layers of insulation," the Fifth Circuit concluded that the SEC's statutory framework impeded the "President's power to remove ALJs based on their exercise of the discretion granted to them." *Id.* That double layer of insulation violated the principle that the court gleaned from *Free Enterprise Fund*: "If principal officers cannot intervene in their inferior officers' actions except in rare cases, the President lacks the control necessary to ensure that the laws are faithfully executed." *Id.*

In reaching that conclusion, the Fifth Circuit specifically declined to apply *Humphrey's Executor*—even though SEC ALJs "perform adjudicative rather than enforcement or policymaking functions." *Id.* In other words, it made no difference that SEC ALJs' function was "quasi-judicial" much like the FTC Commissioners in *Humphrey's Executor*. Rather, the Fifth Circuit leaned on *Myers* in holding that "'quasi-judicial' executive officers must nonetheless be removable by the President 'on the ground that the discretion regularly entrusted to that officer by statue has not been on the whole intelligently or wisely exercised.'" *Jarkesy*, 34 F.4th at 464 (quoting *Myers*, 272 U.S. at 135).

At bottom, the Fifth Circuit held that "two layers of insulation" sufficiently impeded the President's removal power, notwithstanding the long-established exception for "quasi-judicial" officers in *Humphrey's Executor*. Although the Supreme Court later affirmed *Jarkesy*, the Court did not address the Fifth Circuit's holding that the SEC ALJs' removal protections violate the separation of powers. So *Jarkesy*'s holding on the President's removal remains the law of the Fifth Circuit.

C. Implications for Agencies That Intersect With Franchising

We have already seen these changes to the Court's removal jurisprudence play out in courts across the country—including in challenges to agencies relevant to the franchising industry. These decisions arm regulated entities subject to agency enforcement actions with potential additional grounds to challenge such actions.

In particular, there have been a number of cases challenging the structure of the NLRB. In January 2024, SpaceX filed a lawsuit in the U.S. District Court for the Southern District of Texas, asking that the court declare that the policies restricting the removal of NLRB administrative law judges ("ALJs") and members of the NLRB are unconstitutional. Within weeks, Trader Joe's, Amazon, and Starbucks raised similar defenses in Board proceedings, arguing that the NLRB's structure is unconstitutional.

In July 2024, the district court granted SpaceX's request for a preliminary injunction, finding SpaceX "demonstrated a substantial likelihood of success on its claims that Congress has impermissibly protected both the NLRB Members and the NLRB ALJs from the President's Article II power of removal." *Space Expl. Techs. Corp. v. National Lab. Rels. Bd.*, 741 F. Supp. 3d 630, 634 (W.D. Tex. 2024). The court explained:

> The President's control over the officers performing substantial executive functions must be sufficient such that he is able to not only control the performance of their functions but also choose who holds said positions. While not all protections against removal are unconstitutional, Supreme Court precedent generally forbids two or more layers of for-cause protection to impede the President's control. "'Inferior officers' may retain some amount of for-cause protection from firing. Likewise, even principal officers may retain for-cause protection when they act as part of an expert board. But a problem arises when both of those protections act in concert."

Id., 741 F. Supp. 3d at 636 (internal citations omitted). Under those principles, the district court held, both NLRB ALJs and Members are unconstitutionally insulated from removal.

That preliminary injunction decision is currently pending in the U.S. Court of Appeals for the Fifth Circuit, but the Trump administration is no longer making the same arguments as the Board did at the district court level. Just last month, the Board filed a letter in the Fifth Circuit appeal, stating that the Board is no longer "in a position to address the Board-member-removability arguments." Doc. No. 175-1 at 1, *Space Expl. Tech.*

Corp. v. National Lab. Rels. Bd., No. 24-50627 (5th Cir. Feb. 3, 2025) ("Trump Admin Letter").

The Trump administration's position in the SpaceX case is not surprising: as the Board acknowledged in its letter to the Fifth Circuit, President Trump "removed Gwynne A. Wilcox from her position as Member of the National Labor Relations Board," assertedly based on the President's authority to remove Board members "with or without statutory cause, notwithstanding the limits set forth in Section 3(a) of the National Labor Relations Act." Trump Admin Letter at 1.

Meanwhile, Wilcox challenged her removal, and in March 2025, the U.S. District Court for the District of Columbia granted Wilcox's motion for a preliminary injunction. It found that Wilcox was likely to succeed on her argument that President Trump lacks "the authority to terminate members of the National Labor Relations Board at will," and that "his attempt to fire [Wilcox] from her position on the Board was a blatant violation of the law." *Wilcox v. Trump*, No. 25-cv-334 (BAH), 2025 WL 720914, at *3 (D.D.C. Mar. 6, 2025). As the court saw it:

> *Humphrey's Executor* and its progeny control the outcome of this case and require that plaintiff be permitted to continue her role as Board member of the NLRB and her termination declared unlawful and void. The Constitution and caselaw are clear in allowing Congress to limit the President's removal power and in allowing the courts to enjoin the executive branch from unlawful action. Defendants' hyperbolic characterization that legislative and judicial checks on executive authority, as invoked by plaintiff, present "extraordinary intrusion[s] on the executive branch," is both incorrect and troubling. Under our constitutional system, such checks, by design, guard against executive overreach and the risk such overreach would pose of autocracy. An American President is not a king—not even an "elected" one—and his power to remove federal officers and honest civil servants like plaintiff is not absolute, but may be constrained in appropriate circumstances, as are present here.

Id. at *18 (internal citations and footnote omitted).

Days later, however, the D.C. Circuit stayed the district court's decision over a dissent by Judge Millett. In a concurring opinion, Judge Walker noted that the district court did its "level best," but it read *Humphrey's Executor* "in an expansive manner" at odds with *Seila Law* and *Collins*. *Wilcox v. Trump*, No. 25-5057, at *48 (D.C. Cir. Mar. 28, 2025). But, according to Judge Millett, the "NLRB is a 'multimember' agency that does 'not wield substantial executive power.'" *Id.* at *14 (Millett, J., dissenting). And "[t]hough the [NLRA] does not require the Board's members to be balanced across party lines, Presidents since Eisenhower have adhered to a 'tradition' of appointing no more than three members from their own party." *Id.* Thus, Judge Millett would have held that *Humphrey's Executor* fettered the lower courts to uphold the NLRB's removal protections. *Id.* at *14, *23.

Other Trump administration removal decisions have also been challenged: Susan Grundmann challenged President Trump's decision to remove her as a member of the Federal Labor Relations Authority. Also in March 2025, the U.S. District Court for the District of Columbia granted her motion for summary judgment. The court in its opinion explained:

> The removal in this case was unlawful. The Government concedes that Ms. Grundmann's removal violated the FLRA's founding statute—a statute that Congress enacted and the President signed into law to revamp federal labor relations in the federal government. The Government's argument that the statutory removal provision is unconstitutional cannot be reconciled with longstanding Supreme Court precedent that is binding on this Court. And it would encroach on Congress's authority under Article I of the Constitution.

Grundmann v. Trump, No. 25-cv-425 (SLS), 2025 WL 782665, at *2 (D.D.C. Mar. 12, 2025). An appeal is expected to follow.

Hampton Dellinger, the head of the Office of Special Counsel, also challenged his removal. The U.S. District Court for the District of Columbia granted Dellinger's motion for summary judgment, finding that the statutory provision limiting the circumstances in which the President may remove the Special Counsel is constitutional, and President Trump's removal of Dellinger violated that provision. *See Dellinger v. Bessent*, No. 25-cv-0385 (ABJ), 2025 WL 665041 (D.D.C. Mar. 1, 2025). The U.S. Court of Appeals for the D.C. Circuit, however, stayed that decision, thus "giv[ing] effect to the removal of [Dellinger] from his position as Special Counsel." *Dellinger v. Bessent*, No. 25-5052, 2025 WL 717383, at *1 (D.C. Cir. Mar. 5, 2025). In a later per curiam opinion, the court explained that the government had "shown a strong likelihood of success on the merits." *Dellinger v. Bessent*, No. 25-5052, 2025 WL 887518, at *1 (D.C. Cir. Mar. 10, 2025). According to the court:

> [T]he Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer." Granted, *Seila Law* noted the more "limited jurisdiction" of OSC as compared to the agency at issue there, and *Collins* did "not comment on the constitutionality of any removal restriction that applies to [the Special Counsel]." However, the government has shown that the logic of those cases is substantially likely to extend to the Special Counsel.

Id. at *2. Dellinger subsequently dropped his suit.

With all these conflicting decisions, the Supreme Court will undoubtedly need to weigh in again on the President's removal authority—and soon.

IV. Conclusion

These challenges to agency action and structure may only be the beginning. Agency rulemaking covering the gamut of topics that could legally ensnare franchise relationships. All are fair game for challenge—broad agency interpretations of "independent contractor," "joint employment," "unfair competition," and a number of other issues under a broad array of statutes. But this is not the end of the administrative state. Despite these major changes, a word of caution: agencies still enjoy significant power. For example, *Loper Bright* makes clear that courts should continue to defer to agencies' factual conclusions and interpretations of their own regulations, as well as to give respectful consideration to an agency's experience and expertise in administering a statute. And Congress can still delegate major authority to agencies—*Loper Bright* and *West Virginia v. EPA* just require such delegation to be clear. Nevertheless, the last few Supreme Court terms have undeniably made the litigation playing field much more level between the regulators and the regulated.

The combined impact of *Loper Bright*, *Corner Post*, *Seila Law*, and *Jarkesy* (among other decisions) represents a substantial realignment in the balance of power among the three branches of the federal government. For franchising industry entities injured by agency actions (and inaction), these decisions also present important new opportunities to vindicate their rights and protect the franchise model.