Over the past decade, the Supreme Court has bolstered the presidential removal power. But the Court’s expansion of this power has not translated to robust remedies for the regulated parties that bring removal-protection challenges. Recently, in *K & R Contractors, LLC v. Keene*, the Fourth Circuit declined to consider the constitutionality of the removal protections for administrative law judges (ALJs) at the Department of Labor (DOL) because the challenging party was not entitled to a remedy regardless of the answer to the constitutional question. It determined that the last-resort rule — which requires courts to resolve a case on nonconstitutional grounds, if possible, before reaching a constitutional question — constrained it from deciding the merits of the removal-protection claim. While the Fourth Circuit’s reliance on the last-resort rule does not align with how the Supreme Court has traditionally handled presidential removal power cases, the Fourth Circuit’s approach — not the Court’s — should be mirrored going forward.

In February 2017, Michael Keene, a retired miner, claimed benefits under the Black Lung Benefits Act (BLBA). The DOL’s district director issued a proposed decision that awarded benefits to Keene and ordered K & R Contractors — which operated a mine where Keene had worked — to pay those benefits. K & R subsequently requested a hearing on the matter before an ALJ. In June 2018, the case was assigned to ALJ Barto; K & R immediately moved to reassign the claim to

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3 *K & R Contractors*, 86 F.4th 135 (4th Cir. 2023).
4 *Id*. at 148–49.
6 *K & R Contractors*, 86 F.4th at 148–49.
8 *K & R Contractors*, 86 F.4th at 141.
9 *Id*. A BLBA claim must first be filed with a DOL district director, who “develops the record” and determines the coal mine operator that may be held liable for the payment of benefits. *Id*. at 140. After the district director issues the proposed order, any party “may request a hearing before a DOL ALJ.” *Id*. The ALJ’s decision is final unless any party appeals to the Benefits Review Board, whose decisions may be reviewed “in the court of appeals for the circuit in which the claimant’s injury occurred.” *Id*.
10 *Id*. at 141.
another ALJ,\textsuperscript{12} alleging two constitutional violations. First, K & R relied on \textit{Lucia v. SEC}\textsuperscript{13} to argue that DOL ALJs had originally been appointed by the agency’s staff, which violated the Appointments Clause.\textsuperscript{14} Even though the Secretary of Labor — the head of the DOL — had ratified incumbent ALJs’ appointments even before \textit{Lucia} was decided,\textsuperscript{15} K & R insisted that a new hearing officer was still required.\textsuperscript{16} Second, K & R argued that the DOL ALJs were subject to unconstitutional removal protections given that they can be removed only for good cause by the members of the Merit Systems Protection Board, who, in turn, can be removed only for good cause by the President.\textsuperscript{17}

In August 2018, ALJ Barto denied K & R’s motion because his appointment had been ratified by the Secretary of Labor before he “[l]ook any substantial action at all in [the] case.”\textsuperscript{18} “Then, in January 2019, the case was reassigned to ALJ Applewhite for unrelated reasons.”\textsuperscript{19} K & R filed another motion, contending that the DOL ALJs’ appointments and removal protections violated the Appointments Clause because incumbent ALJs still retained competitive-service status.\textsuperscript{20} ALJ Applewhite also denied K & R’s motion, noting that she “was appointed by the


\textsuperscript{13} \textit{K & R Contractors}, 86 F.4th at 141.

\textsuperscript{14} See Motion to Cancel Hearing and Reassignment of Claim, \textit{supra note} 12, at 8.

\textsuperscript{15} \textit{Id.} at 8–9 (citing \textit{Lucia}, 138 S. Ct. at 2060 (Breyer, J., concurring in the judgment in part and dissenting in part)).

\textsuperscript{16} Excerpt of Transcript of Hearing Before the Administrative Law Judge, Keene v. K & R Contractors, LLC, No. 2018-BLA-05457 (U.S. Dep’t of Lab. Jan. 29, 2019), \textit{supra note} 12, at 11, 12. ALJ Barto did not seem to address K & R’s allegation that the ALJs’ removal protections violated the Constitution.

\textsuperscript{17} \textit{K & R Contractors}, 86 F.4th at 142. ALJ Applewhite had transferred to the DOL from the Social Security Administration, and the Secretary of Labor had appointed her as an ALJ in October 2018. \textit{Id.}

\textsuperscript{18} Motion to Hold Claim in Abeyance and New Evidentiary Hearing, \textit{K & R Contractors}, No. 2018-BLA-05457 (U.S. Dep’t of Lab. Jan. 29, 2019), \textit{supra note} 12, at 17, 18–19 (pointing to a memorandum for department heads that “instructs that ALJs appointed prior to [July 16, 2018] will remain part of the competitive service and subject to the requirements of the competitive service,” \textit{id.} at 19).
Secretary of Labor . . . prior to issuing this decision and order.”  
She reviewed the record and awarded benefits to Keene under the BLBA, holding K & R liable.  
K & R then appealed the decision to the Benefits Review Board.  
It argued that the decision should be vacated and remanded because ALJs Barto and Applewhite “were not appointed in accordance with the Appointments Clause,” and they “lacked the authority [under Free Enterprise Fund v. Public Company Accounting Oversight Board] to adjudicate this case because the limitations on their removal violate the separation of powers.”

The Benefits Review Board affirmed ALJ Applewhite’s decision.  
It clarified that an agency head may permissibly appoint an executive officer through ratification and that the Secretary of Labor had done so for ALJ Barto.  
It further noted that K & R failed to show that ALJ Applewhite’s appointment was not valid.  
The Board then turned to K & R’s objection that the ALJs’ removal protections violated the separation of powers.  
It declined to address the argument because K & R “failed to adequately brief this issue.”  
The Board explained that K & R had not developed an argument for this challenge, as it had “not specified how those provisions violate the separation of powers doctrine” or how Free Enterprise Fund applied to the case.  
K & R petitioned the Fourth Circuit to review the Board’s decision.  
The Fourth Circuit denied the petition for review.  
Writing for a unanimous panel, Judge Rushing held that ALJs Barto and Applewhite had both been constitutionally appointed.  
She determined that the Secretary of Labor had lawfully exercised his appointment

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22 Id. at 15–16.
23 K & R Contractors, 86 F.4th at 142.
25 561 U.S. 477 (2010) (holding that the Public Company Accounting Oversight Board’s dual for-cause removal protections were unconstitutional, id. at 492).
28 Id. at *2 (citing Wilkes-Barre Hosp. Co. v. NLRB, 857 F.3d 364, 372 (D.C. Cir. 2017); Advanced Disposal Servs. E., Inc. v. NLRB, 820 F.3d 592, 603 (3d Cir. 2016); CFPB v. Gordon, 819 F.3d 1179, 1191 (9th Cir. 2016)).
29 See id. at *2–3.
30 Id. at *3.
31 Id. at *3–4.
32 Id. at *4.
34 K & R Contractors, 86 F.4th at 139.
35 Judge Rushing was joined by Judges Harris and Quattlebaum.
36 K & R Contractors, 86 F.4th at 150.
authority when he appointed ALJ Applewhite after she transferred to
the agency, and when he ratified ALJ Barto’s previous appointment as
a DOL ALJ. Judge Rushing further repudiated K & R’s contention
that “ratification by a department head cannot prospectively cure a prior
unconstitutional appointment.” The Secretary’s ratification of ALJ
Barto’s appointment, therefore, remedied any constitutional defect re-
lated to his original appointment through the competitive service.

Judge Rushing then considered K & R’s claim that DOL ALJs’ re-
moval protections unconstitutionally insulate them from presidential
control. Recognizing that the constitutionality of ALJs’ removal pro-
tects has split the courts of appeals, Judge Rushing avoided deciding
this constitutional question. She relied on Collins v. Yellen to explain
that K & R was not automatically entitled to vacatur of the agency’s
decision if the court determined that the ALJs’ removal restrictions were
unconstitutional. The removal restrictions, after all, did not cause any
harm to K & R. Rather, ALJs Barto and Applewhite had been law-
fully appointed, meaning they had the lawful authority to “exercise the
power of [their] office.” It would be one thing if the President had
attempted to remove ALJ Barto or ALJ Applewhite from their positions
but was thwarted by the removal restrictions. In that situation, the
President’s inability to fire the ALJs would have clearly harmed K & R,
since the ALJs should have no longer occupied their positions when ad-
judicating the claim. Their actions after the attempted firing would
have been, in a sense, ultra vires. But the ALJs’ removal protections
simply did not come into play here. The ALJs remained authorized to
wield executive power against K & R, which meant K & R did not suf-
fer a constitutional injury. Judge Rushing thus decided that K & R
would not receive its requested relief even if the removal restrictions
were found to be unconstitutional and denied the petition for review.

The Fourth Circuit’s reliance on the last-resort rule fits uncomfort-
ably with the Supreme Court’s recent precedents. From Free Enterprise
Fund to Seila Law LLC v. CFPB to Collins, the Court has decided the

37 Id. at 143–44. Judge Rushing explained that DOL ALJs may be appointed by the “Heads of
Departments,” such as the Secretary of Labor, because ALJs are inferior officers. Id. at 143.
38 Id. at 144.
39 Id. The court also “reject[ed] K & R’s unsupported contention that retaining incumbent ALJs
in the competitive service after their valid appointment poses an Appointments Clause problem.” Id.
40 Id.
41 Id. at 148–49.
42 141 S. Ct. 1761 (2021).
43 K & R Contractors, 86 F.4th at 149.
44 See id.
45 Id.
46 See id.
47 See id.
48 See id.
49 Id. at 150.
50 140 S. Ct. 2183 (2020).
merits of separation-of-powers claims before considering appropriate remedies. It has repeatedly struck down removal protections that impeded the presidential power to remove, only then offering hollow remedies to the regulated parties. Although the Fourth Circuit’s approach inverts the more common order of decisionmaking in such cases, it ultimately allows courts to better uphold separation of powers by limiting judicial interference with the President’s own judgments about his constitutional power and the proper functioning of his branch.

The Fourth Circuit’s decision to review the remedies before the merits of the constitutional question rested upon the last-resort rule: “[T]he Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.” This prudential rule was best articulated by Justice Brandeis in *Ashwander v. Tennessee Valley Authority* as part of the constitutional avoidance doctrine. Justice Brandeis would have resisted “passing upon” the merits of the constitutional questions in *Ashwander* because of nonconstitutional considerations that could have resolved the case instead. For example, Justice Brandeis pointed out that the plaintiffs had failed to demonstrate the “danger of irreparable injury” necessary for an injunction. Because the plaintiffs would not have received their requested remedy regardless of the Court’s decision on the merits, Justice Brandeis would have avoided needlessly sifting through the constitutional weeds. The Fourth Circuit did just that in *K & R Contractors*.

The Fourth Circuit’s reasoning was, therefore, entirely consistent with Justice Brandeis’s concurrence in *Ashwander*. But it was not consistent with the Supreme Court’s (non)application of the last-resort rule in recent removal-protection cases. Begin with *Free Enterprise Fund*.

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51 See Bamzai & Prakash, supra note 1, at 1759.
54 The Fourth Circuit’s discussion of the remedial question closely resembled an analysis of the redressability prong of standing. See William Baude & Samuel L. Bray, *The Supreme Court, 2022 Term — Comment: Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 158 (2023). These remedial questions are admittedly difficult to untangle from jurisdictional questions. See generally Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies — And Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006). But the Fourth Circuit’s focus on remedies in *K & R Contractors* is distinguishable from the standing inquiry. *K & R* would have benefited from a favorable judicial remedy, but the Fourth Circuit determined that it was not entitled to such a judicial remedy. See *K & R Contractors*, 86 F.4th at 149–50. The former consideration answers the redressability question of standing, while the latter answers the remedial question.
56 The constitutional avoidance doctrine reflects an understanding of “the counter-majoritarian difficulty” that arises when courts strike down legislative and executive acts. See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 6, 69–71 (1962); ANDREW NOLAN, CONG. RSCH. SERV., R447706, THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE: A LEGAL OVERVIEW 1–2, 6–10, 14–16 (2014).
57 *Ashwander*, 297 U.S. at 341 (Brandeis, J., concurring).
58 Id. at 344–45.
59 See id. at 341.
The Court concluded that the dual for-cause limitations transgressed the separation-of-powers principle.\(^{59}\) Because the Public Company Accounting Oversight Board (PCAOB) members had been properly appointed, however, Free Enterprise Fund was "not entitled to broad injunctive relief."\(^{60}\) The Court instead severed the PCAOB’s removal protections from the relevant statute.\(^{61}\) But severing the protections did not "invalidate any past actions of the board, enjoin the board from investigating the regulated firm, [or] require a wholly new administrative investigation."\(^{62}\) Free Enterprise Fund, therefore, did not receive any meaningful relief. The Court could have — or perhaps should have — refused to consider the removal-protection challenge given that the PCAOB members’ valid appointments precluded any actual remedies for Free Enterprise Fund. But it did not.

Other recent removal-protection cases show a similar trend. In Seila Law, the Court held that the challenged for-cause removal protection violated the separation of powers.\(^{63}\) After the Court dealt with the constitutional question, it remanded the remedial question to the lower courts.\(^{64}\) The Ninth Circuit decided that Seila Law was not entitled to a remedy,\(^{65}\) and the law firm thus "still found itself subject to the enforcement action in question."\(^{66}\) Even in Collins itself, the Court first addressed the merits of the removal-protection challenge, determining that the for-cause removal restriction violated the separation of powers,\(^{67}\) and then remanded to the lower courts to resolve the remedial question.\(^{68}\) The U.S. District Court for the Southern District of Texas ultimately ruled that the petitioners were not entitled to a remedy.\(^{69}\) A striking pattern emerges: the Court has not harnessed the last-resort rule as the Fourth Circuit did in K & R Contractors. Especially given the serious doubts that the petitioners would obtain any relief on remand,\(^{70}\) the Collins Court could have attempted to determine whether the challengers were entitled to relief first and only then turned to the merits of


\(^{60}\) Id. at 513.

\(^{61}\) Id. at 508.


\(^{63}\) Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2192 (2020).

\(^{64}\) Id. at 2211.

\(^{65}\) CFPB v. Seila L. LLC, 984 F.3d 715, 718, 720 (9th Cir. 2020).


\(^{68}\) Id. at 1789.


\(^{70}\) Collins, 141 S. Ct. at 1802 (Kagan, J., concurring in part and concurring in the judgment in part) (mentioning that the Fifth Circuit had already considered the remedies issue and determined that the Federal Housing Finance Agency’s actions were not void).
the removal-protection challenges. But the Court instead followed the conventional order of decisionmaking — merits first, then remedies.

Although the Fourth Circuit’s approach in *K & R Contractors* reflects some dissonance with the Supreme Court’s recent precedents, this use of the last-resort rule is the right approach for such cases going forward. After all, the Fourth Circuit’s decision remains faithful to a fundamental justification for the last-resort rule: “Separation of [p]owers and [r]espect for [o]ther [b]ranches.” The Fourth Circuit would not address the merits of the removal-protection claim unless K & R demonstrated that it had experienced compensable harm, which would occur if the President challenged, resisted, or expressed displeasure with the allegedly unconstitutional removal limitations of an executive official. The last-resort rule thus allows courts to give “the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority,” namely the President. It calls upon the President to defend the constitutional powers of his office.

The Fourth Circuit’s deference toward the President’s prerogative to define the Executive’s role mirrors the D.C. Circuit’s reasoning when it held in *FEC v. NRA Political Victory Fund* that the constitutionality of a bipartisanship requirement on the President’s appointment power was not justiciable. The court emphasized that it could not “determine . . . whether the statute actually limited the President’s appointment power,” as the President may have appointed the same officials even without the statutory requirement. It suggested that the unconstitutionality of the requirement could be considered justiciable only if the President protested the alleged interference with his authority by violating the statute. The last-resort rule similarly prohibited the Fourth Circuit from addressing the merits of the removal-protection challenge unless K & R showed that the removal limitations interfered with the President’s removal decisions. Without that showing, the

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71 Kloppenberg, *supra* note 5, at 1047.
72 *Id.* at 1047–48 (quoting Rescue Army v. Mun. Ct. of L.A., 331 U.S. 549, 571 (1947)).
73 6 F.3d 821 (D.C. Cir. 1993).
74 *Id.* at 824. The D.C. Circuit did not apply constitutional avoidance because the Supreme Court had decided the constitutional status of a tribunal first when faced with similarly “unusual circumstance[s],” namely “when plaintiffs challenged the constitutional composition or character of a tribunal.” *Id.* at 823 (citing Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 859 (1986); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 56, 87 (1982) (plurality opinion)). Removal-protection cases, however, are categorically different from these “unusual circumstances.” See Jack Ferguson, Note, *Severability and Standing Puzzles in the Law of Removal Power*, 98 NOTRE DAME L. REV. 1731, 1752 (2023) (“[I]n removal power cases, the unlawfulness of a removal clause has no bearing on the agency’s actions . . . . The effect of a removal statute is between an officer and the President, but unless activated and enforced, it changes nothing about an officer’s relationship with private individuals.”
75 *NRA Political Victory Fund*, 6 F.3d at 824.
76 *Id.* at 825.
77 *Id.*
78 See *K & R Contractors*, 86 F.4th at 148–49.
court could not simply assume that the President would have removed the relevant executive official if the removal restriction had not existed.

The Fourth Circuit’s approach in *K & R Contractors* thus allows the courts to “shar[e] the constitutional interpretive power with other branches” and prevents undue intervention into legislative and executive action.79 This approach admittedly raises the bar for regulated entities to present their constitutional challenges in court and “removes all incentive for individual citizens to invest the time, effort, and resources required to raise such challenges.”80 The downturn in the number of suits brought by these entities would likely leave many unconstitutional removal protections on the books. But why should we allow private parties to needlessly force courts to adjudicate difficult constitutional questions, which have the potential to disrupt the administrative state, when the President has not himself expressed concern with the executive official’s actions? Why should we allow private parties to “invoke the removal power in the abstract”781 when the President has not himself questioned the alleged attack on his authority? Unlike, for example, the Article III “guarantee of . . . adjudication by the federal judiciary of matters within the judicial power of the United States,” which “serves to protect primarily personal . . . interests,”882 the inherent Article II presidential removal power serves to protect structural interests. It protects the President from the other branches of government and, by extension, ensures that the President has complete confidence in his alter egos within the executive branch. Because the removal power safeguards not the public at large but rather the President himself, he should be charged with asserting his own constitutional powers.

The Fourth Circuit’s application of the last-resort rule is particularly relevant in the current legal moment. The Court has declared war on the administrative state in recent Terms, and this Term appears to be no different. In fact, the Court will soon speak on the very question that the Fourth Circuit refused to decide — the constitutionality of ALJs’ removal protections — in *SEC v. Jarkesy*.83 *K & R Contractors* offers a better approach. The Court should first look to whether the challenging party is even entitled to remedies before entering the constitutional thicket. By doing so, the Court will demonstrate deference toward the President’s own control and oversight of the executive branch and, thereby, adhere to its proper place within our constitutional structure.

79 Kloppenberg, *supra* note 5, at 1054.
80 Nachmany, *supra* note 66, at 322 (quoting Brief of the New Civil Liberties Alliance as Amicus Curiae in Support of Petitioner at 12, Calcutt v. FDIC, 143 S. Ct. 1317 (2023) (No. 22-714)).
81 Ferguson, *supra* note 74, at 1762.
83 143 S. Ct. 2688 (2023); see Petition for a Writ of Certiorari at 1, *Jarkesy*, 143 S. Ct. 2688 (No. 22-859).