No. 22-714

IN THE

Supreme Court of the United States

HARRY C. CALCUTT, III,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

Michael Pepson
Counsel of Record
Cynthia Fleming Crawford
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-4529
mpepson@afphq.org

Counsel for Amicus Curiae

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF has an interest in this case because it believes judicially created barriers to meaningful Article III review are inconsistent with the separation of powers. Those facing ultra vires or unconstitutional agency enforcement actions should not have to face years of potentially ruinous costs to have their day in court. And courts should not shy away from their solemn duty under the Constitution of saying what the law is, particularly where an unconstitutionally structured administrative body has imposed on a private citizen substantial civil penalties and a

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[1] All parties have received timely notice of *amicus curiae*'s intent to file this brief. *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

lifetime ban on pursuing his chosen profession through an inhouse administrative process suffering myriad constitutional infirmities.

Nor should courts be in the business of fixing agencies' shoddy work to the detriment of individual litigants, as happened here. Due process and fundamental fairness demand that federal administrative bodies must, at the least, make decisions free from serious legal errors.

SUMMARY OF ARGUMENT

This Court should grant Mr. Calcutt's Petition for at least two reasons, both of which are sufficiently important to warrant this Court's intervention.

First, the panel majority's application of *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80 (1943), inadvertently rolls out the red carpet for agency abuse, overreach, and regulatory ping pong in a host of contexts. The *Chenery* principle is supposed to guard against haphazard agency decisions that ignore or incorrectly apply governing law. Toward this end, "[w]hen an agency's decision rests on a collapsed legal foundation," *see* Pet. App. 125a (Murphy, J., dissenting), *Chenery* instructs that courts are not supposed to rescue the agency from its mistakes. Just as a schoolteacher correcting a student's sloppy homework and then awarding an A+ grade would send a bad message to the student, when courts step in to correct agencies' mistakes, it incentivizes more shoddy work. That is what happened here. *See* Pet. App. 52a–72a; Pet. App. 125a–126a (Murphy, J., dissenting). If this precedent is allowed to stand, it would invite the FDIC and other agencies to cite it as

the administrative law equivalent of a "the-dog-ate-my-homework" excuse to justify sloppy decisions.

Second, the panel majority put the cart before the horse, overreading *Collins v. Yellen*, 141 S. Ct. 1761 (2021), to bar meaningful relief on Mr. Calcutt's separation-of-powers claims without first deciding those claims on the merits. An agency should not be allowed "to duck and weave its way out of meaningful judicial review." *See Fleming v. USDA*, 987 F.3d 1093, 1111 (D.C. Cir. 2021) (Rao, J., concurring in part, dissenting in part). And *Collins* should not become the next *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), used by agencies to evade accountability for their actions and bar the courthouse doors to meritorious constitutional claims. *See, e.g., Burgess v. FDIC*, No. 22-cv-00100, 2022 U.S. Dist. LEXIS 213050, at *24–*25 (N.D. Tex. Nov. 6, 2022) (finding "Plaintiff's claims that the FDIC Board structure and the double removal protections afforded FDIC ALJs are unconstitutional have merit" but that "Plaintiff [was] unlikely to succeed on the merits of the remedy" based on Circuit precedent interpreting *Collins*). But that is exactly the kind of mischief the panel decision's framing of *Collins* would invite, providing agencies with a roadmap for weaponizing *Collins* to insulate themselves from constitutional scrutiny.

In considering Mr. Calcutt's Petition, this Court should not turn a blind eye to the reality that in addition to the Article II violations raised by Petitioner, myriad other constitutional infirmities permeate the FDIC's inhouse administrative process. After all, "[t]he FDIC did not just *prosecute* this action. It also *adjudicated* the action [inhouse]—finding Calcutt guilty and imposing a punishment on him in

the form of an end to his career and a $125,000 penalty." *See* Pet. App. 99a (Murphy, J., dissenting). The FDIC's administrative process thus denied Mr. Calcutt a right to a jury trial before his peers in an independent, neutral Article III court, subject to the protections of the Federal Rules of Civil Procedure and Federal Rules of Evidence. This arrangement offends due process, Article III, and the Seventh Amendment. The FDIC's use of its administrative machinery to deprive Mr. Calcutt of core private rights cannot be reconciled with the Constitution.

For these reasons, this Court should grant review on both questions.

ARGUMENT

I. The Panel's Application of *Chenery* Warrants This Court's Review.

As this Court recently reaffirmed, "[t]he basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909–10 (2020). As a corollary, "a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 576 U.S. 743, 758 (2015); *see also Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 224 (2016) ("It is not the role of the courts to speculate on reasons that might have supported an agency's decision.").

As Judge Sutton explained: "It is a staple of administrative law that federal courts may not uphold

a rule on a ground never addressed by the agency."[2] *MCP No. 165 v. U.S. Dep't of Labor*, 20 F.4th 264, 277 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc) (citing *Chenery I*, 318 U.S. at 87); *see also Regents*, 140 S. Ct. at 1934 (Kavanaugh, J., concurring in judgment in part, dissenting in part) ("[T]he *post hoc* justification doctrine merely requires that courts assess agency action based on the official explanations of the agency decisionmakers, and not based on after-the-fact explanations advanced *by agency lawyers during litigation* (or by judges)."). But that is exactly what happened here, with the panel's acceptance and approval. *See* Pet. App. 61a–67a; Pet. App. 125a–126a (Murphy, J., dissenting).

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[2] "*Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168–69 (1962). "If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 196 (1947). "The rationale for *Chenery* is fairness to the parties and recognition that a court cannot adequately review a decision based on reasons not contained in the decision itself." Jeffrey M. Hirsch, *Defending the NLRB: Improving the Agency's Success in the Federal Courts of Appeals*, 5 FIU L. Rev. 437, 448 (2010). "The *Chenery* rule . . . likewise serves the 'think-it-over' function." Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 Duke L.J. 199, 209 (1969).

Under *Chenery*, "an order may not stand if the agency has misconceived the law."[3] *Chenery I*, 318 U.S. at 94. "[T]he FDIC's order is riddled with legal error."[4] Pet. App. 126a (Murphy, J., dissenting); *see* Pet. App. 52a–73a; Pet. 10–12. For that reason alone, vacatur was required. This remains true "even if the reviewing court believes that the agency either would reinstate its order under a different theory or would reach the same decision under the proper rule of law." *Fla. Dep't of Labor & Emp't Sec. v. U.S. Dep't of Labor*, 893 F.2d 1319, 1322 (11th Cir. 1990) (citing *Chenery I*, 318 U.S. at 94); *see FEC v. Akins*, 524 U.S. 11, 25 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case—even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason."). Instead, the panel majority upheld the order, finding remand here would "amount[] to 'an idle and useless formality.'" Pet. App.

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[3] The FDIC's administrative process is unconstitutional for a host of reasons. But as a general principle, and to the extent an agency action is not *ultra vires* or otherwise unconstitutional, remand is appropriate where that action is infected with legal error. *See, e.g., United States v. Schwarzbaum,* 24 F.4th 1355, 1365 (11th Cir. 2022).

[4] The FDIC agrees the panel "erred in sustaining the Board's removal and prohibition order based on a narrower set of harmful effects than the Board itself found." FDIC Stay Resp. 16.

73a (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality op.)). Not so.[5]

Leaving aside the best reading of the statute's sweep,[6] requiring agencies to defend their actions based on the reasons the agency itself gave at the time "serves important values of administrative law," promoting agency accountability and discouraging administrative gamesmanship. *See Regents*, 140 S. Ct. at 1909. It also serves due process values. *See id.* at 1934 (Kavanaugh, J., concurring in part, dissenting in part) ("[A]gency adjudications . . . implicate the due process interests of the individual parties to the adjudication.").

Further still, remand would have allowed the FDIC to exercise its discretion with respect to the

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[5] *Cf. Gui Cun Liu v. Ashcroft*, 372 F.3d 529, 534 (3d Cir. 2004) (Alito, J.) ("[R]emand is appropriate where, as here, we have made a legal determination . . . that fundamentally upsets the balancing of facts and evidence upon which an agency's decision is based.").

[6] There is reason to think the statute's scope has been expanded well beyond its textual bounds by judicial decisions grounded in "legislative history" and statutory purpose. *See* Pet. App. 114a (Murphy, J., dissenting). This has happened before in other contexts. *See, e.g., AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021) (unanimously rejecting this atextual mode of interpretation). The text of the statute—which "can deprive citizens of their property and livelihoods"—should, if anything, instead be construed strictly, consistent with the rule of lenity. *See* Pet. App. 111a (Murphy, J., dissenting). *Cf. Buffington v. McDonough*, 143 S. Ct. 14, 19 (2022) (Gorsuch, J., dissenting from denial of certiorari) (discussing the ancient doctrines of lenity and contra proferentem).

proper sanction without the taint of the agency's incorrect understanding of the law.[7] *See* Pet. App. 126a (Murphy, J., dissenting). *Cf. Chenery I*, 318 U.S. at 88; *Lorenzo v. SEC*, 872 F.3d 578, 602 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("I hope that the SEC on remand pays attention, comes to its senses, and (at a minimum) dramatically scales back the sanctions in this case."); *De La Fuente v. FDIC*, 332 F.3d 1208, 1226–27 (9th Cir. 2003).

As Judge Murphy suggested, the panel majority's "analysis [thus] runs afoul of basic administrative-law principles." Pet. App. 125a (Murphy, J., dissenting). *Cf. Thompson v. Lynch*, 788 F.3d 638, 649 (6th Cir. 2015) (Sutton, J., concurring in part, concurring in judgment). This misapplication of the *Chenery* principle should not be allowed to stand as precedent, as it will stack the deck against individuals and businesses and put a thumb on the scale in favor of the government in countless other proceedings. After all, "[i]f men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021); *see Regents*, 140 S. Ct. at 1909. By all accounts, the FDIC did not do so here.

As Petitioner explains, *see* Pet. 14–23, this Court's intervention is warranted to correct this error, which,

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[7] To be sure, 5 U.S.C. § 706 provides that "due account shall be taken of the rule of prejudicial error." But "[a]bsence of . . . prejudice must be clear for harmless error to be applicable." *United States Steel Corp. v. EPA*, 595 F.2d 207, 215 (5th Cir. 1979). Such is not the case here.

if allowed to stand, will metastasize.[8] *Cf. DISH Network Corp. v. NLRB*, 953 F.3d 370, 380 n.5 (5th Cir. 2020) ("According to one professor who spent four years working in the NLRB's Appellate Court Branch, the frequency of the practice" of making improper post hoc arguments barred by *Chenery* "manifested itself in shorthand shoptalk[.]" (citing Hirsch, 5 FIU L. Rev. 437 at 448 n.45)). The effects of the panel's no-remand ruling radiate far beyond the facts and context of this case, not only threatening the separation of powers but, perhaps worse, freezing in place harsh penalties supported by liability findings infected by legal error. At a minimum, the panel majority's misapplication of *Chenery* warrants summary reversal.

II. The Panel's Application of *Collins* Warrants This Court's Review.

As two cases currently before this Court, *Axon v. FTC*, No. 21-86, and *SEC v. Cochran*, No. 21-1239, illustrate, at times lower courts overread dicta in this Court's decisions in ways that allow agencies to evade accountability for their unconstitutional actions, barring the courthouse doors to meritorious claims. And this precedent, once entrenched, tends to metastasize, spreading itself in ever-expanding contexts. This Court should not allow this to happen again. *Collins* should not become the new *Thunder Basin*, 510 U.S. 200—invoked and expanded by

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[8] The FDIC agrees that "as to the first question presented, applicant has shown both a reasonable probability that the Court will grant review and a fair prospect that it will reverse the judgment below." Govt. Resp. 16. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

administrative bodies and courts alike to sweep a host of constitutional elephants under the rug. This Court should grant Mr. Calcutt's Petition to prevent history from repeating itself, nip this trend in the bud, and clarify *Collins* does not require a heightened showing of harm to invalidate agency actions for Article II removal-restriction violations to grant *prospective*, as opposed to *retrospective*, relief.

A. The Panel Overread *Collins*.

Collins solely addressed the showing necessary to obtain *retrospective* relief for Article II removal-restriction violations.[9] *See* 141 S. Ct. at 1787 ("only remaining remedial question concerns retrospective relief"); *id.* at 1795 (Gorsuch, J., concurring in part) ("the only question before us concerns retrospective relief"); *see also Consumers' Research v. Consumer Prod. Safety Comm'n*, 592 F. Supp. 3d 568, 587 (E.D. Tex. 2022) ("*Collins* does not address requests for prospective relief.").[10] *Cf. Cochran v. SEC*, 20 F.4th

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[9] *Collins* was brought to the panel's attention by the FDIC via a Rule 28(j) letter, *see* CA6 ECF 46, about three weeks before Mr. Calcutt filed his reply, *see* CA6 ECF 48. The panel thus did not have available to it extensive briefing by the parties, and Mr. Calcutt's numerous *amici*, on whether and how the remedial portion of *Collins* applied to Mr. Calcutt's Article II claims. Oral argument was held without supplemental briefing on *Collins*.

[10] A Fifth Circuit panel in a different case subsequently reached the contrary conclusion in the context of a constitutional challenge to a CFPB regulation, citing the Sixth Circuit's decision in *Calcutt*, further underscoring the necessity of this Court's guidance on the remedial issue. *See Cmty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 632 (5th Cir. 2022), cert. pending, Nos. 22-448, 22-663.

194, 210 n.16 (5th Cir. 2021) (en banc) ("*Collins* does not impact our conclusion in this case because Cochran does not seek to 'void' the acts of any SEC official. Rather, she seeks an administrative adjudication untainted by separation-of-powers violations."), *cert. granted sub nom.*, 142 S. Ct. 2707 (2022). Thus, as Professor Aaron Nielson presciently observed, "it is unclear whether *Collins* will prevent a party subject to ongoing agency action from seeking forward-looking injunctive relief. The majority did not resolve this issue, so we'll have to wait and see."[11] Aaron A. Neilson, *Three Views of the Administrative State: Lessons from* Collins v. Yellen, 2020-2021 Cato Sup. Ct. Rev. 141, 163 (2021).

Here, Mr. Calcutt is seeking *prospective* relief: vacatur of the stayed FDIC order before it becomes operative and an adjudication untainted by separation-of-powers violations. Indeed, the panel majority recognized "[t]he Removal and Prohibition Order's prospective effect[.]" Pet. App. 35a. Yet the panel majority mistakenly elided the critical distinction between *retrospective* and *prospective* relief, instead concluding "[t]hat distinction does not

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[11] One district court has described a passage in the remedial portion of *Collins* as "[t]o be honest . . . baffling." *Bhatti v. Fed. Hous. Fin. Agency*, No. 17-CV-2185, 2022 U.S. Dist. LEXIS 226527, at *10-13 (D. Minn. Dec. 16, 2022).

matter here." Pet. App. 34a. That was error.[12] And it should not be allowed to stand as precedent.

Even if *Collins*'s remedial holding applied to claims seeking *prospective* relief, this matter should have been remanded for discovery into whether "the unconstitutional removal restriction inflicted harm."[13] *See* 141 S. Ct. at 1789. *Cf. Collins v. Yellen,* 27 F.4th 1068, 1069 (5th Cir. 2022) (en banc) (remanding to district court); *Bhatti v. Fed. Hous. Fin. Agency*, 15 F.4th 848, 854 (8th Cir. 2021) (same); *Integrity Advance, LLC v. Consumer Fin. Prot. Bureau*, 48 F.4th 1161, 1170 (10th Cir. 2022) ("*Collins* left open an avenue of relief for potential injuries stemming from the actions of an unconstitutionally structured agency."); *Consumer Fin. Prot. Bureau v. Nationwide Biweekly Admin., Inc.*, Nos. 18-15431, 18-15887, 2023 U.S. App. LEXIS 2190, at *4 (9th Cir. Jan. 27, 2023). That the panel declined to do so here underscores the degree to which the panel's "concrete" proof of prejudice standard, *see* Pet. App. 36a, effectively immunizes all Article II

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[12] Indeed, "[t]he negative injunction remedy . . . is a standard tool of equity that federal courts have authority to entertain under their traditional equitable jurisdiction[.]" *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 540 (2021) (Thomas, J., concurring in part, dissenting in part) (cleaned up).

[13] This Court "ha[s] held that a litigant challenging governmental action as void on the basis of the separation of powers is not required to prove that the Government's course of conduct would have been different in a 'counterfactual world' in which the Government had acted with constitutional authority." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2196 (2020) (citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512 n.12 (2010)).

removal claims—no matter how meritorious, vigorously pressed, and well preserved—from Article III review.[14] *But cf.* 5 U.S.C. § 706(2)(B) (courts "shall . . . hold unlawful and set aside agency action . . . found to be . . . contrary to constitutional right").

B. *Collins* Does Not Bar Meaningful Review of Article II Removal Claims.

At a minimum, this Court should clarify that, regardless of the precise relief to which Mr. Calcutt is entitled on his Article II removal claim, "[t]he words of the Constitution are not suggestions or mere formalities." *Rop v. Fed. Hous. Fin. Agency*, 50 F.4th 562, 577 (6th Cir. 2022) (Thapar, J., concurring in part, dissenting in part). And "the Constitution's structural protections are as important for individual liberty as amendments like the First or Fourth." *Id.* at

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[14] The most straightforward remedial approach would be to simply "set aside" the FDIC's order under 5 U.S.C. § 706(2)(B). *Cf. United States v. Arthrex, Inc.,* 141 S. Ct. 1970, 1990 (2021) (Gorsuch, J., concurring in part and dissenting in part) ("Early American courts did not presume a power to 'sever' and excise portions of statutes in response to constitutional violations. Instead, when the application of a statute violated the Constitution, courts simply declined to enforce the statute in the case or controversy at hand."). It should be left to Congress to decide whether and, if so, how to fix the FDIC's unconstitutional administrative process, instead of choosing which removal restrictions to edit out of the statute. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring) ("[C]ourts cannot take a blue pencil to statutes[.]"); *Seila Law*, 140 S. Ct. at 2220 (Thomas, J., concurring in part and dissenting in part) ("[T]he power of judicial review does not allow courts to revise statutes[.]"); *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2365–66 (2020) (Gorsuch, J., dissenting in part) (similar).

587 (Thapar, J., concurring in part, dissenting in part); *see Collins*, 141 S. Ct. at 1780 ("separation of powers is designed to preserve the liberty of all the people").

"[O]ne who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate[.]" *Ryder v. United States*, 515 U.S. 177, 182–83 (1995). That proposition should hold equally true for unconstitutional removal restrictions. "If anything, removal restrictions may be a greater constitutional evil than appointment defects." *Collins*, 141 S. Ct. at 1796 (Gorsuch, J., concurring in part). After all, "[i]n the case of a removal defect, a wholly unaccountable government agent asserts the power to make decisions affecting individual lives, liberty, and property. . . . Few things could be more perilous to liberty than some 'fourth branch' that does not answer even to the one executive official who is accountable to the body politic." *Id.* at 1797 (Gorsuch, J., concurring in part) (citing *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting)); *see also Arthrex,* 141 S. Ct. at 1978–79 ("The President is responsible for the actions of the Executive Branch and cannot delegate that ultimate responsibility or the active obligation to supervise[.]" (cleaned up)).

Lower courts should not be permitted to overread *Collins* to insulate Article II violations from judicial review. At the least, and irrespective of the question of remedy, Mr. Calcutt was entitled to a ruling on the

merits of his Article II claim,[15] particularly where, as here, the Board's Order must be vacated and remanded to the agency because it is (by all accounts) riddled with legal error. *Cf. Collins*, 141 S. Ct. at 1794 n.33 (Thomas, J., concurring) ("There is a colorable argument that a Government official's misunderstanding about the scope of the President's removal authority would render an agency action arbitrary or capricious in certain cases."). If the FDIC scheme is unconstitutional, let the chips fall where they may. But it is no answer to "allow the agency to duck and weave its way out of meaningful judicial review" of that question. *See Fleming*, 987 F.3d at 1111 (Rao, J., concurring in part, dissenting in part); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("Questions may occur which we would gladly avoid; but we cannot avoid

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[15] That is the approach the Fifth Circuit took in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *reh'g en banc denied*, 51 F.4th 644 (5th Cir. 2022), reaching the merits of Mr. Jarkesy's Article II removal-restriction claims and holding that "the statutory removal restrictions for SEC ALJs are unconstitutional," *id.* at 463, *before* (and without) reaching the question of remedy, *see id.* at 463 n.17 ("Because we vacate the SEC's judgment on various other grounds, we do not decide whether vacating would be the appropriate remedy based on this error alone."). *Cf. Kaufmann v. Kijakazi*, 32 F.4th 843, 849–50 (9th Cir. 2022) (reaching merits of removal restriction challenge before concluding that Claimant was not entitled to retrospective relief under *Collins*). And that is the approach the Sixth Circuit panel could permissibly have followed here, had it vacated the Board's Order, as it should have done, because it was infected with a smorgasbord of legal errors. *See* Pet. App. 121a–126a (Murphy, J., dissenting). On remand, the FDIC could then consider these constitutional defects infecting its administrative process in exercising its discretion to set an appropriate penalty.

them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.").

III. The FDIC's Administrative Process is Unconstitutional.

As this Court considers whether to grant the Petition, it should not turn a blind eye to the myriad constitutional infirmities plaguing the FDIC's administrative prosecution process. *Cf. Lorenzo,* 872 F.3d at 602 (Kavanaugh, J., dissenting) ("[A]gency-centric process is in some tension with Article III of the Constitution, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment."); *Arthrex,* 141 S. Ct. at 1993 (Gorsuch, J., concurring in part, dissenting in part) ("Any suggestion that the neutrality and independence the framers guaranteed for courts could be replicated within the Executive Branch was never more than wishful thinking.").

To begin, "under our constitutional structure" the activities of administrative bodies "*must* be exercises of—the 'executive Power.'"[16] *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (citing U.S. Const. Art. II, §1, cl. 1). Because FDIC ALJs are Officers of the

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[16] It is unclear whether the Board enjoys for-cause removal protections. *See* Pet. App. 79a–81a (Murphy, J., dissenting); *see also* Jameson Payne, *Taken for Granted? SEC Implied For-Cause Removal Protection and Its Implications*, Yale Notice and Comment (June 24, 2022), https://www.yalejreg.com/nc/sec-for-cause-removal-protection/; Note, *The SEC Is Not an Independent Agency*, 126 Harv. L. Rev. 781, 801 (2013). If so, those restrictions would violate Article II. This Court should squarely address that important question on the merits.

United States, *see Lucia v. SEC,* 138 S. Ct. 2044, 2051–56 (2018), who presumably "perform substantial executive functions," *Jarkesy*, 34 F.4th at 463, the multi-tier removal restrictions violate Article II, *see id.* at 463–65; *Fleming*, 987 F.3d at 1113–23 (Rao, J., concurring in part, dissenting in part).[17]

Further, as Judge Murphy observed:

> The parties *assume* that the FDIC performs only executive functions. Our resolution should not be taken to have impliedly adopted that premise. The FDIC did not just *prosecute* this action. It also *adjudicated* the action—finding Calcutt guilty and imposing a punishment on him in the form of an end to his career and a $125,000 penalty. Once an Article III court finally enters the picture, moreover, it may review the FDIC's factual findings only under a deferential substantial-evidence test—a test that has been called more deferential than the one governing our review of a district court's factual findings.

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[17] The only basis on which Mr. Calcutt's Article II removal claim would fail is if the FDIC ALJs do not exercise Article II *executive* power but rather Article III *judicial* power. This is plausible. *Cf.* Pet. App. 76a, 99a–101a (Murphy, J., dissenting); *Jarkesy,* 34 F.4th at 450–59. If so, the ALJs would appear to be usurpers in an unlawful office, whose actions are void ab initio. *Cf.* Pet. App. 90a–92a (Murphy, J., dissenting).

Pet. App. 99a (Murphy, J., dissenting); *see also City of Arlington*, 569 U.S. at 312–13 (Roberts, C.J., dissenting).

The FDIC administrative prosecution scheme—in which the FDIC acts as investigator, prosecutor, and judge of its own cause—also violates due process. *See Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) ("[A]n unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case."). *See generally* Andrew Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. Mich. J.L. Reform 103 (2018).

And because the FDIC's inhouse prosecution of Mr. Calcutt implicates his core private rights, it violates Article III.[18] *See also* Pet. App. 99a–101a (Murphy, J., dissenting). *Cf. B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 171 (2015) (Thomas, J., dissenting) ("Because federal administrative agencies are part of the Executive Branch, it is not clear that they have power to adjudicate claims involving core private rights."). This Court "has held that actions seeking civil penalties are akin to special types of actions in debt from early in our nation's history which were distinctly legal claims." *Jarkesy*, 34 F.4th at 454 (citing *Tull v. United States*, 481 U.S. 412, 417–19 (1987)). "A civil penalty was a type of remedy at

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[18] The statutory provision mandating judicial deference to the FDIC's factual findings may well also be unconstitutional. *See also* Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 Geo. J.L. & Pub. Pol'y 27, 42–58 (2018); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1247 (1994).

common law that could only be enforced in courts of law." *Tull*, 481 U.S. at 422. Accordingly, the FDIC's enforcement action against Mr. Calcutt simply "is not the sort that may be properly assigned to agency adjudication under the public-rights doctrine." *Jarkesy*, 34 F.4th at 455. Instead, if the FDIC wishes to prosecute Mr. Calcutt, the Constitution requires it do so in an Article III court.[19] *See generally B&B Hardware,* 575 U.S. at 171 (Thomas, J., dissenting) ("Under our Constitution, the 'judicial power' belongs to Article III courts and cannot be shared with the Legislature or the Executive." (citing *Stern v. Marshall*, 564 U. S. 462, 482–83 (2011). To the extent the FDIC ALJs are, in fact, purporting to exercise the "judicial Power," that office should not exist. *Cf.* Pet. App. 90a–92a (Murphy, J., dissenting).

Mr. Calcutt also had a Seventh Amendment right to be tried before a jury of his peers before the FDIC could end his career and extract substantial civil penalties from him. *See* U.S. Const. amend. VII; *Tull*, 481 U.S. at 422; *Jarkesy*, 34 F.4th at 453–55. *Cf.* Pet. App. 99a–101a (Murphy, J., dissenting). The FDIC's inhouse process violated that right too. *See Burgess*, 2022 U.S. Dist. LEXIS 213050, at *32 ("Plaintiff has shown a substantial likelihood of success on the merits of his claim that the FDIC violated Plaintiff's Seventh Amendment right to a jury trial.").

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[19] "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III." *Stern*, 564 U.S. at 484.

As Judge Murphy noted in dissent: "There must be *some* limit to the government's ability to dissolve the Constitution's usual separation-of-powers and due-process protections by waving a nebulous 'public rights' flag at a court." Pet. App. 101a. Whatever the limit, the FDIC's process exceeds it. The FDIC's administrative prosecution trampled upon Mr. Calcutt's constitutional rights. It should not be allowed to stand. *See Burgess v. FDIC*, No. 22-cv-00100, 2022 U.S. Dist. LEXIS 223387, at *5 (N.D. Tex. Dec. 1, 2022) ("As the entire Enforcement Proceeding is unconstitutional, the Court finds it must enjoin the entire Enforcement Proceeding.").

IV. Granting Meaningful Relief for Article II Violations Affecting Private Rights Will Not Cause the Floodgates to Open.

Granting meaningful relief for Article II removal-restriction violations affecting private rights to liberty or property, like those at issue here, *see* Pet. App. 99a–101a (Murphy, J., dissenting), would not cause practical or floodgates problems. This also is true with respect to addressing the broader constitutional problems with inhouse enforcement processes implicating *private*, as opposed to *public*, rights.

After all, matters involving garden variety public rights, such as claims involving government benefits and federal employment disputes, need not be

addressed by Article III courts in the first instance.[20] As Professor Mila Sohoni has explained, "a government denial of Social Security benefits or a termination of a government employee for cause would not" implicate private rights. Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 Nw. U.L. Rev. 1569, 1586 (2013); *see also Austin v. Shalala*, 994 F.2d 1170, 1177 (5th Cir. 1993) (noting "public right for the government to recover the overpayment of social security benefits" properly assigned to agency). Accordingly, these matters may be initially assigned to administrative forums.

The overwhelming majority of ALJs are tasked with this sort of work. To put this in perspective, as of 2017, there were 1,655 Social Security Administration ALJs and 101 Department of Health and Human Services/Office of Medicare Hearings and Appeals ALJs. *See generally* OPM, ALJs By Agency (as of March 2017), https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency. By contrast, of the nearly two thousand ALJs employed by the federal government, *id.*, the FDIC uses two ALJs, *see* Pet. App. 9a ("Two ALJs currently make up the pool in OFIA."); Pet 6.

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[20] *Cf. Free Enter. Fund*, 561 U.S. at 542–43 (Breyer, J., dissenting) ("[T]he Federal Government relies on 1,584 ALJs to adjudicate administrative matters in over 25 agencies. These ALJs adjudicate Social Security benefits, employment disputes, and other matters highly important to individuals.").

CONCLUSION

This Court should grant plenary review on both questions presented by the Petition.

Respectfully submitted,

Michael Pepson
Counsel of Record
Cynthia Fleming Crawford
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-4529
mpepson@afphq.org

Counsel for Amicus Curiae February 24, 2023