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

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), and its progeny required the Sixth Circuit to remand the case to the agency after determining that the agency had applied the wrong legal standards.

2. Whether *Collins v. Yellen*, 141 S. Ct. 1761 (2021), requires separation-of-powers challengers to offer concrete proof of prejudice as a prerequisite to courts' resolving separation-of-powers challenges to removal restrictions on the merits.

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INTEREST OF AMICUS CURIAE[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as amicus opposing the accumulation of power in any one governmental branch, contrary to the Constitution's careful separation of powers. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

WLF's Legal Studies Division also regularly publishes papers highlighting unconstitutional agency structures. *See, e.g.*, Steven Cernak, *FTC's Challenge To Altria-JUUL Transaction: Antitrust And Constitutional Issues Hiding In Plain Sight*, WLF LEGAL BACKGROUNDER (Sept. 7, 2022); Lawrence S. Ebner, *Unconstitutionally Appointed Administrative Law Judges Continue To Haunt SEC*, WLF LEGAL BACKGROUNDER (Feb. 24, 2017). WLF believes that this Court should reign in these unconstitutional agency structures.

INTRODUCTION

An applicant seeking a stay pending disposition of a certiorari petition "must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will

[*] No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission. All parties received timely notice of this filing.

vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*per curiam*). Here, Justice Kavanaugh found that Harry C. Calcutt III made these showings and so stayed the Sixth Circuit's decision. He was correct that this case is deserving of the Court's review.

The Sixth Circuit *sua sponte* held that it could substitute its reasoned judgment for that of the Federal Deposit Insurance Corporation when deciding the appropriate penalty for a regulatory violation. When Calcutt flagged this flaw in his rehearing petition, the FDIC correctly confessed error in its response and did not oppose rehearing. Yet the Sixth Circuit ignored both parties' pleas and denied the rehearing petition. That left in place the panel opinion, which supplanted the FDIC's judgment. It also deepened a circuit split on whether remand is necessary when a regulatory agency exercises discretion after applying the wrong legal rule. This is reason enough to grant the Petition.

But that is not the only reason that this case cries out for review. Since this Court's decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), lower courts have struggled with deciding when regulated parties may challenge an unconstitutional agency structure. Many courts, including the Sixth Circuit, have held that the answer is almost never. This means that in the Sixth Circuit unconstitutional agencies may continue forever because of an alleged lack of standing. This misreading of *Collins* should be halted so that unconstitutionally structured agencies cannot sanction regulated parties.

STATEMENT

In 2013, the FDIC told Calcutt it intended to remove him from office, prohibit him from further participating in the banking industry, and impose monetary penalties. The charges stemmed from Calcutt's time as president of Northwestern Bank. Over seven years later, the FDIC issued its final decision. The agency's meandering path ignored the Constitution's structure and Calcutt's due-process rights.

After extensive discovery, Administrative Law Judge C. Richard Miserendino held an eight-day hearing in September 2015. Twelve witnesses testified. For purposes of the 2015 hearing, Calcutt and the FDIC agreed to some stipulations. In July 2017, ALJ Miserendino recommended a decision. But before the FDIC could act, this Court held that Securities and Exchange Commission ALJs are inferior officers. *Lucia*, 138 S. Ct. at 2051-56. Realizing that FDIC ALJs are also inferior officers, the FDIC remanded Calcutt's case to a new ALJ—Christopher B. McNeil—and ordered a new hearing.

Yet that new hearing never occurred. On remand, ALJ McNeil denied Calcutt's request for a de novo hearing. ALJ McNeil considered the 2015-hearing testimony and the 2015 stipulations—even though Calcutt now objected to the stipulations. This allowed ALJ McNeil to severely limit the November 2019 hearing's testimony. Moving at warp speed, ALJ McNeil recommended a decision less than five months later.

Calcutt filed exceptions with the FDIC. Rather than analyze Calcutt's exceptions, the FDIC rejected many by referring to its factual recitation. The FDIC then block quoted one of its prior decisions to reject Calcutt's challenge to the FDIC's ALJ-removal process. It similarly cited a prior decision in holding that Calcutt was not entitled to a de novo hearing.

Calcutt petitioned the Sixth Circuit for review of the FDIC's final order. The court of appeals refused to address the merits of Calcutt's constitutional arguments. Rather, it relied on *Collins* to hold that, even if the FDIC's structure violates Article II, Calcutt could not obtain relief for that defect. In other words, the FDIC could continue as normal even if its structure is unconstitutional.

When addressing Calcutt's non-constitutional challenges, the Sixth Circuit agreed that the FDIC made many legal errors. But rather than remand to the FDIC for it to apply the correct legal principles to the facts, the Sixth Circuit substituted its judgment for the FDIC's judgment. At the rehearing stage, the FDIC confessed that this was error and did not oppose remand for proper application of law to facts. Because the Sixth Circuit ignored that confession and denied rehearing, Calcutt seeks certiorari.

SUMMARY OF ARGUMENT

I.A. The courts of appeals are split on how to apply *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). Most courts of appeals have held that *Chenery* requires a court of appeals to remand to an agency for correct application of law to facts when the agency exercised discretion in assessing penalties but applied the

wrong law. These courts only bypass remand when the agency's legal errors could not have affected the decision being reviewed. The Sixth Circuit, however, split from this overwhelming consensus of courts about when remand is necessary.

B. The Sixth Circuit is on the short end of the circuit split here because this Court's decisions are clear. Remand is necessary when an agency makes a legal error along with a discretionary determination that could change under the correct legal rule. Allowing courts to make these decisions in the first instance not only conflicts with administrative law principles, it also violates core separation-of-powers and due-process principles.

C. The question presented is vital. The *Chenery* rule touches most areas of administrative law. Courts cannot comb the record to affirm on a ground not reached by an administrative agency. Yet that is what the Sixth Circuit's decision allows. If this Court denies review, confusion will prevail in the Sixth Circuit and that confusion may spread to other circuits too.

II.A. The Sixth Circuit's decision that Calcutt would never be entitled to relief, even if the FDIC's structure is unconstitutional, conflicts with *Collins*. The Sixth Circuit added language to *Collins* that simply doesn't exist and ignored the Court's actual holding on potential harm.

B. Other decisions from this Court confirm that the Sixth Circuit misread *Collins*. In at least two cases, the Court granted relief without requiring the type of harm that the Sixth Circuit says is needed to

prevail. These decisions are effectively ignored in the Sixth Circuit after its decision here.

III. The Court has held that officers cannot enjoy two layers of for-cause removal protections. Yet FDIC ALJs enjoy two or three layers of such protection. This structure violates Article II. The Court should not allow such an unconstitutional agency to continue depriving citizens of their liberty.

ARGUMENT

I. REVIEW IS NEEDED TO CLARIFY WHEN A COURT MUST REMAND AFTER AN AGENCY EXERCISES DISCRETION WHILE APPLYING THE WRONG LAW.

Courts cannot substitute their views for "determination[s] of policy or judgment which the agency alone is authorized to make." *Chenery*, 318 U.S. at 88. The Sixth Circuit refused to follow *Chenery*'s longstanding rule. Rather, it expanded the meaning of "harmless" so that courts can substitute their judgment for that of expert agencies as they please. This will undercut agency decision-making.

A. The Sixth Circuit Created A Circuit Split On Whether Remand Is Necessary When An Agency Makes Legal Errors.

The Sixth Circuit said that "[r]emand is unnecessary where an agency's 'incorrect [legal] reasoning * * * played no part in its discretionary determination.'" Pet. App. 73a (quoting *United Video, Inc. v. FCC*, 890 F.2d 1173, 1190 (D.C. Cir. 1989)).

United Video, however, held that legal mistakes are harmless errors only when applying either the agency's or the court's interpretation necessarily requires the same result. 890 F.2d at 1190 n.15. The Sixth Circuit admitted that barring Calcutt from the banking industry was a discretionary decision; the correct legal standard doesn't require occupational debarment. *See* Pet. App. 73a. Other circuits would thus view *United Video* as irrelevant when deciding whether remand is appropriate here.

A recent decision illustrates the circuit split. In *United States v. Schwarzbaum*, 24 F.4th 1355 (11th Cir. 2022), the Internal Revenue Service incorrectly calculated penalties for willful failure to file forms. The court recalculated the discretionary penalty and entered judgment for the United States. The Eleventh Circuit reversed because "the fact that the IRS may reach a different result when it recalculates Schwarzbaum's penalties * * * is enough to justify remand." *Id.* at 1366. In other words, remand is necessary whenever there is a "chance that but for the error the agency might have reached a different result." Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 Duke L.J. 199, 211 (citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality)).

The FDIC never considered whether occupational debarment was warranted under the correct legal standard. As the Ninth Circuit has said, "[a] remand for further proceedings is indeed required to allow the agency to consider in the first instance an issue that it had not previously addressed." *Miskey v. Kijakazi*, 33 F.4th 565, 575 (9th Cir. 2022) (cleaned

up). So the Sixth Circuit should have remanded this case to the FDIC to reconsider Calcutt's penalty.

This rule applies to all administrative agencies. When the Board of Veterans' Appeals "misinterprets the law and fails to make the relevant initial factual findings," the reviewing court must remand for application of the correct law. *Byron v. Shinseki*, 670 F.3d 1202, 1205 (Fed. Cir. 2012) (citation omitted). Here, the FDIC never made factual findings about the appropriate penalty under the correct legal standard.

The Sixth Circuit's decision also conflicts with the Tenth Circuit's application of the *Chenery* rule. In *Utah Env't Cong. v. Troyer*, the district court held "that the Forest Service's failure [to apply the best-available-science rule] was harmless" because its "reliance on other available data effectively satisfied the best available science requirements." 479 F.3d 1269, 1287 (10th Cir. 2007). The Tenth Circuit reversed because the error was not harmless; the statute did not mandate a result. *See id.* So the Sixth Circuit's decision splits from many other circuits' decisions requiring remand in similar circumstances.

B. The Sixth Circuit Departed From This Court's Well-Settled Jurisprudence.

The lopsided circuit split is unsurprising given this Court's precedent. Policy judgments and fact-finding are outside the domain of reviewing courts. Judges lack the subject-matter expertise necessary to make agencies' policy decisions for them. *See Ojo v. Garland*, 25 F.4th 152, 171 (2d Cir. 2022) ("[A]n

appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." (quoting *Chenery*, 318 U.S. at 88)).

Reviewing courts are also far too removed from agency hearings to act as fact-finders. *See* 5 U.S.C. § 706(2)(e). For example, the FDIC often imposes a smaller fine and does not bar someone from the banking industry when the harm is below a certain level. The Sixth Circuit is oblivious to past agency practice or how it exercises its discretion in those cases. Yet the court plowed ahead and found that occupational debarment was appropriate here.

Chenery also reaffirms that "[t]he interpretation of the laws [remains] the proper and peculiar province of the courts." The Federalist No. 78, 467 (Alexander Hamilton) (Clinton Rossiter ed. 1961); *see* 5 U.S.C. § 706 ("[T]he reviewing court shall decide all relevant questions of law."). While an agency may interpret statutes it administers, "an order may not stand if the agency has misconceived the law." *Chenery*, 318 U.S. at 94. When the Sixth Circuit pardoned the FDIC's erroneous interpretation of 12 U.S.C. § 1818(e), it sent the message that agencies can misinterpret the law and still have an Article III tribunal affirm.

That's not right. The Administrative Procedure Act, this Court's precedent, and due-process principles all require that parties receive meaningful judicial review after exhausting agencies' internal appeals. *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court

are subject to judicial review."); *see generally Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019) (stressing the need for meaningful judicial review of agency actions). Yet under the Sixth Circuit's standard, courts will not remand cases if they deem remand a "useless formality," Pet. App. at 73a (quoting *Wyman-Gordon Co.*, 394 U.S. at 766 n.6 (plurality)), and can resolve the case more quickly by acting as policymaker. Thus, parties will enter a courtroom arguing under one legal standard (the agency's) and leave having lost under another (the court's). Put simply, "for the courts to substitute their * * * discretion for that of the [agency] is incompatible with * * * judicial review." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962).

Judicial review here is particularly important. "[S]anctions of occupational debarment" are "harsh." *Smith v. Doe*, 538 U.S. 84, 100 (2004) (citing *Hudson v. United States*, 522 U.S. 93, 104 (1997); *De Veau v. Braisted*, 363 U.S. 144, 160 (1960)). Calcutt built a career in the banking industry and may wish to pursue similar work again. The FDIC barred him from working in the industry based on an incorrect legal theory that the Sixth Circuit rightly rejected.

But now Calcutt is denied the ability to appeal his occupational debarment under the correct legal standard. The Sixth Circuit acted as both the fact-finder and the "reviewer." Of course, judicial review means that an independent Article III tribunal checks the fact-finder's work to see if any mistakes were made. It does not mean that the fact-finder checks its own work to see if it passes muster. Yet that is what the Sixth Circuit allowed to pass for judicial review here.

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Congress, on the other hand, says what the law should be. *See* U.S. Const. art. I, § 1. "Allowing judges to pick and choose between" the appropriate sanction under the banking laws "transform[s] them from expounders of what the law is into policymakers choosing what the law should be." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). Agencies balance many factors when deciding penalties. But when courts blend that with judicial review, they disregard the soft considerations that conflict with their intended ruling. This approach violates fundamental due-process principles and is reason to grant review.

C. The Framework For Deciding When To Remand For Agency Consideration Is Vitally Important And Deserves This Court's Review.

Because of the decision below, whether a case is remanded to an agency that made a legal error turns almost exclusively on which court of appeals a petition for review is filed in or which circuit a challenge is pending. In most of the country, remand is necessary when a discretionary action is possibly tainted by a legal error. But in the Sixth Circuit, remand is unnecessary if the record below could support the agency reaching the same conclusion. This split is of critical importance and the Court should resolve it.

The cases evidencing the circuit split on the important *Chenery* issue, cited in § 1.A. *supra*, reveal the breadth of cases affected by the Sixth Circuit's

ruling. From appeals of Social Security determinations to review of an Occupational Health and Safety Administration order, the *Chenery* rule touches almost every area of administrative law. If the Sixth Circuit's decision is left to stand, the courts of appeals will have a staggering amount of power.

American courts follow the party-presentation rule under which the parties frame the issues for courts to decide. *Greenlaw v. United States*, 554 U.S. 237, 243 (2008), This means that "[c]ourts are essentially passive instruments of government." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (quotation omitted).

That rule disappears under the Sixth Circuit's *Chenery* analysis. The Sixth Circuit's decision allows courts of appeals to comb the records and form arguments for why exercises of discretion would be permissible under the correct legal rule. Yet there is no way to know if the agency itself would have reached that conclusion. Even if the evidence supports a finding, that does not make it the only reasonable finding that the agency could reach. That is the entire premise of abuse-of-discretion review. A court "must not substitute its judgment for that" of the one whose decision it is reviewing. *United States v. Tsarnaev*, 142 S. Ct. 1024, 1040 (2022). But that is what the Sixth Circuit did here. It substituted its judgment for that of the FDIC.

Of course, this is not a one-way ratchet. Sometimes, an agency errs in a way that lessened a regulated party's culpability. Under the proper legal rule, the regulated party may face harsher penalties or its conduct may be worse when viewed under the

correct legal principles. In those cases, agencies would want the ability to reconsider the penalty and exercise discretion anew given the correct legal rule. Agencies would not want the courts of appeals to comb the record to determine whether the lesser penalty would still satisfy abuse-of-discretion review under the correct legal rule.

That may be one reason that the FDIC confessed error. Sure, the Sixth Circuit's decision is grievously wrong and that alone was reason to confess error. But it's more likely that there was some parochial interest here. The FDIC wants to maintain its ability to make important policy and discretionary judgments with its unconstitutional structure moving forward. Having convinced the Sixth Circuit to punt on the constitutional question, the FDIC was disappointed that the Sixth Circuit then usurped its authority by substituting the court's judgment for the agency's judgment.

The Sixth Circuit's depriving Calcutt of his rights here by not remanding to the FDIC is even worse than not remanding for possible increased penalties. The FDIC might have its feelings hurt if a penalty is affirmed based on a court's judgment. But it is much worse to lose the ability to make a living in the only profession one has known just because two judges decided that they knew better than the FDIC. This Court should intervene to ensure that moving forward parties in the Sixth Circuit can rest assured that most legal errors will lead to remand for further agency action.

II. THE COURT SHOULD CLARIFY WHEN PARTIES MAY CHALLENGE UNCONSTITUTIONAL AGENCY STRUCTURES.

A. *Collins* Does Not Support The Sixth Circuit's Decision.

The Sixth Circuit declined to decide whether the FDIC's structure is constitutional because it found that, even if it were, Calcutt is unentitled to relief. *See* Pet. App. 23a-24a. This holding conflicts with this Court's decisions on remedies for constitutional violations.

Leaning heavily on *Collins*, the panel held that Calcutt could not show harm. But the standard the Sixth Circuit applied is nothing like the standard the Court used in *Collins*. The panel emphasized that in *Collins* this "Court was not deterred from its holding by the very possibility that harm might occur; rather, it indicated that a more concrete showing was needed." Pet. App. 36a. The word "concrete," however, appears only once in *Collins*—in the standing section. *See* 141 S. Ct. at 1779.

Collins shows that Calcutt is entitled to relief. After finding that the agency's structure violated Article II, the Court considered the appropriate remedy. Because it could not rule out that "the unconstitutional restriction on the President's power to remove" an agency director affected the case's outcome, the Court ordered fact-finding on that issue. *See Collins*, 141 S. Ct. at 1789. The same is required here. Perhaps the unconstitutional removal protections—both for FDIC ALJs and board members—affected this case's outcome. The Sixth

Circuit wrongly swept aside these concerns; Calcutt was denied an opportunity to prove the harm he suffered because of the FDIC's unconstitutional structure. The Sixth Circuit's decision thus does not align with *Collins*.

B. This Court's Other Decisions Also Confirm The Sixth Circuit's Errors.

1. The panel's decision also strays from this Court's decisions about non-dispositive votes on multi-member adjudicatory bodies. For example, the Court vacated a 7-0 decision by the Supreme Court of Pennsylvania in *Williams v. Pennsylvania*, 579 U.S. 1 (2016). One of the seven justices on the Pennsylvania Supreme Court should have recused himself. Pennsylvania argued that any error was harmless because the vote was 7-0 and the non-recusing justice's vote did not affect the case's outcome. The Court soundly rejected that argument.

As the Court said, "it does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position." *Williams*, 579 U.S. at 15. The same is true here. The lack of dissenting votes may mean FDIC board members and ALJs felt insulated enough to issue this decision. They didn't have to worry about what the President thought about their actions. So requiring Calcutt to show that the FDIC would have acted differently but for the removal protections conflicts with *Williams*.

2. *NLRB v. Noel Canning*, 573 U.S. 513 (2014) also shows the absurd results that could flow from the Sixth Circuit's ruling. There, the Court held that the President's recess appointments violated the Constitution and invalidated NLRB actions taken after those appointments. The Court didn't require a showing that the Senate would have declined to confirm the President's appointments or that Senate-confirmed appointees would have voted differently.

But that is the essence of the Sixth Circuit's decision here. Under its harmless error analysis, Noel Canning would have had to show that the Senate would not have confirmed the recess appointees were it in session, or that Senate-approved candidates would have voted differently, to obtain relief on its Article II challenge. Of course, this Court did not require that showing. In other words, the Court granted Noel Canning relief it would not have been entitled to under the panel's ruling.

III. THE FDIC'S STRUCTURE VIOLATES ARTICLE II.

A web of statutes governs removal of FDIC ALJs. This web provides FDIC ALJs with multiple levels of for-cause removal protection. The FDIC may remove an ALJ "only for good cause established and determined by the Merit Systems Protection Board." 5 U.S.C. § 7521(a). This is one level of for-cause removal protection. There is, however, at least one more level of for-cause removal protection. The President may remove MSPB members "only for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 1202(d). This is the second level of for-cause removal protection.

That is not all. "Since the early 1990s, the" FDIC and other banking agencies have shared "a small" ALJ "pool." *Ortega v. U.S. Dep't of the Treasury*, 2019 WL 7598602, *1 (S.D. Tex. Dec. 20, 2019), *adopted*, 2020 WL 263587 (S.D. Tex. Jan. 17, 2020). Federal law requires this arrangement. *See* Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, § 916(a), 103 Stat. 183, 486-87.

A 2018 agreement governs the shared-ALJ pool. An oversight committee—comprised of one member from each agency—oversees the shared ALJs. This means that even if the MSPB finds cause to remove an ALJ, the FDIC might have to go through this inter-agency review committee first. This structure unconstitutionally protects FDIC ALJs from removal.

The issue requires only straightforward application of *Free Enterprise Fund*. There, an accounting firm challenged the Public Company Accounting Oversight Board's structure. The PCAOB included five members, appointed by the SEC to staggered five-year terms. *Free Enter. Fund*, 561 U.S. at 484. This resembled the MSPB's structure—with two more members. *See* 5 U.S.C. §§ 1201, 1202.

PCAOB members were inferior officers under Article II. *Free Enter. Fund*, 561 U.S. at 510. The SEC could remove PCAOB members only for cause. *Id.* at 486 (citation omitted). This was the first level of for-cause removal protection and tracked the for-cause removal protection for FDIC ALJs. *See* 5 U.S.C. § 7521(a).

But that was not the only protection PCAOB members enjoyed. The President could not remove SEC commissioners without cause. *Free Enter. Fund*, 561 U.S. at 487 (citations omitted). This second level of for-cause removal protection was the same protection afforded to MSPB members. *See* 5 U.S.C. § 1202(d).

"[T]he dual for-cause limitations on the removal of [PCAOB] members," the Court explained, "contravene[d] the Constitution's separation of powers." *Free Enter. Fund*, 561 U.S. at 492. The two levels of protection "transform[ed]" the PCAOB's independence. *Id.* at 496. And they deprived the President—and those he supervised—of "full control over the" PCAOB. *Id.* This "stripped" the President of "his ability to execute the laws—by holding his subordinates accountable for their conduct." *Id.*

The two-layer for-cause removal protection for FDIC ALJs similarly strips the President of the ability to hold inferior officers accountable. He cannot remove the ALJs directly. Nor can he remove them indirectly by demanding that the MSPB remove them. So the President cannot execute the banking laws under this structure.

This "arrangement is contrary to Article II's vesting of the executive power in the President." *Free Enter. Fund*, 561 U.S. at 496. The President cannot decide whether FDIC ALJs "are abusing their offices or neglecting their duties." *Id.* MSPB members—whom the President can remove only for cause—make that call. This lack of oversight violates the principle that there is a single President who must take care that the laws be faithfully executed. *See id.* at 496-97

(citing *Clinton v. Jones*, 520 U.S. 681, 712-13 (1997) (Breyer, J., concurring)).

Free Enterprise Fund also distinguished prior cases that upheld some for-cause removal protections. For example, *Humphrey's Ex'r v. United States* upheld for-cause removal protection for Federal Trade Commission commissioners. 295 U.S. 602, 621-32 (1935). The Court explained that Congress can allow "quasi-legislative and quasi-judicial" multi-member agencies to operate independently. *Free Enter. Fund*, 561 U.S. at 493 (quotation omitted). In other limited circumstances, the Court held that "Congress [can] provide tenure protections to certain inferior officers with narrowly defined duties." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192 (2020) (citations omitted).

In *Free Enterprise Fund*, the Court found cases in which it had upheld for-cause removal protections inapposite because the PCAOB's dual for-cause removal protection was "novel." 561 U.S. at 496. Such dual-layer protection does "not merely add" to an officer's agency. *Id.* Rather, it makes officers unaccountable to anyone—including the President. Article II does not permit that structure.

Put differently, the "narrow exception[s]" the Court has recognized do "not extend to two layers of for-cause tenure protection." *Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093, 1117 (D.C. Cir. 2021) (Rao, J., concurring in part and dissenting in part). So "statutory insulation of ALJs with two layers of for-cause removal protection impedes the President's control over execution of the laws and violates the

Constitution's structure of separate and independent powers." *Id.* at 1117-18.

Accepting dual for-cause removal protection could "multipl[y]" the "dispersion of responsibility." *Free Enter. Fund*, 561 U.S. at 497. There is no stopping three, four, or even ten levels of for-cause removal protection. This would essentially eliminate the President's supervision of officers. Once appointed, an officer could stay for life. If the Framers wanted this structure, they knew how to secure it. *See* U.S. Const. art. III, § 1 (judges "hold their Offices during good Behaviour"). They chose a different path.

This case shows possible creep towards ten-level for-cause removal protection. Officers with for-cause removal protection may serve on the inter-agency committee that oversees the banking ALJ pool. If so, this would add another layer of for-cause removal protection if the inter-agency committee must agree with the MSPB's for-cause finding before referral to the FDIC for final action. But even if this is not the case, this structure shows how Congress could add levels of protection. This Court rejected this slippery slope in *Free Enterprise Fund*. Straightforward application of that decision shows that FDIC ALJs enjoy unconstitutional removal protection. Courts of appeals should not be able to punt on these important structural questions under the guise of redressability. Thus, the Court should grant the Petition and require courts to address the merits of these constitutional challenges to agencies' structures.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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