**CASE NO. 20-4303**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

HARRY C. CALCUTT, III,
*Petitioner*,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
*Respondent*.

On Appeal from a Final Decision and Order
By Federal Deposit Insurance Corporation

**BRIEF OF THE CATO INSTITUTE
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER**

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## INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*.

Cato has a strong interest in enforcing our constitutional separation of powers and ensuring the accountability of executive officers—issues that this case presents.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

In a word, the Appointments Clause is about accountability. "The people do not vote for the 'Officers of the United States.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 498–99 (2010) (quoting and citing U.S. Const. art. II, § 2, cl. 2). The people instead elect a president who governs by managing "a clear and effective chain of command" of constitutionally appointed officers. *Id.* at 498. Of course, "[t]he Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so," including "the authority to remove those who assist him in carrying out his duties."

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in any part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

*Id.* at 513; *see also Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2218 (2020) (explaining that "without the power of removal, the President cannot 'be held fully accountable' for the exercise of the executive power"). As a result, the "general rule" is that the Constitution implicitly grants the president an "unrestricted removal power." *Id.* at 2198.

Still, in limited circumstances, the Supreme Court has upheld the constitutionality of statutory restraints on the president's removal authority. These regulations typically require "good cause" before the official can be dismissed. *See, e.g.*, 5 U.S.C. § 7521(a) (establishing "good cause" protections for federal administrative law judges); 12 U.S.C. § 1812 (establishing tenure protections for the Board that heads the FDIC). "Good cause," in turn, is widely understood to entail "inefficiency, neglect of duty, or malfeasance in office," though the Supreme Court has never elucidated any of these terms. *See Free Enter. Fund*, 561 U.S. at 545–547 (Breyer, J., dissenting) (observing that these concepts are "certainly not obvious").

In reviewing the constitutionality of removal regulations that apply to "inferior officers," the Court has set forth two concurrent frameworks. The first, which was established in *Morrison v. Olson*, is a functional standard that permits removal restrictions for inferior officers only to the extent such limits do not "impede" the president's ability to faithfully execute the law. *See* 487 U.S. 654, 691 (1988). The second framework, set forth in *Free Enterprise Fund*, is a formalistic rule that allows Congress to require for-cause removal for inferior officers, but only if it is "the President—or a subordinate he could remove at will—who decide[s] whether the [inferior] officer's conduct merited removal under the good-cause standard." 561 U.S. at 495; *see also id.* at 492 ("We hold that dual for-cause limitations on the removal of [inferior officers] contravene the Constitution's separation of powers."). Last year, the Court affirmed the viability of both frameworks. *Seila Law LLC*, 140 S. Ct. at 2198–99.

The FDIC employs two administrative law judges ("FDIC judges"), and they are inferior officers. *See Lucia v. SEC*, 138 S. Ct. 2044, 2053–55 (2018) (holding that administrative law judges at the Securities and Exchange Commission are inferior officers). Further, Congress endowed these inferior officers with for-cause removal protections. *See* 5 U.S.C. § 7521(a). Accordingly, FDIC judges are subject to both the *Morrison* and *Free Enterprise Fund* frameworks for review. Under both approaches, the FDIC's adjudicative regime fails to pass constitutional muster.

Again, in *Free Enterprise Fund*, the Supreme Court held that "only one level of protected tenure may separate the president from an officer exercising executive power." *Free Enter. Fund*, 561 U.S. at 495. At the FDIC, there are five such layers. And because presidential oversight of the FDIC's regulatory purview is impossibly attenuated, these removal restrictions "impede the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 691.

To be clear, the overwhelming majority of federal administrative law judges (ALJs) pose no threat of upsetting the separation of powers. Most ALJs are purely adjudicative and therefore do not implicate the executive power, while other ALJs wield insufficient authority to impede the president's constitutional duties.

FDIC judges are different. They are among the small minority of ALJs who preside over adversarial proceedings where the government prosecutes substantial penalties against private citizens. Here, for example, the FDIC affirmed the administrative law judge's recommendation to summarily remove petitioner Harry Calcutt from his bank and extract $125,000 in penalties. In this manner, FDIC judges operate as crucial decisionmakers in regulatory enforcement—a quintessential executive function. And yet, despite exercising significant executive authority, FDIC judges escape any meaningful oversight by the executive. Such a diluted degree of presidential oversight cannot stand under prevailing Supreme Court precedent.

## ARGUMENT

### I. FDIC JUDGES ARE UNCONSTITUTIONALLY SHIELDED FROM EXECUTIVE OVERSIGHT

In *Free Enterprise Fund*, the Supreme Court held that Congress may not grant an inferior officer "more than one level of good-cause protection" without "contravening the President's constitutional obligation to ensure the faithful execution of the laws." 561 U.S. at 484 (cleaned up).

In an order interpreting *Free Enterprise Fund*, the FDIC claims that the Supreme Court "specifically exempted" ALJs. *In the Matter of: Michael R. Sapp*, Decision and Order to Prohibit from Further Participation and Assessment of Civil Money Penalty, FDIC 12-477(e), 33 (Sept. 17, 2019). According to the FDIC, the "rationale" for the Court's distinction "is that ALJs perform 'adjudicative' not enforcement or policymaking functions." *Id.*; *see also In the Matter of Harry C. Calcutt III*, Decision and Order to Remove and Prohibit from Further Participation and Assessment of Civil Money Penalties, FDIC-12-568e, 37 (Dec. 15, 2020) ("[Calcutt] has not shown that *Matter of Sapp* was wrongly decided.").

But the FDIC badly misrepresents *Free Enterprise Fund*, which in no way provided a blanket exemption for all ALJs. To the contrary, *Free Enterprise Fund* explained that its holding "does not address" agency adjudicators because "*many* administrative law judges of course perform adjudicative rather than enforcement or policymaking functions." 561 U.S. at 507 n.10 (emphasis added). The Court's clear implication is that while "many" ALJs are purely "adjudicative," some perform "enforcement or policymaking functions" and are, accordingly, subject to the constitutional prohibition on dual for-cause removal restrictions for inferior officers.

To understand the distinction between "adjudicative" agency judges, of which there are many, and the far less numerous "enforcement" agency judges—a minority that includes FDIC judges—it is instructive to consider the aggregate numbers. Of

1,931 federal ALJs, nearly 85 percent work for the Social Security Administration. *See* Office of Mgmt. & Budget, "ALJs by Agency" (last visited Apr. 10, 2021), https://bit.ly/2I3HumJ (identifying 1,655 of 1,931 federal ALJs as serving at the SSA). Unlike FDIC judges, Social Security judges perform an inquisitorial role in nonadversarial adjudications. *See* 42 U.S.C. § 495(b)(1); *see also Sims v. Apfel*, 530 U.S. 103, 110–11 (2000) (describing Social Security proceedings as inquisitorial and investigative rather than adversarial). Obviously, a nonadversarial controversy is far removed from "enforcement" as practiced by FDIC judges.

Of the remaining administrative adjudications that are involved in adversarial proceedings, only a small subset, including the FDIC judges, has the potential to raise separation-of-powers concerns. For example, a tenth of trial-like ALJs are constitutionally innocuous because they operate within idiosyncratic institutional frameworks at the Federal Mine Safety and Health Review Commission (15 ALJs) and the Occupational Safety and Health Review Commission (12 ALJs). *See* Office of Mgmt. & Budget, *supra*. Under these two "split enforcement" programs, prosecution and adjudication functions are siloed in different agencies; the Labor Department prosecutes, while the commissions adjudicate. *See generally* George R. Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 Admin. L. Rev. 315 (1987) (describing the creation and performance of these regimes). By congressional design, these two-of-a-kind commissions are "purely" adjudicative and, therefore, are outside the scope of the Supreme Court's prohibition on double tenure for executive branch officers.

And only a minority of the remaining judges—including those at the FDIC—preside over agency adjudications resulting directly in civil fines and restrictions on private conduct. *Compare* 12 U.S.C. § 1818(e), (i) (authorizing FDIC to impose civil penalties and expel bankers from the industry) *with* 29 U.S.C. §160(e) (requiring the National Labor Relations Board to petition the court of appeals to enforce its remedial orders for unfair labor practices); *see also* Office of Mgmt. & Budget, *supra* (identifying 34 ALJs at the Board).

Of almost 2,000 ALJs, the two judges at the FDIC are among the select few who preside over adversarial proceedings where the government prosecutes a regulatory violation for significant penalties in a trial-like setting. In this capacity, FDIC judges have "all powers necessary to conduct a proceeding in a fair and impartial manner," including the authority to "issue subpoenas," "rule upon the admission of evidence," and generally "regulate the course of the hearing." *See* 12 C.F.R. § 308.5. After building an administrative record, FDIC judges then recommend a decision, including "recommended findings of fact [and] recommended conclusions of law." *See* 12 C.F.R. § 308.38. In the administrative proceeding below. Here, for example, the FDIC affirmed the ALJ's recommendation to summarily remove petitioner from his bank and extract $125,000 in penalties. *See In the Matter of Harry C. Calcutt III*, Decision and Order, FDIC-12-568e, 5.

In sum, FDIC judges exercise "executive power" that cannot be sustained "without the Executive's oversight." *Free Enter. Fund*, 561 U.S. at 498. For this reason, the agency is simply wrong to claim that its ALJs are "exempted" from the prohibition on multiple layers of tenure protections for inferior officers. And, as demonstrated by the petitioner, the FDIC violates this bright-line rule. In *Free Enterprise Fund*, the Court invalidated two levels of for-cause removal restrictions, but FDIC judges are insulated from presidential control by five layers. Pet. Br. at 26-32 (explaining that a FDIC judge's removal would require multiple independent agencies to agree on the meaning of the ALJ's statutory employment protections).

## II. FOR-CAUSE REMOVAL RESTRICTIONS ON FDIC JUDGES "IMPEDE" EXECUTIVE DUTIES

In *Morrison v. Olson*, the Supreme Court set forth a framework for reviewing the constitutionality of congressional controls on the removal of inferior officers at independent agencies. Rather than a formalistic rule, this second separation-of-powers test is a functional approach that asks whether the removal regulation "impede[s] the President's ability to perform his constitutional duty." 487 U.S. at 691. Again, the FDIC's enforcement regime cannot clear that constitutional bar.

Crucially, the Court applied the *Morrison* framework only in settings where executive power "was trained inward to high-ranking Governmental actors." *Seila*

*Law LLC*, 140 S. Ct. at 2200. By contrast, the FDIC's two judges are key decisionmakers in a government process that "bring[s] the coercive power of the state to bear" on private citizens and businesses, such as the substantial penalties imposed on the petitioner. *Id.* at 2200-01.

More broadly, the FDIC's byzantine system for overseeing its judges "impedes" the president's ability to perform his constitutional duties and therefore runs afoul of separation of powers principles. As the petitioner explains, "the President would find it impossible to remove those ALJs even if they brazenly defied agency policy" because he would have to wade through five layers of for cause removal protections to discipline his subordinate. Pet. Br. at 2. These five layers result from the FDIC's participation in a unique multi-agency arrangement for sharing ALJs, and each agency apparently wields a veto over the disciplining of the pooled judges. *Id.* at 29-30. By "diffusing" power, this uncertain chain of command undermines the Constitution's "structural integrity." *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991). In practice, the unusual arrangement for overseeing FDIC judges makes it impossible for the public to "determine on whom the blame . . . ought really to fall" for "pernicious measures." Federalist No. 70 (Hamilton) (discussing importance of constitutional structure for political accountability). Does the buck stop with the FDIC, who appointed the judge? Or does it stop with the other three agencies who share responsibility for these judges, and whose consent is necessary to initiate removal proceedings? Or does it stop with the Merit System Protection Board, which renders the final determination on what constitutes "good cause"? See 5 U.S.C. § 7521(a). At a minimum, it's clear that the buck stops somewhere well short of the president. Because "the buck . . . stop[s] somewhere else," the president "c[an] not be held fully accountable for discharging his own responsibilities," in contravention of the separation of powers. S*ee Free Enter. Fund*, 561 U.S. at 514.

## CONCLUSION

As the Framers recognized, presidential control over the use of executive power by federal agencies is indispensable to good government and, ultimately, liberty. Because the Constitution requires that our government remain democratically accountable, *amicus* asks the Court to find that the FDIC enforcement regime is impermissibly insulated from presidential oversight.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 2,221 words, excluding the parts exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman, 14-point font.

/s/ *Ilya Shapiro*
April 14, 2021

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ *Ilya Shapiro*
April 14, 2021