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 THE FEDERAL DEPOSIT INSURANCE CORPORATION TO REMOVE AND PROHIBIT PETITIONER FROM FURTHER PARTICIPATION IN BANKING AND TO ASSESS CIVIL MONEY PENALTIES

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

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-4303 Case Name: Calcutt v. FDIC

Name of counsel: Michael Pepson

Pursuant to 6th Cir. R. 26.1, Americans for Prosperity Foundation ("AFPF")
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

AFPF has no independent knowledge of any such corporation. Please see Petitioner Mr. Harry Calcutt's Disclosure of Corporate Affiliations and Financial Interest.

CERTIFICATE OF SERVICE

I certify that on April 14, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Michael Pepson

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitution

Statutes

Rules

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

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. One of those ideas is that the separation of powers protects liberty. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF has a particular interest in this case because it believes businesses and individuals, like Petitioner, are entitled to a meaningful remedy for the government's separation-of-powers violations that will afford them complete redress in their specific cases, as required by Article III of the U.S. Constitution.

SUMMARY OF ARGUMENT

The Federal Deposit Insurance Corporation ("FDIC") is an "independent" federal agency that wields vast executive powers as investigator and prosecutor in its in-house enforcement actions. It also acts as the judge of its own cause, adjudicating the very complaints that it votes to issue against individuals whose careers and livelihoods are hanging in the balance. Its officials, shielded by a

[1] Pursuant to FRAP 29(a)(4)(E), *amicus curiae* states that no counsel for a party other than AFPF authored this brief in whole or in part, and no counsel or party other than AFPF made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. This brief is accompanied by an unopposed motion for leave to file.

Matryoshka doll of tenure protections, are effectively unaccountable to any of the three branches of government established by the U.S Constitution.

This extraconstitutional administrative body exercised its unconstitutional powers to issue an order shortly before Christmas 2020 against petitioner Mr. Harry Calcutt, a 73-year-old Michigan community bank chairman, seeking to remove him from his bank and extract $125,000 in civil penalties from him. But this order does not comport with the Constitution because the Administrative Law Judge ("ALJ") who adjudicated the case and recommended the course of action the Board adopted is unconstitutionally protected from removal; therefore, any action he takes is tainted by that violation. This Court should not allow the FDIC's actions to stand.

This particular case, and Mr. Calcutt's unfortunate Odyssey through the FDIC's administrative process, showcase a troubling disorder in the separation of powers. As Justice Jackson explained long ago, "[t]he rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. They also have begun to have important consequences on personal rights." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting). Justice Jackson continued: "They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional

thinking." *Id.* The problem is far worse today, as Congress has devised ever more novel and powerful administrative bodies unmoored to the U.S. Constitution.

As Chief Justice Roberts wrote 60 years later:

> Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules. The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government.

City of Arlington v. FCC, 569 U.S. 290, 312–13 (2013) (Roberts, C.J., dissenting). The Chief Justice observed: "The administrative state wields vast power and touches almost every aspect of daily life. . . . And the federal bureaucracy continues to grow; in the last 15 years, Congress has launched more than 50 new agencies." *Id.* at 313 (cleaned up). Eight years later, this trend shows no sign of slowing down and, by all indications, things will only get worse unless the Article III courts stand firm.

Recent Supreme Court precedent—such as *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020), and *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010)—has made plain that no amount of doctrinal subterfuge can sweep this constitutional disorder under the rug.

In this country, all government power must flow from its proper source—We the People. Our system of government relies on the consent of the governed

memorialized in the U.S. Constitution. The People have agreed on a system of separated powers, whereby the legislative, executive, and judicial branches authorized by that document function as checks and balances upon one another, ensuring accountability and protecting liberty. Words matter. And as its text, structure, and history make plain, our Constitution established *three* branches of government, which are supposed to be separate. *Not* four.

Not so, under various extraconstitutional statutory schemes purporting to authorize administrative bodies, known as "independent" agencies that are unaccountable to any of the three branches of government.

But the most basic rule of law principles demand the Constitution's text be followed. The multi-tier removal protections at issue here, as applied to FDIC ALJs, violate the Constitution. The FDIC administrative process is unconstitutional. This Court should not sweep this under the rug and cannot attempt to fix this constitutional problem by editing the statute(s). This Court should declare the FDIC administrative process unconstitutional and vacate the order without remand.

ARGUMENT

I. THE MULTI-TIER REMOVAL PROTECTIONS VIOLATE ARTICLE II.

"This case implicates one of the inherent tensions in the modern administrative state: Congress wanted to insulate ALJs from political interference, but ALJs wield tremendous power and still remain a part of the executive branch[.]'"

Axon Enter. v. FTC, 986 F.3d 1173, 1187 (9th Cir. 2021). That tension irreconcilably conflicts with the separation of powers and the U.S. Constitution. There is nothing this Court can, or should, do to solve these constitutional problems.

A. FDIC ALJs are Officers of the United States that Exercise Significant Executive Power and Must be Accountable to the President.

As the FDIC essentially admits, under *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the ALJ who presided over Petitioner's case is an Officer of the United States, impelling the Board to reassign Mr. Calcutt's case to a constitutionally-appointed ALJ, which the Board did. *See* A036–A037. That is because FDIC ALJs wield powers that are functionally indistinguishable from those possessed by the SEC ALJs in *Lucia*. *See Burgess v. FDIC*, 871 F.3d 297, 302–03 (5th Cir. 2017); Pet. Br. 34–35; *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 679 (6th Cir. 2018).

"Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution." *FTC v. Ruberoid Co.*, 343 U.S. at 487 (Jackson, J., dissenting). And so too here. In an effort to evade *Free Enterprise Fund*, the Board has suggested its ALJs are exempt from executive control "because ALJs perform 'adjudicative' not enforcement or policymaking functions[.]" *In re Sapp*, 2019 WL 5823871, at *19 (FDIC Sept. 17, 2019).

But merely labeling their function as "adjudicative" or adding the word "judge" to their title cannot change that these ALJs are necessarily executive

officials, who cannot exercise the judicial power.[2] *See* U.S. Const. art. III, § 1. As the Supreme Court has made clear, no matter how one describes the work ALJs are tasked with doing, "under our constitutional structure they *must be* exercises of—the 'executive Power.'" *City of Arlington*, 569 U.S. at 304 n.4; *see also Free Enterprise Fund*, 561 U.S. at 514; *id*. at 516 (Breyer, J., dissenting).

That should end the matter. As Petitioner explains, FDIC ALJs exercise significant executive authorities. *See* Pet. Br. 28. Put different, "as 'Officers of the United States,' ALJs exercise the Article II executive power on behalf of the President. To be sure, ALJs perform adjudicative functions and use adjudicatory procedures to execute the law. Whatever methods or functions are employed, however, officers of the Executive Branch cannot exercise anything but executive power[.]" *Fleming v. United States Dep't of Agric*., 987 F.3d 1093, 1115 (D.C. Cir. 2021) (Rao, J., concurring in part, dissenting in part) (citation omitted). Therefore, under Article II of the Constitution these "executive" officials must be accountable to the President, who, as an elected political official, is ultimately accountable to the root source of all of governmental power under our Constitution: We the People.

[2] This is not to impugn the character, competence, integrity, and impartiality of many ALJs in many agencies. Many ALJs are highly respected by practitioners, comport themselves like Article III judges, and are willing to hold agency staff to their burden of proof and rule against the agency.

This means that "executive" officials known as ALJs—who *cannot*, consistent with the separation of powers and constitutional structure, exercise any "judicial" powers—must be subject to control by the head of the executive branch: the President. That control ensures the President is accountable for the actions of these executive officials, including the ALJ in this case. But the President can duck this accountability unless he has authority to remove these executive actors. And that is precisely what the dual for-cause removal restrictions allow the President to do. That is plainly unconstitutional.

B. Congress Cannot Constitutionally Grant ALJs Two Levels of Removal Protection.

As Petitioner ably explains, *Lucia* and *Free Enterprise Fund* render the plain language of the combined removal provisions in 5 U.S.C. §§ 7521 and 1202(d), as applied to FDIC ALJs, incompatible with the separation of powers.[3] *See* Pet. Br. 31–32. The FDIC ALJs are shielded from removal, 5 U.S.C. § 7521(a), (b)(1) (permitting an ALJ to be removed only "for cause"), as are the members of the Merit System Protection Board ("MSPB"), which is responsible for removing these ALJs, 5 U.S.C. § 1202(d) (permitting Board members to be removed "only for inefficiency,

[3] Records Mr. Calcutt obtained pursuant to a FOIA request suggest the ALJs who preside over FDIC administrative proceedings enjoy unusual protection against removal, as *four* different agencies—*three of which* (including the FDIC) have heads that themselves enjoy for-cause removal protection—must *unanimously* agree to initiate ALJ removal proceedings. *See* Pet. Br. 21–22, 28–30; A124; Ex. L to Pet'r's Mot. to Stay, at 4 (Dkt. 7).

neglect of duty, or malfeasance in office"). This multi-level accountability barrier, standing alone, renders the administrative process constitutionally infirm.

As this Court recently observed in a situation in which administrative officials sought to expand federal criminal law through their regulations:

> Of all the separation-of-powers concerns [with administrative agencies]. . . , perhaps this is the most troubling: the bureaucrats at the agenc[ies] are unaccountable to the public. If the agency adopts an interpretation contrary to the will of the people, what recourse does the public have? Unlike legislators, agency bureaucrats are not subject to elections and are often further protected from removal by civil-service restrictions. Even when an agency implements the will of the public correctly, that determination may still violate the separation of powers.

Gun Owners of Am., Inc. v. Garland, __ F.3d __, 2021 U.S. App. LEXIS 8713, at *43-44 (6th Cir. Mar. 25, 2021). So too here, except that the relevant, elected, politically-accountable official is the President.

Under the Constitution, "[t]he entire 'executive Power' belongs to the President alone." *Seila Law*, 140 S. Ct. at 2197; *see* U.S. Const. art. II, § 1. And under the separation of powers, "[t]he buck stops with the President[.]" *Free Enter. Fund*, 561 U.S. at 493. The Framers specifically intended to ensure the President is held fully accountable for the actions of all Executive officials. *See id.* at 497–98.

Of course, the rise of the extraconstitutional fourth branch of government known as the Administrative State under the banner of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), has undermined the Constitution's separation of powers, allowed the President to escape accountability for the actions of a warren of

free-floating "independent" administrative bodies, and threatened individual liberty.[4] One tier of removal protection may well be one tier too many. But *two* (and possibly as many as *five* in this case) tiers of removal protection is a constitutional accountability nightmare.

"[A]gencies . . . have political accountability, because they are subject to the supervision of the President, who in turn answers to the public." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019). "The President's removal power has long been confirmed by history and precedent. It was discussed extensively in Congress when the first executive departments were created in 1789." *Seila Law*, 140 S. Ct. at 2197 (cleaned up). "Most members of [the First] Congress recognized that forbidding removal effectively would preclude presidential control of law execution and destroy presidential accountability for that task." Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 796 n.556 (2003). Given that the President's "selection of administrative officers is essential to the execution of the

[4] "*Humphrey's Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people." *Seila Law*, 140 S. Ct. at 2211 (Thomas, J., concurring in part and dissenting in part). "Continued reliance on *Humphrey's Executor* to justify the existence of independent agencies creates a serious, ongoing threat to our Government's design." *Id.* at 2218–19 (Thomas, J., concurring in part and dissenting in part). Indeed, *Humphrey*'s "conclusion that the FTC did not exercise executive power has not withstood the test of time." *Id.* at 2198 n.2. *See generally* Daniel Crane, *Debunking* Humphrey's Executor, 83 Geo. Wash. L. Rev. 1835 (2015).

laws by him, so must be his power of removing those for whom he can not continue to be responsible." *Myers v. United States*, 272 U.S. 52, 117 (1926).

The Supreme Court has only recognized two limited circumstances in which Congress can tie the President's hands by limiting this removal power: "one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority," suggesting these are the "outermost constitutional limits of permissible congressional restrictions on the President's removal power" the Court has recognized. *Seila Law*, 140 S. Ct. at 2199–200 (citation omitted).

Neither applies here. And the Supreme Court has held that "Congress cannot limit the President's authority" through granting "two levels of protection from removal for those who nonetheless exercise significant executive power." *Free Enter. Fund*, 561 U.S. at 514. But that is exactly what 5 U.S.C. §§ 7521 and 1202(d) grant to ALJs exercising executive powers. Making matters worse, the three presidentially appointed, Senate-confirmed Board members, by statute, serve fixed-length terms, 12 U.S.C. § 1812(c), and current jurisprudence suggests these unelected officials enjoy for-cause removal protections. *See Weiner v. United States*, 357 U.S. 349, 352, 356 (1958); *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988); *see also Free Enter. Fund*, 561 U.S. at 487. Indeed, as Petitioner explains, there are *five* layers of removal protections at issue here. *See* Pet. Br. 21–

23, 28–32. This "Matryoshka doll of tenure protections" is patently unconstitutional. *See Free Enter. Fund*, 561 U.S. at 497.

As Chief Justice Roberts has observed: "President Truman colorfully described his power over the administrative state by complaining, 'I thought I was the president, but when it comes to these bureaucrats, I can't do a damn thing.' President Kennedy once told a constituent, 'I agree with you, but I don't know if the government will.'" *City of Arlington*, 569 U.S. at 313–14 (Roberts, C.J., dissenting) (citations omitted). That sums up the FDIC pretty well.

II. THIS COURT SHOULD NOT TRY TO BLUE-PENCIL TITLE 5'S FOR-CAUSE REMOVAL PROVISION.

Amicus agrees with Petitioner that this Court should invalidate the FDIC removal order at issue in this case. But *amicus* urges the Court to go no further than invalidating the order. It must leave to Congress whether and how to fix the statute's constitutional problems (if it is even possible to do so).[5] This Court cannot cure the constitutional problems for two reasons: one practical, and one constitutional.

[5] "Congress [cannot] create agencies that straddle multiple branches of Government. The Constitution sets out three branches of Government and provides each with a different form of power—legislative, executive, and judicial. Free-floating agencies simply do not comport with this constitutional structure." *Seila Law*, 140 S. Ct. at 2216 (Thomas, J., concurring in part and dissenting in part) (citing Art. I, §1; Art. II, §1, cl. 1; Art. III, §1).

First, Congress tasked the MSPB and the Federal Circuit—not this Court—with determining what constitutes "good cause" to remove an ALJ under Section 7521. That section states an action may be taken against an ALJ "only for good cause *established and determined by the Merit Systems Protection Board*[.]" 5 U.S.C. § 7521(a) (emphasis added); *see also Long v. SSA*, 635 F.3d 526, 533 (Fed. Cir. 2011) ("Pursuant to 5 U.S.C. § 7521, the Agency was permitted to remove or suspend Long, an ALJ, 'only for good cause established and determined by the [MSPB].'") (citation omitted). Not only does "the [MSPB] ha[ve] exclusive rulemaking and adjudicatory authority with respect to section 7521," *Long*, 635 F.3d at 534 (citation omitted), but MSPB final orders can be reviewed only in the U.S. Court of Appeals for the Federal Circuit. *See* 5 U.S.C. § 7703(b)(1)(A). The Federal Circuit has "exclusive jurisdiction . . . of an appeal from a final order or decision of the [MSPB][.]" 28 U.S.C. § 1295(a)(9). In effect, any attempt by this Court to rewrite those provisions would be advisory, as it would not bind either the MSPB or the Federal Circuit. That alone should preclude any judicial rewrite of Tile 5's for-cause removal provision.

Second, any other remedial approach ignores the separation-of-powers-based limitations on Article III courts' ability to "revise" federal statutes—a task Article I vests in Congress alone. "[C]ourts cannot take a blue pencil to statutes[.]" *Murphy v. NCAA*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring). "Under our

constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." *United States v. Rutherford*, 442 U.S. 544, 555 (1979). "[T]he power of judicial review does not allow courts to revise statutes[.]" *Seila Law*, 140 S. Ct. at 2220 (Thomas, J., concurring in part and dissenting in part); *see also Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2365–66 (2020) (Gorsuch, J., dissenting in part) ("I am doubtful of our authority to rewrite the law in this way. . . . To start, it's hard to see how today's use of severability doctrine qualifies as a remedy at all[.]"). Courts may "'not rewrite a . . . law to conform it to constitutional requirements.'" *Reno v. ACLU*, 521 U.S. 844, 884–85 (1997) (citation omitted).

Instead, federal courts are tasked with adjudicating discrete "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). "[T]he judiciary has no power to alter, erase, or delay the effective date of a statute[.]" Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 942 (2018). Instead, the "province of the court is, solely, to decide on the rights of individuals[.]" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). When courts rule for a complaining party, they must focus on giving complete relief to that party, not rewriting statutes.

Here, the statutory language is a model of clarity: only the MSPB may establish and determine what constitutes "good cause" to remove an ALJ case-by-case, 5 U.S.C. § 7521(a), (b)(1), subject to exclusive review in the Federal Circuit, 5 U.S.C. § 7703; 28 U.S.C. § 1295(a)(9). These powers have broader application than just FDIC ALJs and thus any attempt to blue-pencil those provisions would implicate parties—and legislative policy considerations—not before this Court.

III. EDITING THE STATUTE AND REMANDING THIS CASE WOULD NOT REDRESS PETITIONER'S INJURY.

This Court should simply invalidate the Board Order without remand.[6] *Cf. Seila Law*, 140 S. Ct. at 2219 (Thomas, J., concurring in part and dissenting in part) ("To resolve this case, I would simply deny the . . . CFPB petition to enforce the civil investigative demand."); *PHH Corp. v. CFPB*, 881 F.3d 75, 139 (D.C. Cir. 2018) (*en banc*) (Henderson, J., dissenting) ("I would set aside the Director's decision as *ultra vires* and forbid the agency from resuming proceedings.").

As then-Judge Scalia recognized, remedies for constitutional violations must redress the harms to the injured party. When resolving "cases specifically involving incompatible authorization and tenure (or appointment) statutes," courts must focus

[6] The remedy in *Lucia*—vacating the decision and remanding the matter to the agency for a new hearing before a properly appointed ALJ, *see Lucia*, 138 S. Ct. at 2055 & nn.5–6—is inapplicable here because it cannot redress the practical harms caused by the constitutional violations at issue. The *Lucia* court pointedly declined to address the constitutional violations presented here. *See id*. at 2050 n.1.

on providing relief to "the injury-in-fact that confers standing upon the plaintiff." *Synar v. United States*, 626 F. Supp. 1374, 1393 (D.D.C. 1986) (per curiam) (collecting cases), *aff'd sub nom. Bowsher v. Synar,* 478 U.S. 714 (1986); *see also N. Pipeline Constr. Co. v. Marathon Pipe Line Co*., 458 U.S. 50, 52 (1982) (setting aside exercise of adjudicatory authority *over plaintiff* by bankruptcy judge who lacked Article III life tenure); *Buckley v. Valeo*, 424 U.S. 1 (1976) (setting aside Federal Election Campaign Act provisions granting authority *over plaintiffs* to officials appointed in an improper manner).

Blue-penciling Title 5, or any other statutory provision, would afford Petitioner no relief. Petitioner's injury is caused by an unconstitutional administrative process, which this Court cannot and should not try to fix. *Cf. United Church of Med. Ctr. v. Med. Ctr. Com*., 689 F.2d 693, 701 (7th Cir. 1982) ("Submission to a fatally biased decisionmaking process is in itself a constitutional injury sufficient to warrant injunctive relief, where irreparable injury will follow in the due course of events, even though the party charged is to be deprived of nothing until the completion of the proceedings.").

Failing to end the enforcement action against Petitioner will leave him without a remedy. That result would conflict with the fundamental and longstanding

principle that for every right there must be a remedy.[7] "It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury*, 5 U.S. at 147. This Court should therefore grant the petition and set aside the FDIC decision without remand. *See Noel Canning v. NLRB*, 705 F.3d 490, 515 (D.C. Cir. 2013).

Three more reasons support this result. *First*, as a practical matter, any construction this Court gives to Title 5's for-cause removal provision—whether as a "saving" construction or in an attempt to "sever," *i.e.*, blue-pencil or delete—would be, in effect, an advisory opinion. *Second*, even if this Court could rewrite or delete the offending for-cause removal provision to bring the statutory scheme in line with Article II, in so doing it would create a far worse due-process problem by depriving Petitioner of an impartial, unbiased decisionmaker. *Third*, a remand would wrongly punish Petitioner with undue, burdensome, and extraconstitutional administrative

[7] Severance is not "literally" a remedy, because "[r]emedies operate with respect to specific parties, not on legal rules in the abstract." *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring). In any event, editing the statute to "sever" the Title 5 removal protections at issue here would require "major surgery to the statute that Congress could not possibly have foreseen or intended." *Arthrex, Inc. v. Smith & Nephew, Inc.*, 953 F.3d 760, 769 (Fed. Cir. 2020) (Dyk, J., dissenting from denial of rehearing en banc). *Cf. Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1337 (Fed. Cir. 2019) (holding that severance "cures" the constitutional violation), *cert. granted sub nom., United States v. Arthrex, Inc.*, 141 S. Ct. 549 (Oct. 13, 2020).

process, creating a perverse *disincentive* for future litigants to defend the constitutional separation of powers.

A. This Court Cannot, as a Practical Matter, Definitively Negate the For-Cause Removal Provision.

The Supreme Court's decisions in *Free Enterprise Fund* is binding on all federal courts, resolving the constitutional and statutory questions presented for the entire country. Here, by contrast, if this Court holds Title 5's for-cause removal provision unconstitutional and attempts to sever it, the Court will not definitively redress Petitioner's harm. That is because ALJs would realize, for all practical purposes, the constitutionality of the tenure protection is still an open question in the administrative forums and Federal Circuit to which they are subject. *Cf. Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986) (rejecting "argument that consideration of the effect of a removal provision is not 'ripe' until that provision is actually used"). That is, if the FDIC—through the MSPB—were to remove an ALJ, that ALJ could seek judicial review in the U.S. Court of Federal Claims. *See* 28 U.S.C. § 1491(a). Decisions in that court are appealable to the Federal Circuit, not to this Court. *Id.* § 1295(a)(3). In a case brought by a removed ALJ, the Federal Circuit might conclude either Title 5's for-cause removal protection is constitutional or, if the whole system is unconstitutional, the removal power rather than the tenure protection is inoperative. In conducting that analysis, the Federal Circuit would not be bound by any Sixth Circuit precedent established in this case. This outcome

demonstrates why any attempted "blue pencil" remedy here would, at best, be a quasi-advisory opinion. And worse, why a remand following that opinion could not provide Petitioner with concrete relief.[8]

B. Judicial Removal of ALJ Independence Would Create Insoluble Due-Process Problems.

Even if this Court could blue-pencil the for-cause removal provisions and solve the accountability problem, in doing so, it would create an even-greater due-process problem.[9] Transforming an ALJ into a political appointee deprives Petitioner of the only supposedly independent decisionmaker in the administrative process, a result that is also unconstitutional.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). That "requirement . . . 'applies to administrative agencies which adjudicate as well as to courts.'" *Utica Packing Co. v. Block*, 781 F.2d 71, 77 (6th Cir. 1986) (quoting *Withrow v. Larkin*, 421 U.S. 35,

[8] *Cf. Fleming*, 987 F.3d at 1124 n.12 (Rao, J., concurring in part, dissenting in part) (citations omitted) ("One potential complication with a remand is that if the Secretary removes an ALJ, the ALJ could seek judicial review in the U.S. Court of Federal Claims. That court's decisions are reviewed by the Federal Circuit, which, in turn, is not bound by this court's precedents and could reach a different conclusion about the lawfulness of Section 7521(a). For practical purposes, then, ALJs could remain protected by the dual layer despite a decision from this court holding such a scheme unconstitutional.").

[9] "[T]he separation of powers exists for the protection of individual liberty[.]" *NLRB v. Noel Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring).

46 (1975)). "[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Id.* "Every procedure which would offer a possible temptation to the average man as a judge . . . or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *see also Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 883 (2009) ("[T]he Due Process Clause has been implemented by objective standards that do not require proof of actual bias.").

Severing the for-cause provision to "cure" the separation-of-powers violation for the ALJ would have the perverse effect of further violating the Petitioner's due-process rights by compromising the independence of the ALJ and denying the Petitioner an impartial decisionmaker. "[I]ncreasing presidential control over ALJs would create impartiality concerns under the Due Process Clause. . . . The agencies' ability to appoint ALJs and initiate their removal creates obvious incentives for ALJs to favor agency positions." Kent Barnett, *Resolving the ALJ Quandary*, 66 Vand. L. Rev. 797, 801 (2013). "There is no guarantee of fairness when the one who appoints a judge has the power to remove the judge before the end of proceedings for rendering a decision which displeases the appointer." *Utica Packing Co.*, 781 F.2d at 78. "All notions of judicial impartiality would be abandoned if such a procedure

were permitted." *Id.* Allowing agencies to both select and remove ALJs violates due process by allowing the agency to select the judge in its own case. "Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when . . . a man chooses the judge in his own cause." *Caperton*, 556 U.S. at 886.

That remedy would also require judicial revision of a core provision of the Administrative Procedure Act ("APA"). "Before the APA was enacted, the public expressed significant concern that hearing examiners—as ALJs were then called—were not impartially presiding over agency hearings; rather, the examiners acted as the arms of the agency." Linda D. Jellum, *"You're Fired!": Why the ALJ Multi-Track Dual Removal Provisions Violate the Constitution and Possible Fixes*, 26 Geo. Mason L. Rev. 705, 710 (2019). "The substantial independence that the [APA's] removal protections provide to [ALJs] is a central part of the Act's overall scheme." *Lucia*, 138 S. Ct. at 2060 (Breyer, J., dissenting); *see Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 130–32 (1953) (discussing evolution of ALJ independence). "The [APA] did not go so far as to require a complete separation of investigating and prosecuting functions from adjudicating functions. But . . . the safeguards it did set up were intended to ameliorate the evils from the commingling of functions[.]" *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46 (1950). "[T]he process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him,

free from pressures by the parties or other officials within the agency." *Butz v. Economou*, 438 U.S. 478, 513 (1978).

A judicial rewrite of Title 5's for-cause protection would transform independent ALJs into political appointees beholden to high ranking agency officials who authorize investigations and enforcement actions (and who make final liability determinations). Doing so would vitiate the APA's core due-process-based guarantee of an independent check on the abuse of agency authority.[10] Allowing agencies to hire and fire ALJs based on their decisions would compromise ALJ independence. Political appointees cannot substitute for independent ALJs, for the independence of adjudicators is the essence of fair and impartial decisionmaking.

C. Remand Here Would Not Only Be Unfair and Unduly Burdensome but Also Would Create a Perverse Disincentive to Raise Meritorious Appointments Clause Claims.

As the Supreme Court has made clear, Appointments Clause remedies should "create incentives to raise Appointments Clause challenges." *Lucia*, 138 S. Ct. at 2055 n.5 (cleaned up). The remedy for a violation of the Appointments Clause or separation of powers should advance the structural purpose of Article II by creating

[10] "[T]he agency's ability to overrule an ALJ on both fact and law does not mean that an ALJ's decision is meaningless. The ALJ's credibility findings can be very significant, affecting whether substantial evidence exists for an agency's contrary decision on administrative appeal. Indeed, courts review with a more careful eye agency findings that are contrary to ALJs' factual findings." Barnett, *Resolving the ALJ Quandary*, 66 Vand. L. Rev. at 826–27.

incentives for parties to raise such challenges. *See Ryder v. United States*, 515 U.S. 177, 182–83 (1995). A remand here would have the opposite effect, perversely *disincentivizing* parties from exercising their constitutional rights. *See* Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481, 518–46 (2014).

Consider *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, which involved an Appointments Clause challenge to the Copyright Royalty Board's structure. 684 F.3d 1332 (D.C. Cir. 2012). The basis of the challenge was that Copyright Royalty Judges ("CRJ") were Principal Officers of the United States who had not been properly appointed by the Library of Congress because they were not directly appointed by the President and confirmed by the Senate. *Id.* at 1134, 1336. The D.C. Circuit held the position of CRJ under the statute violated the Appointments Clause. *Id.* at 1134. "To remedy the violation, [this Court] follow[ed] the Supreme Court's approach in *Free Enterprise Fund* . . . by invalidating and severing the restrictions on the Librarian of Congress's ability to remove the CRJs." *Id.* The D.C. Circuit then vacated the challenged determination and remanded the matter.

That remedy did nothing to redress Intercollegiate's injury, perhaps leaving it worse off. *See* Barnett, *To the Victor Goes the Toil*, 92 N.C. L. Rev. at 521–25. This "ill-fitting remedy . . . also created new problems. CRJs are now subject to

political pressure when deciding matters because of their ability to be removed at will by the Librarian of Congress, whom the President, in turn, can remove at will."[11] *Id.* at 524. This "brings the fairness of . . . [copyright-royalty] proceeds into question because political actors can assert more control over the hearings' outcomes." *Id.* at 524–25. That outcome "fails to deter Congress from creating other unconstitutional appointments in the first instance." *Id.* at 523. In sum, the *Free Enterprise Fund* remedy the D.C. Circuit deployed in *Intercollegiate* "fail[ed] to provide incentive to seek redress for future litigants." *Id. But see Lucia*, 138 S. Ct. at 2055 n.5.

This Court therefore must reject any suggestion the *Free Enterprise Fund* blue-pencil remedy would be appropriate here. "[S]ubjection to an unconstitutionally constituted decisionmaker" constitutes irreparable harm. *United Church of Med. Ctr.*, 689 F.2d at 701. A remand would subject Petitioner to a pointless, burdensome, and hopelessly unconstitutional administrative process. As the D.C. Circuit has previously suggested, it is "aware of no theory that would permit . . . [it] to declare [an agency's] . . . structure unconstitutional without providing relief to the appellants in this case." *Fed. Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993).

[11] The Court should consider the remedy's fairness on the proceedings before the agency. *See* Barnett, *To the Victor Goes the Toil*, 92 N.C. L. Rev. at 525.

CONCLUSION

This Court should vacate the Board's Order without remand.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of FRAP 29(a)(5) and FRAP 32(a)(7)(B) because it contains 5,873 words. This brief also complies with the typeface and type-style requirements of FRAP 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Times New Roman 14-point font.

/s/ Michael Pepson
Michael Pepson

Dated: April 14, 2021

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2021, I electronically filed the above Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Petitioner with the Clerk of the Court by using the appellate CM/ECF system. I further certify that service will be accomplished by the appellate CM/ECF system.

/s/ Michael Pepson
Michael Pepson

Dated: April 14, 2021