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 Petition for Review of a Final Decision and Order by the
Federal Deposit Insurance Corporation
(FDIC Nos. 12-568e and 13-115k)

AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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INTERESTS OF *AMICUS CURIAE*

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil rights organization and public-interest law firm. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.[1]

NCLA is particularly disturbed by the manner in which Congress has protected federal agency Administrative Law Judges (ALJs) from removal, thus depriving Americans of their constitutional freedom to live under a government in which executive power is accountable to them through the President. In addition, NCLA is concerned whenever—as in this case—courts decline to decide important constitutional questions placed squarely before them or to provide meaningful remedies to those whose civil liberties have been violated. In such cases, courts strongly disincentivize private citizens from seeking judicial relief when their civil rights are violated, thus depriving the country of one of its most critical methods of challenging unconstitutional governmental action. Courts thereby allow

[1] All parties consented to the filing of this brief. No counsel for a party authored any part of this brief. No one other than the *amicus curiae*, its members, or its counsel financed the preparation or submission of this brief.

unconstitutional action to persist indefinitely rather than nipping it at the first available opportunity.

SUMMARY OF ARGUMENT

The panel declined to rule definitively on an important and recurring constitutional question: Whether certain FDIC officers, including the agency's administrative law judges ("ALJs"), are protected by multiple layers of tenure protection in violation of the "Take Care" clause of the U.S. Constitution. The panel expressed "doubt" that these tenure protections were unconstitutional, but did so only in dictum after concluding it could grant no relief even if they were. *Calcutt v. FDIC*, 37 F.4th 293, 319 (6th Cir. 2022).

That erroneous conclusion put the cart before the horse and stands in considerable tension with Supreme Court precedent and a recent Fifth Circuit decision, all of which squarely adjudicated similar constitutional questions even where the ultimate relief was largely declaratory and disappointing—or even pyrrhic. The panel's approach here—citing lack of a meaningful remedy as reason for not deciding an important constitutional question—also disincentivizes (and effectively precludes) future litigants from ever raising this question, thereby allowing the asserted constitutional defect to persist indefinitely.

The court should grant the petition for rehearing *en banc*.

ARGUMENT

I. THE PANEL'S NO-REMEDY-THUS-NO-DECISION APPROACH WAS ERRONEOUS AND WARRANTS RECONSIDERATION

The panel's disinclination to decide the merits of petitioner Calcutt's removal-protection challenge was enabled by skipping forward and deciding that he was entitled to no relief even if he were right, principally because he could not demonstrate particularized harm caused by the asserted constitutional violation. That unconventional, even illogical approach stands in considerable tension with Supreme Court precedent and a recent decision of the Fifth Circuit.

The panel relied primarily on *Collins v. Yellin*, 141 S. Ct. 1761 (2021), but that reliance was misplaced. There, the Supreme Court addressed an analogous removal-protection question but took the conventional approach—eschewed by the panel here—of deciding the merits first and only then turning to the appropriate remedy. *Collins* vindicated the notion that a constitutional violation deserves *some* resolution, even if that resolution is disappointing or pyrrhic from the challenger's perspective. Thus, despite declining the challengers' invitation to invalidate a government contract allegedly tainted by a constitutional violation, the *Collins* Court nevertheless declared the offending statutory removal-protection unconstitutional, severed it from the relevant statutory scheme, and remanded the case to address the possibility that the challengers were harmed by the violation.

The context in which petitioner Calcutt raises a similar constitutional challenge cries out even more for a definitive decision on the merits, followed by at least *some* judicial fix if his challenge is found meritorious. Unlike *Collins*, which was an offensive plenary action in a district court offering the full panoply of discovery, Calcutt's challenge comes on appellate review of a final agency order he claims was tainted by the unconstitutional tenure protection enjoyed by the adjudicator. That order resulted from a quasi-criminal prosecution initiated *by the agency*, where Calcutt played exclusively on defense in a venue with limited opportunity for discovery to establish whether, as the panel required here, the alleged constitutional defect "inflicted harm" on him. 37 F. 4th at 316.[2]

In this administrative review context, the relevant statute instructs courts to reach one of four possible outcomes: "[A]ffirm, modify, terminate, or set aside, in whole or in part, the order of the agency." 12 U.S.C. § 1818(h)(2). The statute does not specify or limit the reasons why a court might decide to set aside, terminate, or modify an order—any of which would typically constitute satisfactory relief to the petitioner. The statute likewise does not mandate affirmance whenever a reviewing

[2] Indeed, as the panel decision acknowledged, it is unlikely that agencies like the FDIC possess the power or expertise even to adjudicate structural constitutional challenges like Calcutt's, much less to afford the type of discovery needed to prove the kind of particularized harm the panel found lacking here. 37 F.4th at 18-20.

court determines it cannot "invalidate" or declare "void" the entire underlying proceeding.

One plausible reason a court might eschew affirmance—and either set aside, terminate, or modify an agency order—is that the order resulted from an unconstitutional administrative process, especially if the constitutional taint was serious and/or known to the agency. This and other equally sound reasons should not depend on a predicate finding that the asserted taint rendered the underlying proceeding entirely "void" or "invalid," as the panel repeatedly suggested. Indeed, any material taint in the agency's structure or process might plausibly lead a court to withhold its official blessing of the resulting order and to set it aside with or without remand. *Cf. Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Ryder v. United States*, 515 U.S. 177 (1995); *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022).

Collins did nothing to strip courts of such mill-run discretion when reviewing final agency orders, much less to mandate affirmance when relief might be only nominal or pyrrhic.[3] Yet without saying so explicitly, the panel decision effectively *affirmed* the FDIC formal order, thereby bestowing the court's imprimatur

[3] As Justice Gorsuch noted in his partial concurrence in *Collins*:

> The only lesson I can divine is that the Court's opinion today is a product of its unique context—a retreat prompted by the prospect that affording a more traditional remedy here could mean unwinding or disgorging hundreds of millions of that have already changed hands. . . . [N]othing it says undoes our prior guidance authorizing more meaningful relief in other situations. 141 S. Ct. at 1799 (Gorsuch, J., concurring in part).

notwithstanding a credible contention that the order was tainted by an unconstitutional process superintended by governmental officers wielding unconstitutional power.

This hands-off approach stands in stark contrast to the Fifth Circuit's recent decision in *Jarkesy*, an analogous case in which an administrative target challenged a final order resulting from a proceeding superintended by an ALJ working for the SEC. Among several questions presented was essentially the same one presented here: Whether the ALJ was unconstitutionally protected by multiple layers of protection from presidential removal. The court answered that question first—in the affirmative, 34 F.4th at 463-65—and only then considered the appropriate remedy, if any, *id*. at 466. The court identified the most logical remedy—vacatur of the challenged order—but declined to address the appropriateness of that remedy because it had already determined to vacate and remand the case on other grounds. *Id*. at 466 n.21.[4]

The important point is that in *Jarkesy*, as in *Collins* and other cases, the court squarely decided the merits of a properly presented constitutional challenge *first*, even if it ultimately stopped short of providing the full measure of relief sought by the challenger. *Accord Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) (sustaining

[4] The court also declined the SEC's suggestion "to interpret the for-cause protections for ALJs to instead allow removal for essentially any reason." 34 F.4th at 465.

removal-protection challenge and granting only prospective relief in the form of severing the offending statutory provision); *Lucia*, 138 S. Ct. 2044 (sustaining Appointments Clause challenge and remanding for a new hearing rather than dismissing the underlying proceeding); *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 508-513 (2010) (sustaining removal-protection challenge and only severing the statutory tenure protection rather than enjoining regulator's continued operation).

By deciding the merits of these justiciable cases, courts fulfilled their "solemn responsibility" to "say what the law is." *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (Scalia, J., concurring in the judgment) (internal quotations marks and citations omitted); *accord Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) ("Jurisdiction existing, this Court has cautioned, a federal court's 'obligation' to hear and decide a case is 'virtually unflagging'") (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). If nothing else, these decisions put the affected agencies (and others) on notice that their officials were wielding power unconstitutionally and applied at least *some* judicial fix, even if that fix disappointed those who raised the respective challenges.

Perhaps unwittingly, the panel decision completes the full loop on a pan-agency strategy to slam all courthouse doors on removal-protection challenges raised by administrative enforcement targets. In most federal circuits where such challenges were raised before an agency had completed its administrative process,

agencies successfully argued that the case was premature and thus statutorily excluded from federal court jurisdiction. *See generally Cochran v. SEC*, 20 F.4th 194, 203-04 & n.10 (5th Cir. 2021) (*en banc*) (collecting cases), *cert. granted*, 142 S. Ct. 2707 (2022); *Axon Enterprise, Inc. v. FTC*, 986 F.3d 1173, 1180-83 (9th Cir. 2021) (collecting cases), *cert. granted*, 142 S. Ct. 895 (2022). Likewise, as the panel in this case acknowledged, administrative enforcement targets cannot effectively raise such challenges during their proceedings because agencies lack the power or expertise to adjudicate such challenges. 37 F.4th at 311. But the panel has now effectively precluded such challenges *even after the fact* absent proof of particularized harm that will almost never exist, particularly in the administrative review context given the limited discovery available in agency proceedings.

The practical result? Administrative targets subjected to quasi-criminal prosecution superintended by adjudicators they earnestly believe are constitutionally illegitimate can *never* raise that challenge in federal court. Worse yet, agencies are emboldened to forge ahead with business as usual, assured that the constitutional legitimacy of their adjudicators is effectively immune from judicial scrutiny. Stated differently, despite credible claims that these adjudicators wield their coercive governmental power unconstitutionally, the status quo persists indefinitely—presumably until some hypothetical future president purports to fire an ALJ and the

ALJ either refuses to leave office or sues for wrongful termination, a highly improbable scenario for which we are aware of no recent historical precedent.

Moreover, requiring proof of particularized harm in this context is as illogical as it is impractical. The harm is being forced to participate in a governmental proceeding administered by an unconstitutional adjudicator. The fact that *everyone* who appears before that adjudicator suffers the same harm is hardly a reason to allow the agency to get away with it indefinitely. To the contrary, the repetitive and systemic nature of the harm warrants an immediate halt rather than deferral until the perfect unicorn fact pattern emerges.

Finally, even if *Collins* is read as requiring proof of individualized harm to obtain relief on appellate review of agency final orders, petitioner Calcutt endured such harm in spades. If he is correct in his removal-protection challenge, the FDIC required him to defend himself for years in a compulsory law enforcement proceeding superintended by governmental officers who lacked legitimate constitutional authority to wield power over him, and he remains subject to a lifetime industry bar (the occupational death penalty) and substantial financial penalties as a result of that proceeding. What the Supreme Court has characterized as a "here-and-now" constitutional injury when it occurs, *see, e.g., Seila Law*, 140 S. Ct. at 2196, is Calcutt's "there-then-and-forever" injury when viewed in the rearview mirror. It's the same particularized harm either way.

II. THE PANEL'S RULING DISINCENTIVIZES REMOVAL-PROTECTION CHALLENGES AND ALLOWS ALJ TENURE VIOLATIONS TO PERSIST INDEFINITELY

Because the political branches cannot always be relied on to guard their constitutionally defined roles when structuring government agencies, challenges by affected private parties often serve as the most effective vehicles to enforce the separation of powers. *See, e.g., Seila Law*, 140 S. Ct. 2183; *Lucia*, 138 S. Ct. 2044; *Free Enter. Fund*, 561 U.S. 477. Indeed, it is "the claims of individuals—not of Government departments—[that] have been the principal source of judicial decisions concerning separation of powers and checks and balances." *Bond v. United States*, 564 U. S. 211, 222 (2011). Allowing and incentivizing such challenges is therefore vital to our constitutional order. "[W]hen questions involving the Constitution's government-structuring provisions are presented in a justiciable case, it is the solemn responsibility of the Judicial Branch to say what the law is." *NLRB*, 573 U.S. at 571 (Scalia, J., concurring in the judgment) (internal quotations marks and citations omitted).

As the Supreme Court explained in *Ryder v. United States*, in which a court-martialed member of the Coast Guard challenged on Appointments Clause grounds the constitutionality of the judges who convicted him, "one 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 if a violation indeed occurred." 515 U.S. at 182–83. And why is this so? Because "[a]ny other rule would create a disincentive to raise Appointments Clause challenges[.]" *Id*. at 183.

The Court reiterated this incentive-driven approach four years ago in *Lucia,* which held that the ALJs who decided enforcement cases prosecuted by the SEC were "officers" who were not properly appointed under the Appointments Clause. After first addressing the merits of the constitutional challenge, the Court's choice of remedy—remand to the agency for a new hearing before a different, properly appointed ALJ—was explicitly driven by, among other factors, a desire "to create '[]incentive[s] to raise Appointments Clause challenges.'" 138 S. Ct. at 2055 n.5 (quoting *Ryder*, 515 U.S. at 183).

The panel decision here does exactly the opposite. It signals to would-be challengers of administrative tenure protections that courts won't even decide the merits of their challenge absent pre-existing proof of particularized harm that will almost never exist, much less provide a remedy if the challenge is meritorious. The decision thus removes all incentive for individual citizens to invest the time, effort, and resources required to raise such challenges. Why bother?

Worse yet, as previously noted, the panel's approach perversely emboldens agencies to forge ahead indefinitely with business as usual, knowing that even if their adjudicative structures or processes contravene the Constitution, they are

effectively immune from challenge or judicial scrutiny, and they will pay no price for their misfeasance. Indeed, agencies have been on notice since at least 2010 that their ALJs were likely unconstitutional due to their multiple layers of tenure protection, *see Free Enter. Fund*, 561 U.S. at 546 (Breyer, J., dissenting), yet it took another 12 years before any federal court so held, *see Jarkesy*, 34 F.4th at 463-65 (petition for rehearing *en banc* filed July 1, 2022). Under the panel's approach here, that dozen-year drought might have continued forever.

CONCLUSION

The court should grant rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1st, 2022, an electronic copy of the foregoing brief of *amicus curiae* was filed with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/EFC filing system and that service will be accomplished using the appellate CM/ECF system.

/s/ Russell G. Ryan

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because this brief was prepared in 14-point Times New Roman, a proportionally spaced typeface, using Microsoft Word. See Fed. R. App. P. 29(a)(4), (b)(4), 32(g)(1). This brief complies with the type-volume limitation of Rule 29(a)(5) because it contains 2589 words, excluding the parts exempted under Rule 32(f).

/s/ Russell G. Ryan