No. 24-3296

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FRANK WILLIAM BONAN, II, individually and as an institution-affiliated party of GRAND RIVERS COMMUNITY BANK, GRAND CHAIN, ILLINOIS (INSURED STATE NONMEMBER BANK),
Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent.

On Petition for Review from the Federal Deposit Insurance Corporation

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER AND VACATUR

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 24-3296

Short Caption: Bonan v. FDIC

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Steven A. Engel Date: April 2, 2025

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N/A

Attorney's Signature: /s/ Michael H. McGinley Date: April 2, 2025

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Attorney's Printed Name: Jennifer B. Dickey

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Attorney's Signature: /s/ Kevin R. Palmer Date: April 2, 2025

Attorney's Printed Name: Kevin R. Palmer

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

Businesses, and corporate officers and directors, are frequent respondents in administrative enforcement actions brought by the Federal Deposit Insurance Corporation ("FDIC") and other federal agencies. The Chamber has a significant interest in ensuring that those proceedings give enforcement targets a fair shake by respecting the Constitution's structural limitations. It thus submits this brief to ensure both (1) that Petitioner receives his Seventh Amendment right to a jury trial, and (2) that the officers who handle Petitioner's case remain accountable to the President and the people whom he serves.

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, contributed money intended to fund the preparation or submission of this brief. Counsel for all parties consented to this brief's filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents yet another example of an administrative agency exceeding constitutional limits. The Framers recognized that "structural protections against abuse of power [are] critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). Indeed, they regarded the "accumulation of all powers, legislative, executive, and judiciary, in the same hands" as "the very definition of tyranny." The Federalist No. 47, at 298 (James Madison) (Clinton Rossiter ed., 2003). Accordingly, the Framers separated the legislative and executive powers from the judicial; devised a system in which a unitary executive would remain accountable to the people; and granted the right to trial by jury as a further check against government overreach.

The growth of the administrative state has eroded these safeguards—a fact that Petitioner knows all too well. Like other federal agencies, the FDIC "acts as a mini legislature, prosecutor, and court, responsible for creating substantive rules" for financial institutions, "prosecuting violations, and levying knee-buckling penalties against private citizens." *Seila Law LLC v. CFPB*, 591 U.S. 197, 222 n.8 (2020). Even worse, the agency imposes those punishments through in-house proceedings before unaccountable adjudicators, without effective oversight from the people or their elected representatives. That cannot be. The Constitution prohibits such concentrations of power, no matter whether the political branches believed, at

one time or another, that the FDIC's arrangement might prove more efficient than what the Constitution requires. *See Bowsher*, 478 U.S. at 736.

Here, the FDIC exploited that unconstitutional scheme to deprive Petitioner of a jury trial. At the time of the Founding, that "most excellent method of decision" had long been hailed as "the glory of the English law." 3 William Blackstone, *Commentaries on the Laws of England* 391 (1768). And, as the Supreme Court emphasized this past Term, it was "prized by the American colonists" in both criminal and civil cases alike. *SEC v. Jarkesy*, 603 U.S. 109, 121 (2024).

But "as tensions grew between the British Empire and its American Colonies, imperial authorities responded by stripping away th[e] ancient [jury trial] right" on this side of the Atlantic. *Erlinger v. United States*, 602 U.S. 821, 829 (2024). Most notably, the Crown enforced unpopular acts of Parliament in the 1760s "by siphoning adjudications to juryless admiralty, vice admiralty, and chancery courts." *Jarkesy*, 603 U.S. at 121. Those decisions to channel colonial enforcement actions away from the people served as a major catalyst for the Revolutionary War. *See id.*; Philip Hamburger, *Is Administrative Law Unlawful?* 150-51, 243 (2014).

"After securing their independence, the founding generation sought to ensure what happened before would not happen again." *Erlinger*, 602 U.S. at 829. The people thus quickly ratified the Seventh Amendment to "preserve[]" the civil jury trial right in "Suits at common law." U.S. Const. amend. VII. And they understood

this language to "embrace[] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume." *Jarkesy*, 603 U.S. at 122 (citation omitted).

That includes suits by the government for civil penalties, which historically "could only be enforced in courts of law." *Tull v. United States*, 481 U.S. 412, 422 (1987). This guarantee is no less important today, for rerouting such actions through in-house administrative proceedings would eradicate the jury's crucial check on bureaucratic overreach while "concentrat[ing] the roles of prosecutor, judge, and jury in the hands of the Executive Branch." *Jarkesy*, 603 U.S. at 140. "That is the very opposite of the separation of powers that the Constitution demands." *Id.*

Yet that is what the FDIC has continued to do here. It has pursued a civil monetary penalty against Petitioner through the inner workings of the agency. The government must try Petitioner on this quintessential legal claim, if at all, before a jury. And the jury's findings on that claim must govern the FDIC's other claim for a prohibition order insofar as "common issue[s] exist[] between the claims." *Ross v. Bernhard*, 396 U.S. 531, 538 (1970).

At the same time, the FDIC cannot justify its constitutional deprivation by proclaiming the vindication of "public rights." As *Jarkesy* made clear, the "public rights" exception to the Seventh Amendment is narrow and inapplicable absent a specific showing that "'withdraw[al] from judicial cognizance'" has firm roots in

"background legal principles." 603 U.S. at 131-32 (citation omitted). The FDIC cannot identify any historical understanding that would support removing this case from the Article III courts—and the jury review that the Constitution requires.

Even if this enforcement proceeding could have properly been brought in an Article II tribunal, then it still had to be overseen by a constitutionally accountable officer. But that did not happen either.

Under Article II, "the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" *Seila Law*, 591 U.S. at 203 (citations omitted). This power includes the "prerogative to remove executive officials" who exercise power in the President's name. *Id.* at 214. The ALJ who presided over Petitioner's trial qualifies as such an "Officer[] of the United States." U.S. Const. art. II, § 2, cl. 2. Yet she was unconstitutionally insulated from presidential supervision all along by multiple levels of tenure protection. Those layers of protection "subvert[ed] the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 498 (2010). And that structural separation-of-powers error infected the entire framework of the proceedings against Petitioner. He need not show more to obtain a new trial.

Accordingly, this Court should vacate the FDIC's Decision and Orders.

ARGUMENT

I. The Seventh Amendment Prohibits Compelled Adjudication in the FDIC's Juryless Administrative Tribunals.

The Seventh Amendment gives Petitioner "the right to be tried by a jury of his peers" in an Article III court. *Jarkesy*, 603 U.S. at 140. The FDIC's attempt to punish Petitioner through a juryless in-house proceeding is an affront to that guarantee. That constitutional error alone warrants vacatur.

A. Petitioner Has a Constitutional Right to a Jury Trial on the FDIC's Civil Monetary Penalty Claim.

Jarkesy says everything necessary to find a Seventh Amendment violation for the FDIC's civil penalty claim. The agency misreads that controlling decision in suggesting otherwise.

1. The Seventh Amendment Is Implicated Here.

In *Jarkesy*, the Supreme Court held that "the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud." 603 U.S. at 120. Along the way, the Court stressed that "whether [a] claim is statutory is immaterial" to the Seventh Amendment analysis. *Id.* at 122. Rather, "[t]he Seventh Amendment extends to a particular statutory claim if the claim is 'legal in nature.'" *Id.* (citation omitted). And "[t]o determine whether a suit is legal in nature," the Court "consider[ed] the cause of action and the remedy it provides," while noting that "the remedy was the 'more important' consideration." *Id.* at 122-

23 (citation omitted). The "civil penalties in [that] case [were] designed to punish and deter, not to compensate," and they were accordingly "'a type of remedy at common law that could only be enforced in courts of law.'" *Id.* at 125 (citation omitted). As a result, the SEC could not pursue them through an in-house adjudication. *See id.* at 122-27.

So too here. As in *Jarkesy*, the "remedy is all but dispositive" of Petitioner's Seventh Amendment right to a jury trial. *Id.* at 123. The FDIC "seeks civil penalties, a form of monetary relief." *Id.* And "a monetary remedy is legal if it is designed to punish or deter the wrongdoer." *Id.* That is because "[r]emedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo," were historically issued only "by courts of law, not courts of equity." *Tull*, 481 U.S. at 422; *see also Jarkesy*, 603 U.S. at 123. In fact, "[a]ctions by the Government to recover civil penalties under statutory provisions" were long "viewed as one type of action in debt requiring trial by jury." *Tull*, 481 U.S. at 418-19.

The FDIC does not dispute that the penalties in this case are designed to deter and punish Petitioner. Nor could it. Like the statute in *Jarkesy*, section 1818(i) conditions the amount and availability of civil penalties on several criteria, including the defendant's state of mind, *see* 12 U.S.C. § 1818(i)(2)(A)-(C), his "history of previous violations," *id.* § 1818(i)(2)(G)(iii), the amount of "loss" to a banking

institution, *id.* § 1818(i)(2)(B)(ii)(II), (i)(2)(C)(ii), the defendant's "pecuniary gain," *id.* § 1818(i)(2)(B)(ii)(III), (i)(2)(c)(iii), and "such other matters as justice may require," *id.* § 1818(i)(2)(G)(iv). "Of these, several concern culpability, deterrence, and recidivism," which are the hallmarks of punishment statutes. *Jarkesy*, 603 U.S. at 123-24. In addition, section 1818(i) mirrors the statute in *Jarkesy* by providing for three tiers of civil penalties, with "[e]ach successive tier authoriz[ing] a larger monetary sanction." *Id.* at 124; *see* 12 U.S.C. § 1818(i)(2)(A)-(C). And the FDIC "is not obligated to return any money to victims." *Jarkesy*, 603 U.S. at 124. Instead, the penalties recovered "shall be deposited into the Treasury." 12 U.S.C. § 1818(i)(2)(J).

All this shows that the "civil penalties in this case are designed to punish and deter." *Jarkesy*, 603 U.S. at 125. That "effectively decides that this suit implicates the Seventh Amendment right" to a jury trial. *Id.* And, contrary to the FDIC's suggestion, that "right cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought." *Tull*, 481 U.S. at 425 (citation omitted); *see also, e.g.*, *Overwell Harvest, Ltd. v. Trading Techs. Int'l, Inc.*, 114 F.4th 852, 861-62 (7th Cir. 2024) (holding Seventh Amendment applied to a "historically equitable" claim for aiding and abetting breach of fiduciary duty, because the plaintiff "sought clear legal relief in addition to equitable relief" on this claim). Petitioner has a constitutional right to a jury trial on the civil penalty claim.

2. The Public Rights Exception Does Not Apply.

The FDIC does not seriously contest that its pursuit of civil penalties implicates the Seventh Amendment. It therefore retreats to arguing that the "public rights" exception applies. *See* FDIC Op. at 75-81. But the FDIC's invocation of the public rights exception is misplaced.

Jarkesy once again removed any doubt. There, the Supreme Court held that the government "cannot 'conjure away the Seventh Amendment by mandating that traditional legal claims be taken to an administrative tribunal.'" *Jarkesy*, 603 U.S. at 135 (alteration adopted; citation omitted). That is true "[e]ven when an action 'originates in a newly fashioned regulatory scheme.'" *Id.* at 134 (citation and brackets omitted). What matters instead "is the substance of the suit, not where it is brought, who brings it, or how it is labeled." *Id.* at 135. Indeed, "[i]f a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory." *Id.* at 128. The government can rebut that presumption only by pointing to firmly rooted "background legal principles" that justify a departure from the text of Article III and the Seventh Amendment. *Id.* at 131; *see also id.* at 153 (Gorsuch, J., concurring) ("[T]raditionally recognized public rights have at least one feature in common: a serious and unbroken historical pedigree.").

The FDIC cannot point to any history that would allow it to dispense with Petitioner's jury trial right. This case does not involve traditionally recognized public rights, such as the collection and disbursement of tax revenues from a customs agent, the granting of land patents, or immigration matters. *See id.* at 128-30 (majority op.). Nor is there any reason for this Court to expand the doctrine to this new context. "The public rights exception is, after all, an *exception*" that "has no textual basis in the Constitution." *Id.* at 131. It thus must be applied "with care" and "close attention" to Founding-era history; otherwise, "the exception would swallow the rule." *Id.*

The FDIC's attempts to distinguish *Jarkesy* are unavailing. The FDIC notes that unlike with the SEC, its "governing statute does *not* provide for a right to bring an Article III proceeding" for civil penalties; Congress has instead "historically" funneled such claims through the agency. FDIC Op. at 78-79. But that legal framework was forged in the late twentieth century, *see* Pub. L. No. 95-630, § 107(e)(1), 92 Stat. 3641, 3660-61 (1978), and so it is irrelevant to the Seventh Amendment inquiry. "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 34 (2022) (citation omitted). And by "'embedd[ing]' [the jury trial] right in the Constitution," the Framers made sure to "secur[e] it 'against the passing demands of expediency or convenience.'" *Jarkesy*, 603 U.S. at 122

(citation omitted). A legislative decision that long postdated the Founding thus cannot "transmute a private right into a public one" to curtail that fundamental protection. *Id.* at 131 n.2.

The FDIC relatedly suggests that a jury trial would "dismantle the statutory scheme" and "impede swift resolution" of claims because Congress did not provide for jury trials. FDIC Op. at 80-81. But that circular reasoning does not explain why Congress *could not* have assigned these civil penalties claims to an Article III jury proceeding. And the fact that Congress neglected to provide for a constitutional alternative does not "strip [an enforcement] target of the protections of the Seventh Amendment." *Jarkesy*, 603 U.S. at 140. If that were enough to overcome the Seventh Amendment, then its safeguards could be nullified by legislative fiat—whenever Congress chose to reroute legal claims through an administrative agency. The Framers did not ratify such a hollow protection, and Congress cannot defeat it merely by "assign[ing] a matter to an agency for adjudication." *Id.* Again, "what matters is the substance of the action, not where Congress has assigned it." *Id.* at 134.

Finally, the FDIC asserts an "interest in preventing banking misconduct" that could affect "public funds." FDIC Op. at 77-78. That makes no difference either. There is nothing extraordinary or unusual about a federal bank-insurance program that would prevent an Article III court and a jury from adjudicating civil penalty

claims like these. And the FDIC ignores that, "despite its misleading name, the [public rights] exception does not refer to all matters brought by the government against an individual to remedy public harms." *Jarkesy*, 603 U.S. at 152 (Gorsuch, J., concurring) (emphasis omitted). "Instead, public rights are a narrow class defined and limited by history." *Id.*; *see also id.* at 130-32 (majority op.). The FDIC lacks any historical support for invoking that exception here. As this Court has recognized, "[s]uits to collect statutory penalties," although "brought to redress offenses against the public interest," have "long been considered suits to collect a debt which are triable to a jury." *Rogers v. Loether*, 467 F.2d 1110, 1121 n.37 (7th Cir. 1972), *aff'd sub nom. Curtis v. Loether*, 415 U.S. 189 (1974); *accord Tull*, 481 U.S. at 418-19.

For all these reasons, the public rights exception does not apply. The Seventh Amendment does, and the FDIC cannot deprive Petitioner of its protections for the civil penalty claim.

B. The FDIC Further Violated Petitioner's Jury Right by Making Findings for the Prohibition Order Claim that Also Bear on the Civil Penalty Claim.

The FDIC's prohibition order under section 1818(e) likewise serves a "punitive purpose." *Proffitt v. FDIC*, 200 F.3d 855, 861 (D.C. Cir. 2000). But this Court need not address whether the Seventh Amendment would normally apply to

the FDIC's claims for prohibition orders. It can vacate the entire decision against Petitioner while assuming this claim seeks equitable relief.

That is because "the 'Seventh Amendment right to a jury trial applies to all' actions but those 'where equitable rights *alone* were recognized.'" *Overwell Harvest*, 114 F.4th at 861 (citation omitted). It is thus "well settled that when legal and equitable relief are separately authorized by statute, and the 'legal claim is joined with the equitable claim, the right to jury trial on the legal claim, *including all issues common to both claims*, remains intact.'" *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806, 813-14 (7th Cir. 1992) (alteration adopted; emphasis added) (quoting *Tull*, 481 U.S. at 425).

Such is the case here. The FDIC admits it could not impose a prohibition order unless it "prove[d] the separate elements of misconduct, effect, and culpability." FDIC Op. at 25. And it acknowledges that those three elements overlap extensively with the elements required to impose a civil penalty. *See id.* at 25-26. In fact, the FDIC applied the exact same standard "in evaluating the misconduct prongs of both" the civil penalty and prohibition order claims. *Id.* at 27. It also found—for both claims—that the "effect element" was met "because the bank suffered financial loss." *Id.* at 36 (prohibition order); *see id.* at 42 (civil penalty). And it used its culpability findings for the prohibition order claim (along with an

additional finding of recklessness) to support the imposition of a civil penalty. *See id.* at 42.

That factual overlap requires vacatur of the prohibition order too. Because the factual "issues are common with those upon which" the claim to allegedly "equitable relief is based, the legal claim[]" for civil penalties "must be determined *prior* to any final . . . determination of [the] equitable claims." *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962) (emphasis added); *see also Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511 (1959). That sequencing is "essential to vindicating [Petitioner's] Seventh Amendment rights." *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 553 (1990).

Indeed, Petitioner holds those rights "even if adjudication of [the legal] claim[]" by a jury will necessarily "decide[] the equitable claim[] as well." *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, AFL-CIO*, 216 F.3d 577, 582 (7th Cir. 2000). In that case, the jury's "resolution of factual matters"—not the FDIC's—"will control" for both claims. *Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 471 (7th Cir. 2004); *accord Lacy v. Cook County*, 897 F.3d 847, 861-62 (7th Cir. 2018). The Court should therefore vacate the FDIC's Decision and Orders in their entirety.

II. Even if the FDIC Could Compel Adjudication in its Juryless Tribunal, Petitioner Was Entitled to a Proceeding Before a Constitutionally Accountable ALJ.

The tenure protections afforded to the FDIC's ALJs are also unconstitutional. Article II provides that "[t]he executive Power shall be vested in a President." U.S. Const. art. II, § 1, cl. 1. "The entire 'executive Power' belongs to the President alone." *Seila Law*, 591 U.S. at 213. But because the President "alone and unaided" cannot perform all the Nation's executive functions, he necessarily must rely on "the assistance of subordinates." *Myers v. United States*, 272 U.S. 52, 117 (1926).

At the same time, "[t]hese lesser officials must remain accountable to the President, whose authority they wield." *Seila Law*, 591 U.S. at 213. After all, it is the President's solemn duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. And because "[t]he buck stops with the President," he "must have some 'power of removing those for whom he can not continue to be responsible.'" *Free Enter. Fund*, 561 U.S. at 493 (citation omitted). To hold otherwise "would make it impossible for the President" to fulfill his constitutional prerogative, and to "keep [his] officers accountable" to the law and the people whom he serves. *Seila Law*, 591 U.S. at 214-15 (quotation marks omitted); *see* 1 *Annals of Cong.* 518 (1789) (Joseph Gales ed., 1834) (James Madison) (explaining that the President's removal power is necessary to preserve "the chain of dependence" and ensure that

"the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community").

The Supreme Court has carved out just "two exceptions to the President's unrestricted 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." *Seila Law*, 591 U.S. at 215, 218. But this case involves neither. FDIC ALJs wield substantial executive authority. Yet they are, as explained below, at least doubly insulated from the President's removal authority. That multi-layer protection means that "[t]he President is stripped of the power" that the Supreme Court's "precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired." *Free Enter. Fund*, 561 U.S. at 496. That violates Article II.

A. The Removal Restrictions for FDIC ALJs Are Unconstitutional.

1. FDIC ALJs Are Executive Officers Who Exercise Significant Executive Power.

ALJs plainly qualify as "Officers of the United States." U.S. Const. art. II, § 2, cl. 2; *see Burgess v. FDIC*, 871 F.3d 297, 303 (5th Cir. 2017) (FDIC ALJs); *Lucia v. SEC*, 585 U.S. 237, 241 (2018) (SEC ALJs). Their positions are "'established by Law,'" and they "'carry out important functions' over which they 'exercise significant discretion.'" *Burgess*, 871 F.3d at 302 (cleaned up) (quoting *Freytag v. Commissioner*, 501 U.S. 868, 881-82 (1991)). In fact, they possess "all

powers necessary to conduct" the FDIC's enforcement proceedings, 12 C.F.R. § 308.5(b), in which the rights and interests of companies and individuals hang in the balance.

To that end, FDIC ALJs wield their "broad authority to preside over agency adjudications," *Burgess*, 871 F.3d at 302, while armed with "nearly all the tools of federal trial judges," *Lucia*, 585 U.S. at 248. For instance, they may "receive relevant evidence" and "rule upon the admission of evidence and offers of proof." 12 C.F.R. § 308.5(b)(3). They are empowered to issue subpoenas and protective orders, "take or cause depositions to be taken," "administer oaths," "consider and rule upon" non-dispositive motions, "regulate the course of [a] hearing," limit "the attendance of the public and the media," and "prepare and present to the Board of Directors a recommended decision." *Id.* § 308.5(b)(1)-(2), (4)-(5), (7)-(8), (10). They can also impose sanctions on parties. *See id.* §§ 308.25(h), 308.26(c), 308.27(d), 308.108(d)(1). And they may "do all other things necessary and appropriate to discharge the duties" of a presiding officer. *Id.* § 308.5(b)(11).

In short, FDIC ALJs exercise significant authority to "shape the course and scope" of the adversarial proceedings before them. *Burgess*, 871 F.3d at 303; *see Lucia*, 585 U.S. at 248. As a result, "they are sufficiently important to executing the laws that the Constitution requires that the President be able to exercise authority over their functions." *Jarkesy v. SEC*, 34 F.4th 446, 464 (5th Cir. 2022).

2. FDIC ALJs Are at Least Doubly Insulated from the President's Removal Authority.

Despite the substantial executive power entrusted to FDIC ALJs, they enjoy a constitutionally intolerable level of protection from the President's oversight.

Congress cannot "commit[] substantial executive authority to officers" who are shielded by "two layers of for-cause removal" protection. *Free Enter. Fund*, 561 U.S. at 505. That is because such double insulation "not only protects [the officer] from removal except for good cause, but withdraws from the President any decision on whether that good cause exists" in the first place. *Id.* at 495. The decision is instead vested in intermediaries not "subject to the President's direct control." *Id.* And thus, "the President is no longer the judge of the [officer's] conduct." *Id.* at 496. The result is that the President "can neither ensure that the laws are faithfully executed, nor be held responsible for [the officer's] breach of faith." *Id.*

That straightforward principle resolves this case. FDIC ALJs may be removed "only for good cause established and determined by the Merit Systems Protection Board." 5 U.S.C. § 7521(a). And the members of that Board are themselves removable "by the President only for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 1202(d). Such "dual for-cause limitations," standing alone, "contravene the Constitution's separation of powers." *Free Enter. Fund*, 561 U.S. at 492.

The accountability problems do not stop there. The decision to seek removal before the Merits System Protection Board is committed to "the agency in which the administrative law judge is employed." 5 U.S.C. § 7521(a). But the FDIC does not directly employ its ALJs. Instead, it relies upon a "pool of administrative law judges" housed in the Office of Financial Institution Adjudication ("OFIA"), an inter-agency body that serves the FDIC, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve Board, and the National Credit Union Administration. *See* Financial Institutions Reform, Recovery, and Enforcement Act, Pub. L. No. 101-73, § 916, 103 Stat. 183, 486 (1989); 12 U.S.C. § 1813(q); 12 C.F.R. §§ 308.3, 308.103.

That unique inter-agency structure blurs the lines of accountability even more than in *Free Enterprise Fund*. The decision whether to initiate an ALJ removal action is not even vested in a single agency's head; instead, four separate agencies collectively supervise OFIA by ad hoc agreement. With exceptions not relevant here, their agreement states that "[a]ll decisions relating to [OFIA]" must be made by an "inter-agency committee" comprised of representatives from each of the four agencies. *See* Administrative Law Judge Agreement of 2018 ¶ 3 (Dec. 29, 2017), *available at* Dkt. 19-1 (Ex. C), *Burgess v. Whang*, No. 7:22-cv-00100-O (N.D. Tex. Oct. 17, 2022). And any effort to remove an ALJ requires, not just a majority, but

complete unanimity. *See id.* ¶ 2 ("Any change to the Office Staff personnel," including to ALJs, "shall be subject to the prior written approval of all Agencies.").

This sort of "diffusion of accountability" in the Executive Branch is precisely what the Framers sought to prevent. *Free Enter. Fund*, 561 U.S. at 497. The public cannot "determine on whom the blame or the punishment . . . ought really to fall" for matters involving an FDIC ALJ. The Federalist No. 70, at 426 (Alexander Hamilton). For "safely encased within a Matryoshka doll of tenure protections," the ALJ stands "immune from Presidential oversight, even as [she] exercise[s] power in the people's name." *Free Enter. Fund*, 561 U.S. at 497. The law is settled that "Congress cannot limit the President's authority in this way." *Id.* at 514.

3. The FDIC's Counterarguments Fail.

The FDIC cannot wash away this structural constitutional error. It tries to distinguish its ALJs on the ground that they "perform adjudicative functions." FDIC Op. at 84. But the tenure-protected PCAOB in *Free Enterprise Fund* likewise "adjudicate[d] cases." 561 U.S. at 530 (Breyer, J., dissenting). And the adjudicative responsibilities of ALJs cannot alter the constitutional calculus at any rate. Their activities may take a "'judicial form[], but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the executive Power,' for which the President is ultimately responsible." *United States v. Arthrex, Inc.*, 594 U.S. 1, 17 (2021) (some quotation marks omitted). "So even if ALJs' functions are more

adjudicative than PCAOB members, the fact remains that [at least] two layers of insulation impede[] the President's power to remove ALJs based on their exercise of the discretion granted to them." *Jarkesy*, 34 F.4th at 465. Article II prohibits such a structure.

The FDIC next emphasizes that its ALJs' decisions are subject to the agency Board's review. *See* FDIC Op. at 84-85. But many parties bow out and settle before they make their way past the ALJ ringer. And even in those cases that proceed, the ALJ's influence lingers. After all, the ALJ has already "critically shape[d] the administrative record" by the time a case reaches the Board, and the Board affords a measure of "deference to its ALJs, even if not by regulation." *Lucia*, 585 U.S. at 248, 250. In fact, the Board observed here that it "generally defers to an ALJ's factual findings." FDIC Op. at 3 (alteration adopted; citation omitted). The prospect of review thus does not blunt "the constitutional impact of for-cause removal." *Free Enter. Fund*, 561 U.S. at 504 (majority op.) (citation omitted).

B. The Removal Restrictions for FDIC ALJs Create a Structural Error.

The FDIC also erred in requiring Petitioner to affirmatively prove that "harm came from" the challenged multi-layer tenure protections. FDIC Op. at 81. The FDIC subjected Petitioner to an administrative adjudication before an unaccountable ALJ, and that lack of constitutional accountability creates a structural error that warrants automatic vacatur of the agency's decision.

1. Structural Errors Require Automatic Vacatur.

Begin with the basics. "The hallmark of a structural error is that the error persists throughout the proceeding and relates to the framework in which a trial proceeds." *Winston v. Boatwright*, 649 F.3d 618, 628 (7th Cir. 2011). Such constitutional defects are not amenable to "harmless error analysis." *Franklin v. McCaughtry*, 398 F.3d 955, 961 (7th Cir. 2005). And the "required corrective" where one occurs is a new proceeding free from the constitutional infirmity. *McCoy v. Louisiana*, 584 U.S. 414, 428 (2018). In other words, structural errors "require automatic reversal" or vacatur "without regard to their effect on the outcome." *Neder v. United States*, 527 U.S. 1, 7 (1999).

A constitutional error "may be ranked structural" for a variety of reasons. *McCoy*, 584 U.S. at 427. For example, the Supreme Court has deemed errors structural "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017). "An error might also count as structural when its effects are too hard to measure" or "where the error will inevitably signal fundamental unfairness." *McCoy*, 584 U.S. at 427. "These categories are not rigid" or exclusive. *Weaver*, 582 U.S. at 296. And sometimes "more than one of these rationales may be part of the explanation for why an error is deemed to be structural." *Id.* The

"critical" point, however, is that "[a]n error can count as structural even if the error does not lead to fundamental unfairness in every case." *Id.*

2. The Unconstitutional Removal Protections for ALJs Infect the Framework of the Adjudication and Thus Create Structural Error.

The doctrine of structural error applies equally to agency adjudications. The Administrative Procedure Act directs reviewing courts to take "due account" of the "rule of prejudicial error." 5 U.S.C. § 706. And this language "su[ms] up in succinct fashion the 'harmless error' rule applied by the courts in the review of lower court decisions." *Shinseki v. Sanders*, 556 U.S. 396, 406 (2009) (emphasis and citation omitted). For nearly a century, courts applying that rule have recognized that a structural error in the "adjudicatory framework" of a proceeding "cannot be deemed harmless." *Williams v. Pennsylvania*, 579 U.S. 1, 16 (2016) (biased appellate judge on multi-member panel); *see Chapman v. California*, 386 U.S. 18, 23 n.8 (1967) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel), and *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge)).

In the context of agency adjudication, "[i]ssues of separation of powers" are "most fit to the doctrine" of structural error. *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000); *see Bandimere v. U.S. Sec. & Exch. Comm'n*, 844 F.3d 1168, 1181 & n.31 (10th Cir. 2016). And that makes sense. It is extremely "difficult or

impossible for someone subject to a wrongly designed scheme to show that the design—the structure—played a causal role in his loss." *Landry*, 204 F.3d at 1131.

This case is no exception. An Officer's "desire to avoid removal" is supposed to help ensure that she is responsive to the President and thus that the President can meet his obligations under the Take Care Clause. *See FEC v. NRA Political Victory Fund*, 6 F.3d 821, 825 (D.C. Cir. 1993) (quoting *Bowsher*, 478 U.S. at 727 n.5). But that constitutional dynamic breaks down where an executive Officer—like the ALJ here—is effectively shielded from removal. The official's decisionmaking process will naturally differ from those who recognize their accountability to the President and, through him, to the people. The official can act as she pleases because she need not answer to anyone. *See Seila Law*, 591 U.S. at 224-25. In that way, the removal protections predictably "have some impact" on how the FDIC's ALJ "decides matters before [her]." *NRA*, 6 F.3d at 825. And even though that impact is all but "impossible to measure," *id.*, the unconstitutional dynamic has loomed over every decision that the ALJ has made in this multi-year proceeding, thereby "infect[ing] the entire [adjudication] process," *Neder*, 527 U.S. at 8 (citation omitted).

Petitioner need not show more to obtain relief. He has a constitutional right to "an administrative adjudication untainted by separation-of-powers violations." *Cochran v. U.S. Sec. & Exch. Comm'n*, 20 F.4th 194, 210 n.16 (5th Cir. 2021) (en banc), *aff'd sub nom.*, *Axon Enter., Inc. v. FTC*, 598 U.S. 175 (2023). And "[t]he

deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993). Accordingly, there is no need to engage in "a speculative inquiry into what might have occurred in an alternate universe." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). Petitioner is at the very least entitled to a new hearing.

Correcting the error here would also "protect[] some other interest" beyond preserving Petitioner's liberty. *Weaver*, 582 U.S. at 295; *see Bond v. United States*, 564 U.S. 211, 223 (2011) (explaining that the separation of powers protects individual liberty). In particular, "[t]he President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them" because of tenure protections. *Free Enter. Fund*, 561 U.S. at 484. Both the President and the public have a significant interest in eliminating such constitutional defects. This only reinforces that the error here qualifies as structural. *See Weaver*, 582 U.S. at 295.

Moreover, courts should craft remedies that "[i]ncentiv[ize]" litigants to raise separation-of-powers challenges which restore the structural safeguards provided by Article II. *Lucia*, 585 U.S. at 251 & n.5 (citation omitted) (setting aside agency action based on improperly appointed ALJ whose decision was reviewed *de novo* by the SEC, without inquiring into prejudice). But forcing litigants to engage in the

futile task of proving harm from the removal protections afforded to Officers who preside over their adjudications does just the opposite. It would deter them from bringing such challenges and thus perpetuate the unconstitutional scheme—to the detriment of the individual litigant, the President, and the public alike.

In short, when a constitutional error infects the decisionmaking processes of an ALJ "charged with bringing a defendant to judgment," as it does here, "a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm." *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986). The ALJ's lack of constitutional accountability "affects the framework within which the [adjudication] proceeds" and thereby "defies analysis by harmless error standards." *Weaver*, 582 U.S. at 295 (alterations adopted; citations omitted). Petitioner "must therefore be accorded a new" adjudication "without any need first to show prejudice." *McCoy*, 584 U.S. at 428.

3. The FDIC Misconstrued *Collins* in Requiring Petitioner To Prove that He Was Prejudiced by this Structural Error.

In rejecting Petitioner's ALJ removal claim, the FDIC relied on *Collins v. Yellen*, 594 U.S. 220 (2021). *See* FDIC Op. at 81-82. But because that case did not address a party-specific adjudication or a request for prospective relief, it is simply off-point.

Collins involved a collateral challenge to a pair of agreements negotiated between the Federal Housing Finance Agency ("FHFA") and the Department of

Treasury in the wake of the 2008 financial crisis. *See* 594 U.S. at 227, 231-33. Years after the third amendment to those agreements took effect, a group of Fannie Mae and Freddie Mac shareholders sued the FHFA, arguing that the removal protections afforded to the agency's director were unconstitutional. *Id.* at 235. The shareholders asked the Court to "completely undo[]" the third amendment and order a "return to Fannie and Freddie of all dividend payments made pursuant to it," which totaled well over $100 billion. *Id.* at 257 (alterations adopted). In that unusual context, where the plaintiffs sought to vindicate "compensable" harm from an otherwise valid agency action, the Court remanded for the lower courts to "resolve[] in the first instance" whether the "unconstitutional removal restriction inflicted harm." *Id.* at 259-60; *see also id.* at 283 (Gorsuch, J., concurring in part) (observing that "the Court's opinion today is a product of its unique context" and did not "undo[] our prior guidance authorizing more meaningful relief in other situations"). *Collins* thus said nothing to displace—or even cast doubt on—the doctrine of structural error that governs party-specific adjudications. And, as already explained, it is well established that errors in the "adjudicatory framework" of a proceeding "cannot be deemed harmless." *Williams*, 579 U.S. at 16.

Nor does it make any difference that the FDIC's Board reviewed the unconstitutionally insulated ALJ's decision. That does not cure the structural error. In *Vasquez*, for example, the government argued that racial "discrimination in the

grand jury amounted to harmless error" because the evidence was "overwhelming," and the respondent was "convict[ed] after a fair trial." 474 U.S. at 260. In the government's view, that subsequent trial proceeding "purged any taint attributable to the indictment process." *Id.* But the Supreme Court disagreed. As it explained, "even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly *infect the framing* of the indictment and, consequently, the nature or very existence of the proceedings to come." *Id.* at 263 (emphasis added). As a result, the error in the grand-jury proceeding was "not amenable to harmless-error review." *Id.* at 264; *see also Ward v. Vill. of Monroeville*, 409 U.S. 57, 61 (1972) (rejecting argument that adjudicator bias in mayor's traffic court could "be corrected on appeal and trial *de novo* in the County Court of Common Pleas").

The same logic applies with even more force here. By the time Petitioner's case reached the FDIC's Board, the unconstitutionally insulated ALJ had already presided over and significantly "shape[d] the course and scope" of the enforcement proceeding. *Burgess*, 871 F.3d at 303; *see Lucia*, 585 U.S. at 248. The ALJ supervised discovery matters, resolved pre-trial motions, "held a six-day hearing," admitted "310 exhibits," oversaw lay and expert "witness testimony," and issued a 140-page recommended decision, much of which the Board adopted. *See* FDIC Op.

at 2. There is no question that the ALJ shaped the record that came before the Board, so one "simply cannot know" how the unconstitutional removal provisions affected the outcome of the adjudication. *Vasquez*, 474 U.S. at 264. That inherent uncertainty requires "adherence to a rule of mandatory [vacatur]." *Id.*

Moreover, even setting aside the approach required for structural errors in party-specific adjudications, the Supreme Court has treated relief for separation-of-powers violations differently when a party seeks prospective relief. In that context, the Court has repeatedly rejected the view that a plaintiff must "show that the challenged act would not have been taken if the responsible official had been subject to the President's control." *Seila Law*, 591 U.S. at 211; *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992) (explaining that parties can challenge an agency's failure to fulfill a procedural requirement "even though [they] cannot establish with any certainty" that fulfilling the requirement will alter the agency's action).

For instance, *Free Enterprise Fund* was a challenge brought by an accounting firm subject to the Board's reporting requirements and auditing standards. The Court held the dual for-cause limitations on the removal of Board members unconstitutional. *See* 561 U.S. at 492. The Court then concluded that the accounting firm was "entitled to declaratory relief sufficient to ensure that" the requirements to which it was subject would "be enforced only by a constitutional agency accountable

to the Executive." *Id.* at 513. And it explained that such forward-looking relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Id.* at 491 n.2 (citation omitted).

Here, Petitioner is subject to a restriction that is indisputably forward-looking in nature—a writ of prohibition. He is therefore also entitled to prospective relief to ensure that the agency does not operate unconstitutionally in enforcing that writ. That requires redetermination of his case by decisionmakers not subject to unconstitutional removal restrictions.

CONCLUSION

The Chamber respectfully requests that the Court vacate the FDIC's Decision and Orders.

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2025, I caused the foregoing *amicus curiae* brief to be filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit. The Court's CM/ECF system was used to file the brief, and service will therefore be accomplished by the CM/ECF system on all CM/ECF-registered counsel.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 7th Cir. R. 29 because it contains 6,998 words, excluding those portions of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 7th Cir. R. 32(b) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman 14-pt font.

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