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
of the Federal Deposit Insurance Corporation

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

Daryl Joseffer
Stephanie A. Maloney
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Andrew J. Pincus
Counsel of Record
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Avi M. Kupfer
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606

Counsel for Amicus Curiae *the Chamber of Commerce of the United States of America*

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: Andrew J. Pincus

Pursuant to 6th Cir. R. 26.1, The Chamber of Commerce of the United States of America
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:

No.

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/Andrew J. Pincus

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

Page

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

The Restrictions on Removal of FDIC ALJs Violate the Constitution. 5

A. FDIC ALJs Exercise Significant Authority and Qualify As Inferior Officers of the United States. 7

B. Double Insulation of FDIC ALJs From Presidential Removal Authority Violates the Appointments Clause. 11

CONCLUSION 20

CERTIFICATE OF COMPLIANCE 21

CERTIFICATE OF FILING AND SERVICE 22

TABLE OF AUTHORITIES

Cases **Page(s)**

Axon Enterprise, Inc. v. FTC,
986 F.3d 1173 (9th Cir. 2021) 16

Bowsher v. Synar,
478 U.S. 714 (1986) 13

Buckley v. Valeo,
424 U.S. 1 (1976) 6, 8

Burgess v. FDIC,
871 F.3d 297 (5th Cir. 2017) 9

City of Arlington v. FCC,
569 U.S. 290 (2013) 17

DOT v. Ass'n of Am. Railroads,
575 U.S. 43 (2015) 12

Edmond v. United States,
520 U.S. 651 (1997) 6

Fleming v. USDA,
987 F.3d 1093 (D.C. Cir. 2021) 16

Free Enterprise Fund v. PCAOB,
561 U.S. 477 (2010) .... *passim*

Freytag v. Commissioner,
501 U.S. 868 (1991) 7, 8, 10

Humphrey's Executor v. United States,
295 U.S. 602 (1935) 13

Kisor v. Wilkie,
139 S. Ct. 2400 (2019) 16

Lucia v. SEC,
138 S. Ct. 2044 (2018) .... *passim*

TABLE OF AUTHORITIES (continued)

Cases (continued) **Page(s)**

Myers v. United States,
272 U.S. 52 (1926) 5, 12, 13

Ramspeck v. Fed. Trial Examiners Conf.,
345 U.S. 128 (1953) 11

Seila L. LLC v. CFPB,
140 S. Ct. 2183 (2020) 5, 12-14

United States v. Germaine,
99 U.S. 508 (1879) 6, 7

Constitutions, statutes, and regulations

U.S. Const.:

Art. II .... *passim*

§ 1, cl. 1 .... 5, 16

§ 2, cl. 2 .... 5, 6

Appointments Clause .... *passim*

§ 3 5

Art. III 8

Administrative Procedure Act, 5 U.S.C. § 551 et seq. 15

5 U.S.C. §§ 556-57 7

5 U.S.C. § 1202(d) 15

5 U.S.C. § 1305 17

5 U.S.C. § 3105 .... 7, 17

5 U.S.C. § 5372 7

TABLE OF AUTHORITIES
(continued)

Statutes and regulations (continued) **Page(s)**

5 U.S.C. § 7521(a) 15, 19

Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 17

12 U.S.C. § 242 18

12 U.S.C. § 1752a(c) 18

12 U.S.C. § 1812 18

15 U.S.C. § 78d(a) 18

15 U.S.C. § 7211(e)(5)(A) 18

5 C.F.R.:

Section 930.204(a) 17

12 C.F.R.:

Section 308.3 18

Section 308.5(b) 8

Section 308.5(b)(1) 9

Section 308.5(b)(3) 8, 9

Section 308.5(b)(5)-(7) 9

Section 308.5(b)(7) 10

Section 308.25(h) 9

Section 308.26(c) 9

Section 308.27(d) 9

Section 308.38(a) 10

TABLE OF AUTHORITIES
(continued)

Statutes and regulations (continued) **Page(s)**

Section 308.40 10

Section 308.536(d) 10

Other authorities

1 Annals of Cong. (1789) 12

30 Writings of George Washington (J. Fitzpatrick ed. 1939) 5

56 Fed. Reg. 27,790 (June 17, 1991) 9, 17

86 Fed. Reg. 2246 (Jan. 12, 2021) 11

Fed. Deposit Ins. Corp., *Resolution 085152* (July 19, 2018) 11

Fed. R. App. P. 29(a)(4)(E) 1

Resp't's Br., *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130) 16

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). The Chamber therefore has an interest in ensuring that the power to preside over those proceedings, and to affect the interests of those businesses and

---

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

individuals, is vested in officials whose appointment and tenure accords with the requirements of the Constitution. Where, as here, the exercise of substantial authority under the laws of the United States impacts the rights and interests of companies and individuals subject to the FDIC's regulations and enforcement, it is essential that such power is not insulated from the democratically accountable President. Furthermore, to the extent that the FDIC utilizes administrative proceedings to establish generally applicable standards and policies, its ALJs wield Article II authority that also requires such accountability.

SUMMARY OF ARGUMENT

This case presents fundamental questions about the Constitution's structural protections—in particular, the President's ability to supervise FDIC administrative law judges (ALJs), executive officials who wield significant Article II authority. These ALJs preside over enforcement actions brought by the FDIC in which companies and individuals have their rights and interests adjudicated. Through such proceedings, ALJs may impose remedies and penalties as broad as those available in an action in federal court.

That significant authority confirms the importance of ensuring that FDIC ALJs are overseen in the transparent and politically accountable manner that the Constitution requires for all "officers" who wield considerable power. But these ALJs are protected from presidential control by at least two layers of tenure protections that bar removal absent a showing of good cause: one layer that protects the ALJs from removal, and a second layer that protects from removal the executive officers responsible for ALJ dismissal decisions.

That dual good-cause limitation on the removal of executive officers is identical to the one that the Supreme Court invalidated in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), for diffusing accountability in a manner that violates the Appointments Clause. As the Court explained in that case, the Framers created a structure that confers on the President plenary power to direct his subordinates in the execution of the laws—including the power to remove them from office. Limits on the President's oversight of the unelected officers who assist his faithful execution of the laws frustrate the public's prerogative to hold the Executive to account.

For that reason, the President generally must have the ability to remove all constitutional officers—*i.e.*, any official exercising significant authority pursuant to the laws of the United States. And ALJs, who preside over agency enforcement proceedings, constitute officers, as the Supreme Court confirmed in *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

Taken together, *Lucia* and *Free Enterprise Fund* compel the conclusion that the statutory scheme governing the removal of FDIC ALJs is unconstitutional. *First*, the ALJs are inferior constitutional officers who exercise significant executive authority on behalf of the FDIC. Like the ALJs in *Lucia*, they conduct adversarial proceedings with nearly all the tools of federal trial judges. *Second*, the multiple levels of good-cause tenure that protect the ALJs from accountability to the President violate the Appointments Clause.

Indeed, as compared to the executive officers in *Free Enterprise Fund*, FDIC ALJs are even less susceptible to presidential oversight given the additional limitations on their removal. The only direct supervision of FDIC ALJs is provided by a committee comprised of unidentified representatives from four separate agencies. And agreement by all four agencies is required to initiate a removal action

against an ALJ. Those restrictions confirm the unconstitutionality of the current structure.

Because petitioner's case was adjudicated before an ALJ subject to unconstitutional removal protections, the order of the FDIC Board of Directors should be vacated.

ARGUMENT

The Restrictions on Removal of FDIC ALJs Violate the Constitution.

The Constitution specifies that the "executive Power shall be vested in a President of the United States of America," who must "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; *id.*, § 3. Yet the Framers recognized that it would be impossible for the President, acting alone, to "perform all the great business of the State." *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020) (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)).

Thus, the Constitution, in the Appointments Clause, Art. II, § 2, cl. 2, identifies two categories of "lesser executive officers" who assist the President in discharging the executive power, *Seila*, 140 S. Ct. at 2197; *see also Myers v. United States*, 272 U.S. 52, 117 (1926) (The President "execute[s] the laws" with "the assistance of subordinates.");

United States v. Germain, 99 U.S. 508, 510 (1878) ("[A]ll persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment.").

The President has exclusive power to "nominate, and by and with the Advice and Consent of the Senate, . . . appoint" the first category—principal "Officers of the United States." Art. II., § 2, cl. 2. The Appointments Clause also identifies "inferior Officers," *id.*, "whose work is directed and supervised at some level by" the principal officers, *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 510 (2010) (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)). Congress may vest the appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II., § 2, cl. 2.

Notably, officers are different in kind than "employees of the United States," who are the "lesser functionaries subordinate to officers" that comprise the bulk of the federal government's workforce. *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976) (per curiam). That distinction matters because employees, unlike officers, "need not be selected" or (as discussed below) removed "in compliance with the strict

requirements of Article II." *Freytag v. Commissioner*, 501 U.S. 868, 880 (1991).

Supreme Court precedent makes clear that the FDIC's ALJs are inferior officers. And that precedent also establishes that the restrictions on the removal of those ALJs violate the Constitution. The decision below must be vacated.[2]

A. FDIC ALJs Exercise Significant Authority and Qualify As Inferior Officers of the United States.

The Supreme Court's framework for differentiating constitutional officers from mere federal employees makes clear that FDIC ALJs qualify as inferior officers.

To begin with, an inferior officer must "occupy a 'continuing' position established by law." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (quoting *Germaine*, 99 U.S. at 511). FDIC ALJs indisputably are appointed to a position created by statute that spells out their "duties, salary, and means of appointment." *Freytag*, 501 U.S. at 881; *see also* 5 U.S.C. §§ 556-57 (ALJ functions); *id.* § 3105 (hiring practices); *id.* § 5372 (pay scale).

[2] The Chamber takes no position on petitioner's argument that the limits on the President's power to remove members of the FDIC Board of Directors render the agency's structure unconstitutional.

In addition, to qualify as an inferior officer, the individual must exercise "significant authority pursuant to the laws of the United States." *Lucia*, 138 S. Ct. at 2051 (quoting *Buckley*, 424 U.S. at 126). The Supreme Court has twice concluded that non-Article III judges who preside over adversarial hearings exercise significant executive authority.

Those determinations rested on the existence of "four specific (if overlapping) powers"—the authority to "take testimony," to "conduct trials," to "rule on the admissibility of evidence," and to "enforce compliance with discovery orders." *Id.* at 2053 (Securities and Exchange Commission (SEC) ALJs); *see also Freytag*, 501 U.S. 868 (United States Tax Court special trial judges). Like SEC ALJs and special trial judges, FDIC ALJs exercise "all powers necessary to conduct" adversarial proceedings, 12 C.F.R. § 308.5(b), and do so with "nearly all the tools of federal trial judges," *Lucia*, 138 S. Ct. at 2053.

First, as to testimony, FDIC ALJs have the power to "receive relevant evidence and to rule upon the admission of evidence and offers of proof." 12 C.F.R. § 308.5(b)(3); *see also* A180-88 (order in this case regarding the admissibility of testimony and exhibits).

Second, FDIC ALJs conduct trials; they "administer oaths, rule on motions, and generally regulate the course of a hearing, as well as the conduct of parties and counsel." *Lucia*, 138 S. Ct. at 2053 (alterations and quotation marks omitted); *see also* 12 C.F.R. § 308.5(b)(1), (5)-(7); A114-23 (notice in this case setting deadlines for discovery and motions *in limine*; establishing requirements for prehearing statements; and scheduling hearing); A171-79 (order in this case denying in part and granting in part motion to strike affirmative defenses).

Third, FDIC ALJs "rule upon the admission of evidence and offers of proof." 12 C.F.R. § 308.5(b)(3). As discussed above, the ALJ here ruled on the admission of testimony and exhibits, and on the availability of affirmative defenses. *See* A171-88.

And fourth, the ALJs have the power to enforce compliance with discovery orders. *Burgess v. FDIC*, 871 F.3d 297, 302-03 & n.39 (5th Cir. 2017); *see also, e.g.*, 12 C.F.R. §§ 308.25(h), 308.26(c), 308.27(d); 56 Fed. Reg. 27,790, 27,798 (June 17, 1991) ("The administrative law judge has the plenary authority to control the conduct of administrative proceedings, including discovery.").

The fact that ALJs typically do not render final decisions, because their rulings are subject to plenary review by the FDIC, 12 C.F.R. §§ 308.5(b)(7), 308.40, does not undermine their status as inferior officers. The Supreme Court has "explicitly reject[ed]" the "theory that final decisionmaking authority is a *sine qua non* of officer status." *Lucia*, 138 S. Ct. at 2052 n.4; *see also Freytag*, 501 U.S. at 873 (special trial judges "prepare proposed findings and an opinion").

Like their SEC counterparts, FDIC ALJs issue decisions that contain "factual findings, legal conclusions, and appropriate remedies." *Lucia*, 138 S. Ct. at 2054. The ALJ in this case issued a 145-page decision containing his "findings of fact, conclusions of law, and recommended" remedies. A189-333; *see also* 12 C.F.R. § 308.38(a). Moreover, even if the power to issue final decisions was relevant to the officer calculus, FDIC ALJs exercise that authority in certain types of actions. *See, e.g.*, 12 C.F.R. § 308.536(d) (providing that absent appeal, an ALJ "decision will constitute the final decision of the Board" in fraud actions).

The FDIC does not appear to dispute the status of its ALJs as inferior officers. Less than a month after *Lucia* was decided, the FDIC

responded by selecting new ALJs who, unlike their predecessors, were appointed by the department head in order to comply with the holding of *Lucia*. Fed. Deposit Ins. Corp., *Resolution 085152* (July 19, 2018), www.fdic.gov/news/board/2018-07-19-085152.pdf; *see also* 86 Fed. Reg. 2246, 2246 (Jan. 12, 2021) (advising that the FDIC Board of Directors "has appointed all ALJs that preside over FDIC enforcement proceedings" "[s]ince the *Lucia* decision"). The agency's post-*Lucia* corrective action recognizes that the structural safeguards of the Appointments Clause apply to FDIC ALJs.

B. Double Insulation of FDIC ALJs From Presidential Removal Authority Violates the Appointments Clause.

The status of FDIC ALJs as inferior officers carries important constitutional implications for their method of appointment, and for the way they may be removed from office. The dual good-cause limitation on the removal of FDIC ALJs impermissibly restrains the President's power to remove them from office.[3]

1. Article II "grants . . . the executive power of the government" "to the *President*," who must "take care that the laws be faithfully

[3] This case does not require the Court to rule on the permissibility of a *single* for-cause removal restriction protecting ALJs. *Cf. Ramspeck v. Fed. Trial Examiners Conf.*, 345 U.S. 128, 142 (1953).

executed." *Myers*, 272 U.S. at 163-64 (emphasis added). The subordinate constitutional officers who wield authority on the President's behalf therefore "must remain accountable to" him. *Seila*, 140 S. Ct. at 2197.

Article II accordingly provides the President with "the power of appointing, overseeing, and controlling" the officers "who execute the laws" on his behalf. *Id.* (quoting James Madison in 1 Annals of Cong. 463 (1789)). Only through that chain of command can the President be "held fully accountable" to the people "for discharging his own responsibilities." *Free Enterprise Fund*, 561 U.S. at 513; *see also DOT v. Ass'n of Am. Railroads*, 575 U.S. 43, 63 (2015) (Alito, J., concurring).

The President's oversight power "generally includes the ability to remove executive officials." *Seila*, 140 S. Ct. at 2197*; see also Free Enterprise Fund*, 561 U.S. at 492 (detailing the history of this "settled and well understood construction of the Constitution"); *Myers*, 272 U.S. at 122 (describing the "exclusive power of removal" as a "necessity" of "the executive power").

The "power of removing those for whom [the President] cannot continue to be responsible"—like the power to appoint officers in the first place— is "essential to the execution of the laws by" the President.

Seila, 140 S. C. at 2198 (quoting *Myers*, 272 U.S. at 117). "Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Free Enterprise Fund*, 561 U.S. at 514. Therefore, Congress "cannot reserve for itself the power of removal of an officer charged with the execution of the laws." *Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

2. The Supreme Court has upheld only two narrow restrictions on the President's power to remove the principal officers and inferior officers. First, the Court has stated that Congress may, under certain circumstances, place for-cause limitations on the power of the President to remove the principal officers of "multimember expert agencies that do not wield substantial executive power." *Seila*, 140 S. Ct. at 2199-200; *see also Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Second, and relevant to FDIC ALJs, Congress may place for-cause limitations on the ability of principal officers to remove inferior officers that have "limited duties and no policymaking or administrative authority." *Seila*, 140 S. Ct. at 2200.

But these exceptions may not be combined into a single "dual for-cause limitation" on the President's authority to control executive

officials. *Free Enterprise Fund*, 561 U.S. at 492. To begin with, constitutional concerns are heightened in the context of independent agencies, like the FDIC, whose heads are themselves shielded from "the most direct method of presidential control—removal at will." *Seila*, 140 S. Ct. at 2204. Adding a second layer of tenure protection impermissibly diminishes the President's authority to hold principal officers of independent agencies accountable for their removal decisions with respect to inferior officers "to the same extent that he may hold [principal officers] accountable for everything else that [they] do[]." *Free Enterprise Fund*, 561 U.S. at 495-96. Such a double limitation on presidential authority is "contrary to Article II's vesting of the executive power in the President" and violates the Constitution's separation of powers. *Id.* at 496.

Free Enterprise Fund reached that precise conclusion and controls the outcome here. The Court in that case addressed a statutory restriction on the removal of inferior officers of the SEC. An independent agency, the SEC oversees the Public Company Accounting Oversight Board (PCAOB) and appoints its members (inferior officers under Article II) to five-year terms. *Id.* at 484-86.

Under the challenged statutory scheme, PCAOB members could be removed by the SEC only "for good cause shown," and, in turn, SEC Commissioners could be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 486-87. The Court held that the combined effect of those restrictions—two "layer[s] of insulation" between the PCAOB's exercise of executive authority and any presidential oversight—resulted in an unconstitutional "diffusion of accountability." *Id.* at 497, 501.

The statutory scheme at issue here likewise grants the inferior officers of an independent agency at least two layers of "good-cause protection" from the President's removal power, and therefore violates the Appointments Clause. The Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq., provides that ALJs may be removed by an agency head "only for good cause established and determined by the Merit Systems Protection Board." *Id.* § 7521(a). The members of that Board, in turn, are themselves removable by the President "only for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 1202(d). That exactly parallels the structure held unconstitutional in *Free Enterprise Fund*.

Such a structure impermissibly dilutes the President's control over executive officials, subverting both his "ability to ensure that the laws are faithfully executed" as well as "the public's ability to pass judgment on his efforts." *Free Enterprise Fund*, 561 U.S. at 497-98; *see also, e.g.*, *Fleming v. USDA*, 987 F.3d 1093, 1115-18 (D.C. Cir. 2021) (Rao, J., concurring in part and dissenting in part); *Axon Enterprise, Inc. v. FTC*, 986 F.3d 1173, 1187 (9th Cir. 2021) (noting "substantial questions" about whether a similar dual good-cause tenure scheme violates the Appointments Clause). Indeed, the government has acknowledged that the status of ALJs as constitutional officers renders dual good-cause tenure restrictions impermissible. *See* Resp't's Br. at 20, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130), 2017 WL 5899983, at *20.

Although the methods by which FDIC ALJs carry out executive authority largely are adjudicatory, their duties nonetheless are an exercise of the "executive Power" conferred upon the President. Art. II, § 1, cl. 1; *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) ("[E]ven when agency activities take . . . 'judicial' forms, they continue to be exercises of the executive Power." (quotation marks and alterations

omitted)); *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013). As the FDIC itself has explained, the "powers granted" to its ALJs "are intended to further the Agency's goal[s]" with respect to the administrative hearing process. 56 Fed. Reg. at 27,792. The Appointments Clause therefore prohibits the diffusion of responsibility that results from dual for-cause limitations on removal.

3. The two-layered good-cause protection of FDIC ALJs from removal by the President is enough to render that statutory scheme unconstitutional. But several other features of the system by which FDIC ALJs can be held to account for their exercise of executive authority make this structure even less susceptible to presidential control than the tenure system that was invalidated in *Free Enterprise Fund*—and therefore even more clearly unconstitutional.

The authority of FDIC ALJs ultimately is derived from the APA, 5 U.S.C. §§ 1305, 3105. Pursuant to APA regulation, FDIC ALJs "'receive a career appointment' . . . to a position created by statute." *Lucia*, 138 S. Ct. 2047 (alterations omitted) (quoting 5 C.F.R. § 930.204(a)); *see also* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 916(1), 103 Stat. 183, 486 (directing the FDIC and

other banking agencies to "establish their own pool of administrative law judges").

Only by a stroke of significant luck, then, will the President's appointment of members of the FDIC Board of Directors, *see* 12 U.S.C. § 1812, coincide with the retirement of FDIC ALJs, thereby creating a rare opening to (indirectly) affect the activities of those executive officers. By contrast, the President typically will have at least an opportunity to appoint SEC Commissioners who, in turn, can shape the PCAOB through selection of the term-limited members of the PCAOB. *See* 15 U.S.C. §§ 78d(a), 7211(e)(5)(A).

The diffuse and opaque system of accountability for FDIC ALJs further aggravates the threat to presidential control. The ALJs are housed in the Office of Financial Institution Adjudication, a body created by a memorandum of agreement between the FDIC and three other banking agencies. 12 C.F.R. § 308.3; Ex. L to Pet'r's Mot. to Stay at 1 (Dkt. 7). As detailed in petitioner's opening brief (at 30-31), three of the four agencies that supervise the Office have heads whom the President can remove only for cause. 12 U.S.C. §§ 242, 1752a(c). And the agreement of those agencies may be required to initiate a removal

action against an ALJ. 5 U.S.C. § 7521(a); *see also* Ex. L to Pet'r's Mot. to Stay at 3 (describing the "inter-agency" group that generally must "approv[e]" "[a]ll decisions relating to the Office").

To make matters worse, under the operative interagency agreement, the Office is "subject to the general oversight" of a committee whose membership includes "representatives" of the four agencies. Ex. L to Pet'r's Mot. to Stay at 3. The FDIC's representative is a lower-level assistant general counsel, A640-41, and that also may be true of the other agencies' representatives.

To exercise any meaningful control over FDIC ALJs—constitutional officers who exercise executive power—the President first would need the opportunity to appoint, or good cause to remove, multiple agency heads. Then he would have to hold out hope that the fresh appointees assign like-minded representatives to an interagency oversight body. The Appointments Clause cannot bear the weight of that Rube Goldberg accountability structure.

The insulation from accountability to both the President and the appointing principal officers is thus greater than that of the inferior officers whose double-layered for-cause removal protection was

invalidated in *Free Enterprise Fund*. This Court should reach the same conclusion in this case: the tenure scheme for FDIC ALJs violates the Constitution.

CONCLUSION

For the foregoing reasons, the order of the FDIC Board of Directors should be vacated.

Dated: April 14, 2021

Respectfully submitted,

/s/ *Andrew J. Pincus*

Andrew J. Pincus
Counsel of Record
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Avi M. Kupfer
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606

Daryl Joseffer
Stephanie A. Maloney
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae *the Chamber of Commerce of the United States of America*

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because:

   ☒ this brief contains 3,701 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 32(f), *or*

   ☐ this brief uses a monospaced typeface and contains _________ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   ☒ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook, *or*

   ☐ this brief has been prepared in a monospaced spaced typeface using *(state name and version of word processing program)* ___________________________ with *(state number of characters per inch and name of type style)* _________________ ____.

/s/ *Andrew J. Pincus*
Andrew J. Pincus
Counsel for Amicus Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on April 14, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Andrew J. Pincus*
Andrew J. Pincus
Counsel for Amicus Curiae