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 REHEARING AND REHEARING EN BANC

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

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

Name of counsel: Andrew J. Pincus

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

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No.

CERTIFICATE OF SERVICE

I certify that on August 1, 2022 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.

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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 by other federal agencies. The Chamber therefore has a strong interest in ensuring that courts provide appropriate remedies when agency decisions rest on

[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.

erroneous interpretations of the governing statute or agency authority is vested in officials who are improperly insulated from the accountability that the Constitution requires.

SUMMARY OF ARGUMENT

1. A long-settled principle of administrative law, rooted in *SEC v. Chenery Corp.* (*Chenery I*), 318 U.S. 80 (1943), holds that when a reviewing court determines that an agency based its decision on an erroneous legal standard, and the agency decision involves the application of discretion, the court must remand the case to allow the agency to exercise its discretion under the proper legal rule. The majority here not only failed to apply this settled principle—it created an "exception" to allow it to uphold the agency decision as long as it concludes that the agency might have reached the same result. That exception would eviscerate *Chenery*—and the predictability of process that is so essential for businesses operating in a heavily regulated industry. The Court should grant rehearing to correct that patently erroneous holding.

2. The panel also erred in holding that a plaintiff seeking prospective relief for a separation-of-powers violation must present

"concrete" evidence that he was injured by the violation. That holding is contrary to the Supreme Court's precedents, which have invalidated statutory schemes—and awarded corresponding prospective relief—without requiring a showing that the agency would have reached a different decision if the decisionmaker had not been protected by unconstitutional removal restrictions. Nothing in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), disturbed those precedents. Indeed, the Court had no occasion to consider them, as *Collins* involved only retrospective relief. And even if *Collins* were relevant to the question here, it would support petitioner Calcutt, because the *Collins* Court relied only on the "possibility" of an injury as a basis for remanding to decide remedy.

Moreover, the Supreme Court has repeatedly explained that a remedy is essential to encouraging lawsuits that help to protect the separation of powers. The panel's proof-of-a-different-outcome requirement will be impossible to satisfy in virtually all cases and will therefore effectively eliminate any incentive for parties to assert these separation-of-powers challenges and any need for courts to decide them.

ARGUMENT

I. The Panel Majority's No-Remand Holding Warrants Review.

Banking is a heavily regulated industry, and businesses in the industry rely upon long-settled requirements of administrative process to know what to expect from interactions with their regulators. One such long settled requirement of administrative law is that "a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 576 U.S. 743, 758 (2015). Agencies may not rely upon post-hoc justifications in court, and courts may not "intrude upon the domain which Congress has exclusively entrusted to an administrative agency" to uphold agency action based upon "findings [that] might have been made," *Chenery I*, 318 U.S. at 88, 94, or by "substituting what [the court] considers to be a more adequate or proper basis" for the action, *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *see Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 420 (1992).

If the agency's "grounds are inadequate," a court must remand for the agency either to provide "a fuller explanation of the agency's reasoning at the time of the agency action" or to take "new agency action." *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1896 (2020) (emphases omitted).

The panel correctly recognized that the FDIC applied an impermissibly-lenient causation standard in determining whether petitioner's actions had one of the impermissible effects identified in the statute. Add.43-45. But, instead of remanding for the agency to consider in the first instance whether the evidence satisfied that requirement, the majority prevented the agency from exercising its discretion to determine whether the evidence satisfied the proper causation standard and any appropriate sanction based on what even the majority acknowledged was a reduced set of sanctionable conduct. That is precisely what *Chenery* prohibits.

The deck is often already stacked in favor of the regulator in administrative proceedings, and this approach would only exacerbate that problem. It would deprive regulated parties of the reasonable expectation that an administrative agency's action would stand or fall based on the agency's stated reasons. And it would likewise deprive them of the opportunity to make arguments to regulator in the first instance—a valuable opportunity for businesses that must operate under a web of technical requirements.

The majority stated that a remand "would be in tension with the substantial-evidence standard of review for factual findings." Add.51. But that standard simply describes the amount of evidence necessary to "[]support[]"agency factual findings under the Administrative Procedure Act, 5 U.S.C. § 706(2)(E); *see Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019). It does not empower courts to uphold agency action based on an incorrect legal standard. Add.90 (Murphy, J., dissenting).

The panel also erred in holding that a remand "would risk contradicting the harmless-error rule." Add.52; *see* 5. U.S.C. § 706 (courts must take "due account . . . of the rule of prejudicial error"). That principle simply prevents a remand that "would be an idle and useless formality," *Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 545 (2008), because the purported agency error has "no bearing on . . . the substance of [the] decision reached," *Mass. Trs. of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 248 (1964). It does not permit a court to assume that if the agency had applied the correct legal standard it would have exercised its discretion in the same way—or imposed the exact same penalties—simply because it "might have" done so. *Chenery I*, 318 U.S. at 94.

The majority's no-remand rule is not limited to the FDIC. If permitted to stand, that novel approach would fundamentally alter review of federal agency actions within this Circuit and create a conflict with every other Circuit. It therefore warrants review and correction.

II. The Panel Was Obligated To Remedy The Unconstitutional Restriction On ALJ Removal By Vacating The FDIC's Decision.

The panel avoided reaching the substance of Calcutt's separation-of-powers challenges to the statutory removal restrictions on the FDIC's Board of Directors and administrative law judges (ALJs) by holding that Calcutt would not be entitled to any remedy even if there were a constitutional violation. The restriction on the removal of FDIC ALJs is unconstitutional for the reasons stated in our merits-stage amicus brief. *See also Jarkesy v. SEC*, 34 F.4th 446, 463-65 (5th Cir. 2022) (holding ALJ removal restriction unconstitutional and awarding relief). The panel's erroneous holding requiring proof of prejudice before remedying that violation will effectively insulate from juridical correction virtually every unconstitutional removal restriction. Such a result would harm not only businesses, but all Americans, who rely upon the constitutional structure that has allowed our country to flourish and made our government responsive to the people.

A. Requiring Proof That A Removal Restriction Inflicted Harm Violates Supreme Court Precedent.

The panel's holding—that a party demonstrating that an agency decisionmaker was protected by an unconstitutional removal restriction is entitled to a remedy only if he demonstrates that the adjudicator would have reached a different decision in the absence of the restriction—rests on a fundamental misunderstanding of *Collins v. Yellen*, *supra*. The remedy holding in *Collins* concerned only retrospective relief. Other Supreme Court decisions impose no proof-of-harm requirement to obtain *prospective* relief. Finally, even if *Collins* did inform the prospective-relief question, *Collins* itself held that the "possibility" of harm is sufficient.

1. There was no occasion in *Collins* to address the issue of prospective relief for an unconstitutional restriction on removal authority. The *Collins* petitioners were Fannie Mae and Freddie Mac shareholders who challenged the dividend formula established by the Federal Housing Finance Agency (FHFA), as Fannie's and Freddie's

conservator, under an agreement with the Department of Treasury. 141 S. Ct. at 1775. The shareholders contended that the agreement was implemented by FHFA Directors who were insulated from plenary presidential control by a statutory for-cause removal restriction. *Id.* at 1775. The Court agreed. *Id.* at 1783-87.

But while the case was pending, FHFA eliminated the at-issue dividend formula. 141 S. Ct. at 1779. As a result, the shareholders "no longer ha[d] a live claim for prospective relief." *Id.* at 1787. The only remaining "remedial question . . . concern[ed] retrospective relief" for "compensable harm." *Id.* at 1787-89.

On that question, the Court declined to grant automatic relief based on the unconstitutional removal restriction. Instead, the Court stated that the availability of relief turned on whether the restriction had "inflicted harm" on the shareholders by altering the government's actions. *Collins*, 141 S. Ct. at 1789. The Court then remanded the case for the lower courts to "resolve[] in the first instance" whether "the unconstitutional removal provision inflicted harm" on the shareholders by, for example, thwarting "the President['s] . . . attempt[] to remove a

Director" who had "taken" "actions" with which the President disagreed. *Id.*

The Court has taken a markedly different approach when considering *prospective* relief for separation-of-powers violations. For that situation, 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 L. LLC v. CFPB*, 140 S. Ct. 2183, 2196 (2020); *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, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), the Court held unconstitutional a dual for-cause limitation on the removal of Board members in a challenge brought by an accounting firm subject to the Board's reporting requirements and auditing standards. *Id.* at 487-88, 492-508. 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. That type of forward-looking equitable relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Id.* at 491 n.2 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)).

There was no need for the *Free Enterprise* Court to remand for the harm inquiry prescribed in *Collins*—whether "the President might have replaced one of the confirmed [FHFA] Directors . . . or a confirmed Director might have altered his behavior." *Collins*, 141 S. Ct. at 1789. A separation-of-powers violation, the Court explained, "may create a 'here-and-now' injury that can be remedied by a court" without delving into hypotheticals. *Free Ent.*, 561 U.S. at 513 (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986)).

The panel should have followed that same approach here. The sanctions imposed on Calcutt are forward-looking in nature. And that is particularly true of the ban on future association with a banking institution. Calcutt was therefore entitled to relief—redetermination of his case by decisionmakers not subject to unconstitutional removal restrictions.[2]

2. Even if *Collins* did provide relevant instruction on how courts should consider prospective relief for separation-of-powers violations, the panel misread that decision to require a "concrete showing" of harm. Add.26; *see* Pet. 15-19.

The shareholders in *Collins* alleged only "the possibility" of harm from the unconstitutional removal restriction: The "President *might* have replaced one of the confirmed [FHFA] Directors . . . or a confirmed Director *might* have altered his behavior." *Collins*, 141 S. Ct. at 1789 (emphasis added). Yet the Court remanded the case for the lower courts to conduct the harm inquiry "in the first instance." *Id.* at 1789 & n.26.

On the panel's reading of *Collins*, a remedy is never warranted "by the very possibility that harm *might* occur." Add.26. But as just explained, *Collins* held the opposite—stating that a remand to consider

[2] Judge Murphy indicated (Add.63-70) that relief might be barred by the de facto officer doctrine. But the Supreme Court has refused to apply the doctrine to cases, like this one, involving direct review of a decision by the official subject to the separation-of-powers challenge. *Ryder v. United States*, 515 U.S. 177, 181-83 (1995).

a potential remedy *was* justified by the "possibility that the unconstitutional removal restriction" caused injury. 141 S. Ct. at 1789. And as explained in Calcutt's petition (at 17-18), the heightened standard adopted by the panel conflicts with the approach taken by other circuits that have applied *Collins*.

* * * * *

Either way the panel's remedy holding is sliced—as misapplying *Collins* to the question of prospective relief, or as misreading *Collins* to require proof of prejudice before a remand may be ordered—this Court should correct the panel's error and align this Court's remedies law with governing Supreme Court precedent.

B. The Panel's Decision Eliminates Any Incentive To Assert Removal Restriction Challenges.

Separation-of-powers challenges are essential to ensure that Executive officials are "accountable to political force and the will of the people." *Freytag v. Commissioner*, 501 U.S. 868, 884 (1991). Accordingly, the Supreme Court has emphasized that those who bring valid separation-of-powers challenges are "entitled to relief," *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018), and it has been wary of adopting rules that "create a disincentive to raise" such challenges, *Ryder*, 515 U.S. at 183.

If, as the panel held, courts may reach the merits of removal-restrictions challenges only when there is concrete proof of injury, few such cases will ever be resolved on the merits. A claimant rarely is in a position to produce concrete proof that, but for an unconstitutional removal restriction, the President would have replaced an official or that official would have altered his behavior to cohere to the President's policies. *See Collins*, 141 S. Ct. at 1789. Administrations do not monitor the day-to-day activities of agencies and their officers in search of conflicts with the President's views. Rather, the focus is on influencing the decisions of the officers subject to the President's control at a high level. Because the panel's holding would snuff out most separation-of-powers challenges, the panel's erroneous prejudice requirement warrants correction.

CONCLUSION

This Court should grant panel rehearing or rehearing en banc.

August 1, 2022

Respectfully submitted,

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