No. 20-4303

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HARRY C. CALCUTT III,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

ON PETITION FOR REVIEW OF A FINAL DECISION AND ORDER BY THE FEDERAL DEPOSIT INSURANCE COMPANY

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITION FOR REHEARING EN BANC OR PANEL REHEARING

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July 29, 2022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

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

Name of counsel: Michael Pepson

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

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

No.

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

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

CERTIFICATE OF SERVICE

I certify that on July 29, 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/ Michael Pepson

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

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. One of those ideas is that the separation of powers protects liberty. As part of this mission, it appears as *amicus curiae* before federal and state courts.

SUMMARY OF ARGUMENT

This Court should grant Mr. Calcutt's Petition for at least two reasons.

First, the panel majority's application of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), inadvertently rolls out the red carpet for agency abuse, overreach, and regulatory ping pong in a host of contexts. The *Chenery* principle is supposed to guard against haphazard agency decisions that ignore or incorrectly apply governing law. Toward this end, "[w]hen an agency's decision rests on a collapsed legal foundation," *see* Add. 90 (Murphy, J., dissenting), *Chenery* instructs that courts are not supposed to rescue the agency from its mistakes. Just as a schoolteacher correcting a student's sloppy homework and then awarding an A+ grade would send

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

a bad message to the student, when courts step in to correct agencies' mistakes, it incentivizes more shoddy work. That is what happened here. *See* Add. 39–52; Add. 87–91 (Murphy, J., dissenting). If this precedent is allowed to stand, it would invite the FDIC and other agencies to cite it as the administrative law equivalent of a "the-dog-ate-my-homework" excuse to justify sloppy agency decisions.

Second, the panel majority put the cart before the horse, overreading *Collins v. Yellen*, 141 S. Ct. 1761 (2021), to bar meaningful relief on Mr. Calcutt's separation of powers claims without first deciding those claims on the merits. An agency should not be allowed "to duck and weave its way out of meaningful judicial review." *See Fleming v. USDA*, 987 F.3d 1093, 1111 (D.C. Cir. 2021) (Rao, J., concurring in part, dissenting in part). But that is exactly the kind of mischief the panel decision's framing of *Collins* would invite, providing agencies with a roadmap for weaponizing *Collins* to insulate themselves from constitutional scrutiny. This holds particularly true with respect to the FDIC, whose statutory review scheme potentially bars federal district court review of constitutional challenges to the agency's structure, procedures, and existence, as well as *ultra vires* challenges. *See* 12 U.S.C. § 1818(i); *Bank of La. v. FDIC*, 919 F.3d 916 (5th Cir. 2019). *Cf. Cochran v. SEC,* 20 F.4th 194, 204 (5th Cir. 2021) (en banc) (distinguishing FDIC review statute from SEC review statute), cert. granted *sub nom*., 212 L.Ed.2d 777 (2022). This Court should also clarify the extent to which these types of claims may or must be raised after the

FDIC's administrative process has run its course, and, on the flip side, what classes of claims may or must be brought in federal district court by those facing FDIC administrative prosecutions.

This is important because in addition to the Article II violations raised by Petitioner, myriad other constitutional infirmities permeate the FDIC's inhouse administrative process. After all, "[t]he FDIC did not just *prosecute* this action. It also *adjudicated* the action [inhouse]—finding Calcutt guilty and imposing a punishment on him in the form of an end to his career and a $125,000 penalty." *See* Add. 71–72 (Murphy, J., dissenting). The FDIC's administrative process thus denied Mr. Calcutt a right to a jury trial before his peers in an independent, neutral Article III court, subject to the protections of the Federal Rules of Civil Procedure and Federal Rules of Evidence. This arrangement offends due process, Article III, and the Seventh Amendment. The FDIC's use of its administrative machinery to deprive Mr. Calcutt of core private rights cannot be reconciled with the Constitution.

This Court should grant the Petition.

ARGUMENT

I. The Panel's Application of *Chenery* Warrants En Banc Review.

As the Supreme Court recently reaffirmed, "[t]he basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909–10 (2020). "It

is a staple of administrative law that federal courts may not uphold a rule on a ground never addressed by the agency." *MCP No. 165 v. United States DOL*, 20 F.4th 264, 277 (6th Cir. 2021) (Sutton, J., dissenting from denial of rehearing en banc) (citing *Chenery*, 318 U.S. at 87); *see also Regents*, 140 S. Ct. at 1934 (Kavanaugh, J., concurring in judgment in part, dissenting in part) ("[T]he *post hoc* justification doctrine merely requires that courts assess agency action based on the official explanations of the agency decisionmakers, and not based on after-the-fact explanations advanced *by agency lawyers during litigation* (or by judges)."). But that is exactly what happened here, with the Court's acceptance and approval. *See* Pet. 6–8; Add. 90–91 (Murphy, J., dissenting).

The Supreme Court has long held "an order may not stand if the agency has misconceived the law." *Chenery*, 318 U.S. at 94. "[T]he FDIC's order is riddled with legal error." Add. 91 (Murphy, J., dissenting); *see* Add. 43–52; Pet. 6–8. For that reason alone, vacatur was required. Instead, the panel majority upheld the order, finding remand here would "amount[] to 'an idle and useless formality.'" App. 52 (quoting *NLRB v. Wyman-Gordon Co*., 394 U.S. 759, 766 n.6 (1969) (plurality op.)). Not so.

Leaving aside at present the best reading of the statute's sweep,[2] requiring agencies to defend their actions based on the reasons the agency itself gave at the time "serves important values of administrative law," promoting agency accountability and discouraging administrative gamesmanship. *See Regents*, 140 S. Ct. at 1909. It also serves due process values. *See also id.* at 1934 (Kavanaugh, J., concurring in part, dissenting in part) ("[A]gency adjudications . . . implicate the due process interests of the individual parties to the adjudication.").

Further still, remand would have allowed the FDIC to exercise its discretion with respect to the proper sanction without the taint of the agency's incorrect understanding of the law. *See* Add. 90–91 (Murphy, J., dissenting); Pet. 10–11.

As Judge Murphy suggested, the panel majority's "analysis [thus] runs afoul of basic administrative-law principles." Add. 90 (Murphy, J., dissenting). *Cf. Thompson v. Lynch*, 788 F.3d 638, 649 (6th Cir. 2015) (Sutton, J., concurring in part,

[2] There is reason to think that the statute's scope has been expanded well beyond its textual bounds by judicial decisions grounded in "legislative history." *See* Add. 78–80 (Murphy, J., dissenting). This has happened before in other contexts. *See, e.g., AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021) (unanimously rejecting this atextual mode of interpretation). This error should not be replicated here. Instead, the text of the statute—which "can deprive citizens of their property and livelihoods"—should, if anything, be construed strictly, consistent with the rule of lenity. *See* Add. 80 (Murphy, J., dissenting). The panel's reference to the *Chevron* deference framework, Add. 16, should also be removed. The Supreme Court has recently declined to apply it on multiple occasions. *See, e.g., AHA v. Becerra*, 142 S. Ct. 1896 (2022); *Becerra v. Empire Health Found.*, 142 S. Ct. 2354 (2022). This Court should follow that path and abandon *Chevron*.

concurring in judgment). This misapplication of the *Chenery* principle should not be allowed to stand as precedent in this Circuit, as it will stack the deck against individuals and businesses and put a thumb on the scale in favor of the government in countless other proceedings. Courts should not rescue agencies from their own shoddy work, as the panel majority mistakenly sought to do here. *See* Add. 90–91 (Murphy, J., dissenting). After all, "[i]f men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021); *see Regents*, 140 S. Ct. at 1909. The FDIC did not do so here.

II. The Panel's Application of *Collins* Warrants En Banc Review.

This Court should grant Mr. Calcutt's Petition to clarify *Collins* does not require a heightened showing of harm to invalidate agency actions for Article II removal-restriction violations to grant *prospective*, not *retrospective*, relief.

Collins solely addressed the showing necessary to obtain *retrospective* relief for Article II removal-restriction violations. *See id.* 141 S. Ct. at 1787 ("only remaining remedial question concerns retrospective relief"); *id.* at 1795 (Gorsuch, J., concurring in part) ("the only question before us concerns retrospective relief"). Here, Mr. Calcutt was seeking *prospective* relief: vacatur of the then-stayed FDIC order before it became operative. *See also Calcutt v. FDIC*, No. 20-4303, 2021 U.S. App. LEXIS 161 (6th Cir. Jan. 5, 2021) (granting stay), stay lifted, 37 F.4th 293 (6th

Cir. 2022). Indeed, the panel majority recognized "[t]he Removal and Prohibition Order's prospective effect[.]" Add. 25. Yet the panel majority mistakenly elided the critical distinction between *retrospective* and *prospective* relief, instead concluding "[t]hat distinction does not matter here." Add. 24. That was error.[3] And it should not be allowed to stand as precedent in this Circuit.

III. The FDIC's Administrative Process is Unconstitutional.

As this Court considers whether to grant the Petition for the reasons given therein, it should not turn a blind eye to the myriad additional constitutional infirmities plaguing the FDIC's administrative prosecution process. *Cf. Lorenzo v. SEC,* 872 F.3d 578, 602 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("[A]gency-centric process is in some tension with Article III of the Constitution, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment.").

To begin, "under our constitutional structure" the activities of administrative bodies "*must* be exercises of—the 'executive Power.'"[4] *City of Arlington v. FCC*,

[3] Even if *Collins*'s remedial holding applied to claims seeking *prospective* relief, this matter should be remanded for discovery into whether "the unconstitutional removal restriction inflicted harm." *See Collins*, 141 S. Ct. at 1789. *Cf. Collins v. Yellen,* 27 F.4th 1068, 1069 (5th Cir. 2022) (en banc) (remanding to district court).

[4] It is unclear whether the Board enjoys for-cause removal protections. *See* Add. 56–59 (Murphy, J., dissenting); *see also* Jameson Payne, *Taken for Granted? SEC Implied For-Cause Removal Protection and Its Implications*, Yale Notice and Comment (June 24, 2022), https://www.yalejreg.com/nc/sec-for-cause-removal-protection/; Note, *The SEC Is Not an Independent Agency*, 126 Harv. L. Rev. 781, 801 (2013). If so, those restrictions would violate Article II. This Court should squarely address that important question on the merits.

569 U.S. 290, 304 n.4 (2013) (citing U.S. Const. Art. II, §1, cl. 1). Because FDIC ALJs are Officers of the United States, *see Lucia v. SEC,* 138 S. Ct. 2044, 2051–56 (2018), who presumably "perform substantial executive functions," *Jarkesy v. SEC*, 34 F.4th 446, 463 (5th Cir. 2022), the multi-tier removal restrictions violate Article II, *see id.* at 463–65; *Fleming*, 987 F.3d at 1113–23 (Rao, J., concurring in part, dissenting in part).[5] But as Judge Murphy observed:

> The parties *assume* that the FDIC performs only executive functions. Our resolution should not be taken to have impliedly adopted that premise. The FDIC did not just *prosecute* this action. It also *adjudicated* the action—finding Calcutt guilty and imposing a punishment on him in the form of an end to his career and a $125,000 penalty. Once an Article III court finally enters the picture, moreover, it may review the FDIC's factual findings only under a deferential substantial-evidence test—a test that has been called more deferential than the one governing our review of a district court's factual findings.

Add. 71–72 (Murphy, J., dissenting) (emphasis in original); *see also City of Arlington*, 569 U.S. at 312–13 (Roberts, C.J., dissenting).

The FDIC administrative prosecution scheme—in which the FDIC acts as investigator, prosecutor, and judge of its own cause—also violates due process. *See Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) ("[A]n unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case.").

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[5] The only basis on which Mr. Calcutt's Article II removal claim would fail is if the FDIC ALJs do not exercise Article II *executive* power but rather Article III *judicial* power. This is plausible. *Cf.* Add. 71–73 (Murphy, J., dissenting); *Jarkesy,* 34 F.4th at 450–59. If so, the ALJs would appear to be usurpers in an unlawful office, whose actions are void ab initio. *Cf.* Add. 65–67 (Murphy, J., dissenting).

See generally Andrew Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. Mich. J.L. Reform 103 (2018).

And because the FDIC's inhouse prosecution of Mr. Calcutt implicates his core private rights, it violates Article III.[6] *See also* Add. 71–73 (Murphy, J., dissenting). The Supreme Court "has held that actions seeking civil penalties are akin to special types of actions in debt from early in our nation's history which were distinctly legal claims." *Jarkesy*, 34 F.4th at 454 (citing *Tull v. United States*, 481 U.S. 412, 417–19 (1987)). "A civil penalty was a type of remedy at common law that could only be enforced in courts of law." *Tull*, 481 U.S. at 422. Accordingly, the FDIC's enforcement action against Mr. Calcutt simply "is not the sort that may be properly assigned to agency adjudication under the public-rights doctrine."[7] *Jarkesy*, 34 F.4th at 455. Instead, if the FDIC wishes to prosecute Mr. Calcutt, the Constitution requires that it do so in an Article III court. In any event, to the extent the FDIC ALJs are, in fact, purporting to exercise the "judicial Power," that generic

[6] The statutory provision mandating judicial deference to the FDIC's factual findings may well also be unconstitutional. *See also* Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 Geo. J.L. & Pub. Pol'y 27, 42–58 (2018); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1247 (1994).

[7] "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III." *Stern v. Marshall*, 564 U.S. 462, 484 (2011).

office should not exist, and a usurper in unlawful office claim would lie. *Cf.* Add. 65–67 (Murphy, J., dissenting).

Mr. Calcutt also had a Seventh Amendment right to be tried before a jury of his peers before the FDIC could end his career and extract substantial civil penalties from him. *See* U.S. Const. amend. VII; *Tull*, 481 U.S. at 422; *Jarkesy*, 34 F.4th at 453–55. *Cf.* Add. 71–73 (Murphy, J., dissenting). The FDIC's inhouse process violated that right too.

More broadly, as Judge Murphy noted in dissent: "There must be *some* limit to the government's ability to dissolve the Constitution's usual separation-of-powers and due-process protections by waving a nebulous 'public rights' flag at a court." Add. 73 (Murphy, J., dissenting). Whatever the limit, the FDIC's process exceeds it. The FDIC's administrative prosecution trampled upon Mr. Calcutt's constitutional rights. It should not be allowed to stand.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of FRAP 29(b)(4) and FRAP 32(a)(7)(B) because it contains 2,598 words. This brief also complies with the typeface and type-style requirements of FRAP 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Times New Roman 14-point font.

/s/ Michael Pepson
Michael Pepson

Dated: July 29, 2022

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2022, I electronically filed the above Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Petition for Rehearing En Banc or Panel Rehearing with the Clerk of the Court by using the appellate CM/ECF system. I further certify that service will be accomplished by the appellate CM/ECF system.

/s/ Michael Pepson
Michael Pepson

Dated: July 29, 2022