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 from the
Federal Deposit Insurance Corporation
(FDIC Nos. 12-568e and 13-115k)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONER AND VACATUR

John M. Masslon II
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
jmasslon@wlf.org

Counsel for Amicus Curiae
Washington Legal Foundation

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* opposing the accumulation of power in any one governmental branch, which violates the Constitution's careful separation of powers. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

INTRODUCTION

The Supreme Court recently breathed new life into the Appointments Clause. It affirmed that the President can remove principal officers at will. The President a court, or an agency head must appoint inferior officers. Nor may inferior officers have multiple levels of for-cause removal protection. These requirements ensure that officers are accountable to the President; they do not enjoy lifetime appointments like Article III judges.

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[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties consented to WLF's filing this brief.

Not everyone has received the message. The Federal Deposit Insurance Corporation refuses to adhere to the Supreme Court's recent case law. It believes that its complex procedures for appointing and removing its administrative law judges satisfy the Appointments Clause. In fact, the procedures fall far short of what the Constitution requires.

The FDIC also misunderstands how adversarial proceedings work. Parties often stipulate to facts in one proceeding that they would not stipulate to in another case. And fact-finders evaluate a witness's credibility based on her demeanor, tone, inflection, and posture. But in the FDIC's view, none of that matters. A replacement ALJ can view a cold record and use stale stipulations when considering a case tried before a different ALJ.

The FDIC's refusal to acknowledge how administrative hearings work betrays a dislike for the Supreme Court's Appointments Clause cases. It pretends that it can technically comply with those decisions by having constitutionally appointed ALJs ratify the decisions of unconstitutionally appointed ALJs. This Court should reject that two-pronged attack on the Supreme Court's precedent and vacate the FDIC's decision.

STATEMENT

In 2013, the FDIC told Harry C. Calcutt III it intended to remove him from office, prohibit him from further participating in the banking industry, and impose monetary penalties. The charges stemmed from Calcutt's time as president of Northwestern Bank. Over seven years later, the FDIC issued its final decision. The agency's meandering path ignored the Constitution's structure and Calcutt's due-process rights.

After extensive discovery, ALJ C. Richard Miserendino held an eight-day hearing in September 2015. Twelve witnesses testified. For purposes of the 2015 hearing, Calcutt and the FDIC agreed to some stipulations. In July 2017, ALJ Miserendino recommended a decision. But before the FDIC could act, the Supreme Court held that Securities and Exchange Commission ALJs are inferior officers. *Lucia*, 138 S. Ct. at 2051-56. Realizing that FDIC ALJs are also inferior officers, the FDIC remanded Calcutt's case to a new ALJ—Christopher B. McNeil—and ordered a new hearing.

Yet that new hearing never occurred. On remand, ALJ McNeil denied Calcutt's request for a *de novo* hearing. ALJ McNeil considered the 2015-hearing testimony and the 2015 stipulations—even though

Calcutt now objected to the stipulations. This allowed ALJ McNeil to severely limit the November 2019 hearing's testimony. Moving at warp speed, ALJ McNeil recommended a decision less than five months later.

Calcutt filed exceptions with the FDIC. It did not appreciate the extra work and lamented the fact that Calcutt challenged many aspects of ALJ McNeil's recommended decision. So it took some shortcuts. Rather than analyze Calcutt's exceptions, the FDIC rejected many by referring to its factual recitation. The FDIC then block quoted one of its prior decisions in rejecting Calcutt's challenge to the FDIC's ALJ-removal process. It similarly cited a prior decision in holding that Calcutt was not entitled to a *de novo* hearing.

Because the FDIC refused to rule on Calcutt's stay request, he moved for a stay in this Court. In opposing the motion, the FDIC played more procedural games and argued that Calcutt could not request a stay in his exceptions to ALJ McNeil's decision. This Court rejected that argument and stayed the FDIC's decision.

ARGUMENT

The President "with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States . . . but the Congress may by

Law vest the Appointment of [] inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. Under *Lucia*'s reasoning, FDIC ALJs are inferior officers.

But the FDIC Board—the department head—did not appoint ALJ Miserendino. So after *Lucia*, the FDIC remanded these matters to ALJ McNeil for a *de novo* hearing. This, however, did not solve the constitutional defects. First, the FDIC cannot remove its ALJs at will. This structure provides the ALJs with multiple levels of for-cause removal protection. Second, ALJ McNeil did not hold a *de novo* hearing. Rather, he held a hybrid hearing combining aspects of the 2015 and 2019 hearings. Third, the President cannot remove three FDIC Board members at will. These constitutional flaws require vacating the FDIC's decision.

I. *FREE ENTERPRISE FUND* HELD THAT MULTIPLE LAYERS OF FOR-CAUSE REMOVAL PROTECTION FOR INFERIOR OFFICERS ARE UNCONSTITUTIONAL.

A. The FDIC either did not understand or ignored Calcutt's argument that ALJ McNeil is unconstitutionally shielded from removal. In overruling Calcutt's exception, the FDIC offered no analysis of its ALJ removal power. Nor did it try to distinguish relevant case law.

ALJ McNeil was properly appointed. But that does not mean that the FDIC can remove him at will. Rather, a web of statutes governs removal of FDIC ALJs. This web provides FDIC ALJs with multiple levels of for-cause removal protection.

The FDIC may remove an ALJ "only for good cause established and determined by the Merit Systems Protection Board." 5 U.S.C. § 7521(a). This is one level of for-cause removal protection. There is, however, at least one more level of for-cause removal protection. The President may remove MSPB members "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). This is the second level of for-cause removal protection.

That is not all. "Since the early 1990s, the" FDIC and other banking agencies have shared "a small" ALJ "pool." *Ortega v. U.S. Dep't of the*

Treasury, 2019 WL 7598602, *1 (S.D. Tex. Dec. 20, 2019), *adopted*, 2020 WL 263587 (S.D. Tex. Jan. 17, 2020). Federal law requires this arrangement. *See* Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, § 916(a), 103 Stat. 183, 486-87.

A 2018 agreement governs the shared-ALJ pool. An oversight committee—comprised of one member from each agency—oversees the shared ALJs. This means that even if the MSPB finds cause to remove an ALJ, the FDIC might have to go through this inter-agency review committee first. This structure unconstitutionally protects ALJ McNeil from removal.

B. This case presents a straightforward application of the Supreme Court's decision in *Free Enterprise Fund*. There, an accounting firm challenged the Public Company Accounting Oversight Board's (PCAOB's) structure. The PCAOB included five members, appointed by the SEC to staggered five-year terms. *Free Enter. Fund*, 561 U.S. at 484. This resembled the MSPB's structure—with two more members. *See* 5 U.S.C. §§ 1201 and 1202.

PCAOB members were inferior officers under the Appointments Clause. *Free Enter. Fund*, 561 U.S. at 510. The SEC could remove PCAOB members only for cause. *Id.* at 486 (citation omitted). This was the first level of for-cause removal protection and tracked the for-cause removal protection for FDIC ALJs. *See* 5 U.S.C. § 7521(a).

But that was not the only protection PCAOB members enjoyed. The President could not remove SEC commissioners without cause. *Free Enter. Fund*, 561 U.S. at 487 (citations omitted). This second level of for-cause removal protection was the same protection afforded to MSPB members. *See* 5 U.S.C. § 1202(d).

"[T]he dual for-cause limitations on the removal of [PCAOB] members," the Court explained, "contravene[d] the Constitution's separation of powers." *Free Enter. Fund*, 561 U.S. at 492. The two levels of protection "transform[ed]" the PCAOB's independence. *Id.* at 496. And they deprived the President—and those he supervised—of "full control over the" PCAOB. *Id.* This "stripped" the President of "his ability to execute the laws—by holding his subordinates accountable for their conduct." *Id.*

The two-layer for-cause removal protection for FDIC ALJs similarly strips the President of the ability to hold inferior officers accountable. He cannot remove the ALJs directly. Nor can he remove them indirectly by demanding that the MSPB remove them. So the President cannot execute the banking laws under this structure.

This "arrangement is contrary to Article II's vesting of the executive power in the President." *Free Enter. Fund*, 561 U.S. at 496. The President cannot decide whether FDIC ALJs "are abusing their offices or neglecting their duties." *Id.* MSPB members—whom the President can remove only for cause—make that call. This lack of oversight violates the principle that there is a single President who must take care that the laws be faithfully executed. *See id.* at 496-97 (citing *Clinton v. Jones*, 520 U.S. 681, 712-13 (1997) (Breyer, J., concurring)).

Free Enterprise Fund also distinguished prior cases that upheld some for-cause removal protections. For example, *Humphrey's Ex'r v. United States* upheld for-cause removal protection for Federal Trade Commission commissioners. 295 U.S. 602, 621-32 (1935). The Court explained that Congress can allow "quasi-legislative and quasi-judicial" multi-member agencies to operate independently. *Free Enter. Fund*, 561

U.S. at 493 (quotation omitted). In other limited circumstances, the Court held that "Congress [can] provide tenure protections to certain inferior officers with narrowly defined duties." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192 (2020) (citations omitted).

In *Free Enterprise Fund*, the Court found cases in which it had upheld for-cause removal protections inapposite because the PCAOB's dual for-cause removal protection was "novel." *Free Enter. Fund*, 561 U.S. at 496. Such dual-layer protection does "not merely add" to an officer's agency. *Id.* Rather, it makes officers unaccountable to anyone—including the President. The Appointments Clause does not permit that structure.

Put differently, the "narrow exception[s]" the Court has recognized do "not extend to two layers of for-cause tenure protection." *Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093, 1117 (D.C. Cir. 2021) (Rao, J., concurring in part and dissenting in part). So "statutory insulation of ALJs with two layers of for-cause removal protection impedes the President's control over execution of the laws and violates the Constitution's structure of separate and independent powers." *Id.* at 1117-18.

Accepting dual for-cause removal protection could "multipl[y]" the "dispersion of responsibility." *Free Enter. Fund*, 561 U.S. at 497. There is no stopping three, four, or even ten levels of for-cause removal protection. This would essentially eliminate the President's supervision of officers. Once appointed, an officer could stay for life. If the Framers wanted this structure, they knew how to establish it. *See* U.S. Const. art. III, § 1 (judges "hold their Offices during good Behaviour"). They chose a different path.

This case shows possible creep towards ten-level for-cause removal protection. Officers with for-cause removal protection may serve on the inter-agency committee that oversees the banking ALJ pool. If so, this would add another layer of for-cause removal protection if the inter-agency committee must agree with the MSPB's for-cause finding before referral to the FDIC for final action. But even if this is not the case, this structure shows how Congress could add levels of protection. The Supreme Court rejected this slippery slope in *Free Enterprise Fund*. Straightforward application of that decision shows that FDIC ALJs enjoy unconstitutional removal protection.

II. CALCUTT WAS ENTITLED TO A *DE NOVO* HEARING BEFORE A CONSTITUTIONALLY APPOINTED ALJ.

After *Lucia*, the FDIC remanded the case to ALJ McNeil for a new hearing. But Calcutt did not receive a new hearing. Rather, ALJ McNeil held that the 2015 hearing "serve[d] as the primary source of the evidentiary record" that he would review. A105. This ruling violated the Supreme Court's command in *Lucia* and the Administrative Procedure Act.

A. *Lucia* Required A *De Novo* Hearing.

As described above, in *Lucia* the Supreme Court held that SEC ALJs are inferior officers that the President, a court, or an agency head must appoint. Because Lucia's hearing was before an unconstitutional ALJ, the Court addressed the proper remedy.

The Court "held that the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed'" ALJ. *Lucia*, 138 S. Ct. at 2055 (quoting *Ryder v. United States*, 515 U.S. 177, 183, 188 (1995)). And, when possible, that ALJ must be someone not involved in the first hearing. *Id.* at 2055 n.5.

Justice Breyer dissented from *Lucia*'s remedy analysis. In responding to that dissent, Justice Kagan—writing for the Court—

explained that the former ALJ could not "be expected to consider the matter as though he had not adjudicated it before" because he had "already both heard" the evidence "and issued an initial decision on the merits." *Lucia*, 138 S. Ct. at 2055.

Similar concerns arise with ALJ McNeil's relying on the record before ALJ Miserendino. ALJ McNeil could not consider the matter anew if he relied on ALJ Miserendino's evidentiary rulings. Those evidentiary rulings—which ALJ McNeil adopted before the 2019 hearing—made it impossible to fairly consider Calcutt's arguments. This goes against *Lucia*'s command.

There is a related concern with allowing ALJ McNeil to consider the 2015-hearing testimony. ALJ McNeil had no chance to evaluate the witnesses' demeanors. *See Clark v. Warden*, 934 F.3d 483, 497 (6th Cir. 2019) (fact-finders make credibility determinations by examining "witnesses' demeanor" (quoting *Powell v. Collins*, 332 F.3d 376, 389 (6th Cir. 2003))). Rather, he relied on a cold record. This reliance on a cold record leads to a simple conclusion: ALJ McNeil relied on ALJ Miserendino's credibility findings.

The Supreme Court ordered a *de novo* hearing in *Lucia* because it required a hearing before an unbiased ALJ who would make the necessary factual findings. To make credibility findings, the fact-finder "must hear" witnesses. *United States v. Raddatz*, 447 U.S. 667, 677 (1980) (quoting *Morgan v. United States*, 298 U.S. 468, 481 (1936)). But the FDIC denied Calcutt this due-process right. Rather, it allowed the hearing to occur before an ALJ who preferred sticking with an unconstitutionally appointed ALJ's factual findings.

Yet ensuring due process was not the only reason to have a new ALJ hear the case. Doing so encourages litigants to raise Appointments Clause defects. *Lucia*, 138 S. Ct. at 2055 n.5 (citing *Ryder*, 515 U.S. at 183). Denying a *de novo* hearing after a successful Appointments Clause challenge has the opposite effect; it discourages raising the issue.

The downside to requesting a second, non-*de novo* hearing is great. The new ALJ can pick and choose from the two transcripts when making factual findings. Any favorable evidence the accused may offer at the first hearing can now be countered with new evidence at the second hearing. And the ALJ can discount any favorable evidence from the second hearing by citing adverse evidence offered at the first hearing.

This downside is particularly present in cases like this one, in which the parties stipulated to facts before the first hearing. A defendant might stipulate to a fact for the same reason that a defendant pleads guilty under *North Carolina v. Alford*, 400 U.S. 25 (1970). The defendant recognizes that the government's evidence is likely to persuade a fact-finder. Yet the defendant does not concede that the stipulation is true. After the hearing before the unconstitutional ALJ, Calcutt could have learned new facts that make an *Alford*-type stipulation unnecessary.

But denying a *de novo* hearing means that Calcutt could not receive the benefits of his Appointments Clause challenge and any newly discovered facts. He is stuck with the 2015-hearing stipulations. This dilemma discourages, rather than encourages, raising Appointments Clause violations. That disincentive contravenes *Lucia*'s command to encourage such challenges.

B. The FDIC's Rationale For Denying A *De Novo* Hearing Is Unpersuasive.

1. The 2015 hearing was voidable.

ALJ McNeil correctly concluded that the 2015 hearing was not void *ab initio*. A105. As the Supreme Court explained in *Lucia*, defendants must preserve Appointments Clause challenges to guarantee relief. 138

S. Ct. at 2055 (citing *Ryder*, 515 U.S. at 182-83). If the hearing were void *ab initio*, all hearings before unconstitutional ALJs would need to be redone before a constitutionally appointed ALJ—even when the defendant did not preserve the issue. But that fact is irrelevant for determining the appropriate remedy for a fully preserved Appointments Clause violation.

The hearing before ALJ Miserendino was voidable. It is like a contract formed after fraud. There, the innocent party can choose to void the contract. *See McClellan v. Midwest Machining, Inc.*, 900 F.3d 297, 303 (6th Cir. 2018) (citing *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 425 (1998)). Here, Calcutt had the option of voiding the hearing before ALJ Miserendino by preserving his Appointments Clause claim and asking for a *de novo* hearing before a new ALJ. He exercised that option and properly demanded a *de novo* hearing. Yet ALJ McNeil—and then the FDIC—denied that request. Rather, they determined that only the order itself was voidable.

These rulings conflict with the Supreme Court's rationale for granting a hearing before a new ALJ in *Lucia*. The taint of the prior hearing remains if all the evidence is still part of the record before the new ALJ. Nor is there any incentive to raise an Appointments Clause challenge. So the fact that the hearing before ALJ Miserendino was not void *ab initio* is irrelevant when determining whether Calcutt was entitled to a *de novo* hearing before ALJ McNeil.

2. The Federal Rules of Evidence do not support the FDIC's decision.

The FDIC's decision overruling Calcutt's exception furthered the problem. In its view, the Federal Rules of Evidence and the FDIC's rules did not require a new hearing. A038-A040. But the cited cases are distinguishable, and more relevant authority shows the flaws in the FDIC's analysis.

To support admitting testimony from the 2015 hearing at the 2019 hearing, the FDIC relied on the Supreme Court's decision in *Harrison v. United States*, 392 U.S. 219 (1968) and this Court's decisions in *United States v. Daniels*, 377 F.2d 255 (6th Cir. 1967) and *Bondie v. Bic Corp.*, 947 F.2d 1531 (6th Cir. 1991). But *Daniels* is no longer good law. *See Winn v. Renico*, 175 F. App'x 728, 732 (6th Cir. 2006) (explaining that prior testimony is inadmissible if the witness is available to testify (citation omitted)). And *Harrison* and *Bondie* addressed only statements by a party opponent. *See Harrison*, 392 U.S. at 222; *Bondie*, 947 F.2d at 1534.

The FDIC's reliance on cases like *Freudeman v. Landing of Canton*, 702 F.3d 318 (6th Cir. 2012) is even further afield. Although counsel may refresh a witness's recollection with prior testimony, that prior testimony is inadmissible. *United States v. Stewart*, 61 F.3d 904 (table), 1995 WL 424422, *3 (6th Cir. 1995); *United States v. Lnu*, 575 F.3d 298, 307 (3d Cir. 2009) (citation omitted).

These rules do not mean that the 2015 testimony was unusable during the 2019 hearing. But the testimony's use was limited to impeachment by a prior inconsistent statement. *See Hutchison v. Bell*, 303 F.3d 720, 743 (6th Cir. 2002) (citing *United States v. Perez*, 280 F.3d 318, 349 (3d Cir. 2002)). ALJ McNeil—and then the FDIC—used the prior testimony as substantive evidence despite no proof that the witnesses were unavailable to testify. Contrary to the FDIC's decision, this does not align with the Federal Rules of Evidence.

The FDIC also cited *United States v. Boothman*, 654 F.2d 700 (10th Cir. 1981) and *United States v. Marino*, 617 F.2d 76 (5th Cir. 1980) to support admitting the 2015 stipulations at the 2019 hearing. Both cases reached a conclusion in one perfunctory paragraph without citing a single authority. *See Boothman*, 654 F.2d at 703; *Marino*, 617 F.2d at 82.

But several well-reasoned decisions hold that stipulations from a prior proceeding are not automatically admissible at a later proceeding. For example, in *Waldorf v. Shuta*, the Third Circuit distinguished *Boothman* and *Marino* when holding that "a stipulation does not continue to bind the parties if they expressly limited it to the first proceeding or if the parties intended the stipulation to apply only at the first trial." 142 F.3d 601, 616 (3d Cir. 1998) (citations omitted). The Third Circuit is not alone in rejecting later use of a stipulation when the parties intended for the stipulation to apply for only the first proceeding. *See United States v. Kanu*, 695 F.3d 74, 78 (D.C. Cir. 2012); *United States v. Burkhead*, 646 F.2d 1283, 1285 (8th Cir. 1981).

A good example of a court's refusing to recognize a stipulation from a prior trial is *Hunt v. Marchetti*, 824 F.2d 916 (11th Cir. 1987). After a newspaper said that the Central Intelligence Agency would try to implicate Hunt for John F. Kennedy's assassination, he sued for libel. At the first trial, the parties stipulated that Hunt was not in Dallas when President Kennedy was assassinated. *Id.* at 917. After trial, the Eleventh

Circuit reversed and remanded for a new trial. At the second trial, the newspaper refused to stipulate that Hunt was not in Dallas. The district court barred Hunt from referencing the stipulation and the Eleventh Circuit affirmed that decision. *Id.* at 917-18.

The FDIC therefore mistakenly relied on the Federal Rules of Evidence when denying Calcutt's request for a *de novo* hearing. Properly applied, the rules require a *de novo* hearing. Much of the evidence admitted at the 2019 hearing was inadmissible under the rules—for good reason. Admitting that evidence denied Calcutt a fair hearing before a neutral ALJ.

3. The FDIC's rules do not support its decision.

Realizing the weakness in its Federal Rules of Evidence analysis, the FDIC concluded—in a single sentence—that the evidence was admissible under the FDIC's own rules. It offered no separate analysis of how or why the FDIC's rules permitted the admission of 2015-hearing evidence at the 2019 hearing. Rather, it relied on decisions interpreting the Federal Rules of Evidence. *See* A038-A040. As described above, this analysis was wrong.

The lack of citations supporting its conclusion that the 2015-hearing evidence was admissible under 12 C.F.R. § 308.36(a)(3) is telling. Westlaw does not include a single court decision citing Section 308.36(a)(3). The FDIC knows that this is a Hail Mary attempt at salvaging procedures that violated *Lucia*'s clear command. The Court should knock down the pass for two reasons.

First, the FDIC's rules allow introduction of evidence only as permitted under the APA. 12 C.F.R. § 308.36(a)(1). The APA, however, barred the use of the 2015-hearing testimony and stipulations as substantive evidence. So even under the FDIC's view of its rules, they did not permit ALJ McNeil to consider the 2015-hearing evidence.

The APA provides that "[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision." 5 U.S.C. § 556(e). This language shows why the APA barred introduction of the 2015-hearing evidence. The APA's use of the word "exclusive" means that nothing outside the record may undergird an ALJ's decision. *See Republic Airlines, Inc. v. Civil Aeronautics Bd.*, 756 F.2d 1304, 1320 (8th Cir. 1985); *see also Butz v. Economou*, 438 U.S. 478, 513 (1978). So unless the 2015-hearing evidence was part of the exclusive record, ALJ McNeil could not consider it under the APA and the FDIC's own rules.

The 2015-hearing evidence was not part of the exclusive record. The APA uses the singular nouns "transcript" and "proceeding." This shows that the exclusive record includes only one transcript from one proceeding. Other parts of the same section bolster this interpretation. It uses the plural nouns "exhibits," "papers," and "requests" when defining the exclusive record's contents. This shows that Congress knew how to allow inclusion of multiple items—like exhibits—in the exclusive record. Congress chose, however, to limit the exclusive record to a single proceeding.

Yet ALJ McNeil and the FDIC saw things differently. In their view, the exclusive record included the 2015-hearing evidence. This argument crumbles when taken to its logical conclusion. Under this theory of the exclusive record, everything from the 2015 hearing was in the exclusive record. That means ALJ Miserendino's recommended decision was part of the exclusive record. And if that was so, ALJ McNeil could use it when making his recommended decision.

But *Lucia* was clear. The prior ALJ's factual findings cannot taint the new ALJ's findings. This is impossible if the new ALJ may rely on the old ALJ's recommended decision. In other words, including the 2015-hearing evidence in the exclusive record is nonsensical.

Again, this did not bar using parts of the 2015-hearing transcript during the 2019 hearing. But those portions had to be used in a manner that gave Calcutt due process. For example, the 2015 transcript could have been used to impeach a witness. Or if a witness was unavailable, that witness's testimony could have been admitted as substantive evidence.

What could not occur was wholesale importation of the 2015-hearing evidence into the 2019 hearing. This violated Section 556(e)'s definition of what the exclusive record includes. And because the FDIC's rules allow the introduction of evidence only as permitted by the APA, ALJ McNeil and the FDIC improperly admitted (and considered) the 2015-hearing evidence.

Second, even if not barred by the APA, introducing the 2015-hearing evidence at the 2019 hearing violated Calcutt's right to due process of law. In *Richardson v. Perales*, 402 U.S. 389 (1971) the Supreme

Court addressed the intersection of the APA and the Fifth Amendment's Due Process Clause. *Perales* was a social-security case and the admissibility standard for those administrative hearings tracked Section 308.36(a)(3). *See id.* at 400 (citation omitted). The Court recognized "that procedural due process is applicable to the adjudicative administrative proceeding involving 'the differing rules of fair play, which through the years, have become associated with differing types of proceedings.'" *Id.* at 401 (quoting *Hannah v. Larche*, 363 U.S. 420, 442 (1960)). The "extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss." *Id.* at 401-02 (cleaned up).

The Court has set forth a three-part test to determine "what process is constitutionally due." *Gilbert v. Homar*, 520 U.S. 924, 931 (1997). Courts must balance "the private interest that will be affected," "the risk of an erroneous deprivation of such interest through the procedures used," together with "the probative value, if any, of additional or substitute procedural safeguards," and "the Government's interest." *Id.* at 931-32 (quoting *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Weighing these factors, allowing unfettered admission of the 2015-hearing evidence violated Calcutt's due-process rights.

The interest at stake is occupational debarment. This is a "serious penalty." *United States v. Gammons*, 51 M.J. 169, 177 (C.A.A.F. 1999) (citing *Hudson v. United States*, 522 U.S. 93, 97-98 (1997)). A penalty is also more serious when it's permanent. *See Logan v. Zimmerman*, 455 U.S. 422, 434 (1982). The debarment here is permanent, making it more severe. Because Calcutt faces a serious penalty, he is entitled to substantial due-process protections.

The risk of an erroneous deprivation of Calcutt's interest is moderate. Rather than having the fact-finder view the witnesses and make credibility findings, the FDIC allowed ALJ McNeil to make the decisions based on a cold record. There is a reason that appellate courts decline to make credibility determinations. *See, e.g.*, *United States v. Cooke*, 915 F.2d 250, 252 (6th Cir. 1990). Seeing the witness is critical to correct findings. On the other hand, Calcutt examined or cross-examined the witnesses at the 2015 hearing. Because parts of this factor point in different directions, this factor is neutral.

The Government's interest is extremely low. It is not as if witnesses were unavailable or live testimony was impossible. There is nothing in the record showing that ALJ McNeil admitted the 2015-hearing evidence on this basis. Yet he still denied Calcutt's request for a *de novo* hearing for alleged efficiency. This is not a legitimate interest. So the Court should not give it significant weight.

Balancing these factors, the FDIC's rules—as interpreted by the FDIC—violated Calcutt's due-process rights. Virtually no governmental interest justifies denying Calcutt a *de novo* hearing while he is facing serious penalties. With the other factor neutral, the balance weighs against the FDIC. This is a second, independent reason to reject the FDIC's reliance on its own rules in denying Calcutt a *de novo* hearing.

III. *SEILA LAW* CONFIRMS THAT THE FDIC'S STRUCTURE VIOLATES THE APPOINTMENTS CLAUSE.

Congress may restrict the President's ability to remove principal officers in limited cases. *Humphrey's Ex'r*, 295 U.S. at 621-32. But as *Seila Law* explained, the power to remove FTC commissioners recognized in *Humphrey's Executor* is at "the outermost constitutional limits of permissible congressional restrictions on the President's removal power." 140 S. Ct. at 2200 (quotation omitted).

Seila Law addressed a challenge to the constitutionality of for-cause removal protection for the Consumer Finance Protection Bureau's director. The Court reiterated that "officers must remain accountable to the President, whose authority they wield." *Seila Law*, 140 S. Ct. at 2197. There are "only two exceptions to the President's unrestricted removal power." *Id.* at 2192. For principal officers—like the FDIC's board members—Congress may "give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that perform[s] legislative and judicial functions and [does] not [] exercise any executive power." *Id.* at 2187.

Seila Law's analysis of the CFPB's director's for-cause removal protection mainly focused on executive power. It continually returned to the idea that the CFPB exercises executive power while, at most, the Court in *Humphrey's Executor* viewed the FTC as exercising "executive function" rather than "executive power." *Seila Law*, 140 S. Ct. at 2198 (cleaned up).

When an agency exercises executive power, "the general rule that the President possesses the authority to remove those who assist him in carrying out his duties" prevails. *Seila Law*, 140 S. Ct. at 2198 (cleaned up). The FDIC exercises executive power. So it falls outside *Humphrey's Executor*'s outermost constitutional limit and the general rule applies.

In 1935, the Court viewed the FTC as "an administrative body" performing "specified duties as a legislative or as a judicial aid." *Humphrey's Ex'r*, 295 U.S. at 628. So the Court thought the FTC did not "exercise any executive power." *Seila Law*, 140 S. Ct. at 2199. That holding, however, "has not withstood the test of time." *Id.* at 2198 n.2

But the FDIC exercises executive power. The FDIC Board "seek[s] daunting monetary penalties against private parties on behalf of the United States in federal court." *Seila Law*, 140 S. Ct. at 2200; *see* 12 U.S.C. § 1818(i). It also "issue[s] final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law*, 140 S. Ct. at 2200; *see* 12 U.S.C. § 1818.

As *Seila Law* explained, both functions are "quintessentially executive power not considered in *Humphrey's Executor*." 140 S. Ct. at 2200 (footnote omitted). Because the FDIC wields these powers, it exercises executive power. Thus, the President must be able to remove FDIC directors at-will. *See id.* at 2198; *Humphrey's Ex'r*. 295 U.S. at 632.

Because three of the five FDIC Board members have for-cause removal protection, this Court should vacate the FDIC's decision.

* * *

At first blush, this case appears to present questions of first impression about removal protections for FDIC Board members and ALJs and the appropriate remedy for an Appointments Clause violation. But on second look, answering the questions requires only straightforward application of the Supreme Court's decisions in *Free Enterprise Fund*, *Lucia*, and *Seila Law*. Faithfully applying those precedents, this Court should vacate the FDIC's decision and remand for further proceedings.

CONCLUSION

This Court should vacate the FDIC's decision.

Respectfully submitted,

/s/ John M. Masslon II
John M. Masslon II
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
jmasslon@wlf.org

Counsel for Amicus Curiae
Washington Legal Foundation

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,368 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

/s/ John M. Masslon II
JOHN M. MASSLON II
Counsel for Amicus Curiae
Washington Legal Foundation

April 9, 2021

CERTIFICATE OF SERVICE

I certify that, on April 9, 2021, I served all counsel of record via the Court's CM/ECF system.

/s/ John M. Masslon II
JOHN M. MASSLON II
Counsel for Amicus Curiae
Washington Legal Foundation

April 9, 2021