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 REHEARING *EN BANC*

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INTEREST OF *AMICUS CURIAE*[*]

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ARGUMENT

The regulatory state relies on a careful balance: courts interpret the law, and agencies implement policy. This division ensures that each branch exercises its authority without encroaching on the other's domain. Still, after correcting the Federal Deposit Insurance Corporation's legal errors, the panel majority substituted its beliefs about Harry C. Calcutt III's penalty for the FDIC's judgment. This conflicts not only with many circuits' applications of the harmless-error doctrine, it also implies that

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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. Both parties consented to WLF's filing this brief.

courts can arbitrarily expand and contract the meaning of 'harmless' whenever an agency errs.

I. THE COURT SHOULD NOT ALLOW A PANEL TO SPLIT FROM OTHER CIRCUITS ON AN IMPORTANT ISSUE OF ADMINISTRATIVE LAW.

A. The panel said that "[r]emand is unnecessary where an agency's 'incorrect [legal] reasoning . . . played no part in its discretionary determination.'" Opinion at 52 (quoting *United Video, Inc. v. FCC*, 890 F.2d 1173, 1190 (D.C. Cir. 1989)). *United Video*, however, held that legal mistakes are harmless errors only when applying either the agency's or the court's interpretation necessarily *requires* the same result. 890 F.2d at 1190 n.15. The panel admits that barring Calcutt from the banking industry was a discretionary decision; the correct legal standard doesn't require occupational debarment. Opinion at 52. Other circuits would thus view *United Video* as irrelevant when deciding whether remand is appropriate here.

A recent decision illustrates the split. In *United States v. Schwarzbaum*, 24 F.4th 1355 (11th Cir. 2022), the Internal Revenue Service incorrectly calculated penalties for willful failure to file forms. The court recalculated the discretionary penalty and entered judgment for the United States. The Eleventh Circuit reversed because "the fact

that the IRS may reach a different result when it recalculates Schwarzbaum's penalties . . . is enough to justify remand." *Id.* at 1366. In other words, remand is necessary when there is a "chance that but for the error the agency might have reached a different result." Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 Duke L.J. 199, 211 (citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality)).

The FDIC never considered whether occupational debarment was warranted under the correct legal standard. As the Ninth Circuit has said, "[a] remand for further proceedings is indeed *required* to allow the agency to consider in the first instance an issue that it had not previously addressed." *Miskey v. Kijakazi*, 33 F.4th 565, 575 (9th Cir. 2022) (cleaned up). So the panel should have remanded this case to the FDIC to reconsider Calcutt's penalty.

This rule applies to all administrative agencies. When the Board of Veterans' Appeals "misinterprets the law and fails to make the relevant initial factual findings," the reviewing court must remand for application of the correct law. *Byron v. Shinseki*, 670 F.3d 1202, 1205 (Fed. Cir. 2012)

(citation omitted). Here, the FDIC never made factual findings about the appropriate penalty under the correct legal standard.

The panel's decision also conflicts with the Tenth Circuit's application of the *Chenery* rule. In *Utah Env't Cong. v. Troyer*, the district court held "that the Forest Service's failure [to apply the best-available-science rule] was harmless" because its "reliance on other available data effectively satisfied the best available science requirements." 479 F.3d 1269, 1287 (10th Cir. 2007). The Tenth Circuit reversed because the error was not harmless; the statute did not mandate a result. *See id.* So the panel's decision splits from many other circuits' decisions that require remand in similar circumstances.

B. The split from other circuits is unsurprising given the Supreme Court's precedent. Courts cannot substitute their views for "determination[s] of policy or judgment which the agency alone is authorized to make." *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). The panel refused to follow *Chenery*'s longstanding rule. Rather, it expanded the meaning of "harmlessness" so courts can substitute their judgment for that of expert agencies as they please. This will undercut agency decision-making for at least two reasons.

First, policy judgments and fact-finding are outside the domain of reviewing courts. Judges lack the subject-matter expertise necessary to make agencies' policy decisions for them. *See Ojo v. Garland*, 25 F.4th 152, 171 (2d Cir. 2022) ("[A]n appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." (quoting *Chenery*, 318 U.S. at 88)). Second, reviewing courts are far too removed from agency hearings to act as fact-finders. *See* 5 U.S.C. § 706(2)(e). For example, the FDIC often imposes a smaller fine and does not bar someone from the banking industry when the harm is below a certain level. The panel is oblivious to past agency practice or how it exercises its discretion in those cases. Yet the panel plowed ahead and found that occupational debarment was appropriate here.

C.1. *Chenery* also reaffirms that "[t]he interpretation of the laws [remains] the proper and peculiar province of the courts." The Federalist No. 78, 467 (Alexander Hamilton) (Clinton Rossiter ed. 1961); *see* 5 U.S.C. § 706 ("[T]he reviewing court shall decide all relevant questions of law."). While an agency may interpret statutes it administers, "an order may not stand if the agency has misconceived the law." *Chenery*, 318 U.S. at 94. When the panel pardoned the FDIC's erroneous interpretation of

12 U.S.C. § 1818(e), it sent the message that agencies can misinterpret the law and still have an Article III tribunal affirm.

That's not right. The Administrative Procedure Act, Supreme Court precedent, and due-process principles all require that parties receive meaningful judicial review after exhausting agencies' internal appeals. *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."); *see generally Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019) (stressing the need for meaningful judicial review of agency actions). Yet under the panel's standard, courts will not remand cases if they deem remand a "useless formality," Opinion at 52 (quoting *Wyman-Gordon Co.*, 394 U.S. at 766 n.6 (plurality)), and can resolve the case more quickly by acting as policymaker. Thus, parties will enter a courtroom arguing under one legal standard (the agency's) and leave having lost under another (the court's). Put simply, "for the courts to substitute their . . . discretion for that of the [agency] is incompatible with. . . judicial review." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962).

2. Judicial review here is particularly important. "[S]anctions of occupational debarment" are "harsh." *Smith v. Doe*, 538 U.S. 84, 100 (2004) (citing *Hudson v. United States*, 522 U.S. 93, 104 (1997); *De Veau v. Braisted*, 363 U.S. 144, 160 (1960)). Calcutt built a career in the banking industry and may wish to pursue similar work again. The FDIC barred him from working in the industry based on an incorrect legal theory that the panel rightly rejected.

But now Calcutt is denied the ability to appeal his occupational debarment under the correct legal standard. The panel majority acted as both the fact-finder and the "reviewer." Of course, judicial review means that an independent Article III tribunal checks the fact-finder's work to see if any mistakes were made. It does not mean that the fact-finder checks their own work to see if it passes muster. Yet that is what the panel majority allowed to pass for judicial review here.

3. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Congress, on the other hand, says what the law should be. *See* U.S. Const. art. I, § 1. "Allowing judges to pick and choose between" the appropriate sanction under the banking laws "transform[s] them from

expounders of what the law is into policymakers choosing what the law should be." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). Agencies balance many factors when deciding penalties. But when courts blend that with judicial review, they disregard the soft considerations that conflict with their intended ruling. This approach violates fundamental due-process principles and is reason to rehear this case.

II. THE PANEL'S OPINION ALLOWS UNCHECKED VIOLATIONS OF THE CONSTITUTION'S STRUCTURAL PROTECTIONS.

A. The panel declined to decide whether the FDIC's structure is constitutional because it found that, even if it were, Calcutt is unentitled to relief. Opinion at 23. This holding conflicts with the Supreme Court's decisions on remedies for constitutional violations.

Leaning heavily on *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the panel held that Calcutt could not show harm. But the standard the panel applied is nothing like the standard the Court used in *Collins*. The panel said that "[t]he *Collins* Court was not deterred from its holding by the very possibility that harm might occur; rather, it indicated that a more concrete showing was needed." Opinion at 26. The word "concrete," however, appears only once in *Collins*—in the standing section. *See* 141 S. Ct. at 1779.

Collins shows that Calcutt is entitled to relief. After finding that the agency's structure violated the Appointments Clause, the Court considered the appropriate remedy. Because it could not rule out that "the unconstitutional restriction on the President's power to remove" an agency director affected the case's outcome, the Court ordered fact-finding on that issue. *See Collins*, 141 S. Ct. at 1789. The same is required here. It could be that the unconstitutional removal protections—both for FDIC ALJs and board members—affected this case's outcome. The panel wrongly swept aside these concerns. Calcutt was denied an opportunity to prove the harm he suffered because of the FDIC's unconstitutional structure. The panel's decision thus does not align with *Collins*.

B. The panel's decision also strays from Supreme Court decisions about non-dispositive votes on multi-member adjudicatory bodies. For example, the Court vacated a 7-0 decision by the Supreme Court of Pennsylvania in *Williams v. Pennsylvania*, 579 U.S. 1 (2016). One of the seven justices on the Pennsylvania Supreme Court should have recused himself. Pennsylvania argued that any error was harmless because the vote was 7-0 and that justice's vote did not affect the case's outcome. The Court soundly rejected that argument.

As the Court said, "it does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position." *Williams*, 579 U.S. at 15. The same is true here. The lack of dissenting votes may mean FDIC board members and ALJ felt insulated enough to issue this decision. They didn't have to worry about what the President thought about their actions. So requiring Calcutt to show that the FDIC would have acted differently but for the removal protections conflicts with *Williams*.

C. *NLRB v. Noel Canning*, 573 U.S. 513 (2014) also shows the absurd results that could flow from the panel's ruling. There, the Court held that the President's recess appointments violated the Constitution and invalidated NLRB actions taken after those appointments. The Court didn't require a showing that the Senate would have declined to confirm the President's appointments or that Senate-confirmed appointees would have voted differently.

But that is the essence of the panel's decision here. Under the panel's harmless error analysis, Noel Canning would have had to show

that the Senate would not have confirmed the recess appointees were it in session, or that Senate-approved candidates would have voted differently, to obtain relief on its Appointments Clause challenge. Of course, the Supreme Court did not require that showing. In other words, the Supreme Court granted Noel Canning relief it would not have been entitled to under the panel's ruling.

D. The panel's error means it did not consider the constitutionality of the FDIC's structure. One example shows that structure violates the Appointments Clause. The two-layer for-cause removal protection for FDIC ALJs 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 one 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)).

In short, the panel's decision conflicts with the Supreme Court's Appointments Clause cases. The burden it places on Calcutt encourages further unconstitutional appointments. The Supreme Court has held courts should do the opposite. *See Lucia*, 138 S. Ct. at 2055 n.5 (citing *Ryder v. United States*, 515 U.S. 177, 183 (1995)). Thus, the Court should rehear this case to clarify the burden a party must meet to obtain relief on an Appointments Clause challenge.

III. THE PANEL'S DECISION THREATENS THIS COURT'S REPUTATION AS AN IMPORTANT ADMINISTRATIVE LAW TRIBUNAL.

It is no secret that some circuits are viewed as experts in certain areas of law. If you are researching a Jones Act issue, look to the Fifth Circuit. If you are interested in Indian law, go to the Tenth Circuit. Or if you have a bet-the-company securities issue, check the Second Circuit's law. The panel majority's opinion threatens this Court's reputation for being an exemplar in the administrative law arena.

When this Court was selected last year in the multi-circuit lottery, many rejoiced. Along with the D.C. Circuit, this Court is a beacon for administrative law fans. Both the government and private parties know

that they will receive a fair and thoughtful adjudication. That is why there has been a recent uptick in administrative filings in this circuit. Many statutes permit parties to file challenges to agency actions in multiple circuits. Increasingly, when the Sixth Circuit is a choice for parties, they are filing in Cincinnati.

The panel's decision threatens that reputation. If it is left to stand, private parties may no longer trust that they will receive a fair hearing; even if they win on the legal issues a panel may substitute its judgment for the agencies' judgment. That means that a party challenging agency action must anticipate all the possible grounds for affirmance the panel could reach for. Besides the rationale that the agency offered, the party must then also respond to the potential alternative grounds for affirmance. This makes litigating administrative law cases in this Circuit untenable. To avoid this, the Court should rehear this case and hold that the proceedings violated separation-of-powers principles or that the panel violated *Chenery*.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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August 1, 2022

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(b)(4) because it contains 2,600 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.

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CERTIFICATE OF SERVICE

I certify that, on August 1, 2022, I served all counsel of record via the Court's CM/ECF system.

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