NO. 22-11172

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CORNELIUS CAMPBELL BURGESS,
Plaintiff-Appellee / Cross-Appellant,

v.

JENNIFER WHANG, IN HER OFFICIAL CAPACITY AS AN ADMINISTRATIVE LAW JUDGE; FEDERAL DEPOSIT INSURANCE CORPORATION; MARTIN J. GRUENBERG, IN HIS OFFICIAL CAPACITY AS ACTING CHAIRMAN OF THE FDIC; MICHAEL J. HSU, IN HIS OFFICIAL CAPACITY AS A DIRECTOR OF THE FDIC; ROHIT CHOPRA, IN HIS OFFICIAL CAPACITY AS A DIRECTOR OF THE FDIC,
Defendants-Appellants / Cross-Appellees.

On Appeal from the United States District Court for the Northern District of Texas (Case No. 7:22-cv-100) (District Judge Reed Charles O'Connor)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING APPELLEE/CROSS-APPELLANT AND AFFIRMANCE IN PART/REVERSAL IN PART

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April 4, 2023

CERTIFICATE OF INTERESTED PERSONS

I certify that the following listed persons and entities have an interest in this case's outcome as described in the fourth sentence of Fifth Circuit Rule 28.2.1. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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April 4, 2023

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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 President's supervisory authority. It affirmed that the President can remove principal officer at will. The President, a court, or an agency head must appoint inferior officers. Inferior officers cannot 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 Article II's requirements. In fact, the procedures fall far short of what the Constitution requires.

The FDIC's actions betray a dislike for the Supreme Court's decisions. It has done everything possible before this Court to avoid having an Article III court reach the merits of the constitutional challenges. This continues the FDIC's pattern in the Sixth Circuit and the Supreme Court. Seeing the writing on the wall, the FDIC is trying to delay the inevitable decision that its structure violates Article II. This Court should reject that two-pronged attack on the Supreme Court's precedent and affirm in part and reverse in part.

STATEMENT

Cornelius Campbell Burgess served as Chief Executive Officer and President of Herring Bank from 2000 to 2012. The last ten years as CEO, he also served as President. He continued the Burgess and Herring families' history of controlling the Bank since its founding in 1899.

The FDIC and Texas Department of Banking began investigating the Bank in 2010. They discovered that Burgess approved his own expenses and could not show that some expenditures were bank related. They also determined that Burgess did not keep all the Bank's stock on the Bank's ledger and deposited dividends from those stocks into his personal bank account.

After a four-year investigation, in November 2014 the FDIC began an administrative enforcement action against Burgess for allegedly using the Bank's funds for personal expenses. ALJ Christopher McNeil held a lengthy hearing in September 2016. Only four months later, ALJ McNeil issued a report and recommended that the FDIC fine Burgess $200,000, remove him from his bank-related positions, and bar him from working in the banking industry.

The FDIC adopted ALJ McNeil's recommended decision. Burgess petitioned this Court for review of the FDIC's final order. While that petition was pending, the Supreme Court held that Securities and Exchange Commission ALJs are inferior officers of the United States for Appointments Clause purposes. *Lucia*, 138 S. Ct. at 2051-56. Given that decision, this Court remanded the case to the FDIC for further proceedings. *Burgess v. FDIC*, No. 17-60579 (5th Cir. Aug. 20, 2018) (per curiam).

Over a year after remand, the FDIC assigned ALJ Jennifer Whang to this proceeding. (ALJ Whang may be the only active ALJ for the Office of Financial Institution Adjudication. *See* Our Judges, Office of Fin. Inst. Adjudication, http://bit.ly/3Kb3TiN (last visited Apr. 4, 2023)). Over two years later, she held a three-day supplemental hearing. Then eight months later, ALJ Whang issued her recommended decision. Unsurprisingly, that recommended decision mirrored ALJ McNeil's recommended decision. Burgess filed exceptions with the FDIC.

Before the FDIC ruled on the exceptions, Burgess sued in district court challenging the constitutionality of the FDIC's structure and procedures. He did not challenge ALJ Whang's factual findings or any other case-specific decisions. Rather, the suit focused on only the constitutionality of the FDIC's structure and its procedures. Burgess moved for a preliminary injunction on three grounds. The District Court granted the motion on one ground—the FDIC's procedures violated Burgess's Seventh Amendment rights. The District Court denied relief on his claims that FDIC ALJs and FDIC Board members enjoy unconstitutional for-cause removal protections.

The FDIC appealed the preliminary injunction and Burgess cross-appealed. This Court then denied the FDIC's time-wasting motion to summarily vacate the preliminary injunction and remand with instructions to dismiss the case.

SUMMARY OF ARGUMENT

I.A. The FDIC misreads this Court's precedent when arguing that a previous panel held that Congress explicitly stripped federal courts of jurisdiction over suits like this one. The relevant cases show that the Court has declined to consider that issue. Rather, the Court has held, in factual scenarios dissimilar to these, that district courts lacked jurisdiction over some claims that bear no resemblance to Burgess's claims.

B. Because it has not addressed the issue before, this Court must decide whether 12 U.S.C. § 1818(i)(1) explicitly strips federal courts of jurisdiction over Burgess's claims. Adopting the FDIC's argument would raise serious doubts about the constitutionality of Section 1818(i)(1). First, the FDIC's interpretation deprives regulated parties like Burgess of due process of law. Rather than have an Article III court adjudicate claims about the constitutionality of the FDIC's structure, an administrative tribunal would make that decision. Second, it would violate the separation of powers to allow Congress to strip federal courts of jurisdiction to decide whether an administrative agency is constitutionally structured. The Court can therefore use the constitutional-avoidance canon when construing Section 1818(i)(1).

C. Alternatively, the FDIC argues that Section 1818 implicitly strips federal courts of jurisdiction over claims like Burgess's. This argument lacks merit because (1) Burgess's claims are wholly collateral to the underlying administrative proceeding, (2) the FDIC lacks expertise in constitutional law, and (3) Burgess could not receive meaningful judicial review of his claim with a petition for review. So the District Court properly exercised jurisdiction over this case.

II.A. FDIC ALJs enjoy at least two levels of for-cause removal protection. The Supreme Court has held that multiple levels of for-cause removal protection for inferior officers violates Article II. As FDIC ALJs are inferior officers, the statutory scheme protecting them is unconstitutional.

B. There is a second way in which the FDIC's structure is unconstitutional. The Constitution forbids principal officers of the United States from enjoying any for-cause removal protections. The only exception to this prohibition is for bipartisan multi-member agencies that do not exercise executive power. As the FDIC exercises substantial executive power, it falls outside that exception. Thus, FDIC Board members' for-cause removal protections violate Article II.

C. Despite finding that Burgess was likely to show that the FDIC's structure is unconstitutional, the District Court held that Burgess was unlikely to succeed on those claims because he could not show a constitutional injury. This argument, however, overreads the Supreme Court's and this Court's recent precedent. Taken as a whole, the Supreme Court's decisions show that parties who must litigate before an unconstitutionally structured agency may obtain relief. This Court's decisions are also distinguishable and should not be extended to cover scenarios like those present here.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION OVER THIS CASE.

It is unsurprising that the FDIC leans heavily on jurisdictional arguments in its brief. Both this Court's jurisprudence and that of the Supreme Court show that FDIC Board members and ALJs enjoy unconstitutional removal protections. But the FDIC wants to prolong this unconstitutional structure as long as possible. So it seeks to force Burgess to expend yet more resources fighting the charges before the FDIC in the hopes that the money dries up and he stops fighting. If that doesn't work, the FDIC at least wants to delay the inevitable until a petition for review is filed after the FDIC bars Burgess from the banking industry.

But this Court need not wait that long to decide whether the FDIC's structure is constitutional and whether its procedures comply with the Seventh Amendment. The District Court properly held that it had jurisdiction over Burgess's claims. And because the FDIC does not challenge this Court's appellate jurisdiction, the Court should reach the merits of the FDIC's and Burgess's arguments. It should then affirm the District Court's Seventh Amendment ruling and reverse on the other two counts.

A. The FDIC Misreads *Bank of Louisiana* and *Cochran.*

The FDIC argues (at 21-29) that *Bank of Louisiana v. FDIC*, 919 F.3d 916 (5th Cir. 2019), and *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021) (en banc), hold that 12 U.S.C. § 1818(i)(1) explicitly strips federal courts of jurisdiction to hear challenges to the FDIC's structure. This argument, however, misreads both decisions. The misreading of *Bank of Louisiana* and *Cochran* stems from a misunderstanding of how the Supreme Court (currently) requires courts to analyze whether a statute implicitly strips a court of jurisdiction to hear a case.

Courts use a two-part test when deciding whether Congress implicitly stripped federal courts of jurisdiction over some claims. First, courts examine whether Congress's intent to deprive district courts of jurisdiction over claims is "fairly discernible in the statutory scheme." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970)). If the answer is yes, courts next examine whether the asserted claims are the type that Congress wanted reviewed by the agency.

Under Supreme Court precedent, courts must consider three factors when deciding the second inquiry. First, will a litigant "as a practical matter be able to obtain meaningful judicial review" of its claim? *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 213 (1994) (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991)). Second, can the agency use its expertise when deciding the issue? *See id.* at 212 (citation omitted). And third, are the claims "wholly collateral" to the case's merits? *Id.* (quoting *Heckler v. Ringer*, 466 U.S. 602, 618 (1984)).

The implicit-jurisdiction-stripping inquiry is thus two parts. The FDIC argues that *Cochran*'s language discussing *Bank of Louisiana* clarifies that Section 1818(i)(1) explicitly strips district courts of jurisdiction to hear cases like this one. But that was not what *Cochran* held. Rather, *Cochran* clarified that *Bank of Louisiana* found that the first part of the implicit-jurisdiction-stripping inquiry was satisfied. In other words, *Bank of Louisiana* found it "fairly discernable in the statutory scheme" that Congress sought to strip district courts of jurisdiction. *Block*, 467 U.S. at 351.

After finding that Congress intended to strip district courts of jurisdiction, the panel in *Bank of Louisiana* considered the *Thunder Basin* factors to see if the bank's claim there fell within the class of claims that Congress did not want district courts to hear. The *Bank of Louisiana* panel did not mince words. First, the panel discussed the difference between the explicit- and implicit-jurisdiction-stripping analyses. *Bank of Louisiana*, 919 F.3d at 923. But because "[t]he parties and the district court addressed the question presented under the implicit preclusion analysis, [the panel did] the same." *Id.* In other words, the panel in *Bank of Louisiana* did not address whether Section 1818(i)(1) explicitly strips courts of jurisdiction to hear cases.

The panel then explicitly held that it was not deciding whether Section 1818(i)(1) explicitly strips federal courts of jurisdiction. It said that it "need not resolve [the explicit-jurisdiction-stripping] issue because of [its] holding that the statutory scheme withdraws district jurisdiction implicitly." *Bank of Louisiana*, 919 F.3d at 924 n.10. In fact, that footnote expresses serious doubt about the FDIC's argument that Section 1818(i)(1) explicitly strips federal courts of jurisdiction. *See id.* ("section 1818(i) does not reference other jurisdictional statutes explicitly").

True, the *Bank of Louisiana* panel said it was "cycl[ing] through" the *Thunder Basin* factors. 919 F.3d at 925. But read in the context of that section of the opinion, this statement means that the panel found the second part of the implicit-jurisdiction-stripping inquiry easy. It thought that it could determine whether the bank's claims were the type that Congress meant to strip from the district courts' jurisdiction without analyzing the *Thunder Basin* factors. This is because the suit in *Bank of Louisiana* was filed after the FDIC issued a final order in an enforcement proceeding. *See* 919 F.3d at 921. As the panel in *Bank of Louisiana* correctly noted, this was the type of claim that is at the heart of Section 1818(i)(1).

The panel in *Bank of Louisiana* was not saying that cycling through the *Thunder Basin* factors was unnecessary because Section 1818(i)(1) explicitly stripped federal courts of jurisdiction over the bank's claims. Again, at least two other places in the panel's opinion clarify that it was only holding that Congress implicitly stripped district courts of jurisdiction to hear claims like the bank's. That does not mean that Congress also meant to strip district courts of jurisdiction to hear claims like Burgess's.

The FDIC's argument that *Bank of Louisiana* and *Cochran* show that Section 1818(i)(1) explicitly strips federal courts of jurisdiction thus lacks merit. Even a cursory read of *Bank of Louisiana* reveals that the Court's holding was limited. And *Cochran* had no reason to overrule this panel ruling. The en banc Court's language should thus be interpreted for what it was, an inartful way to explain that the first part of the implicit-jurisdiction-stripping analysis was easy. Thus, this panel should engage in the full explicit- and implicit-jurisdiction-stripping analyses.

B. The FDIC's Reading Of Section 1818(i)(1) Raises Serious Due-Process And Separation-Of-Powers Problems.

1. The Due Process Clause of the Fifth Amendment ensures that parties have access to judicial process—not administrative process. The Constitution prohibits depriving any person of "due process of law." U.S. Const. amend. V. "[A] mass of materials in the early years of the republic equated due process of law with judicial process." Gary Lawson, *Take the Fifth . . . Please!: The Original Insignificance of the Fifth Amendment's Due Process of Law Clause*, 2017 B.Y.U. L. Rev. 611, 630; *see* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L.J. 408, 443 (2010) ("due process of law" commonly referred "to judicial process").

This reflected the understanding of pre-Revolutionary colonists. The colonists thought that "an act of Parliament that purports to abrogate the procedural protections of customary law violates due process." Nathan S. Chapman & Michael W. McConnell, *Due Process As Separation of Powers*, 121 Yale L.J. 1672, 1700 (2012).

The Fifth Amendment's Due Process Clause therefore protects the right to judicial process. But interpreting Section 1818 to strip district courts of jurisdiction to hear claims like Burgess's allows the government to skirt these due-process protections. This Court should not bless such a deprivation of due process.

Burgess argues that the FDIC is unconstitutionally structured and does not wish to expend the enormous resources to continue litigating his case before the agency. The Due Process Clause requires that an Article III court review this claim. But under the FDIC's interpretation of Section 1818 and FDIC precedent, it gets to make this decision. This replaces judicial process—the core of due process—with administrative process.

It's of no moment that Burgess ultimately can challenge a final FDIC order through a petition for review. By that time, the damage would have already been done. Burgess would have been deprived of a lot of money while litigating before an unconstitutionally structured agency. Again, this means that the only level of review that Burgess is guaranteed is administrative review. Such administrative review does not constitute due process of law.

Bank of Louisiana does not alter this analysis. There, the panel discussed how it is permissible to force parties to direct due-process and equal-protection claims to the FDIC before petitioning for review with a court of appeals. *Bank of Louisiana*, 919 F.3d at 925. But again, *Bank of Louisiana* was not a challenge to the constitutionality of the FDIC's structure itself. Everyone assumed that the FDIC was constitutionally structured and thus exercised legitimate power to decide issues.

This case differs because Burgess is challenging the constitutional structure of the agency itself. This type of claim cannot receive meaningful review on petition for review to a court of appeals. The only way to ensure that parties have due process—that is judicial process—is to hold that Section 1818(i)(1) does not explicitly strip district courts of jurisdiction to hear claims like Burgess's.

2. Separation-of-powers principles also show why the Court should reject the FDIC's reading of Section 1818(i)(1). "Separation of powers constrains the power to regulate federal jurisdiction." Michael J. Gerhardt, *The Constitutional Limits to Court-Stripping*, 9 Lewis & Clark

L. Rev. 347, 360 (2005). There are at least two ways that the FDIC's construction of Section 1818(i)(1) implicates the separation of powers.

First, Congress cannot strip federal courts of jurisdiction "to usurp the authority of the other branches in any way." Gerhardt, 9 Lewis & Clark L. Rev. at 360. Reading Section 1818(i)(1) to explicitly strip federal courts of jurisdiction over Burgess's claims would usurp the judiciary's authority. "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). The only way for the federal courts to exercise this duty is to hear challenges to the constitutional structure of federal agencies. Allowing review of such claims only on a petition for review essentially allows administrative agencies to say what the law is without meaningful judicial review of those decisions by Article III courts. This ties in with the second way in which the FDIC's argument violates the separation of powers.

Congress cannot strip federal courts of jurisdiction "in any way that undermines the functioning of Article III courts." Gerhardt, 9 Lewis & Clark L. Rev. at 360. But that is what the FDIC's construction of Section 1818(i)(1) would do. Article III courts protect the rights of all Americans and ensure that Congress and the President do not violate the Constitution. The FDIC argues, however, that Congress can explicitly strip federal courts of jurisdiction to carry out these functions.

Under the FDIC's construction, Section 1818(i)(1) bars federal courts from declaring that an agency is unconstitutionally structured. This would allow an unconstitutionally structured agency to deprive citizens of liberty without any judicial check. That is the type of undermining of the courts' function that the separation of powers bars.

Feds for Med. Freedom v. Biden, 2023 WL 2609247 (5th Cir. Mar. 23, 2023) (en banc) does not alter this analysis. There, the majority said that the dissent did not point to any case law supporting its position on jurisdiction stripping. *Id.* at *12. But as Professor Gerhardt explained (9 Lewis & Clark L. Rev. at 361), *Martin v. Hunter's Lessee*, 14 U.S. 304, 305 (1816) demonstrates that separation of powers bars Congress from stripping Article III courts of jurisdiction over some cases. The majority in *Feds for Medical Freedom* did not address these arguments about the limits on jurisdiction stripping.

"[T]he canon of constitutional avoidance" "provides that when a serious doubt is raised about the constitutionality of an act of Congress, [courts] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Nielsen v. Preap*, 139 S. Ct. 954, 971 (2019) (cleaned up). Here, even if two reasonable interpretations exist for Section 1818(i)(1), this Court should adopt Burgess's interpretation. As explained above, the other possible interpretation—advanced by the FDIC—would raise serious doubt about the constitutionality of Section 1818(i)(1). Under Burgess's interpretation, Section 1818(i)(1) does not explicitly strip federal courts of jurisdiction to hear this case. Thus, the inquiry must next turn to whether Congress implicitly stripped district courts of jurisdiction to hear Burgess's claims.

C. The *Thunder Basin* Analysis Is Distinguishable From *Bank of Louisiana*.

Bank of Louisiana held that the *Thunder Basin* factors showed that Congress meant to strip federal courts of jurisdiction over cases like that one. And if this case were like *Bank of Louisiana*, that would end the inquiry and this Court would have to vacate the District Court's order and remand with instructions to dismiss. But this case differs in material ways from *Bank of Louisiana*. These differences lead to a different analysis of the *Thunder Basin* factors. This analysis shows that the District Court had jurisdiction over Burgess's case.

1. The bank in *Bank of Louisiana* sued over two enforcement proceedings. The first was already before this Court on a petition for review under Section 1818(h)(2) while the second was pending before the FDIC Board after an ALJ had issued a recommended decision. *Bank of Louisiana*, 919 F.3d at 920-22. In its suit, the bank alleged that the FDIC violated its equal-protection and due-process rights during the enforcement proceedings. *See id.* at 921. It did not allege that the FDIC was unconstitutionally structured or that its Seventh Amendment rights were violated.

This difference is key to whether Burgess can receive meaningful judicial review of his claims. If he were raising due-process and equal-protection claims, like the bank in *Bank of Louisiana*, he could obtain meaningful judicial review of the FDIC's determination. But he is challenging the constitutionality of the FDIC Board's structure. There is no way for him to obtain meaningful judicial review of that defect.

The harm that occurs when there is a due-process or equal-protection violation can be remedied by an Article III court later on. For example, a court can require the FDIC to consider evidence that was excluded before the ALJ or to disregard evidence the ALJ considered. The *Bank of Louisiana* panel recognized this in holding that the bank could receive meaningful judicial review. *See* 919 F.3d at 925-28.

The harm from being forced to litigate before an unconstitutionally structured agency, however, cannot be remedied on appeal. The entire point of the challenge is that Burgess should not have to expend time, money, and effort litigating before a board whose members enjoy unconstitutional for-cause removal protections. The only way for Burgess to get meaningful judicial review of this claim is to sue before the FDIC finishes the ultra vires administrative proceedings and have an Article III court provide relief.

So in *Bank of Louisiana* the first factor weighed heavily in favor of finding that the bank's claims were of those sort that Section 1818(i)(1) was meant to remove from district courts' jurisdiction. Here, the factor weighs heavily against finding that Congress meant to strip district courts of jurisdiction to hear Burgess's claims.

2. As described above, the analysis here for the first *Thunder Basin* factor differs substantially from that in *Bank of Louisiana*. The other two factors are easily analyzed under the Court's more recent *Cochran* decision.

The FDIC lacks any expertise in constitutional law. Rather, federal courts possess such expertise. Because Burgess's claims do not "depend on a special understanding of" the banking laws, this factor weighs heavily in favor of finding that Section 1818(i)(1) does not implicitly strip district courts of jurisdiction to hear Burgess's claims. *See Cochran*, 20 F.4th at 207-08.

3. Finally, the issues raised in Burgess's suit are wholly collateral to the underlying proceeding. "[W]hether a claim is collateral to the relevant statutory-review scheme depends on whether that scheme is intended to provide the sort of relief sought by the plaintiff." *Cochran*, 20 F.4th at 207 (citing *Elgin v. Dep't of Treasury*, 567 U.S. 1, 22 (2012)). Burgess seeks a declaration that the FDIC's structure and procedures are unconstitutional before the administrative proceedings finish. This is not the type of relief that the statutory-review scheme is meant to provide. All three *Thunder Basin* factors therefore weigh against holding that Section 1818(i)(1) implicitly deprives district courts of jurisdiction over Burgess's claims. So the District Court properly exercised jurisdiction.

II. BURGESS IS LIKELY TO SUCCEED ON HIS CHALLENGES TO THE FDIC'S STRUCTURE.

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 McNeil. So after *Lucia*, the FDIC remanded the case to ALJ Whang. 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, the President cannot remove three FDIC Board members at will. These constitutional flaws require reversing the District Court's denial of the preliminary injunction on those counts.

A. *Free Enterprise Fund* Held That Multiple Layers Of For-Cause Removal Protection For Inferior Officers Are Unconstitutional.

The FDIC does not understand the argument that its ALJs are unconstitutionally shielded from removal. *See In re Calcutt*, 2020 WL 8472520, *22 (FDIC Dec. 15, 2020) (citing *In re Sapp*, 2019 WL 5823871, *19 (FDIC Sept. 17, 2019)). In *Calcutt*, the FDIC did not cite *Free Enterprise Fund* once in its analysis of whether FDIC ALJs' removal protections are constitutional. *See id.* But *Free Enterprise Fund* is dispositive and requires finding that FDIC ALJs enjoy unconstitutional removal protections.

ALJ Whang was properly appointed. But that does not mean that the FDIC can remove her 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. ROA.237. An oversight committee—having one member from each agency—oversees the shared ALJs. ROA.239. Thus, 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 Whang from removal.

This case presents a straightforward application of *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, 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. Article II 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 would be 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 the potential for 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 not, this structure shows how Congress might 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. Thus, Burgess is likely to succeed on the merits of this claim.

B. *Seila Law* Confirms That The FDIC's Structure Violates Article II.

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 congressional restrictions on the President's power to remove FTC commissioners recognized in *Humphrey's Executor* are 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 its board members' for-cause removal protections fall 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, Burgess will likely also succeed on this claim.

C. *Collins* And *CFSA* Do Not Bar Relief.

1. The District Court agreed that the FDIC's structure likely violates Article II. ROA.344. Yet it found that Burgess was unlikely to succeed on the merits because he could not show an injury from the unconstitutional structure. *See id.* This holding conflicts with the Supreme Court's decisions on remedies for constitutional violations.

The Court's decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), shows that Burgess is entitled to relief. After finding that the agency's structure violated Article II, 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 District Court held that it could not adopt this analysis because of this Court's decision in *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616 (5th Cir. 2022). This reliance was misplaced because *CFSA* is distinguishable from this case.

CFSA was a facial challenge to rules issued by the CFPB. No charges were pending against the association or its members for violating those rules. Here, the FDIC instituted proceedings against Burgess and sought to sanction him for allegedly violating his fiduciary duties. This difference matters.

When interpreting an opinion, its language "must be read in the context of [the case's] facts." *Gibson v. Kilpatrick*, 773 F.3d 661, 669 (5th Cir. 2014). Sometimes the language in an opinion may appear to be very broad, yet when viewed in context the narrowness of the holding becomes clear. At first glance, *CFSA*'s language appears very broad. But this is because the Court was addressing a sweeping facial challenge to a statute on both constitutional and statutory (Administrative Procedure Act) grounds.

The issue before the Court here was not before the *CFSA* panel. So the panel there did not have to address the question of what kind of injury is necessary when an ALJ with unconstitutional removal protections begins proceedings against a regulated party and FDIC Board members with unconstitutional removal protections review exceptions. That issue is now before the Court. The Court should hold that such proceedings are a harm directly linked to the unconstitutional removal protections.

2. Even if *CFSA* is persuasive, it should not be extended here. First, *CFSA* ignored the Supreme Court's hypothetical that actions taken because of for-cause removal protections may demonstrate a constitutional harm that courts can remedy. *See Collins*, 141 S. Ct. at 1789. This type of harm is separate from the harm that would arise if the President tried to remove someone from office but could not do so because of the removal protections. The panel in *CFSA* leaned on this latter hypothetical—while ignoring the first hypothetical—and then wove a three-part test for constitutional injury from whole cloth.

NLRB v. Noel Canning, 573 U.S. 513 (2014) shows the absurd results that could flow from extending the *CFSA* decision. 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 refused to confirm the President's appointments or that Senate-confirmed appointees would have voted differently.

But if this Court were to extend *CFSA*'s 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 District Court's decision.

Collins is wreaking havoc in cases challenging unconstitutional agency structures. No matter this Court's holding here, it should urge the Supreme Court to grant a petition—like Calcutt's—to clarify when parties may obtain relief for an unconstitutional agency structure. Justice Kavanaugh stayed the Sixth Circuit's *Calcutt* opinion, which means there are likely at least five votes to reverse. *Calcutt v. FDIC*, 2022 WL 4546340, *1 (U.S. Sept. 29, 2022) (Kavanaugh, J., in chambers); *see Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (explaining the requirements for a stay pending disposition of a certiorari petition). A plea from this Court may prompt the necessary certiorari grant.

CONCLUSION

This Court should affirm in part and reverse in part.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains exactly 6,500 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 hereby certify that, on April 4, 2022, I served all counsel of record via the Court's CM/ECF system.

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