No. 22-714

IN THE

Supreme Court of the United States

HARRY C. CALCUTT, III,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm devoted to defending constitutional freedoms from the administrative state's depredations. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.[1]

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, and the right to have laws made by the nation's elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government). These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, the President, federal agencies, and even sometimes the Judiciary, have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although the American People still enjoy the shell of their Republic, there has developed within it a very different sort of

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[1] No counsel for any party to this case authored this brief in whole or part, and no party or counsel other than *amicus curiae* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus curiae* notified all parties on February 22, 2023 of its intention to file this brief.

government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

NCLA is particularly disturbed by the way Congress has protected federal agency Administrative Law Judges ("ALJ") from removal, thus depriving Americans of their constitutional freedom to live under a government in which executive power is accountable to them through the President. In addition, NCLA is concerned whenever—as in this case—courts decline to decide important constitutional questions placed squarely before them or to provide meaningful remedies to those whose civil liberties have been violated. By doing so, courts strongly disincentivize private citizens from seeking judicial relief when their civil rights are violated, thus depriving the country of one of its most critical methods of challenging unconstitutional governmental action and allowing unconstitutional action to persist indefinitely rather than addressing it at the first available opportunity.

SUMMARY OF ARGUMENT

In the proceeding below, the Sixth Circuit declined to rule definitively on an important and recurring constitutional question: Whether certain Federal Deposit Insurance Corporation ("FDIC") officers, including the agency's ALJs, are protected by multiple layers of tenure protection in violation of the "Take Care" clause of the U.S. Constitution. The court expressed "doubt" that these tenure protections were unconstitutional, but did so only in dictum after

concluding it could grant no relief even if they were. Pet.App.40a–41a.

That erroneous conclusion put the cart before the horse and stands in considerable tension with this Court's precedent and a recent Fifth Circuit decision, all of which squarely adjudicated similar constitutional questions even where the ultimate relief was largely declaratory and disappointing—or even pyrrhic. The Sixth Circuit's approach here—citing lack of a meaningful remedy as reason for not deciding an important constitutional question—also disincentivizes (and may well preclude) future litigants from challenging unconstitutional layers of tenure protection enjoyed by administrative officials, thereby allowing such constitutional infirmities to persist indefinitely.

The Court should grant the petition for certiorari.

ARGUMENT

I. THE SIXTH CIRCUIT'S NO-REMEDY-THUS-NO-DECISION APPROACH WAS ERRONEOUS AND WARRANTS THIS COURT'S REVIEW

The lower court's disinclination to decide the merits of petitioner Calcutt's removal-protection challenge was enabled by skipping forward and deciding that he was entitled to no relief even if he were right on the merits, principally because he could not demonstrate particularized harm caused by the asserted constitutional violation. That unconventional, even illogical approach stands in

considerable tension with this Court's precedent and a recent decision of the Fifth Circuit.

The court below relied primarily on *Collins v. Yellin*, 141 S. Ct. 1761 (2021), but that reliance was misplaced. There, this Court addressed an analogous removal-protection question but took the conventional approach of deciding the merits first and only then turning to the appropriate remedy. *Collins* vindicated the notion that a constitutional violation deserves *some* resolution, even if that resolution is disappointing or pyrrhic from the challenger's perspective. Thus, despite declining the challengers' invitation to invalidate a government contract allegedly tainted by a constitutional violation, this Court in *Collins* nevertheless declared the offending statutory removal-protection unconstitutional, severed it from the relevant statutory scheme, and remanded the case for assessment of whether the challengers had been harmed by the violation. *Id.* at 1783-89.

The context in which petitioner Calcutt raises a similar constitutional challenge cries out even more for a definitive decision on the merits, followed by at least *some* judicial fix if his challenge is found meritorious. Unlike *Collins*, which was an offensive plenary action in a district court offering the full panoply of discovery, Calcutt's challenge comes on appellate review of a final agency order he claims was tainted by the unconstitutional tenure protection enjoyed by his adjudicator. That order resulted from a quasi-criminal prosecution initiated *by the agency*, where Calcutt played exclusively on defense in a venue with limited opportunity for discovery to

establish whether, as the lower court required here, the alleged constitutional defect "inflicted harm" on him. Pet.App.34a–35a.[2]

In this administrative review context, the controlling statute instructs courts to reach one of four possible outcomes: "[A]ffirm, modify, terminate, or set aside, in whole or in part, the order of the agency." 12 U.S.C. § 1818(h)(2). The statute does not specify or limit the reasons why a court might decide to set aside, terminate, or modify an order—any of which would typically constitute satisfactory relief to the petitioner. The statute likewise does not mandate affirmance whenever a reviewing court determines it cannot "invalidate" or declare "void" the entire underlying proceeding, as the court below repeatedly suggested.

One plausible reason a court might eschew affirmance of an agency final order—and instead either set it aside, terminate it, or modify it—is that the order resulted from an unconstitutional administrative process, especially if the constitutional taint was serious and/or known to the agency. This and other equally sound reasons should not depend on a predicate finding that the asserted taint rendered the underlying proceeding entirely "void" or "invalid." Indeed, any material taint in the agency's structure or process might reasonably lead a court to withhold its

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[2] Indeed, as the court below acknowledged, it is unlikely that agencies like the FDIC possess the power or expertise even to adjudicate structural constitutional challenges like Calcutt's, much less to afford the type of discovery needed to prove the kind of particularized harm the court found lacking here. Pet.App.38a–42a.

official blessing of the resulting final order and to set it aside, with or without remand. *Cf. Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Ryder v. United States*, 515 U.S. 177 (1995); *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir.), *reh'g denied*, 51 F.4th 644 (2022).

Collins did nothing to strip courts of such mill-run discretion when reviewing final agency orders, much less mandate affirmance when relief might be only nominal or pyrrhic.[3] Yet without saying so explicitly, the decision below effectively *affirmed* the FDIC formal order, thereby bestowing the court's imprimatur notwithstanding a credible contention that the order was tainted by an unconstitutional process superintended by a governmental officer wielding unconstitutional power. *Cf. Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2220 (2020) (Thomas, J., concurring in part and dissenting in part) ("Presented with an enforcement request from an unconstitutionally insulated Director, I would simply deny the CFPB's petition for an order of enforcement.").

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[3] As Justice Gorsuch noted in his partial concurrence in *Collins*:

> The only lesson I can divine is that the Court's opinion today is a product of its unique context—a retreat prompted by the prospect that affording a more traditional remedy here could mean unwinding or disgorging hundreds of millions of dollars that have already changed hands. … [N]othing it says undoes our prior guidance authorizing more meaningful relief in other situations.

141 S. Ct. at 1799 (Gorsuch, J., concurring in part).

This hands-off approach stands in stark contrast to the Fifth Circuit's recent decision in *Jarkesy*, an analogous case in which an administrative target challenged a final order resulting from a proceeding superintended by an ALJ working for the Securities and Exchange Commission ("SEC"). Among several questions presented was essentially the same one presented here: Whether the ALJ was unconstitutionally protected by multiple layers of protection from presidential removal. The court answered that question first—in the affirmative, 34 F.4th at 463–65—and only then considered the appropriate remedy, if any, *id*. at 466. The court identified the most logical remedy—vacatur of the challenged order—but declined to address the appropriateness of that remedy because it had already determined to vacate and remand the case on other grounds. *Id*. at 466 n.21.[4]

The important point is that in *Jarkesy*, as in *Collins* and other cases, the court squarely decided the merits of a properly presented constitutional challenge *first*, even if it ultimately stopped short of providing the full measure of relief sought by the challenger. *Accord Seila Law*, 140 S. Ct. 2183 (sustaining removal-protection challenge and granting only prospective relief in the form of severing the offending statutory provision); *Lucia*, 138 S. Ct. 2044 (sustaining Appointments Clause challenge and remanding for a new hearing rather than dismissing the underlying proceeding); *Free Enter. Fund v.*

[4] The court also declined the SEC's suggestion "to interpret the for-cause protections for ALJs to instead allow removal for essentially any reason." 34 F.4th at 465.

PCAOB, 561 U.S. 477, 508–13 (2010) (sustaining removal-protection challenge and only severing the statutory tenure protection rather than enjoining regulator's continued operation).

By deciding the merits of these justiciable cases, courts fulfilled their "solemn responsibility" to "say what the law is." *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (Scalia, J., concurring in the judgment) (internal quotations marks and citations omitted); *accord Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) ("Jurisdiction existing, this Court has cautioned, a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'") (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)); *Chicot Cnty. v. Sherwood*, 148 U.S. 529, 534 (1893) ("[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends."). If nothing else, these decisions put the offending agencies (and others) on notice that their officials were wielding power unconstitutionally and applied at least *some* judicial fix, even if that fix disappointed those who raised the respective challenges.

Perhaps unwittingly, the decision below completed the full loop on a pan-agency strategy to slam all courthouse doors on removal-protection challenges raised by administrative enforcement targets. In most federal circuits where such challenges have been raised before an agency completed its administrative process, the agencies successfully argued that the case was premature and thus statutorily excluded from federal court jurisdiction. *See generally Cochran v.*

SEC, 20 F.4th 194, 203–04 & n.10 (5th Cir. 2021) (en banc) (collecting cases), *cert. granted*, 142 S. Ct. 2707 (2022); *Axon Enter., Inc. v. FTC*, 986 F.3d 1173, 1180–83 (9th Cir. 2021) (collecting cases), *cert. granted*, 142 S. Ct. 895 (2022). Likewise, as the decision below acknowledged, administrative enforcement targets cannot effectively raise such challenges during their proceedings because agencies lack the power or expertise to adjudicate such challenges. Pet.App.24a–25a. And now the decision below, if allowed to stand, would effectively preclude such challenges *even after the fact* absent proof of particularized harm that will almost never exist, particularly in the administrative review context given the limited discovery available in agency proceedings.

What is the practical result of closed courthouse doors? Administrative targets subjected to quasi-criminal prosecutions superintended by adjudicators they earnestly believe are constitutionally illegitimate might *never* be able to present their challenge in federal court. Worse yet, agencies would be further emboldened to forge ahead with business as usual, assured that the constitutional legitimacy of their adjudicators is effectively immune from judicial scrutiny either before, during, or after the fact. *But see Cochran*, 20 F.4th at 199–204 (allowing pre-enforcement challenge to removal protections enjoyed by SEC ALJs). Stated differently, despite credible claims that these adjudicators wield their coercive governmental power unconstitutionally, the status quo could persist indefinitely—presumably until some hypothetical future President purported to fire an ALJ and the ALJ either refused to leave office or sued for wrongful termination, a highly improbable factual

scenario for which *amicus curiae* is aware of no recent historical precedent.

Moreover, requiring proof of particularized harm in this context is as illogical as it is impractical. The harm was being forced to participate in a governmental proceeding administered by an unconstitutional adjudicator. The fact that *everyone* who appears before that adjudicator suffers the same harm is hardly a reason to allow the agency to get away with it indefinitely. To the contrary, the repetitive and systemic nature of the harm warrants an immediate remedy rather than deferral until the perfect unicorn fact pattern emerges.

Finally, even if *Collins* could be read to require proof of individualized harm to obtain relief on appellate review of agency final orders, petitioner Calcutt endured such harm in spades. If he is correct in his removal-protection challenge, the FDIC required him to defend himself for years in a compulsory enforcement proceeding superintended by a governmental officer who lacked legitimate constitutional authority to wield power over him, and he remains subject to a lifetime industry bar (the occupational death penalty) and substantial financial penalties as a result of that proceeding. What this Court has characterized as a "here-and-now" constitutional injury as it occurs, *see, e.g., Seila Law*, 140 S. Ct. at 2196, is Calcutt's "there-then-and-forever" injury when viewed in the rearview mirror. It's the same particularized harm either way.

II. THE DECISION BELOW DISINCENTIVIZES REMOVAL-PROTECTION CHALLENGES AND ALLOWS ALJ TENURE VIOLATIONS TO PERSIST INDEFINITELY

Because the political branches cannot always be relied on to jealously guard their constitutionally defined roles when structuring government agencies, challenges by affected private parties serve as the most frequent and effective vehicles to enforce the separation of powers. *See, e.g., Seila Law*, 140 S. Ct. 2183; *Lucia*, 138 S. Ct. 2044; *Free Enter. Fund*, 561 U.S. 477. Indeed, it is "the claims of individuals—not of Government departments—[that] have been the principal source of judicial decisions concerning separation of powers and checks and balances." *Bond v. United States*, 564 U.S. 211, 222 (2011). Allowing and incentivizing such challenges is therefore vital to our constitutional order.

As this Court explained in *Ryder v. United States*, in which a court-martialed member of the Coast Guard challenged on Appointments Clause grounds the constitutionality of the judges who convicted him, "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred." 515 U.S. at 182–83. And why is this so? Because "[a]ny other rule would create a disincentive to raise Appointments Clause challenges[.]" *Id.* at 183.

The Court reiterated this incentive-driven approach in *Lucia,* which held that the ALJs who

decided enforcement cases prosecuted by the SEC were "officers" not properly appointed under the Appointments Clause. After first addressing the merits of the constitutional challenge, the Court's choice of remedy—remand to the agency for a new hearing before a different, properly appointed ALJ—was explicitly driven by, among other factors, a desire "to create '[]incentive[s] to raise Appointments Clause challenges.'" 138 S. Ct. at 2055 n.5 (quoting *Ryder*, 515 U.S. at 183).

The decision below does exactly the opposite. It signals to would-be challengers of unlawful tenure protections that courts won't even decide the merits of their challenges absent pre-existing proof of particularized harm that will almost never exist, much less provide a remedy if the challenge is meritorious. The decision thus removes all incentive for individual citizens to invest the time, effort, and resources required to raise such challenges. Why bother?

Worse yet, the disincentive that the Sixth Circuit's approach creates perversely emboldens agencies to forge ahead indefinitely with business as usual, knowing that even if their adjudicative structures or processes contravene the Constitution, they are effectively immune from challenge or judicial scrutiny, and they stand to pay no price for their misfeasance. Indeed, agencies have been on notice since at least 2010 that their ALJs were likely unconstitutional due to their multiple layers of tenure protection, *see Free Enter. Fund*, 561 U.S. at 546 (Breyer, J., dissenting), yet it took another 12 years before any federal court so held, *see Jarkesy*, 34 F.4th

at 463–65. Under the Sixth Circuit's approach here, that dozen-year drought might have lasted forever.

CONCLUSION

The Court should grant Calcutt's petition for a writ of certiorari.

Respectfully submitted,

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