

No. 22-11172

United States Court of Appeals for the Fifth Circuit

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

v.

FEDERAL DEPOSIT INSURANCE CORPORATION; JENNIFER WHANG, in her official capacity as an Administrative Law Judge; 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, Wichita Falls
No. 7:22-CV-00100 (Hon. Reed C. O'Connor)

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION,
IN SUPPORT OF PLAINTIFF-APPELLEE/CROSS-APPELLANT
BURGESS WITH THE CONSENT OF ALL PARTIES**

ADITYA DYNAR
JOHN KERKHOFF
PACIFIC LEGAL FOUNDATION
3100 Clarendon Boulevard
Suite 1000
Arlington, VA 22201
Tel.: (202) 807-4472
ADynar@pacificlegal.org
JKerkhoff@pacificlegal.org

Attorneys for Amicus Curiae Pacific Legal Foundation

Supplemental Certificate of Interested Persons

No. 22-11172, *Cornelius C. Burgess v. Federal Deposit Insurance Corporation, et al.*

The undersigned counsel of record certifies that the following listed persons and entities (in addition to those listed in the Certificate of Interested Persons of Plaintiff-Appellee/Cross-Appellant and Defendants-Appellants/Cross-Appellees) as described in the fourth sentence of CA5 R. 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

Aditya Dynar, counsel for amicus curiae Pacific Legal Foundation, ADynar@PacificLegal.org, (202) 807-4472.

John F. Kerkhoff, counsel for amicus curiae Pacific Legal Foundation, JKerkhoff@PacificLegal.org, (202) 888-6881.

Pacific Legal Foundation, 3100 Clarendon Blvd., Suite 1000, Arlington, VA 22201. As required by FRAP 26.1, Pacific Legal Foundation is a nonprofit corporation organized under the laws of California. It has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

/s/ Aditya Dynar

ADITYA DYNAR

Attorney for Amicus Curiae

Table of Contents

Supplemental Certificate of Interested Persons	i
Glossary	viii
Statement of Interest of Amicus Curiae.....	1
Summary of the Argument	2
Argument	3
I. FDIC Board Members’ Insulation from At-Will Removal.....	3
A. Members of the FDIC Board Are Principal Officers	5
B. They Exercise Substantial Executive Power	5
C. So, the Statutory Removal Restriction Is Unconstitutional	7
II. FDIC ALJs’ Insulation from At-Will Removal.....	8
A. FDIC ALJs Are Officers of the United States	9
B. FDIC ALJs Are Executive, Not Judicial, Officers	10
C. So, the ALJ-Removal Restrictions Are Unconstitutional	13
III. Seventh Amendment Right to Jury Trial	15
Conclusion.....	20
Certificate of Service	21
Certificate of Compliance	22
ECF Certification.....	23

Table of Authorities

Cases	Page(s)
<i>Bowsher v. Synar</i> , 478 U.S. 714 (1986)	3
<i>Bureau of Consumer Financial Protection v. Townstone, Inc.</i> , No. 1:20-cv-04176 (N.D. Ill. 2022)	2
<i>Calcutt v. FDIC</i> , 37 F.4th 293 (6th Cir. 2022)	8, 15
<i>City of Arlington v. FCC</i> , 569 U.S. 290 (2013)	12–13
<i>Collins v. Yellen</i> , 141 S. Ct. 1761 (2021)	1, 19
<i>Community Financial Services Ass’n of Am. v. CFPB</i> , 51 F.4th 616 (5th Cir. 2022)	16
<i>Consumers’ Research, By Two, LP v. Consumer Product Safety Comm’n</i> , CA5 No. 22-40328	1
<i>Free Enterprise Fund v. PCAOB</i> , 561 U.S. 477 (2010)	<i>passim</i>
<i>Freytag v. CIR</i> , 501 U.S. 868 (1991)	5
<i>Hayburn's Case</i> , 2 U.S. 408 (1792)	12
<i>Ex Parte Hennen</i> , 38 U.S. 230 (1839)	4
<i>Humphrey’s Executor v. United States</i> , 295 U.S. 602 (1935)	4–5, 7
<i>Jarkesy v. SEC</i> , 34 F.4th 446 (5th Cir. 2022)	<i>passim</i>

Leachco, Inc. v. Consumer Product Safety Commission,
 No. 6:22-cv-00232-RAW (E.D. Okla. 2022) 2

Louisiana Pub. Serv. Comm’n v. FCC,
 476 U.S. 355 (1986) 20

Lucia v. SEC,
 138 S. Ct. 2044 (2018) 2, 9–10

Morrison v. Olson,
 487 U.S. 654 (1988) 6

Myers v. United States,
 272 U.S. 52 (1926) 4

Rapanos v. United States,
 547 U.S. 715 (2006) 1

Sackett v. EPA,
 566 U.S. 120 (2012) 1

SEC v. Cochran,
 S. Ct. No. 21-1239 1

Seila Law LLC v. CFPB,
 140 S. Ct. 2183 (2020) *passim*

U.S. Army Corps of Eng’rs v. Hawkes Co.,
 578 U.S. 590 (2016) 1

United States v. Arthrex,
 141 S. Ct. 1970 (2021) *passim*

Wiener v. United States,
 357 U.S. 349 (1958) 7

Constitutions

U.S. Const. amend. VI 16

U.S. Const. amend. VII *passim*

U.S. Const. art. I, § 2, cl. 5 11

U.S. Const. art. I, § 3, cl. 6 11

U.S. Const. art. II, § 1, cl. 1 3

U.S. Const. art. II, § 2, cl. 2 5, 11–12

U.S. Const. art. II, § 3, cl. 4..... 3
 U.S. Const. art. III, § 1, cl. 2 11
 U.S. Const. art. III, § 2, cl. 3 16

Statutes

5 U.S.C. § 1202(d) 7, 14
 5 U.S.C. § 3105 9
 5 U.S.C. § 3344 9
 5 U.S.C. § 7521(a) 9, 14
 12 U.S.C. § 2 5, 7
 12 U.S.C. § 242..... 14–15
 12 U.S.C. § 1752a..... 15
 12 U.S.C. § 1752a(c)..... 15
 12 U.S.C. §§ 1811–1835a..... 6
 12 U.S.C. § 1811(b)(2)..... 5
 12 U.S.C. § 1812..... 15
 12 U.S.C. § 1812(a)(1)..... 5, 7
 12 U.S.C. § 1812(a)(1)(C)..... 5
 12 U.S.C. § 1812(c)(1) 7–8, 14
 12 U.S.C. § 1812(c)(3) 7–8, 14
 12 U.S.C. § 1818..... 6
 12 U.S.C. § 1818(i) 6
 12 U.S.C. § 1818(i)(2)..... 16
 12 U.S.C. § 1819(a) 5
 12 U.S.C. § 1819(a)(Tenth)..... 6
 12 U.S.C. § 1820(k)(6)(A)(ii) 6
 12 U.S.C. § 1820a..... 6
 12 U.S.C. § 1822..... 6
 12 U.S.C. § 1824..... 6

12 U.S.C. § 1833a(g) 6
 12 U.S.C. § 5491(b)(2)..... 5
 12 U.S.C. § 5491(c)(3) 7
 15 U.S.C. § 2053(a) 7
 28 U.S.C. § 631(i) 11
 28 U.S.C. § 631(a) 11
 30 U.S.C. § 823(b) 7
 The All Writs Act, 28 U.S.C. § 1651 17

Regulations

12 C.F.R. § 308.5(a) 9
 12 C.F.R. § 308.5(b)(1) 10
 12 C.F.R. § 308.5(b)(2) 10
 12 C.F.R. § 308.5(b)(3) 10
 12 C.F.R. § 308.5(b)(5) 10
 12 C.F.R. § 308.5(b)(7) 10
 12 C.F.R. § 308.5(b)(11) 10
 12 C.F.R. § 308.25..... 10
 12 C.F.R. § 308.38(a) 10
 12 C.F.R. § 308.40..... 12

Other Authorities

VIII Old Whig (Feb. 6, 1788), <https://bit.ly/3KkHSOP> 18
 Amar, Akhil Reed, *Bill of Rights: Creation and Reconstruction* (1998) 18
 Barnett, Randy & Bernick, Evan, *The Original Meaning of the 14th Amendment* (2021) 16
 Fischer, James M., *Understanding Remedies* § 1.0 (3d ed. 2014) 17

Lawson, Gary, <i>Take the Fifth ... Please!: The Original Insignificance of the Fifth Amendment's Due Process of Law Clause</i> , 2017 B.Y.U.L. Rev. 611.....	16
Letter from the Federal Farmer, No. 4 (Oct. 12, 1787), https://bit.ly/40rtjP0	18
Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), https://bit.ly/40rveDc	19
Madison, James, <i>Writings 1772–1836</i> (The Library of America 1999)	19
Methvin, Thomas J. , <i>Alabama—The Arbitration State</i> , 62 Ala. L. Rev. 49 (2001).....	19
Rakove, Jack, <i>Original Meanings: Politics and Ideas in the Making of the Constitution</i> (1996)	19
Rowling, J.K., <i>Harry Potter and the Sorcerer's Stone</i> (Scholastic 1997)	8
Whitehouse, Sheldon, <i>Restoring the Civil Jury's Role in the Structure of Our Government</i> , 55 Wm. & Mary L. Rev. 1241 (2014).....	18–19

Glossary

ALJ	Administrative Law Judge
CA5 R.	Fifth Circuit Rule
CFPB	Consumer Financial Protection Bureau
CIR	Commissioner of Internal Revenue
FCC	Federal Communications Commission
FDIC	Federal Deposit Insurance Corporation
FRAP	Federal Rules of Appellate Procedure
MSPB	Merit Systems Protection Board
NCUA	National Credit Union Administration
PCAOB	Public Company Accounting Oversight Board
PLF	Pacific Legal Foundation
SEC	Securities and Exchange Commission

Statement of Interest of Amicus Curiae¹

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited constitutional government, private property rights, and individual freedom. PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers. PLF attorneys have participated as lead counsel in several cases involving the role of the judicial branch as an independent check on the executive and legislative branches under the Constitution's separation of powers.² And PLF regularly participates in separation-of-powers cases as amicus curiae.³

¹ This amicus brief is submitted under FRAP 29(a) with the consent of all parties. This brief was not authored in whole or in part by counsel for any of the parties. No party or party's counsel contributed money for the brief. No one other than amicus and its counsel have contributed money for this brief.

² See, e.g., *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Rapanos v. United States*, 547 U.S. 715 (2006) (same).

³ *Consumers' Research, By Two, LP v. Consumer Product Safety Comm'n*, CA5 No. 22-40328; *Collins v. Yellen*, 141 S. Ct. 1761 (2021) (constitutionality of removal restrictions); *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) (same); *SEC v. Cochran*, S. Ct. No. 21-1239 (district court jurisdiction to consider challenge to an independent agency's enforcement proceedings).

This case concerns questions of critical importance to PLF and its clients: the constitutionality of officer-removal restrictions and the Seventh Amendment right to a trial by jury. PLF is currently litigating these issues on behalf of a family-owned company that makes infant loungers.⁴ Likewise, PLF is representing companies and individuals facing enforcement actions from other independent agencies that wield vast powers without public accountability.⁵ The outcome, in this case, is therefore of special interest to PLF.

Summary of the Argument

FDIC investigated Cornelius Burgess, CEO of Herring Bank (2000–2012), based on a tip that he was using bank funds to renovate his house. After a four-year investigation, FDIC haled Burgess into an in-house adjudicatory hearing. On appeal to this Court, the Court sent the case back to FDIC for a *Lucia*-compliant administrative law judge.⁶ On remand, the new ALJ concluded exactly what the previous ALJ had—a lifetime ban on Burgess working in the banking industry, and a \$200,000 civil fine.

⁴ *Leachco, Inc. v. Consumer Product Safety Commission*, No. 6:22-cv-00232-RAW (E.D. Okla. 2022).

⁵ *Bureau of Consumer Financial Protection v. Townstone, Inc.*, No. 1:20-cv-04176 (N.D. Ill. 2022).

⁶ *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

The Court should now decide the constitutional issues presented in this case in Burgess's favor:

1. Removal protections for FDIC board members violate the separation of powers.

2. If the FDIC administrative law judges wield not judicial but executive power, then insulating them with multiple layers of removal protection violates the Constitution's separation of powers.

3. The FDIC's in-house adjudication violated Mr. Burgess's Seventh Amendment right to a jury trial.

Argument

I. FDIC Board Members' Insulation from At-Will Removal

Begin with *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). The Court held that restricting the President's executive power to remove the director of the Consumer Financial Protection Bureau violates the Constitution's separation of powers. *Id.* at 2197. This result, the Court held, *id.*, flows from the Vesting and Take Care Clauses of Article II. U.S. Const. art. II, § 1, cl. 1 ("executive Power shall be vested in a President"), § 3, cl. 4 (the President "shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States").

The First Congress recognized the President's removal power in 1789. *Bowsher v. Synar*, 478 U.S. 714, 723 (1986). The President's removal power has been a "settled and well understood construction of

the Constitution.” *Ex parte Hennen*, 38 U.S. 230, 259 (1839). To conclude otherwise “would make it impossible for the President ... to take care that the laws [are] faithfully executed.” *Myers v. United States*, 272 U.S. 52, 164 (1926). *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 483 (2010), and *Seila*, 140 S. Ct. at 2198, both confirmed the President has virtually unimpeded constitutional removal power. The Supreme Court has thus consistently recognized the removal power.

Only two exceptions limit that power:

- (a) an exception for inferior officers with limited duties and no policymaking or administrative authority, *Seila*, 140 S. Ct. at 2199–2200; and
- (b) an exception for principal officers who do not exercise executive power, *id.* at 2198–99 (discussing *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935)).

Here, neither the inferior-officer nor the “*Humphrey’s Executor* exception” applies because FDIC’s board of directors are (1) principal, not inferior, officers (2) who exercise substantial, “quintessentially executive power not considered in *Humphrey’s Executor*.” *Seila*, 140 S. Ct. at 2200. Accordingly, insulating commissioners from the President’s removal power is unconstitutional.

A. Members of the FDIC Board Are Principal Officers

The FDIC five-member board comprises principal officers nominated by the President and confirmed by the Senate: the Comptroller of the Currency, the CFPB Director, and three members having “State bank supervisory experience.” *See* 12 U.S.C. §§ 2, 1812(a)(1), 1812(a)(1)(C), 5491(b)(2). This appointment method is required for principal officers. U.S. Const. art. II, § 2, cl. 2.

Further, Congress authorized FDIC’s five-member board to appoint inferior officers, like the “administrator” of the “division of asset disposition,” 12 U.S.C. § 1811(b)(2), as well as “such officers and employees as are not provided for in this chapter,” 12 U.S.C. § 1819(a); *see* U.S. Const. art. II, § 2, cl. 2 (allowing Congress to “vest the Appointment of such inferior Officers ... in the Heads of Departments”). Accordingly, the FDIC Directors are heads of FDIC, *Free Enter. Fund*, 561 U.S. at 512–13, and thus principal officers, *Freytag v. CIR*, 501 U.S. 868, 884 (1991). So, the inferior-officer exception does not apply.

B. They Exercise Substantial Executive Power

The *Humphrey’s Executor* exception permits Congress to constrain the President’s ability to remove heads of “multimember expert agencies that do not wield substantial executive power.” *Seila*, 140 S. Ct. at 2199–2200. But FDIC admits that it wields substantial executive power.

Here, as in *Seila*, the FDIC board exercises “substantial” and “quintessentially executive power,” *id.* at 2200. An illustrative, nonexhaustive list makes that clear:

- It takes care that 75 separate sections of the United States Code, 12 U.S.C. §§ 1811–1835a, are faithfully executed.
- It has extensive investigatory powers. *E.g.*, 12 U.S.C. §§ 1820a, 1833a(g).
- It has power to commence in-house “administrative adjudications” and thereby bring “the coercive power of the state to bear on millions of private citizens,” *Seila*, 140 S. Ct. at 2200–01. *E.g.*, 12 U.S.C. §§ 1818, 1820(k)(6)(A)(ii).
- It has power to commence civil actions for civil penalties and injunctive relief. *E.g.*, 12 U.S.C. § 1818(i).
- It has power to place private banks in receivership with itself and take over their day-to-day functions. 12 U.S.C. § 1822.
- It has power to draw up to half a trillion dollars “for insurance purposes” from the treasury as needed. 12 U.S.C. § 1824.
- It has power to make rules. 12 U.S.C. § 1819(a)(Tenth).

FDIC does not dispute that it wields significant executive power. There is “no real dispute” that “law enforcement functions that typically have been undertaken by officials within the Executive Branch” qualify as “executive” power. *Morrison v. Olson*, 487 U.S. 654, 691 (1988); *id.* at

706 (Scalia, J., dissenting). In short, the FDIC board exercises substantial, “quintessentially executive power [that was] not considered in *Humphrey’s Executor*.” *Seila*, 140 S. Ct. at 2200; *see also id.* 2199 (noting *Humphrey’s Executor* applied to an agency “said not to exercise any executive power”) (emphasis added). Therefore, the *Humphrey’s Executor* exception to the President’s otherwise unrestricted removal power does not apply.

C. So, the Statutory Removal Restriction Is Unconstitutional

Under 12 U.S.C. § 1812(c)(1), (c)(3), each board member appointed by the President serves for a fixed term of years and continues to serve after that term expires until a successor is appointed. Three of the five board members may not be removed by the President except for cause.⁷ *See Wiener v. United States*, 357 U.S. 349, 352, 356 (1958) (equating fixed term-length with for-cause removal protection); *Free Enterprise Fund*, 561 U.S. at 487 (same); *cf.* 15 U.S.C. § 2053(a); 30 U.S.C. § 823(b); 5 U.S.C. § 1202(d).

⁷ The remaining two board members—Comptroller of the Currency, and CFPB Director, 12 U.S.C. § 1812(a)(1)—enjoy no insulation from removal. *See* 12 U.S.C. § 2 (“The Comptroller of the Currency shall be appointed by the President, by and with the advice and consent of the Senate, and shall hold his office for a term of five years unless sooner removed by the President, upon reasons to be communicated by him to the Senate.”); *Seila*, 140 S. Ct. 2183 (declaring unconstitutional the removal protection for CFPB’s Director contained in 12 U.S.C. § 5491(c)(3)).

If so read, the statute garbs an Invisibility Cloak⁸ over a majority of the FDIC board—three of the five board members—that insulates them from the President’s removal power. Because all FDIC business is conducted by a vote of the majority of the board, insulating a majority of the board from the President’s removal power fully insulates FDIC from presidential oversight. That places the statute in irreconcilable conflict with the Vesting and Take Care Clauses of Article II. *Seila*, 140 S. Ct. at 2191; *Free Enterprise Fund*, 561 U.S. at 513–14.

The removal restriction implied from the fixed-term appointment contained in 12 U.S.C. §§ 1812(c)(1), (c)(3), therefore, violates Article II of the Constitution because the President’s power to remove principal officers who exercise substantial executive power cannot be restricted by Congress. *See, e.g., Calcutt v. FDIC*, 37 F.4th 293, 338–39 (6th Cir. 2022) (Murphy, J., dissenting) (rejecting the notion that an implied removal restriction can be read into 12 U.S.C. § 1812). Read plainly, Section 1812 does not establish a removal restriction; if it does, the restriction is unconstitutional.

II. FDIC ALJs’ Insulation from At-Will Removal

To be an officer of the United States, the individual must occupy a “continuing position established by law” and must exercise “significant

⁸ J.K. Rowling, *Harry Potter and the Sorcerer’s Stone* 201 (Scholastic 1997).

authority pursuant to the laws of the United States.” *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (simplified). Second, under *Arthrex*, applying *Lucia*’s analysis of the Constitution’s separation of powers and the Take Care and Vesting Clauses of Article II, an executive officer may not be protected with multiple layers of removal protection.

A. FDIC ALJs Are Officers of the United States

Because FDIC ALJs mirror the SEC’s, this issue is simple. *Lucia* held that SEC ALJs are officers of the United States, so FDIC ALJs are too. FDIC ALJs are appointed by law to a continuing position from which they can be removed only “for good cause.” 5 U.S.C. §§ 3105, 3344, 7521(a). They exercise “significant authority.” *Lucia*, 138 S. Ct. at 2051. They have “all powers necessary to conduct a proceeding” “in accordance with the provisions of chapter 5 of title 5 of the United States Code.” 12 C.F.R. § 308.5(a). And they wield “significant discretion when carrying out important functions” as chronicled in law. *Lucia*, 138 S. Ct. at 2053 (simplified). Indeed, the powers of FDIC ALJs are virtually indistinguishable from those of the SEC ALJs at issue in *Lucia*:

FDIC ALJ	SEC ALJ
“all powers necessary,” 12 C.F.R. § 308.5(a), “do all other things necessary and appropriate to discharge the duties of a	“do all things necessary and appropriate,” <i>Lucia</i> , 138 S. Ct. at 2049

presiding officer,” <i>id.</i> § 308.5(b)(11)	
“administer oaths,” “rule upon all procedural and other motions,” and “regulate the course of the hearing and the conduct of the parties and their counsel,” <i>id.</i> § 308.5(b)(1), (5), (7)	“administer oaths, rule on motions, and generally regulate the course of a hearing, as well as the conduct of parties and counsel,” <i>id.</i> at 2053 (simplified)
“rule upon the admission of evidence,” <i>id.</i> § 308.5(b)(3)	“rule on the admissibility of evidence,” <i>id.</i> at 2053
“compel” discovery, impose “sanctions,” and “issue subpoenas,” <i>id.</i> §§ 308.5(b)(2), 308.25	“enforce compliance with discovery orders,” <i>id.</i> at 2053
issue “recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order,” <i>id.</i> § 308.38(a)	“issue decisions containing factual findings, legal conclusions, and appropriate remedies,” <i>id.</i> at 2053

In sum, FDIC ALJs are officers of the United States.

B. FDIC ALJs Are Executive, Not Judicial, Officers

United States v. Arthrex explained that even if the “duties” of executive-agency hearing officers “partake of a Judiciary quality,” these officers “exercis[e] executive power” because they operate within the executive branch. 141 S. Ct. 1970, 1982 (2021) (simplified). This Court must follow *Arthrex* even if its Members feel duty-bound to point out the gaps in the reasoning of portions of *Arthrex*. Gaps, if any, are for the

Supreme Court to reevaluate. In other words, because FDIC ALJs are executive officers of the United States, insulating them with multiple layers of protection from the President's removal power violates the Constitution's separation of powers and the Vesting and Take Care Clauses of Article II.

Arthrex's categorization of agency ALJs as executive officers is rather curious, however. Facially, FDIC ALJs perform functions and duties that look like those performed by Article III judges. But if FDIC ALJs are judicial officers, other constitutional problems arise.

For example, it could be argued that FDIC ALJs, like principal judicial officers, should serve during "good Behavior," U.S. Const. art. III, § 1, cl. 2, subject to the House's "sole Power of Impeachment," U.S. Const. art. I, § 2, cl. 5, and the Senate's "sole Power to try all Impeachments," U.S. Const. art. I, § 3, cl. 6. Or a better analogy is to magistrate judges who are appointed by Article III judges, 28 U.S.C. § 631(a), and can be removed by a majority vote of the Article III judges of the district in which they serve "for incompetency, misconduct, neglect of duty, or physical or mental disability," 28 U.S.C. § 631(i).

But serious separation-of-powers problems surface with these two analogies as well.

First, if FDIC ALJs were judicial officers, then there would be an Appointments Clause problem, U.S. Const. art. II, § 2, cl. 2. That's so

because vesting the appointment of judicial officers in someone other than the “President” or “the Courts of Law,” *id.*, would surely violate the Constitution’s separation of powers.

Second, it would present a removal-power problem, albeit a different one than the parties present here—that FDIC ALJs are not subject to the same removal methods as are available to remove Article III judges (impeachment) or magistrate judges (for cause).

And, third, there might arise a question about whether FDIC board members can sit in review of the decision of a judicial officer, 12 C.F.R. § 308.40—a practice that, as noted in *Hayburn’s Case*, five of the six Justices, while riding circuit, had declared unconstitutional. 2 U.S. 408 (1792) (stating that it is unconstitutional for Congress to authorize an executive officer—the Secretary of War—to review decisions made by judicial officers).

Fourth, an argument can be made that, given the nature of their functions and duties, ALJs should not be housed outside of Article III. But Chief Justice Roberts’ view (in which Justices Kennedy and Alito joined), expressed in dissent in *City of Arlington v. FCC*, 569 U.S. 290, 312 (2013)—that agency ALJs wield “judicial power”—did not carry the day. Chief Justice Roberts, in writing the majority’s opinion in *Arthrex*, therefore, relied on the majority opinion in *City of Arlington*, to say that agency ALJs, even when they perform what looks like “judicial”

functions, are “activities of executive officers.” *Arthrex*, 141 S. Ct. at 1982. “[I]ndeed, under our constitutional structure they *must* be exercises of ... the executive power for which the President is ultimately responsible.” *Id.* (quoting *City of Arlington*, 569 U.S. at 305 n.4) (simplified).

Perhaps Chief Justice Roberts’ view from *City of Arlington* is the better view. It looks to the functions performed, not the Article II or Article III encasing that holds the officer whose functions are under evaluation, to determine (1) how that officer should be appointed, (2) whether and by whom that officer can be removed from office, (3) who sits to review the officer’s decision, (4) the scope of that review, and (5) whether the constitutional presumption against commingling of separated functions permits Congress to take a function properly belonging to one branch and give it to an officer of another branch. Maybe that is the better, if not a more elegant, way to sort out the separation-of-powers problems inherent in agency adjudication.

But similarities aside, FDIC ALJs are *not* judicial officers; they are executive officers. So says *Arthrex*, which remains binding precedent for this Court.

C. So, the ALJ-Removal Restrictions Are Unconstitutional

Under *Free Enterprise Fund* and *Jarkesy*, two layers of removal protection for executive officers run afoul of the Appointments Clause.

561 U.S. at 492–97; *Jarkesy v. SEC*, 34 F.4th 446, 464 (5th Cir. 2022).

Here, FDIC ALJs enjoy at least *five levels* of removal protection:

Level One • MSPB must find “good cause” to terminate ALJs.
5 U.S.C. § 7521(a).

Level Two • MSPB members themselves enjoy for-cause
removal protection. 5 U.S.C. § 1202(d).

• Four banking agencies—FDIC, Office of the
Comptroller of the Currency, the Board of
Governors of the Federal Reserve, and the National
Credit Union Administration⁹—must unanimously
agree (“all Continuing Agencies”) to remove the
ALJs. Dist. Ct. Doc. 19-1, PageID 211. The heads of
three of these four banking agencies themselves
enjoy removal protection:

Level Three ○ Three of the five FDIC board members, as
explained above, 12 U.S.C. §§ 1812(c)(1),
(c)(3), enjoy for-cause removal protection;

Level Four ○ The Federal Reserve Board of Governors can
be removed by the President only “for cause,”
12 U.S.C. § 242;

⁹ Dist. Ct. Doc. 19-1, PageID 210 (defining “Continuing Agencies”); *id.* at PageID 209–10 (defining “Office Staff” to include “administrative law judges”).

- Level Five
- The National Credit Union Administration board members serve for a term of years and cannot be removed by the President except for cause, 12 U.S.C. § 1752a(c).

It is difficult to reconcile this five-level “Matryoshka doll” encasing enjoyed by FDIC ALJs with the Constitution’s separation of powers. *Free Enterprise Fund*, 561 U.S. at 497. Even if this Court were to conclude that the FDIC and NCUA board members can be removed by the President at will because of statutory silence in 12 U.S.C. §§ 1812, 1752a (as noted in Part I of this brief, citing Judge Murphy’s dissent in *Calcutt*, 37 F.4th at 338–39), the unanimous agreement of four banking agencies still leaves three layers of removal protection that FDIC ALJs enjoy. That is so because one of those four agencies—the Federal Reserve—is headed by principal officers that can only be removed “for cause.” 12 U.S.C. § 242. Under binding precedent, therefore, this multilevel removal protection is plainly unconstitutional.

III. Seventh Amendment Right to Jury Trial

The Court is bound by circuit precedent on this issue—*Jarkesy*—which held that when an agency seeks “to obtain civil penalties under a statute, the subject of the action has the right to a jury trial.” 34 F.4th at 454.

Here, Mr. Burgess contests FDIC’s adjudicatory decision imposing a \$200,000 civil penalty and a lifetime ban on him from working in the banking industry. FDIC obtained a civil penalty against Mr. Burgess “under a statute,” *Jarkesy*, 34 F.4th at 454; 12 U.S.C. § 1818(i)(2). Mr. Burgess is thus entitled to a trial by jury. *Jarkesy* concludes that, as here, it violates the Seventh Amendment when an agency head or an agency ALJ finds facts in lieu of a jury.¹⁰

Thus, to implement *Jarkesy* and protect Mr. Burgess’s Seventh Amendment right to a jury trial, this Court should simply vacate the agency decision,¹¹ or alternatively direct the district court to conduct a *de novo* jury trial where FDIC would be required to prove its allegations

¹⁰ The Founders wrote criminal jury requirements into Article III itself as well as the Sixth Amendment. U.S. Const. art. III, § 2, cl. 3; amend. VI. The Fifth Amendment guaranteed a grand jury and the due process of law, which itself requires a jury. 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, 658. It also violates (in the case of federal agencies) the Fifth Amendment’s Due Process Clause when the investigating, accusing, prosecuting, judging, enforcing, and the penalty-collecting agency also finds facts in in-house proceedings without a jury. Randy Barnett & Evan Bernick, *The Original Meaning of the 14th Amendment* 31 (2021) (“The original meaning of ‘due process of law’ in the Fourteenth Amendment guarantees some judicial process before any person can be deprived of life, liberty, or property. This judicial process includes a jury trial,” which “date[s] back to the Founding.”).

¹¹ See *Community Financial Services Ass’n of Am. v. CFPB*, 51 F.4th 616, 643 (5th Cir. 2022) (vacating unconstitutional agency action).

against Mr. Burgess. The All Writs Act, 28 U.S.C. § 1651, confirms this Court's power to so direct the district court.

Because the FDIC adjudication violated the Seventh Amendment, this Court should vacate the agency decision against Mr. Burgess, which restores the *status quo ante*; it returns the parties to the status as it existed before FDIC commenced in-house proceedings against Mr. Burgess.¹² Vacatur is the narrowest remedy that rectifies the wrong.¹³

Alternatively, to protect Mr. Burgess's right to a jury trial under the Seventh Amendment, this Court should direct the district court to empanel a jury. The Court has no power to authorize the FDIC ALJ (i.e., an executive officer as noted above), on remand, to preside over and empanel a jury.

In other words, if the Court is inclined to award FDIC a retrial, the Court should direct the district court to preside over a jury trial because it is the most defensible answer under the Constitution's separation of powers, which proscribes Article III judges from giving Article III functions to officers of Article II agencies.

¹² See James M. Fischer, *Understanding Remedies* § 1.0 at 2 (3d ed. 2014) ("The essential elements of rectification are to undo the injurious effects of the wrong," which is accomplished "by creating the situation that would have existed had the wrong not occurred.").

¹³ See Fischer, *Understanding Remedies* § 2.6 at 6.

That is so because the jury has been, for centuries, an arm of the *judicial* branch.¹⁴ This much is neither in dispute nor a partisan position. Senator Sheldon Whitehouse’s law review article, for example, contains extensive support for the unremarkable proposition that the civil jury served as a check exercised by the people over the judicial branch.¹⁵ An Old Whig offered this summation: “Judges, unincumbered by juries, have been ever found much better friends to government than juries. Such judges will always be more desirable than juries.”¹⁶ Senator Whitehouse echoes Old Whig: “The principles of separation of powers and government by the people, including the civil jury, are our established guardians against such encroachment. We allow them to wither at our peril.” 55

¹⁴ Akhil Reed Amar, *Bill of Rights: Creation and Reconstruction* 94–95 (1998).

¹⁵ Sheldon Whitehouse, *Restoring the Civil Jury’s Role in the Structure of Our Government*, 55 Wm. & Mary L. Rev. 1241 (2014); *see also* Letter from the Federal Farmer, No. 4 (Oct. 12, 1787), <https://bit.ly/40rtjP0> (Trial by jury ensures “that common people should have a part and share of influence in the judicial, as well as the legislative department.”).

¹⁶ VIII Old Whig (Feb. 6, 1788), <https://bit.ly/3KkHSOP>.

Wm. & Mary L. Rev. at 1272. James Madison,¹⁷ Thomas Jefferson,¹⁸ and John Adams¹⁹ join the chorus.

The jury gave life to America’s conception of popular sovereignty—We the People held all power. Through juries, the sovereign people oversaw their agents in government. *See* Federal Farmer No. 4, *supra*. By allowing the community to supervise their judges and prosecutors, “civil jury trials ensur[e] that parties are not forced to suffer the biases that might develop among judges.” Whitehouse, 55 Wm. & Mary L. Rev. at 1266–67. Jurors “shielded individuals from the injustice that would otherwise issue from feckless judges all too eager to serve their royal masters.”²⁰

Agency ALJs engage in jury-less factfinding. If *Arthrex* is correct, then as executive officers, FDIC ALJs do not have the power to empanel and preside over a jury trial. Nor can such power be implied under some notion that this Court’s remedial power is restricted to remands to the agency. *See, e.g., Collins v. Yellen*, 141 S. Ct. 1761 (2021); *Jarkesy*, 34

¹⁷ James Madison, *Writings 1772–1836* 444 (The Library of America 1999).

¹⁸ Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), <https://bit.ly/40rveDc>.

¹⁹ Thomas J. Methvin, *Alabama—The Arbitration State*, 62 Ala. L. Rev. 48, 49 (2001) (quoting John Adams in 1774).

²⁰ Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 294 (1996).

F.4th at 450, 463 n.17. A federal “agency literally has no power to act ... unless and until Congress confers power upon it.” *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986). And Congress has granted neither FDIC ALJs nor the FDIC board the power to empanel and preside over jury trials. Article III judges, by contrast, have the full judicial power to empanel and preside over jury trials.

Conclusion

The Court should conclude in favor of Mr. Burgess on all issues presented: (1) the FDIC board is unconstitutionally structured; (2) the FDIC ALJs are unconstitutionally insulated from at-will removal; (3) the FDIC proceeding denied Mr. Burgess his Seventh Amendment rights.

Respectfully submitted,

Dated: April 6, 2023.

/s/ Aditya Dynar

ADITYA DYNAR

JOHN KERKHOFF

PACIFIC LEGAL FOUNDATION

3100 Clarendon Boulevard

Suite 1000

Arlington, VA 22201

Tel.: (202) 807-4472

ADynar@pacificlegal.org

JKerkhoff@pacificlegal.org

Attorneys for Amicus Curiae

Pacific Legal Foundation

Certificate of Service

I certify that I electronically filed the foregoing brief using the Court's CM/ECF system. I certify that attorneys for all parties are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 6, 2023.

/s/ Aditya Dynar

ADITYA DYNAR

Attorney for Amicus Curiae

Certificate of Compliance

This Brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because:

- This Brief contains 4,320 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii), and within the word limit of 6,500 under FRAP 29(a)(5).

This Brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6) because:

- This Brief has been prepared in Century, a proportionally-spaced typeface using Microsoft Word in 14-point font.

Dated: April 6, 2023.

/s/ Aditya Dynar

ADITYA DYNAR

Attorney for Amicus Curiae

ECF Certification

I certify that (i) the required privacy redactions have been made pursuant to CA5 R. 25.2.13; (ii) this electronic submission is an exact copy of the paper document pursuant to CA5 R. 25.2.1; (iii) this document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses; (iv) the original paper document was signed by the attorney of record and will be maintained for a period of three years after mandate or order closing the case issues, pursuant to CA5 R. 25.2.2.

Dated: April 6, 2023.

/s/ Aditya Dynar

ADITYA DYNAR

Attorney for Amicus Curiae

From: cmecf_caseprocessing@ca5.uscourts.gov
To: [Incoming Lit](#)
Subject: 22-11172 Burgess v. Whang "Amicus Curiae Brief Filed"
Date: Thursday, April 6, 2023 3:41:09 PM

NOTE TO PUBLIC ACCESS USERS Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing.

PLEASE DO NOT REPLY TO THIS EMAIL AS IT ORIGINATES FROM AN UNATTENDED EMAIL ADDRESS.

United States Court of Appeals for the Fifth Circuit

Notice of Docket Activity

The following transaction was entered on 04/06/2023 at 2:40:19 PM Central Daylight Time and filed on 04/06/2023

Case Name: Burgess v. Whang

Case Number: [22-11172](#)

Document(s): [Document\(s\)](#)

Docket Text:

AMICUS CURIAE BRIEF FILED by Pacific Legal Foundation. Date of service: 04/06/2023 via email - Attorney for Appellants/Cross-Appellees: Anthony, Brooks, Nicely; Attorney for Appellees/Cross-Appellants: Berrelez, Dawson, Heidler; Attorney for Amicus Curiae: Masslon [22-11172] (Aditya Dynar)

Notice will be electronically mailed to:

Mr. Manuel Gabino Berrelez: mberrelez@velaw.com, pgriffin@velaw.com
Mr. Arthur E. Anthony: aranthony@fdic.gov
Mr. Michael A. Heidler: mheidler@velaw.com, levans@velaw.com
Mr. Joseph Brooks: jobrooks@fdic.gov, jobrooks@fdic.gov
Mr. James T. Dawson: jamesdawson@velaw.com
Mr. John Mercer Masslon, II: jmasslon@wlf.org, john-masslon-0268@ecf.pacerpro.com
Mr. Aditya Dynar: adi.dynar@ncla.legal, incominglit@pacificlegal.org, ppuccio@pacificlegal.org

NOTICE WILL BE DELIVERED BY OTHER MEANS TO:

Mr. Andrew A. Nicely
Federal Deposit Insurance Corporation
Appellate Litigation Unit-Legal Division
VS-B-7027
3501 Fairfax Drive
Arlington, VA 22226

The following document(s) are associated with this transaction:

Document Description: Amicus Curiae Brief Filed

Original Filename: Burgess ac br FINAL2.pdf

Electronic Document Stamp:

[STAMP acefStamp_ID=1105048708 [Date=04/06/2023] [FileNumber=10080039-0]

[74d568d21282afbe33515ba304f84e8aa79e80bc57985f090a2f6f1428f3169df9aea124b0205093cafb835b08102662dfbcfd1dcf3b649fe6ad7da81937db]